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# Legislative Regulation of Intelligence-Gathering Activities: Problems and Ways to Solve Them

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## Abstract

It is proved that the main problem of legal regulation of the activities of operational units of law enforcement agencies of Ukraine is its unsystematic nature. Ensuring such consistency is quite possible by making changes and additions to the legislation. The concept of reforming the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine should consist of interrelated elements that provide for changes and additions to the legislation in three areas of regulation of public relations: criminal procedure (detailed regulation of the activities of operational units in the Criminal Procedure Code with a substantial expansion of their powers, in particular, in terms of ensuring the safety of persons who cooperate confidentially with pre-trial investigation bodies); intelligence-gathering (legislative regulation of clear grounds for the initiative activities of operational units to detect the preparation and commission of crimes, and the independent, with a clear exhaustive legislative definition, system of intelligence-gathering activities with their differentiation depending on the subject of authorisation, considering those that an operational employee can conduct without any permits and approvals); in the field of state secret protection (comprehensive regulation in the Law of Ukraine "On state secret" of legal relations related to the conspiracy of the activities of operational units and other internal structural entities of those state bodies that need it). The purpose of the study is to make proposals for improving the legislative regulation of intelligence-gathering and other activities of operational units of law enforcement agencies of Ukraine. The methodological basis of the research is the dialectical-materialistic method of scientific knowledge of socio-legal phenomena, and general scientific and special methods of legal science, in particular: system-structural – to determine the content of the investigated categories and legal phenomena, the development of terminology, systematisation of scientific knowledge of the chosen area in general, a comprehensive analysis of the provisions of normative regulations and the development of a system of proposals for reforming legislation and using foreign experience in Ukraine; comparative-legal and comparative – for a comprehensive analysis of national legislation and subordinate normative regulations, norms of international law, which constitute the legal basis of operational law; logical-legal (dogmatic) – during the establishment of the conceptual framework, the formulation of proposals for amendments and additions to legislative acts; statistical – for the analysis of the investigated materials of intelligence-gathering cases, criminal proceedings, survey results; sociological (questionnaires, interviews, surveys) – for the examination of the opinions of practitioners, determining the effectiveness of the application of individual legal institutions. It is necessary to make changes and additions to the legislation to create a mechanism of legal regulation of intelligence-gathering activities of operational units of law enforcement agencies of Ukraine. The essence of these changes is determined by different approaches, distinguished by levels. At the highest, strategic level, a deep transformation is required for legislative regulation of the complex of public relations on countering crime by law enforcement agencies (intelligence-gathering activities, criminal proceedings, protection of state secret). The tactical level corresponds to the introduction of scientifically based proposals for the settlement of issues of intelligence-gathering activities. The best option for the scheme of improving the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine is the introduction of a tactical level of reform with a gradual transition to a strategic one

## Keywords:

operational units; intelligence-gathering activities; intelligence-gathering measures; law enforcement agencies; criminal process; pre-trial investigation; state secret

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## Introduction

One of the conditions for the development of Ukraine as a democratic state governed by the rule of law of the European model is an extensive renewal of the criminal justice system, the institutions of which are able to ensure the protection of human rights and freedoms, counteraction to crime, protection of the interests of society and the state by means of an covert nature, in particular intelligence-gathering. The practical implementation of the Criminal Procedure Code (CPC) of Ukraine, in comparison with the CPC of the Ukrainian SSR, which was in force for over 50 years, demonstrated the importance of a radical change in the model of criminal proceedings, the legal status of its participants, the procedural form of pre-trial investigation and legal proceedings in general. In connection with the coordination of the criminal procedural legislation of Ukraine with international standards, a thorough study of the legal mechanisms of functioning of operational units of the National Police (NP) of Ukraine, which are entrusted with the task of identifying, documenting and disclosing the primary majority (over 95%) of all criminal offences registered in the state, preventing the most dangerous manifestations of organised and professional crime, becomes relevant.

Considering the tendency to increase in the number of registered applications and reports on criminal offences (from 3.2 million in 2012 to 7.2 million in 2019), and cases (proceedings) under investigation by the internal affairs bodies (NP), from 443.7 thousand in 2012 to 809.6 thousand in 2019, proper legislative and organisational support for the subjects of the intelligence-gathering activities (OSA) is recognised as one of the priorities. The functioning of criminal police units is affected, in particular, by such factors as an increase in the level of specific, latent, crimes related to human and arms trafficking, drug trafficking, mining, illegal financial and economic activities, etc. Along with the consistent capacity-building of the police and the effectiveness of its measures, its activities are also affected by influential deterrents. For example, at the end of 2019, there were over 600 proceedings sent by the police in the courts against members of organised groups and criminal organisations, but only 48 were considered during the year (that is, for every fourth proceeding, the trial lasts over three years). According to official reports of the NP, the rate of detection of grievous and extremely grievous crimes committed in qualified forms of complicity ranges from 30 to 50% with an annual increase in the balance of criminal proceedings of the corresponding category, in which the final procedural decision has not been made. Materials collected in the framework of intelligence-gathering cases (OSC) were used as evidence only in 31.4% (conducted secret investiga-

tive (search) actions (SISA) 34.3 %) of proceedings, which generally indicates an underestimation or inability to use the capabilities of operational units to ensure evidence in criminal proceedings.

In general, the reasons for the low performance of OSC work are deep and complex. However, almost the main one seems to be the uncertainty of the actual legal content of the OSA (so it is no coincidence that there are still disputes about whether the OSA is a science). After the adoption of the CPC of Ukraine, such activity (mentally it is still perceived as a separate form of countering crime) partially depends on rationing by criminal procedure legislation (for the first time in the history of lawmaking, the CPC of Ukraine highlighted an independent chapter 21 "Secret investigative (search) actions").

However, the introduction in Ukraine of a progressive modern model of adversarial criminal procedure (focused on Western European models) should not narrow (limit) the natural legal regulation of the initiative activities of operational units to combat crime (which fully corresponds to the established traditions of regulating covert work). Now, an unbalanced hybrid model of the activities of operational units with unclear content and criteria for the ratio of intelligence-gathering, criminal procedural, and search activities is present. This conceptual inconsistency permanently identifies existing gaps and causes new problems of legislative, departmental (interdepartmental) regulatory, and organisational nature, which in practice require urgent and effective solutions.

*The purpose of the study* is to make proposals for improving the legislative regulation of intelligence-gathering activities of operational units of law enforcement agencies of Ukraine.

The following tasks are set to achieve this goal:

- identify the main problems existing in the legislative regulation of intelligence-gathering and other activities of operational units of law enforcement agencies of Ukraine;
- give a general description of the current state of studies aimed at solving practical problems of the activities of operational units of law enforcement agencies of Ukraine;
- highlight the features and prospects of using international experience to improve OSA in Ukraine;
- form conceptual foundations for improving the system of legal regulation of secret cooperation in Ukraine;
- formulate specific proposals to the Law of Ukraine "On intelligence-gathering activities" and the CPC of Ukraine.

## Results and Discussion

Based on a comprehensive analysis of the practice of applying the norms of the Constitution of Ukraine

(Art. 3, 31- 34, 55, 57, 59, 60, 62, 63), Criminal Code of Ukraine (Art. 11, 36, 38, 39, 42, 43, 45), CPC of Ukraine (par. 1, 2, 20, 21, 40, 42, 43; Art. 36, 40, 41, 84-94, 103-110, 159-156, 207-211, 214-216), a number of laws of Ukraine (on OSA, NP, prosecutor's office, organisational and legal grounds for combating organised crime, preventing corruption, information, Security Service of Ukraine, ensuring the security of persons taking part in criminal proceedings, state secret, execution of decisions and application of the practice of the European Court of Human Rights, etc.), a number of international treaties, the consent to be bound by the Verkhovna Rada of Ukraine, and bylaws, identified a number of conflicts, gaps, contradictions, and even systemic errors made by the legislator, which still negatively affect the effectiveness of tasks on prevention, detection, and investigation of crimes.

According to surveys, the imperfection of legislation regulating the criminal process (91.2%), OSA (91.1 %) and the protection of state secret (80.9%) are recognised as the main factors for weakening operational positions in the work of the relevant divisions of the NP of Ukraine. It is about:

- imperfection of the legislative definition of OSA, the concept and list of intelligence-gathering measures (OSM);
- absence of legal grounds for conducting OSM for the purpose of detecting and suppressing crimes that are prepared and committed in the context of conspiracy (part 1, 3 of Art. 6 and part 1, 3 of Art. 9 of the Law of Ukraine “On intelligence-gathering activities”);
- unclear criteria for sufficiency of information for the implementation of OSA;
- loss of initiative by operational units in criminal proceedings (Art. 41 of the CPC of Ukraine);
- lack of clear legislative regulation of the possibility of proceedings in the OSC in case of detection of signs of a crime (without entering information in the unified state register of legal entities);
- establishing by law a direct link between the procedure for conducting OSM and the norms of the CPC of Ukraine (instead of a separate independent regulation of their content and the procedure for conducting them);
- inability to conduct a number of important intelligence activities within the framework of operational development of persons involved in crimes (monitoring of bank accounts; special investigative experiment; imitation of the crime situation);
- insufficient regulation of assistance to the implementation of OSA, etc.

In the structure of modern studies on OSA issues and covert work, seven blocks should be distinguished, depending on the subject of research. From

general, fundamental to specialised (by the scope of the subject of research) works of the monographic level, the:

1. studies devoted to the general fundamental foundations of OSA and covert work should be considered. There has been a lack of such research over the past decade. These are individual monographs, doctoral and candidate theses prepared before the entry into force of the CPC of Ukraine and the introduction of appropriate amendments to the Law of Ukraine “On intelligence-gathering activities”.

2. Research devoted to certain principles of OSA and covert work. Among such studies, several groups can be distinguished:

a) studies of various aspects of OSA and covert work, including: legal regulation, organisation, tactics (tactical and psychological foundations), use of OSM. Conceptual scientific research, the subject of which is the use of OSM and the psychology of OSA, is now over ten years old. Studies of the organisation and tactics of OSA are even more outdated. The only dissertation that is an exception to this trend is devoted to the legal regulation of OSA, it was defended in 2013 in the specialty “Theory and history of state and law; history of political and legal doctrines”;

b) studies of the main categories of OSA and covert work, including: forms, forces, and means of OSA, and its methods or OSM. Over the past decade, only the funds of the OSA have been investigated at the monographic level (the results of the dissertation research for the doctor of the law were presented in 2018). Methods of OSA (operational search measures) were not investigated in the complex. The studies were conducted only in relation to some of them. Therewith, a number of monographic studies were conducted on the legal, organisational, and tactical principles of conducting SISA. Dissertations devoted to such an important category as the forms of OSA have not been prepared. At the monographic level, the problems of only one of these forms – intelligence-gathering were investigated. Operational development and operational prevention are also ignored by researchers;

c) certain areas (lines) of activity within the OSA and covert work: determining the location of persons put on the wanted list; execution by operational units of the investigator's and prosecutor's instructions to conduct the SISA; intelligence-gathering for the security of persons taking part in criminal proceedings; criminal intelligence on the Internet;

d) certain types of activities to ensure the effectiveness of OSA and covert work: information and analytical support (the last separate comprehensive study was completed in 2011 – at the level of a doctoral dissertation); ensuring the secrecy of the activities of operational units (2017); material, technical,

and financial support of OSA and covert work (during the last decade, it was not the subject of a separate comprehensive scientific study);

e) secret cooperation (as a special, separate, integral element of the content of the OSA) is constantly the subject of scientific research. Comprehensive studies were completed in the early 2010s. In 2019, a monograph was published that systematically addresses the issues of the institute of secret cooperation.

3. Studies devoted to the counteraction of operational units to crimes committed by a separate section of the special part of the Criminal Code of Ukraine, part of articles of such a section, a separate article, or part of an article, or crimes united in a separate group based on purely criminological features. Over the past decade, a substantial number of comprehensive scientific studies have been conducted in this area. The authors of such studies formulate their subject using three main forms.

The first form is the widest within the OSA, it is formulated as "counteraction by operational units" (afterwards, the type of crime is stated). Thus, the subject of the study covers intelligence-gathering and criminal procedural activities of operational units.

The second form is narrower than the previous one: "operational search counteraction" (afterwards, the type of crime is stated). With this formulation, the subject of research covers only the intelligence-gathering activities of operational units.

The third form – "detection and investigation (afterwards, the type of crime is stated)" covers not only the OSA and the covert work of operational units to counteract a specific type of crime, but also the procedural activities of an investigator, prosecutor, forensic tactics, and the use of special knowledge in criminal proceedings.

4. Research of intelligence-gathering criminal procedural activities of individual operational units of specific law enforcement agencies. Since the beginning of the current century, scientific intelligence in this area has been conducted only in relation to operational units: the penitentiary system; special units for combating organised crime of the Ministry of Internal Affairs of Ukraine; the operational service of the Ministry of Internal Affairs of Ukraine and operational and technical units of the NP.

5. Studies devoted to the problems of countering specific operational units (individual law enforcement agencies) of a certain type of crime. Such studies over the past decade have mainly been devoted to the activities of the internal affairs bodies (NP):

a) criminal investigation (countering mercenary and violent crimes; grievous and extremely grievous crimes of previous years; crimes in the field of illegal trafficking in synthetic narcotic drugs; crimes

against property committed by radical individuals; robberies on railway facilities, etc.);

b) protection of the economy, and in the past of the state service for combating economic crime (countering crimes that encroach on the external economic security of Ukraine; obtaining illegal benefits and other corruption crimes; criminal acts in the field of public utilities, etc.);

c) special units for combating organised crime, operational services (countering bribery in the Department of Internal Affairs system and obtaining illegal benefits in general; crimes in the public sector, etc.);

d) operational service units (countering drug crimes and obtaining illegal benefits).

6. Research of problems of conducting specific intelligence-gathering activities and secret investigative (search) actions. Such actions and activities that have been investigated at the dissertation level over the past decade include: operational survey; operational inspection; in-cell work; visual surveillance; audio and video control of a person and place; removal of information from transport telecommunications networks; performing a special task to solve the criminal activities of an organised group, operational combination, controlled delivery, prompt purchase, and monitoring the commission of a crime in general.

7. Studies devoted to the conduct of OSM (SISA): a) within the framework of countering a specific type of crime; b) separate operational unit of a particular law enforcement agency. Since the beginning of this century, less than ten dissertations on similar subjects have been defended. It is considered impractical to conduct these studies in the future (due to the narrow boundaries of the subject). Many of the papers related to this block are fundamental and contain provisions that can be used to improve various aspects of countering crime by the forces and means of operational units of various subjects of the OSA. However, in the context of radical changes in legislation and law enforcement practice, the legal foundations of the OSA have become particularly important and require a separate targeted comprehensive analysis.

The use of international experience is important. Based on the results of the analysis of modern models of the organisation of covert work of law enforcement agencies of other countries (criminal intelligence, detective activities, secret investigations, etc.), it can be concluded that Ukraine has introduced the main guarantees for ensuring the protection of human rights and freedoms during the implementation of secret activities in the process of pre-trial investigation at the level of standards of developed Western European countries, which primarily covers: judicial authorisation of secret measures (with

the possibility of full-fledged judicial control and prosecutor's supervision); the permissibility of secret procedural actions only in case of impossibility or substantial complication of obtaining the necessary data in another way; conducting such actions only within the framework of the investigation of particularly dangerous acts (under the CPC of Ukraine – grievous and extremely grievous crimes); establishing a procedure for notifying persons about conducting secret actions against them and their results; limiting the possibility of monitoring communication with certain categories of persons (close relatives, priests, helpline consultants, defender lawyers, and doctors); the duty of the investigative body to immediately destroy the results of secret actions that do not relate to specific proceedings and have no evidentiary value; minimising the possibility of interference in the private life of other (unrelated) persons. Therewith, the legal field of Ukraine does not sufficiently define precautions for possible abuse of its right by the defence party. Today, some such subjects of criminal proceedings, taking advantage of differences in the interpretation of the norms of the criminal procedure law (sometimes on far-fetched grounds that cannot be refuted in the process of public verification), require the court to recognise as inadmissible evidence collected tacitly with a substantial expenditure of time, human and material resources.

Notably, in the EU and US countries there are specific problems related to the secret activities of law enforcement agencies. In recent years, they have constantly become the subject of attention of researchers [1-6].

Based on the doctrinal provisions of the theory of OSA and criminal procedure, the latest studies of Ukrainian and foreign researchers, and the results of the analysis of international experience, and long-term practice, ways to solve the most fundamental problems that exist in the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine are offered.

First of all, this concerns the problem of defining the concept of intelligence-gathering activity. It is interpreted as a system of public and secret search, intelligence and counterintelligence activities conducted using operational and operational-technical means (Art. 2 of the Law of Ukraine "On intelligence-gathering activities"). Such a definition cannot provide an unambiguous understanding of the concept of OSA, its legal content. This is due to limited information content. In addition, the legislator does not propose definitions of search, intelligence and counterintelligence measures, does not distinguish them into public and secret, and does not form a list of them. This applies to both operational and

operational-technical means. Except for the definition of OSA, the terms "operational means", "operational and technical means", "search measures", "intelligence measures", "counterintelligence measures", "public measures", "secret measures" are not used in the text of the Law [7]. An activity with indefinite content cannot be a tool for achieving a specific goal or completing tasks.

Taking this into account, researchers who investigated aspects of OSA were forced, first of all, to formulate their own definition of the concept of such activities, their content, and individual components. The most effective approaches were those that were based on an in-depth analysis of fundamental scientific works on the content of human activity in general and legal activity in particular.

In the opinion of this study, a universal "formula" for understanding the content and formulation of the definition of a certain type of legal activity, in particular the OSA, was proposed by M.A. Pogoretskyi. The researcher appropriately identifies such internal structural elements of the content of the OSA and criminal process as the purpose, tasks, actions, and subjects that form them as integral active systems and their external elements, which are stages and organisational-legal forms [8]. The application of this approach to clarifying the essence and formulation of concepts of certain subspecies of activity within the framework of OSA and criminal proceedings has always led to the development of definitions that were distinguished by the accuracy of determining the content of the concepts under study. It concerns primarily the monographic research of O.S. Starenkyi, O.O. Sukhachov, I.O. Sukhorada, O.Yu. Tatatrov, A.M. Chernyak, and others.

Within the framework of the doctrinal provisions of the OSA theory and based on many years of practice, it is proposed to interpret the OSA as a system of actions that:

- are conducted for the purpose of detecting and suppressing crimes, preventing criminal offences;
- consist in searching for and recording factual data on the criminal activities of individuals and groups, the location and fate of persons put on the wanted list;
- conduct operational units of legal protection bodies in accordance with the powers granted to them by law;
- they can be conducted both openly and secretly [8].

It is considered appropriate to choose these four components as the basis for the legislative definition of OSA.

One of the most pressing problems of the OSA is that the law does not provide grounds for operational units to work on the prevention of crimes. The

Law of Ukraine “On intelligence-gathering activities” obliges operational units to take the necessary OSM for the prevention, timely detection and suppression of crimes, exposing the causes and conditions that contribute to the commission of crimes, and conducting the prevention of offences practice (part 1 of Art. 7). However, by obliging to conduct crime prevention, identify, and stop them, the legislator did not give operational units the appropriate tools. Therefore, operational units do not actually have the legal authority to conduct such activities. Ultimately, Art. 6 of the Law of Ukraine “On intelligence-gathering activities” in the last paragraph prohibits making decisions on conducting intelligence-gathering activities in the absence of the grounds provided for in this article. The scope of such grounds includes “the availability of sufficient information obtained in accordance with the procedure established by law, which requires verification by means of intelligence-gathering measures and means, about: crimes that are being prepared; persons preparing to commit a crime; persons who are hiding from pre-trial investigation bodies, an investigating judge, a court, or evading serving a criminal sentence”.

Therewith, Art. 9 of this law provides that in each case there are grounds for conducting an OSA, an OSC is established. Therefore, any OSM for the prevention and detection of crimes is illegal. Thus, all activities of operational units to search for the facts of preparation and commission of crimes should be considered devoid of legal grounds. The prosecutor, within the framework of supervision over the activities of units authorised to conduct OSA, in case of detection of the facts of conducting OSM without establishing OSC, is obliged to give instructions on their immediate termination.

Ukrainian researchers who have investigated various aspects of the activities of operational units of law enforcement agencies have repeatedly focused on this problem. The analysis of recent works in this area [9] gives grounds for concluding that the best way to correct the situation is to supplement part one of Art. 6 of the Law of Ukraine “On intelligence-gathering activities” with paragraph five, which as one of the grounds for conducting an OSA would determine the implementation of prevention, timely detection, and suppression of crimes, and exposing the causes and conditions that contribute to their commission. Simultaneously with the introduction of this norm, it is necessary to provide operational units of law enforcement agencies with effective tools for its effective implementation. In the theory of OSA and the practice of rule-making activities of the National Police, such tools are defined as intelligence-gathering measures (or search measures or operational (initiative) search

measures. Their peculiarity (in comparison with other OSM and SISA) is the minimal risks of possible illegal restriction of the rights and freedoms of citizens and business entities. The purpose of conducting them is to obtain primary (intelligence) information about previously unknown facts of committing crimes or preparing for them (83.3%), and orientation of the investigator, prosecutor in the areas (means) of effective collection of evidence and tactics of pre-trial investigation (80.4%). The list of such measures (in various versions) is contained in each of the drafts of the Laws of Ukraine “On intelligence-gathering activities”, which were submitted to the Verkhovna Rada of Ukraine in 2008, 2009, 2016, 2017, and 2019. In the latter of them, search activities are defined as a set of public and secret actions, the purpose of which is to search and record factual data on the illegal activities of persons (groups of persons), identify, prevent, and stop criminal offences, establish the location of wanted persons in accordance with the current legislation. The project developers included the following to the list of these activities: operational installation; radio engineering survey; polygraph survey; intelligence survey; obtaining certificates; personal search; operational identification of persons, objects, and substances; determination of identification and technological features of a radio-electronic device; radio search; operational survey of persons with their consent.

In our opinion, such a definition does not allow discovering the ratio of OSA and intelligence-gathering, and the list of measures is unnecessarily narrowed.

Notably, when defining the concepts of these measures (Art. 1 of the draft law), the developers of the document:

- resorted to cumbersome and incorrect wording;
- did not offer a definition of an intelligence survey;
- used different names to refer to the same events (a survey using a computer polygraph instead of a polygraph-logical survey);
- submitted definitions of search activities that are not included in the list (information search);
- ignored the conventional search event for operational units, which in the theory and practice of the OSA was called “operational inspection”.

In addition, the analysis of these definitions gives grounds to assert that the content of the proposed measures is imposed, partially covering the content of other OSM and even certain areas of OPS. Thus, according to the definition of information search, its content includes: intelligence-gathering, secret surveillance, operational installation, and agent work. In turn, the content of the operational installation covers surveys and obtaining information, etc. All of the above indicates a lack of consistency in

the development of the institute of search activities.

Based on the analysis of the practice of operational units of law enforcement agencies of Ukraine and the achievements of the theory of OSA, it can be stated that search activities should not be separated from intelligence-gathering activities. They need to be normalised precisely as OSM, which operational units can conduct on their own initiative and without the consent of the prosecutor or obtaining court permission. The names of these measures should clearly reflect their content (so that the legislator does not have to formulate their definitions, burdening the perception and complicating legal practice). In particular, it is believed that it would be appropriate to introduce such a list of intelligence-gathering measures in the law:

- survey of individuals with their consent;
- survey of publicly available objects;
- survey of publicly inaccessible objects (with the consent of the persons in possession or use of whom they are);
- collecting publicly available information from any source;
- collection of restricted access information contained in law enforcement data banks;
- obtaining confidential information with the consent of persons who have access to it;
- short-term introduction to the criminal environment;
- visual surveillance in publicly accessible places (for the purpose of: recognising signs of committing a crime and establishing data that subsequently allow identifying persons involved in it; identifying unknown persons in the course of other OSM and secret investigative (search) actions);
- identification of radio-electronic equipment in a certain place and determination of their identification and/or technological features;
- comprehensive analysis of information obtained during other events.

This study suggests that the materials of intelligence-gathering activities conducted to detect crimes should be accumulated in intelligence-gathering cases. “Such cases should be initiated in certain areas of countering crime,” – from the notice. The procedure for conducting these cases should be determined by bylaws.

The actions of operational units included in the list proposed above should be legally fixed not only as intelligence-gathering measures but also as measures of operational support of criminal proceedings. In modern conditions, this institution is reflected only in bylaws and actually exists outside the law, which substantially reduces the effectiveness of operational units in the framework of pre-trial investigation.

Therefore, it is necessary to expand the powers of operational units in the field of criminal proceedings through the consolidation in the CPC of Ukraine

of their right to conduct a set of measures for operational support of criminal proceedings in agreement with the investigator and with the permission of the procedural manager. The relevant approval (permission) should relate to the implementation of the entire set of measures within the framework of the case of operational support of criminal proceedings (91.1 %).

Operational search measures and operational support measures for criminal proceedings should be considered specific types of OSM.

This study suggests that it is necessary to fix directly in the law the definition and an exhaustive list of OSM with their differentiation into groups depending on the subjects of authorisation (a specially appointed judge of the Court of Appeal, a prosecutor, the head of an operational unit), given that the decision to conduct certain OSM in the event that their implementation does not threaten substantial restrictions on the rights and freedoms of citizens, can be made by an operational employee (with possible options for their further approval in instances). During the legislative classification of OSM, the risks of possible interference in the private life of citizens and restrictions on their rights and freedoms should be considered. International legal standards and decisions of the European Court of Human Rights are mandatory for consideration.

Formulating the legislative definition of OSM, it is proposed to define them as measures conducted by operational units to perform the tasks of OSA, using the rights granted to these units by law. Therewith, organisational and security measures that operational units use without the purpose of obtaining information that is relevant for a specific OSM or a specific criminal proceeding should be clearly distinguished from OSC. First of all, this refers to measures to ensure secrecy (conspiracy).

In general, in the activities of operational units, three areas of legal relations should be distinguished, which are regulated by various legislative acts: first, the OSA (the Law of Ukraine “On intelligence-gathering activities”); second, the involvement of operational units (their employees) in criminal proceedings (the CPC of Ukraine); third, ensuring the conspiracy of forces and means (the Law of Ukraine “On state secret”).

Within the framework of the latter, it is necessary to recognise that legal relations connected to the conspiracy of operational units do not concern the OSA and the criminal process but belong to the field of ensuring the state secret. The ordering of these relations should be based on the following provisions.

First, the legal regulation of the conspiracy of operational units should be conducted in strict accordance with the Constitution of Ukraine, it should be based on the provisions of the Law of Ukraine “On state secret”, where a separate section should

regulate specific measures that can be applied to prevent the disclosure of classified information, including through disinformation. The CPC of Ukraine and the Law of Ukraine “On intelligence-gathering activities” should state that ensuring the secrecy of their own secret activities by operational units is conducted in accordance with the procedure and on the grounds provided for by the Law of Ukraine “On state secret”. The issue of financing the conspiracy of operational units and their interaction with other state structures to ensure the secrecy of their own activities should be regulated at the level of a resolution of the Cabinet of Ministers of Ukraine [10].

Secondly, at the level of legislation and by-laws, it is necessary to define the following: one of the principles of the OSA is secrecy – the rule of secret, hidden, unknown to anyone (except for their own subjects) implementation; the principle of secrecy applies not only to the OSA, but also to all the activities of operational units, in particular, the execution of orders of the investigator, prosecutor to conduct the SISA; conspiracy of the activities of operational units should be considered a system of measures aimed at ensuring the secrecy of this activity; the purpose of conspiracy of the activities of operational units is to keep secret information about facts, time, places, circle of objects and subjects of conducting OSM and SISA, belonging of their subjects, and the means used by them (premises, transport, equipment, etc.) to law enforcement agencies; the task of conspiracy of operational units is to create the false beliefs for objects of OSM and SISA about the lack of intent and any actions to search for and fix factual data on irregularities of individuals and groups, responsibility for which is provided for by the Criminal Code of Ukraine, intelligence and subversive activities of special services of foreign states and organisations to stop offences and in the interests of criminal proceedings [10].

Third, in terms of conducting specific OSC and SISA by operational units, the subject of classification should only be information about where, when, by whom, and with what disinformation (legends and means of disguise) specific OSC and SISA are conducted. Within the framework of strategic aspects of the activities of operational units, personal data of all secret employees (full-time and freelance), information about enterprises, institutions, organisations, premises, and vehicles created and used for the purpose of ensuring conspiracy are subject to classification. Protection of state secret regarding the activities of operational units is conducted through a system of measures that are established by legal provisions. These measures should be classified into organisational, technical, cryptographic, and verification measures for persons in connection with granting access to state secret [10].

A substantial problem of legislative regulation of the OSA is the imperfection of legislative norms on which its information-analytical support is based. Among the main problems of such provision, the lack of proper legal grounds and the uncertainty of the mechanism of legal regulation are highlighted, which requires a systematic update (addition of relevant provisions) of both the CPC of Ukraine and the laws of Ukraine “On intelligence-gathering activities”, “On state secret”, with the development of targeted bylaws of a departmental (interdepartmental) nature. The main context of the changes: providing operational units with sufficient rights and removing obstacles to the preservation, accumulation and processing of information obtained in the course of the OSA and fulfilling the instructions of the investigator, prosecutor to conduct the SISA (93.9%); obtaining by operational units the possibility of consolidating arrays of the specified information in a digital format with information that does not constitute a state secret (88.8%); simplifying the exchange of necessary information between various operational units of law enforcement agencies by converting requests to digital format and reducing the time for responses (requests) (90.4%); introducing legal and technical means to prevent illegal use of this information (67.9%).

Among the covert methods of work, it is necessary to focus on the use of the services of persons who, based on conspiracy, receive and provide law enforcement agencies with the necessary information, create conditions necessary for conducting certain actions, activities, operations, etc., that is, secret cooperation. This is one of the oldest means of obtaining information necessary for the fight against crime. Despite the rapid development of science and technology, informatisation of all fields of public life, it does not lose its relevance even now. Incomplete and imperfect legislative regulation of the use of secret cooperation in the framework of criminal proceedings and intelligence-gathering activities has led to a variety of problems for its organisation, the range of which was already wide. Due to the rapid changes taking place in the social and information fields of life of Ukrainian society, new approaches require solving tactical problems of secret cooperation [11].

The central link (basis) of the Institute of secret cooperation should be the interrelated provisions of the Law of Ukraine “On intelligence-gathering activities” and the CPC of Ukraine. These norms should disclose its content, tasks and establish the range of subjects. The legislative norms of the second level of the mechanism of legal regulation of secret cooperation (within the framework of the same legislative acts) should be related to these provisions, which establish the specific features of regulating

relations between operational units and their secret employees in terms of: specific features of engaging in secret cooperation; its registration (fixing the fact of secret cooperation); remuneration and considering the work experience of secret employees; their social and legal protection, ensuring confidentiality and security. These norms should refer to the norms of the third level – the provisions of civil, labour, tax, and other legislation [11].

The problems of legal regulation of secret cooperation are inherent not only in Ukraine. In recent years, they have been actively investigated by researchers from other countries [12-16]. In general, foreign specialists examine the problems of voluntary assistance provided by citizens to the police [17-25].

According to the examples of the FRG and the US in Ukraine, it is advisable to regulate the activities of persons who, on their own initiative, using legislative guarantees of confidentiality, provide law enforcement agencies (free of charge or for a fee) with reliable and up-to-date information about the preparation and commission of crimes (regardless of the object of encroachment). Therewith, it is necessary to consider the experience of the Russian Federation regarding the regulation of the appointment and payment by the police of rewards for assistance in solving crimes and detaining persons who committed them, ensuring the confidentiality of the provision of such information, and the security of those who reported it. These individuals cannot be considered covert employees (freelance covert employees), they are part of the social institution of covert cooperation. Their representatives can form a covert apparatus, and they should be considered potential candidates for such cooperation, as is practised in the US, the FRG, and other developed democratic countries. The experience of the US in engaging in cooperation of suspected, accused, and convicted (prisoners) persons is useful for implementation in Ukraine. On the grounds defined by law regarding the possibility of releasing them from serving a criminal sentence or mitigating it in the event of providing real assistance in identifying and (or) investigating the facts of preparation and (or) commission of a crime [26].

The main problem of legal regulation of the activities of operational units of the law enforce-

ment agencies of Ukraine is the lack of consistency. Ensuring such consistency is possible by making changes and additions to the legislation. The concept of reforming the legal regulation of intelligence-gathering and criminal procedural activities of operational units of law enforcement agencies of Ukraine should consist of interrelated elements that provide for changes and additions to the legislation in three areas of regulation of public relations:

- criminal procedure (detailed regulation of the activities of operational units in the CPC of Ukraine with a substantial expansion of their powers, in particular, to ensure the safety of persons who cooperate confidentially with pre-trial investigation bodies);
- operational-search (legislative rationing of clear grounds for the initiative activities of operational units to detect the preparation and commission of crimes, and an independent, with a clear exhaustive legislative definition, system of OSC with differentiation depending on the subject of authorisation, considering those that an operational employee can conduct without any permits and approvals);
- in the field of state secret protection (comprehensive regulation in the Law of Ukraine "On state secret" of legal relations related to the conspiracy of the activities of operational units and other internal structural findings of those state bodies that need it) [28-30].

### Conclusions

It is necessary to make changes and additions to the legislation to make the mechanism of legal regulation of intelligence-gathering activities of operational units of law enforcement agencies of Ukraine systematic. The essence of these changes can be determined within different approaches, separated by their level. At the highest, strategic, deep transformation is subject to legislative regulation of the entire complex of public relations related to countering crime by law enforcement agencies, in particular the OSA, criminal proceedings, and the protection of state secret. The tactical level corresponds to the introduction of scientifically based proposals for the settlement of OSA issues. The best option for the scheme of improving the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine is the introduction of a tactical level of reform with a gradual transition to a strategic one.

## References

- [1] Atkinson, C. (2019). Mind the grass! Exploring the assessment of informant coverage in policing and law enforcement. *Journal of Policing, Intelligence and Counter Terrorism*, 14, 1-19.
- [2] Bullock, K. (2017). Shoring up the “home guard”? Reflections on the development and deployment of police volunteer programmes in England and Wales. *Policing and Society: An International Journal of Research and Policy*, 27(4), 341-357.
- [3] Callender, M., Pepper, M., & Cahalin, K. (2019). Exploring the police support volunteer experience: Findings from a national survey. *Policing and Society: An International Journal of Research and Police*, 29(4), 392-406.
- [4] Cherniak, A.M. (2017). Detection and investigation of crimes in the international student's exchange sphere. *Bulletin of Criminal Proceedings*, 3, 143-148.
- [5] Christopher, N. (2017). Liability to deception and manipulation: The ethics of undercover policing. *Journal of Applied Philosophy*, 34(3), 370-388.
- [6] Dobrin, A. (2017). Volunteer police: History, benefits, costs and current descriptions. *Security Journal*, 30(3), 717-733.
- [7] Dobrin, A., & Wolf, R. (2016). What is known and not known about volunteer policing in the United States. *International Journal of Police Science and Management*, 18(3), 220-227.
- [8] Henry, P., Rajakaruna, N., Crous, C., & Buckley, J. (2019). Key attributes of an effective human source handler: Implications for handler selection and training. *The Police Journal*, 93(4), 290-309.
- [9] Hribov, M.L., & Kozachenko, O.I. (2019). International experience of tacit cooperation's legal regulation. *Scientific Herald of the National Academy of Internal Affairs*, 3(112), 83-97.
- [10] Hribov, M.L., & Kozachenko, O.I. (2020). The ways of improvement of tacit cooperation's legal regulation. *Scientific Herald of the National Academy of Internal Affairs*, 2(115), 8-18.
- [11] Hribov, M.L., & Sukhachov, O.O. (2019). Conspiracy as a system of measures to ensure the secret of the criminal procedural and investigative activities of the operational law enforcement units. *Bulletin of Criminal Procedure*, 4, 33-44.
- [12] Kniaziev, S.M. (2019). Unofficial investigation as a fundamental category of the theory of operational investigation activity and criminal process. *Law Magazine of the National Academy of Internal Affairs*, 2(18), 72-72.
- [13] Kniaziev, S.M. (2019). Judicial controlling for noncasual activity: International experience. *Law Magazine of the National Academy of Internal Affairs*, 1(17), 90-98.
- [14] Kondrashechkin, R.V. (2017). Legal Status of Confidential Detective Unit Employees. *Police Activity*, 4, 16-24.
- [15] Kruisbergen, E.W. (2013). Infiltrating organized crime groups. Theory, regulation and results of a last resort method of investigation. *Cahier Politiestudies*, 3, 109-136.
- [16] Kruisbergen, E.W. (2017). When other methods fail... Infiltrating organized crime groups in the Netherlands. In *Contemporary Organized Crime* (pp. 253-278). Cham: Springer.
- [17] Loftus, B. (2019). Normalizing covert surveillance: The subterranean world of policing. *The British Journal of Sociology*, 5(70), 2070-2091.
- [18] Loftus, B., & Goold, B. (2012). Covert surveillance and the invisibilities of policing. *Criminology & Criminal Justice*, 12(3), 275-288.
- [19] Loftus, B., Goold, B., & Mac Giollabhui, S. (2015). From a visible spectacle to an invisible presence: The working culture of covert policing. *British Journal of Criminology*, 56, article number azv076.
- [20] Maercker, A., & Guski-Leinwand, S. (2018). Psychologists involvement in repressive “Stasi” secret police activities in former East Germany. *International Perspectives in Psychology: Research, Practice, Consultation*, 7(2), 107-119.
- [21] Petlitskiy, S.V. (2016). Comparative analysis of the rules governing the application of security measures to persons providing assistance on a confidential basis (according to the legislation of the Republic of Belarus and foreign countries. *Economics and Law*, 10(68), 43-50.

- [22] Pohoretskyi, M.A. (2007). *Functional purpose of operational search activities in the criminal process*. Kharkiv: Arsis
- [23] Schlembach, R. (2018). Undercover policing and the spectre of domestic extremism: The covert surveillance of environmental activism in Britain. *Social Movement Studies*, 17, 1-16.
- [24] Schreurs, W., Kerstholt, J.H., Vries, P.W., & Giebels, E. (2018). Citizen participation in the police domain: The role of citizens attitude and morality. *Journal of Community Psychology*, 6(46), 775-789.
- [25] Steden, R., & Mehlbaum, S. (2019). Police volunteers in the Netherlands: A study on policy and practice. *Policing and Society*, 29(4), 420-433.
- [26] Uhnnoo, S., & Löfstrand, C. (2018). Voluntary policing in Sweden: Media reports of contemporary forms of police citizen partnerships. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 19(1), 41-60.
- [27] Vladimirov, S.I. (2017). The question of the definition "assistance to citizens operational units of internal affairs bodies". *Actual Problems of Russian Law*, 6, 195-201.
- [28] Wolf, R., Holmes, S., & Jones, C. (2016). Utilization and satisfaction of volunteer law enforcement officers in the office of the American sheriff: An exploratory nationwide study. *Police Practice and Research: An International Journal*, 17(5), 448-462.
- [29] Wolf, R., Pepper, I., & Dobrin, A. (2017). An exploratory international comparison of professional confidence in volunteer policing. *The Police Journal: Theory, Practice and Principles*, 90(2), 91-106.

### Список використаних джерел

- [1] Atkinson C. Mind the grass! Exploring the assessment of informant coverage in policing and law enforcement. *Journal of Policing, Intelligence and Counter Terrorism*. 2019. No. 14. P. 1–19.
- [2] Bullock K. Shoring up the "home guard"? Reflections on the development and deployment of police volunteer programmes in England and Wales. *Policing and society: an international journal of research and policy*. 2017. Vol. 27. No. 4. P. 341–357.
- [3] Callender M., Pepper M., Cahalin K. Exploring the police support volunteer experience: findings from a national survey. *Policing and society: an international journal of research and police*. 2019. Vol. 29. No. 4. P. 392–406.
- [4] Черняк А. М. Виявлення та розслідування злочинів у сфері міжнародного студентського обміну. *Вісник кримінального судочинства*. 2017. № 3. С. 143–148.
- [5] Christopher N. Liability to deception and manipulation: the ethics of undercover policing. *Journal of applied philosophy*. 2017. Vol. 34. No. 3. P. 370–388.
- [6] Dobrin A., Wolf R. What is known and not known about volunteer policing in the United States. *International journal of police science and management*. 2016. Vol. 18. No. 3. P. 220–227.
- [7] Dobrin A. Volunteer police: history, benefits, costs and current descriptions. *Security journal*. 2017. Vol. 30. No. 3. P. 717–733.
- [8] Henry P., Rajakaruna N., Crous C., Buckley J. Key attributes of an effective human source handler: Implications for handler selection and training. *The police journal*. 2019. Vol. 93. No. 4. P. 290-309.
- [9] Грібов М. Л., Козаченко О. І. Шляхи вдосконалення правового регулювання негласного співробітництва. *Науковий вісник Національної академії внутрішніх справ*. 2020. Вип. 2. № 115. С. 8-18.
- [10] Грібов М. Л., Козаченко О. І. Міжнародний досвід правового регулювання негласного співробітництва. *Науковий вісник Національної академії внутрішніх справ*. 2019. Вип. 3. № 112. С. 83-97.

- [11] Грібов М. Л., Сухачов О. О. Конспірація як система заходів забезпечення негласності кримінально процесуальної та оперативно-розшукової діяльності оперативних підрозділів правоохоронних органів. *Вісник кримінального судочинства*. 2019. № 4 С. 33-44.
- [12] Князев С. М. Негласна робота як фундаментальна категорія теорії оперативно-розшукової діяльності та кримінального процесу. *Юридичний часопис Національної академії внутрішніх справ*. 2019. Вип. 2. № 18. С. 72-78.
- [13] Князев С. М. Судовий контроль за здійсненням негласної діяльності: міжнародний досвід. *Юридичний часопис Національної академії внутрішніх справ*. 2019. Вип. 1. № 17. С. 90-98.
- [14] Кондрашечкин Р. В. Правовое положение лиц, оказывающих конфиденциальное содействие органам, осуществляющим оперативно-разыскную деятельность. *Полицейская деятельность*. 2017. № 4. С. 16-24.
- [15] Kruisbergen E. W. Infiltrating organized crime groups. Theory, regulation and results of a last resort method of investigation. *Cahier politiestudies*. 2013. No. 3. P. 109-136.
- [16] Kruisbergen E. W. When other methods fail... Infiltrating organized crime groups in the netherlands. In *Contemporary Organized Crime*. Cham: Springer, 2017. P. 253-278.
- [17] Loftus B. Normalizing covert surveillance: the subterranean world of policing. *The british journal of sociology*. 2019. Vol. 5. No. 70. P. 2070-2091.
- [18] Loftus B., Goold B. Covert surveillance and the invisibilities of policing. *Criminology & criminal justice*. 2012. Vol. 12. No. 3. P. 275-288.
- [19] Loftus B., Goold B., Mac Giollabhui S. From a visible spectacle to an invisible presence: the working culture of covert policing. *British journal of criminology*. 2015. No. 56. Article number azv076.
- [20] Maercker A., Guski-Leinwand S. Psychologists involvement in repressive "Stasi" secret police activities in former East Germany. *International perspectives in psychology: research, practice, consultation*. 2018. Vol. 7. No. 2. P. 107-119.
- [21] Петлицкий С. В. Сравнительный анализ норм, регламентирующих порядок применения мер по обеспечению безопасности к лицам, оказывающих содействие на конфиденциальной основе (по законодательству Республики Беларусь и зарубежных стран). *Экономика и право*. 2016. Вип. 10. № 68. С. 43-50.
- [22] Погорецький М. А. Функціональне призначення оперативно-розшукової діяльності у кримінальному процесі: монографія. Харків: Арсіс, 2007. 576 с
- [23] Schlembach R. Undercover policing and the spectre of "domestic extremism": the covert surveillance of environmental activism in Britain. *Social movement studies*. 2018. No. 17. P. 1-16.
- [24] Schreurs W., Kerstholt J. H., Vries P. W., Giebels E. Citizen participation in the police domain: the role of citizens attitude and morality. *Journal of community psychology*. 2018. Vol. 6. No. 46. P. 775-789.
- [25] Steden R., Mehlbaum S. Police volunteers in the Netherlands: a study on policy and practice. *Policing and society*. 2019. Vol. 29. No. 4. P. 420-433.
- [26] Uhnoo S., Löfstrand C. Voluntary policing in Sweden: media reports of contemporary forms of police citizen partnerships. *Journal of Scandinavian studies in criminology and crime prevention*. 2018. Vol. 19. No. 1. P. 41-60.
- [27] Владимиров С. И. К вопросу о дефиниции «содействие граждан оперативным подразделениям органов внутренних дел». *Актуальные проблемы российского права*. 2017. № 6. С. 195-201.
- [28] Wolf R., Holmes S., Jones C. Utilization and satisfaction of volunteer law enforcement officers in the office of the American sheriff: an exploratory nationwide study. *Police practice and research: an international journal*. 2016. Vol. 17. No. 5. P. 448-462.
- [29] Wolf R., Pepper I., Dobrin A. An exploratory international comparison of professional confidence in volunteer policing. *The police journal: theory, practice and principles*. 2017. Vol. 90. No. 2. P. 91-106.

# Законодавче регулювання оперативно-розшукової діяльності: проблеми та шляхи їх розв'язання

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## Анотація

Мета дослідження – внесення пропозицій з удосконалення законодавчого регулювання оперативно-розшукової та інших видів діяльності оперативних підрозділів правоохоронних органів України. Методологічною основою дослідження є діалектико-матеріалістичний метод наукового пізнання соціально-правових явищ, а також загальнонаукові та спеціальні методи юридичної науки, зокрема: системно-структурний – для визначення змісту досліджуваних категорій і правових явищ, зокрема формування понятійно-категорійного апарату, систематизації наукових знань обраного напрямку дослідження загалом, комплексного аналізу положень нормативно-правових актів та формування системи пропозицій щодо реформування законодавства й використання в Україні іноземного досвіду; порівняльно-правовий та компаративний – для комплексного аналізу національного законодавства й підзаконних нормативно-правових актів, норм міжнародного права, що становлять правову основу оперативно-розшукової діяльності; логіко-юридичний (догматичний) – під час розроблення понятійного апарату, формулювання пропозицій щодо внесення змін і доповнень до законодавчих актів; статистичний – для аналізу вивчених матеріалів оперативно-розшукових справ, кримінальних проваджень, результатів анкетування; соціологічні (анкетування, інтерв'ювання, опитування) – для дослідження думок практичних працівників, визначення ефективності застосування окремих правових інститутів. Наукова новизна. Обґрунтовано, що головною проблемою правового регулювання діяльності оперативних підрозділів правоохоронних органів України є її несистематизованість. Забезпечення такої системності цілком можливе за рахунок внесення змін і доповнень до законодавства. Концепція реформування законодавчого регулювання діяльності оперативних підрозділів правоохоронних органів України має складатися із взаємопов'язаних елементів, що передбачають зміни й доповнення до законодавства за трьома напрямками регулювання суспільних відносин: кримінально-процесуальним (детальна регламентація діяльності оперативних підрозділів у Кримінальному процесуальному кодексі зі значним розширенням їхніх повноважень, зокрема в частині забезпечення безпеки осіб, які конфіденційно співпрацюють з органами досудового розслідування); оперативно-розшуковим (законодавче унормування чітких підстав ініціативної діяльності оперативних підрозділів з виявлення підготовки та вчинення злочинів, а також самостійної, із чітким вичерпним законодавчим визначенням, системи оперативно-розшукових заходів з диференціацією їх залежно від суб'єкта санкціонування, що враховують і такі, які оперативний працівник може провести без жодних дозволів і погоджень); у сфері охорони державної таємниці (комплексне врегулювання в Законі України «Про державну таємницю» правовідносин, пов'язаних із конспірацією діяльності оперативних підрозділів та інших внутрішніх структурних утворень тих державних органів, які цього потребують). Висновки. З метою надання системності механізму правового регулювання оперативно-розшукової діяльності оперативних підрозділів правоохоронних органів України необхідно внести зміни й доповнення до законодавства. Сутність цих змін зумовлена різними підходами, що розмежовуються зарівнями. Найвищому, стратегічному, рівні глибокої трансформації потребує законодавче регулювання комплексу суспільних відносин, що пов'язані з протидією злочинності правоохоронними органами (зокрема оперативно-розшукова діяльність, кримінальний процес, захист державної таємниці). Тактичний рівень відповідає внесенню науково обґрунтованих пропозицій з урегулювання питань оперативно-розшукової діяльності. Оптимальним варіантом схеми вдосконалення законодавчого регулювання діяльності оперативних підрозділів правоохоронних органів України є запровадження тактичного рівня реформування з поступовим переходом до стратегічного

## Ключові слова:

контроль за вчиненням злочину; спеціальний слідчий експеримент; провокація злочину; допустимість доказів; доказування

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# Criminal Corruption Offences: Conceptual Problems in the Context of Reforming the Criminal Legislation of Ukraine

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## Abstract

The scientific originality of the study is that it: 1) highlights the problems of defining a criminal corruption offence and ways to solve them; 2) identifies shortcomings in the definition of a corruption crime provided for in the Draft General part of the Criminal Code of Ukraine 2020, formulates proposals for their elimination; 3) clarifies the main advantages and disadvantages of the list of corruption offences contained in the note to Art. 45 of the Criminal Code of Ukraine; 4) improves the classification of criminal corruption offences by the method and subject of their commission; 5) defines the content, positive and negative aspects of criminal law consequences of a criminal corruption offence. The purpose of the study is to identify problematic issues related to the construction of legal provisions concerning criminal corruption offences, both in the Criminal Code of Ukraine and in the draft General part of the Criminal Code of Ukraine 2020, and to determine ways to solve them. The study used a set of scientific methods: terminological, system-structural, formal-logical, and comparative-legal. The theoretical basis of the research consists of the papers of Ukrainian and foreign researchers, the provisions of the Criminal Code of Ukraine, and the practice of its application. According to the results of the study, the following conclusions were formulated: 1) the absence of the definition of “corrupt criminal offence” in the Criminal Code makes it impossible to determine the criminal-legal content of this group of torts and establish what criminal offences and crimes are included to them; 2) during the establishing of this definition, it must be consistent with the definition of a criminal offence, corruption offences, and corruption; 3) the concept of a tripartite understanding of the unlawful benefit (as subject, purpose, and means of committing the crime) in the definition of corruption should transform the design similar to “acts consisting in the offer or the promise of providing unlawful benefits, its provision, acceptance of an offer or promise of such benefits on receiving the request or demand to provide”; 4) the list of corruption offences proposed in the note to Art. 45 of the Criminal Code of Ukraine, on the one hand, does not cover all of criminal offences related to corruption, and on the other – includes criminal offences that should not be attributed to corruption; 5) criminal corruption offences by way of commission is proposed to be subdivided into: a) unlawful acquisition of certain property abusing the official position; b) abuse of power, official position or authority; c) offer, promise to provide unlawful benefit and the provision of such benefits for the commission or omission of certain actions (active bribery); d) the acceptance of an offer or promise of such benefits, obtaining it, request or the requirement to provide (passive bribery); d) other corrupt criminal acts (conditional corruption, quazi-corruption, and criminal offences that are included in the notes to Art. 45 of the Criminal Code unjustified); 6) analysis of the negative criminal law consequences of criminal corruption offence shows the law in certain cases equated these offences to grievous and extremely grievous crimes; 7) in the context of the reform of the criminal law it is necessary to improve the foundation of different types of confiscation, prohibition to engage in certain activities or to hold certain positions, and to consider the criminalization of concealment of criminal corruption offence

## Keywords:

corruption; corruption crime; corruption offence; anti-corruption; official; confiscation; unlawful benefit

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## Introduction

Corruption has been, is, and will continue to be (at least in the near future) one of the largest and major problems in Ukraine. Even though a number of systematic measures have been taken to combat corruption in recent years, it is still widespread in various spheres of the public life of Ukrainians [1]. The Ukrainian state annually loses billions from embezzlement in all areas of public life, as a result of which a substantially lower quality of services, goods, the level of social and material security, and most importantly – irreparable human losses. For example, embezzlement in medicine causes an increase in the level of morbidity of the population, its mortality, and in defence – an increase in irreparable losses among military personnel, volunteers, and the civilian population [1].

Corruption is a socially dangerous phenomenon not only for Ukraine but also for other states. It makes it impossible to establish and maintain internationally accepted rules and is one of the main reasons that the least developed countries still remain so [2]. Corruption increases operating costs, limits investment incentives and, ultimately, leads to a decrease in economic growth [3], public confidence, productivity of the social and political economy, increases inequality [4], and is one of the most substantial factors that undermine the quality of public administration [5]. The high level of corruption and low level of public administration that is observed in most modern countries harm the well-being of society and undermine public confidence [4].

Among all the manifestations of corruption, the highest danger is represented by criminal corruption offences. Therefore, ensuring criminal legal protection of public relations from criminal corruption offences is a priority area of modern criminal law policy in Ukraine.

To this end, the law on criminal liability establishes a number of criminal law provisions that define the types of criminal corruption offences, measures of influence that can be applied to the persons who committed them, and other legal consequences of committing such torts.

In recent years O.O. Dudorov, T.O. Kolomoiets, S.M. Kushnir & O.L. Makarenkov [3] and other researchers have been working on solving the problems of criminal corruption offences. However, at present, a single concept of a criminal offence, which would provide an opportunity to formulate a definition of this concept, highlight its features, determine the list of such torts, and justify their criminal-legal consequences, increasing the effectiveness of countering criminal offences and crimes of this category has not been formulated.

*The purpose of the study* is to identify problematic issues related to the construction of criminal law

provisions concerning criminal corruption offences, both in the Criminal Code of Ukraine and in the draft General part of the Criminal Code of Ukraine 2020, and to determine ways to solve them.

## Results and Discussion

A systematic analysis of the provisions of criminal legislation allows identifying a number of shortcomings in the construction of an appropriate mechanism for criminal-legal counteraction to persons who commit criminal corruption offences. The Criminal Code of Ukraine does not define the concept of “criminal corruption offence”, which makes it impossible to clearly outline the criminal legal content of this group of torts, and therefore, establish which criminal offences and crimes belong to them.

Since a criminal corruption offence is a type of criminal offence, it is characterised by the following features:

- it is a socially dangerous act (commission or omission);
- it is provided for by the Criminal Code of Ukraine;
- it is a culpable act;
- it is committed by the subject of a criminal offence.

Therewith, a criminal corruption offence should logically have the characteristics of a corruption offence (part 1 of Art. 1 of the Law of Ukraine “On prevention of corruption” of October 14, 2014) or, at least, should not contradict them.

A corruption offence is an act containing signs of corruption committed by a person specified in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption” of October 14, 2014, for which the law establishes criminal, disciplinary, and/or civil liability [6]. That is, a criminal corruption offence, considering its belonging to corruption offences, should have three more features:

- it is an act that contains signs of corruption;
- it is committed by the person specified in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption” of October 14, 2014;
- it has a criminal liability established for it. A comparison of these signs with the signs of individual criminal corruption offences gives grounds to assert that there are certain discrepancies in the relevant categories.

Socially dangerous manifestations of corrupt criminal offences are not limited to three forms of corruption:

- use of official powers or related opportunities for the purpose of obtaining unlawful benefits;
- accepting an unlawful benefit or promising/offering such benefit to oneself or others;
- promise/offer or provision of unlawful benefits to a person specified in part 1 of Art. 3 of the Law

of Ukraine “On prevention of corruption”, or at their request to other individuals or legal entities to persuade this person to illegally use the official powers granted to them or related opportunities [6]. They also cover other acts (for example, misuse of budget funds, illegal enrichment, etc.).

In addition, there are more subjects of criminal corruption offences than the subjects defined in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption”. For example, in the case of an offer, promise, or provision of an unlawful benefit, the subject is general, which is not mentioned in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption”.

Thus, when formulating the definition of a criminal corruption offence, it is necessary to consider the fact that it must be consistent with the definition of a criminal offence (part 1 of Art. 11 of the Criminal Code of Ukraine), a corruption offence and corruption (part 1 of Art. 1 of the Law of Ukraine “On prevention of corruption” of October 14, 2014). Therewith, it cannot be excluded that if the definition of a criminal corruption offence is constructed, it may be necessary to make appropriate changes to the definitions of corruption offence and corruption to coordinate these concepts.

**Corruption crime in the draft Criminal Code of Ukraine 2020.** Unlike the current Criminal Code of Ukraine, the draft new Criminal Code of Ukraine defines a corruption crime. A crime that has two mandatory characteristics is recognised as corrupt:

a) unlawful benefit as the purpose, object, or means of committing a crime;

b) a method of committing a crime that consists in the illegal use of power, official position, or certain powers or influencing decision-making by a person with power, an official position, or certain powers (paragraph 18 of part 2 of Art. of the 1.3.1 draft) [7].

The analysis of this definition gives grounds to assert that only crimes related to unlawful benefit (as the purpose, subject or means of committing a crime) are recognised as corrupt, which can be committed in one of the following ways: by illegal use of power, official position, or certain powers, or by influencing decision-making by a person vested with power, an official position, or certain powers. Thus, a corruption crime has two mandatory features, each of which contains alternative elements.

The first sign is related to an unlawful benefit. However, in the General part of the draft Criminal Code of Ukraine, there is no definition of an unlawful benefit, which should be recognised as a disadvantage since this concept is important for the application of various legal provisions. It should be covered in Art. 1.3.1 “Meaning of the main terms of the Criminal Code of Ukraine”.

This is also a problem of the current Criminal Code of Ukraine, which contains several definitions

of unlawful benefits (in the note to Art. 160 of the Criminal Code of Ukraine, in part 2 of the note to Art. 354 of the Criminal Code of Ukraine, in the note to Art. 364-1 of the Criminal Code of Ukraine). The definitions, provided for in part 2 of the note to Art. 354 of the Criminal Code and the note to Art. 364-1 of the Criminal Code of Ukraine are identical, and therefore there was no need to duplicate the provisions of the criminal legislation.

The project concept provides that unlawful benefits as an element of a criminal corruption offence may exist within it in the form of the purpose, subject, or means of committing a crime.

The proponent of this concept is M.I. Khavronyuk [4] noted that in the use of official powers or related powers, the unlawful benefit is the goal of a corrupt act, and when this goal is achieved (for example, in the case of an official taking someone else's property under the circumstances set out in Art. 191 of the Criminal Code of Ukraine) – its subject.

If an official or other relevant person accepts an offer, promise, or requests or demands an unlawful benefit, then the latter is the purpose of their corrupt act, and the unlawful benefit that such a person receives is its subject. If an unlawful benefit is offered, promised, or provided (bribery), then it is mainly a means of committing a corrupt act.

Another unlawful benefit (“the commission or omission of any action in its favour or in the interests of third parties”, that is, providing services or benefits of an intangible nature) is the goal, which a person tries to achieve by promising or offering it, and if it receives it in return – then it is the subject; there may be another situation (remuneration), when first a person receives an unlawful benefit as an object, and in return transfers another unlawful benefit to the person concerned – just like the subject of a corrupt act” [8].

The analysis of this concept raises a logical question: How to apply it practically? If a person is preparing to use official powers or related powers for the acquisition of certain property or commits an attempt on such an act, then the unlawful benefit, according to this concept, should be considered as the goal of a corrupt act, and if the person took possession of the relevant property, then the unlawful benefit should be recognised as the subject. Consequently, within the same structure of a criminal offence, depending on the stages of its commission, an unlawful benefit can exist as a goal and as a subject.

According to this concept, an unlawful benefit is subject only if it is received (part 3, 4 of Art. 354, Art. 368, part 3, 4 of Art. 368-3, part 3, 4 of Art. 368-4, part 2, 3 of Art. 369-2 of the Criminal Code of Ukraine).

The unlawful benefit is a target for abuse of power, official position, or authority (Art. 364, 364-1, 365-2, 369-3 of the Criminal Code of Ukraine).

However, the purpose in the composition of these offences is to obtain (receive) such benefits. This refers to the illegal use of power, official position, or authority to obtain unlawful benefits. In these cases, it is easiest to establish it, since the word “goal” is directly indicated in the disposition of the article.

However, M.I. Khavronyuk's [4] position, according to which an unlawful benefit is the goal in cases where a person accepts an offer, a promise of an unlawful benefit, or requests or demands it, seems debatable. It is possible to partially agree with the approach of the researcher because the goal in these compositions is the will, the desire of a person to get an unlawful benefit. However, in this case, there is a competition between two conceptually different views on the interpretation of this feature of the corresponding elements of criminal offences: according to one, the unlawful benefit is the goal, and to the second – the subject of a criminal offence [8].

An unlawful benefit is a means if it is offered, promised or provided for committing or omitting certain actions (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, 369 of the Criminal Code of Ukraine). In these compositions, it is a means of inducing a person to commit certain acts.

The disadvantage of distributing unlawful benefits on the subject and means of a criminal offence is that it contradicts the established view of the subject of a crime as material values (which a person can perceive with their senses or record by special technical means), about which and by direct influence on which (or without such influence) a criminal act is committed (authors of the definition: A.A. Muzyka & E.V. Lashchuk) [7]. For example, considering an offer or promise to provide an unlawful benefit, there is no doubt that the offer and promise are socially dangerous actions in this case. The connection of socially dangerous actions with the subject of a criminal offence consists in the fact that the act is committed about the subject or by direct influence on it. In this case, the offer and promise are made regarding the subject of a criminal offence. However, the position that an unlawful benefit, in this case, facilitates the commission of a socially dangerous action – an offer or promise, that is, it is a means of a criminal offence, seems erroneous [9].

A three-way understanding of an unlawful benefit (as an object, purpose, means) can be transformed into a construction like “acts consisting in offering or promising to provide an unlawful benefit, providing it, accepting an offer or promise of such a benefit, receiving it, requesting or demanding to provide it”. In such circumstances, all possible aspects of unlawful benefits would be considered. Therewith, its advantage will be to simplify the understanding of

this characteristic of a criminal corrupt offence, and therefore, make it easier to apply in practice.

Interpreting the concept of unlawful benefits literally, it can include items for illegal actions with which (manufacture, storage, carrying, sale, etc.) criminal liability may occur, in particular firearms, military supplies, explosives, drugs, etc. Admittedly, an official can receive an unlawful benefit in the form of a firearm as it is property and is received without legal grounds. However, it should be considered that in the literal sense, unlawful benefit as a sign of relevant criminal offences concerns only those of their composition, in the dispositions of which it is provided. In these circumstances, is it possible to recognise as unlawful benefits the objects of crimes provided for in Art. 191, 262, 308, 312, 313, 320, 357, 410 of the Criminal Code of Ukraine, in case of acquisition of them by abusing an official's official position? An important argument in favour of a negative answer to this question is that the term “obtainment” is used in the definition of unlawful benefits, and these compositions regard “acquisition”, which is not identical.

The second sign of a corruption crime, which is proposed in the draft Criminal Code of 2020, is the presence of one of the following methods of committing a crime, which consists in:

- illegal use of power, official position, or certain powers;
- influence on decision-making by a person with power, official position, or certain powers.

Illegal use of power, official position, or certain powers covers the commission of relevant crimes through abuse of power, official position, or certain powers. However, not any illegal use of power, official position, or certain powers can be a way of corruption crime, since it is necessary to combine such a way with an unlawful benefit as the purpose, subject, or means of committing a crime. Illegal use of power, official position, or certain powers is the most common way to commit criminal corruption offences. It is typical, in particular, for Art. 191, 262, 308, 312, 313, 357, 364, 364-1, 365-2, 410 Criminal Code of Ukraine.

Such a method as “influencing decision-making by a person with power, official position, or certain powers” is inherent in cases of proposals, promises to provide unlawful benefits, and providing such benefits for committing or not committing certain actions (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, 369 of the Criminal Code of Ukraine).

Therewith, the situation regarding the acceptance of an offer, promise or acquisition of an unlawful benefit, and a request or demand to provide such a benefit, is not clear. What method can such cases be attributed to? Can this be illegal use of power, official position, or certain powers? It is impossible to

any, since the illegal use of power, official position, or certain powers, which consists in committing or omitting certain actions, is outside the objective side of such criminal offences. This is another flaw in the new concept of corruption crime, which shows that this project needs to be finalised.

**Types of criminal corruption offences.** The list of corruption offences presented in the note to Art. 45 of the Criminal Code has many shortcomings, related, on the one hand, to the fact that it does not cover all criminal offences that should be considered corruption, and on the other hand, it contains individual criminal offences that do not belong to corruption. It seems that one of the conditions for forming a scientifically substantiated list of criminal corruption offences should be the definition of a criminal corruption offence, and possibly the development of their classification since there are criminal offences that only partially belong to corruption. They can be either corrupt or non-corrupt. It is not entirely correct to consider them corrupt. However, it is also impractical not to recognise them as corrupt under certain circumstances. Therefore, it is necessary to determine the future concept of criminal corruption offences: to provide a definition of a criminal corruption offence without a clear list of such torts or to formulate a clear list of offences of this category, as in the note to Art. 45 of the Criminal Code.

Currently, 20 criminal offences are recognised as corruption. The list of criminal corruption offences is exhaustive. They can be divided into two groups. The first is criminal offences that are recognised as corrupt only if they are committed through abuse of official position (provided for in Art. 191, 262, 308, 312, 313, 320, 357, 410 of the Criminal Code of Ukraine).

Criminal corruption offences, according to the Criminal Code of Ukraine, are criminal offences provided for in art. 191, 262, 308, 312, 313, 320, 357, 410, in case of their commission by abuse of official position, and criminal offences provided for in art. 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3 of this Code.

Mainly these are the main and qualified compositions of acquisition by abuse of an official's position of certain property: someone else's property (Art. 191 of the Criminal Code of Ukraine); firearms (except smoothbore hunting arms), military supplies, explosives, explosive devices, or radioactive materials (Art. 262 of the Criminal Code of Ukraine); drugs, psychotropic substances or their analogues (Art. 308 of the Criminal Code of Ukraine); precursors (Art. 312 of the Criminal Code of Ukraine); equipment intended for the manufacture of drugs (Art. 313 of the Criminal Code of Ukraine); documents, stamps, seals (Art. 357 of the Criminal Code of Ukraine); weapons, military supplies, explosives or

other military substances, means of transportation, military and special equipment, or other military property (Art. 410 of the Criminal Code of Ukraine).

The only exception is a crime under part 2 of Art. 320 of the Criminal Code of Ukraine, but it also, although it does not directly consist in taking possession of certain property by abusing an official's position, because it consists in violating the established rules for sowing or growing sleeping poppies or cannabis, and violating the rules for the production, manufacture, storage, accounting, release, distribution, trade, transportation, transfer, or use of drugs, psychotropic substances, their analogues, or precursors intended for the production or manufacture of these drugs or substances, which led to the acquisition of drugs, psychotropic substances, their analogues, or precursors by abusing an official's position.

If criminal offences of the first group are committed by any entity other than an official (general or other special entity, as, for example, in Art. 191 of the Criminal Code of Ukraine), they are not recognised as corrupt. The second group consists of criminal offences under Art. 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3 of the Criminal Code of Ukraine, which in any case are recognised as corrupt, regardless of the subject and method of commission.

Classification of criminal corruption offences can be conducted according to various criteria. By **the method of committing the crime** conventionally, they are divided into: supplies, explosives, explosive devices, or radioactive materials (part 2 of Art. 262 of the Criminal Code of Ukraine); drugs, psychotropic substances or their analogues (part 2 of Art. 308 of the Criminal Code of Ukraine); precursors (part 2 of Art. 312 of the Criminal Code of Ukraine); equipment intended for the manufacture of drugs, psychotropic substances, or their analogues (part 2 of Art. 313 of the Criminal Code of Ukraine); documents, stamps, seals (Art. 357 of the Criminal Code of Ukraine); weapons, military supplies, explosives, or other military substances, means of transportation, military and special equipment, or other military property (part 2 of Art. 410 of the Criminal Code of Ukraine):

- abuse of power, official position, or authority: abuse of power or official position (Art. 364 of the Criminal Code of Ukraine); abuse of authority by an official of a private legal entity, regardless of its organizational and legal form (Art. 364-1 of the Criminal Code of Ukraine); abuse of authority by persons providing public services (Art. 365-2 of the Criminal Code of Ukraine);

- offer, promise to provide an unlawful benefit, and providing such a benefit for committing or omitting certain actions (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, Art. 369, part 1 of Art. 369-2, 369-3 of the Criminal Code of Ukraine)

(active bribery). It is the influence on decision-making by a person with power, official position, or certain powers. The peculiarity of this corruption offence is that it is committed by a general subject;

- acceptance of an offer or promise of such a benefit, its acquisition, request, or demand to provide (part 3, 4 of Art. 354, 368, part 3, 4 of Art. 368-3, part 3, 4 of Art. 368-4, part 2, 3 of Art. 369-2 of the Criminal Code of Ukraine) (passive bribery);

- other criminal and illegal corruption acts. These are conditionally corrupt, quasi-corrupt and criminal offences that were unreasonably included in the note of Art. 45 of the Criminal Code of Ukraine. These include: misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget assignments or with their excess (Art. 210 of the Criminal Code of Ukraine); violation of the established rules for the circulation of drugs, psychotropic substances, their analogues or precursors (Art. 320 of the Criminal Code of Ukraine); illegal enrichment (Art. 368-5 of the Criminal Code of Ukraine); illegal influence on the results of official sports competitions (Art. 369-3 of the Criminal Code of Ukraine).

By **subjects** of a criminal offence, they can be divided into:

- those committed by a general subject (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, Art. 369, part 1 of Art. 369-2, 369-3 of the Criminal Code of Ukraine);

- those committed by a special subject (other criminal corruption offences). Special subjects of criminal corruption offences are:

- a) an official (Art. 191, 262, 308, 312, 313, 320, 357 of the Criminal Code of Ukraine);

- b) an official of a private legal entity, regardless of its organizational and legal form (Art. 364-1, part 3, 4 of Art. 368-3 of the Criminal Code of Ukraine);

- c) an official of a legal entity under public law (Art. 364, 368 of the Criminal Code of Ukraine);

- d) military official;

- e) a person authorised to perform the functions of the state or local self-government (Art. 368-5 of the Criminal Code of Ukraine);

- f) an official of the administrator or recipient of budget funds (Art. 210 of the Criminal Code);

- g) an employee of an enterprise, institution, or organization who is not an official, or a person who works for the benefit of the enterprise, institution, or organization (part 3, 4 of Art. 354 of the Criminal Code of Ukraine);

- h) a person who is not a civil servant, or an official of local self-government, but conducts professional activities related to the provision of public services (Art. 365-2, 368-4 of the Criminal Code of Ukraine).

**Criminal and legal consequences of a criminal corruption offence.** The commission of a criminal

corruption offence has specific negative criminal-legal consequences for their subjects. A person who has committed a criminal corruption offence cannot be released from criminal liability in connection with active remorse (Art. 45 of the Criminal Code of Ukraine), reconciliation of the guilty person with the victim (Art. 46 of the Criminal Code of Ukraine), transfer of the person to bail (Art. 47 of the Criminal Code of Ukraine), change of circumstances (Art. 48 of the Criminal Code of Ukraine). The prerequisites for these types of exemption from criminal liability are criminal offences and negligent minor crimes (Art. 45, 46 of the Criminal Code of Ukraine) or criminal misconduct and minor crimes (Art. 47, 48 of the Criminal Code of Ukraine). Among criminal corruption offences, only the composition provided for in parts 1 and 3 of Art. 357 of the Criminal Code of Ukraine belongs to criminal misdeeds. Minor crimes are criminal corruption offences under part 2 of Art. 191, part 1 of Art. 210, part 2 of Art. 320, part 2 of Art. 357, Art. 354, part 1 of Art. 364, part 1 of Art. 364-1, part 1, 2 of Art. 365-2, part 1 of Art. 368, part 1, 2, 3 of Art. 368-3, part 1, 2, 3 of Art. 368-4, part 1 of Art. 369, part 1, 2 of Art. 369-2, 369-3 of the Criminal Code of Ukraine. Consequently, if they are committed, a person cannot be released from criminal liability on the specified grounds. Such a ban does not apply to exemption from criminal liability due to the expiration of the statute of limitations (Art. 49 of the Criminal Code of Ukraine), and to dismissal for offering, promising, or providing unlawful benefits (part 5 of Art. 354 of the Criminal Code of Ukraine). However, in the criminal legislation of some countries, these prohibitions also apply to exemption from criminal liability due to the expiration of the statute of limitations. For example, illegal acquisition by abuse of official position of certain property: someone else's property (part 2 of Art. 191 of the Criminal Code of Ukraine); firearms (except smoothbore hunting), combat in accordance with part 6 of Art. 62 of the Criminal Code of Kyrgyzstan, a person who committed certain corruption crimes, in particular under part 1, 2 of Art. 319 (corruption), part 4 of Art. 320 (abuse of official position), part 1, 2 of Art. 323 (illegal enrichment), it cannot be released from criminal liability due to the expiration of the statute of limitations for criminal prosecution [10]. Prohibition of imposing a more lenient sentence than is provided for by law (Art. 69 of the Criminal Code of Ukraine). For a person who has committed a criminal corruption offence, based on Art. 69 of the Criminal Code of Ukraine, the court may not:

- impose the main penalty below the lowest limit established in the sanction of the article (sanctions of part of the article) of the Special part of the Criminal Code of Ukraine;

- switch to another, more lenient type of main punishment, not specified in the sanction of the article (sanctions of part of the article) of the Special part of the Criminal Code of Ukraine for this criminal offence;

- not to impose an additional penalty, which is provided for in the sanction of the article (sanctions of part of the article) of the Special part of the Criminal Code of Ukraine as mandatory.

Prohibition ***exemption from punishment*** on certain grounds: exemption from punishment due to the loss of a person's public danger (part 4 of Art. 74 of the Criminal Code of Ukraine), exemption from serving a sentence with probation (Art. 75 of the Criminal Code of Ukraine); exemption from serving a sentence with probation for pregnant women and women with children under the age of seven (Art. 79 of the Criminal Code of Ukraine). In practice, there are cases when courts apply part 1 of Art. 75 of the Criminal Code of Ukraine regarding the release from serving a sentence with probation of persons who have committed a criminal corruption offence, which in turn leads to the incorrect application of the law of Ukraine on criminal liability by the court [11].

For persons who have committed corrupt criminal offences, there are also stricter requirements for parole (Art. 81 of the Criminal Code of Ukraine). They must factually serve a longer sentence than persons who have committed similar criminal offences, but non-corrupt ones. For example, according to part 3 of Art. 81 of the Criminal Code of Ukraine, parole can be applied after the convicted person has factually served at least two-thirds of the sentence imposed by the court for a corruption minor crime, intentional grievous crime or negligent extremely grievous crime, and also if the person has previously served a sentence of imprisonment for an intentional criminal offence and before the cancellation or removal of the conviction again committed an intentional criminal offence, for which they were sentenced to imprisonment.

The conditions for replacing the unserved part of the sentence with a more lenient one are stricter (Art. 82 of the Criminal Code of Ukraine). For example, according to part 4 of Art. 82 of the Criminal Code of Ukraine, the replacement of the unserved part of the sentence with a more lenient one is possible after the convicted person has factually served at least half of the sentence imposed by the court for a corruption minor crime, an intentional grievous crime, or a negligent extremely grievous crime, and if the person has previously served a sentence of imprisonment for an intentional criminal offence and before the cancellation or removal of the conviction again committed an intentional criminal offence for which they were sentenced to imprisonment.

The analysis of these provisions shows that the legislator equated a corruption minor crime with an intentional grievous crime or a negligent extremely grievous crime. For persons who have committed criminal corruption offences, additional conditions for release from serving a sentence are established based on the law of Ukraine on amnesty or the act of pardon. According to part 4 of Art. 86 of the Criminal Code of Ukraine, persons found guilty of committing criminal corruption offences, sentences against which have not entered into legal force, cannot be released from serving their sentence, and persons whose sentences have entered into legal force cannot be completely released by the law on amnesty from serving their sentence. These persons may be released from serving their sentence after they have factually served the terms established by part 3 of Art. 81 of the Criminal Code of Ukraine, that is, those established for parole.

According to part 3 of Art. 87 of the Criminal Code of Ukraine, persons convicted of committing corrupt criminal offences may be released from serving their sentence by clemency after they factually serve the terms established by part 3 of Art. 81 of the Criminal Code of Ukraine, that is, those established for parole.

Conviction removal before the expiration of the terms specified in Art. 89 of the Criminal Code of Ukraine is not allowed in cases of intentional grievous, extremely grievous, and criminal corruption offences (part 2 of Art. 91 of the Criminal Code of Ukraine).

Committing certain criminal corruption offences or socially dangerous acts that fall under the characteristics of an act provided for in the Special part of the Criminal Code of Ukraine (Art. 191, 262, 308, 312, 313, 320, 357, 410, 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3), is the basis for applying special confiscation. Most of these articles are grounds for special confiscation if the main penalty for committing the acts described in them is imprisonment or a fine of over three thousand non-taxable minimum incomes of citizens. The exception is criminal offences under part 1 of Art. 210, 364-1, 365-2 of the Criminal Code of Ukraine, in the case of which special confiscation is applied regardless of their sanction.

The commission of a criminal corruption offence may be the basis for applying criminal law measures to a legal entity.

The grounds for applying criminal law measures to a legal entity are:

- commission by its authorised person on behalf of and in the interests of a legal entity of any of the criminal offences provided for in Art. 209 and 306, parts 1 and 2 of Art. 368-3, parts 1 and 2 of Art. 368-4, Art. 369 and 369-2 of the Criminal Code of Ukraine;

– failure to fulfil the obligations imposed on its authorised person by law or constituent documents of a legal entity to take measures to prevent corruption, which led to the commission of any of the criminal offences provided for in Art. 209 and 306, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, Art. 369 and 369-2 of the Criminal Code of Ukraine (paragraphs 1, 2 of part 1 of Art. 96-3 of the Criminal Code of Ukraine).

The study of such consequences of committing criminal corruption offences shows that the legislator substantially limited the possibilities of exemption from criminal liability of the relevant subjects and established stricter conditions for applying other measures of a criminal legal nature. Therewith, the criminal legislation of other countries mainly does not provide for such negative criminal-legal consequences.

In certain cases, the legislator equated the negative criminal-legal consequences of minor corruption crimes with similar consequences for grievous and extremely grievous crimes. In addition, the fact that legislator in certain cases does not differentiate the criminal-legal consequences for different types of criminal corruption offences in terms of severity does not correspond to the principle of fairness.

In this regard, O.O. Dudorov [3] notes that the goal of the legislator (reducing the scale of corrupt behaviour through increased criminal law repression) meets public expectations. In addition, it is a typical example of fragmentary, non-systemic changes in the Criminal Code. These changes can hardly be assessed otherwise than as a manifestation of distrust of the state represented by the parliament towards the judicial corps, which is not able to apply the norms of the General part of the Criminal Code in a qualified and balanced way for some reason only in relation to violators of anti-corruption legislation. The researcher considers such an increase in criminal law repression appropriate and fair, however, only in relation to the so-called grand corrupt officials and subject to a well-thought-out implementation of this idea in a legislative matter [12].

The results of the examination of the judicial practice of sentencing for criminal corruption offences give grounds to assert that for such acts the court mostly imposes a fine, much less often – imprisonment for a certain term with its factual serving. As an additional penalty, deprivation of the right to hold certain positions (related to the provision of public services, law enforcement agencies, local self-government bodies, institutions, organizations, and enterprises, regardless of the form of ownership, organizational, and legal form; related to the performance of administrative, economic, and organizational administrative functions, senior positions in military formations of the Armed

Forces of Ukraine, etc.) and confiscation of property are used. A plea agreement is often concluded.

Despite the insubstantial amounts of unlawful benefits in some cases, the courts do not close criminal proceedings due to insignificance. For example, for providing unlawful benefits to a police officer for 150 UAH, a convicted person was fined 17.000 UAH [13].

Therewith, in the new draft Criminal Code of Ukraine, a corruption crime is important only for:

– appointment of a fine as an additional penalty. According to part 5 of Art. 3.1.3 of the draft, a fine as an additional penalty is imposed only in certain cases, in particular in the case of committing a corruption crime;

– determination of the limits of the criminal law in relation to an act committed outside the territory of Ukraine. According to part 2 of Art. 1.4.5 of the draft, this code is subject to application to a foreigner or a stateless person who does not permanently reside in Ukraine, if they have committed an act outside the territory of Ukraine that, according to Art. 2.1.5 of the Criminal Code of Ukraine, is recognised as a corruption crime in complicity with a citizen of Ukraine.

Thus, in the draft Criminal Code of Ukraine, the legislator completely renounces restrictions on criminal corruption offences enshrined in the Criminal Code of Ukraine. Such a step cannot be evaluated unambiguously. On the one hand, the criminal-legal consequences of committing corrupt criminal offences violate the principles of criminal law, and therefore, it would probably be possible to predict that the Constitutional Court of Ukraine could eventually declare them unconstitutional. Although, on the other hand, they have a certain potential to deter from committing corrupt criminal offences.

Notably, in the context of reforming criminal legislation, other countries use other tools to counteract corrupt criminal offences.

**Confiscation.** Illegal assets acquired by a person as a result of committing corruption or other criminal offences are mainly confiscated. The Criminal Code of Ukraine also uses confiscation tools in the context of countering corrupt criminal offences: it is considered a punishment and a criminal-legal measure. Confiscation of property, the origin of which a person cannot explain, in a civil manner, without bringing them to criminal responsibility, seems promising. The advantages of such a tool, compared to other proof standards, are that the respondent will be required to explain the source of the excess wealth. Otherwise, such property is subject to confiscation. However, there are also certain shortcomings associated with the low level of guarantees for the protection of human rights, compared

to those used in criminal proceedings (in particular, the lack of presumption of innocence). Therewith, it is possible to solve this problem by raising the standards of proof, without reducing them to those used in criminal proceedings [14].

Given the existence of a number of options for confiscation of certain assets in connection with the commission of a criminal corruption offence, it is important that they do not contend with each other and are not used for the commission of the same act. The existence of different levels of sanctions against the same fact rightly notes P. Maggio [6], leads to problems of violation of the “ne bis in idem” rule [15].

***Lifetime prohibition to hold certain positions or engage in certain activities.*** For persons who have committed corrupt criminal offences, lifetime bans on engaging in certain activities or holding certain positions can be applied as a punishment, or at least increase the minimum and maximum limits of this punishment provided for in part 1 of Art. 55 of the Criminal Code of Ukraine. An indefinite (lifetime) ban on holding positions in the civil service is provided, for example, in Art. 317 bis of the Criminal Code of Italy [16].

***Criminalization of concealment of a criminal corruption offence.*** According to part 1 of Art. 396 of the Criminal Code of Ukraine, criminal liability is imposed for the concealment of a grievous or extremely grievous crime. However, the criminal legislation of certain countries highlights the concealment of a corruption crime. For example, Art. 432 of the Criminal Code of Kazakhstan establishes criminal liability for concealment of corruption, grievous or particularly grievous crime or a crime against the sexual integrity of a minor [17].

The scientific originality of the study is that it: 1) highlighted the problems of defining a criminal corruption offence and ways to solve them; 2) identified flaws in the definition of a corruption crime provided for in the draft General part of the Criminal Code of Ukraine 2020, formulated proposals for their elimination; 3) identified the main advantages and disadvantages of the list of corruption offences presented in the note to Art. 45 of the Criminal Code of Ukraine; 4) improved the classification of criminal corruption offences according to the method and subject of their commission; 5) considered the content, positive and negative aspects of the criminal legal consequences of a criminal corruption offence.

## Conclusions

Based on the conducted research, the following conclusions were formulated.

1. The absence of a definition of “criminal corruption offence” in the Criminal Code of Ukraine

does not allow outlining the criminal legal content of this group of torts and establishing which criminal offences and crimes belong to them. When formulating this definition, it should be considered that it must be consistent with the definition of a criminal offence, corruption offence, and corruption. Therewith, it cannot be excluded that if the definition of a criminal corruption offence is constructed, it may be necessary to make appropriate changes to the definitions of corruption offence and corruption to coordinate these concepts.

2. The analysis of the definition of a corruption crime used in the draft General part of the Criminal Code of Ukraine 2020 (paragraph 18 of part 2 of Art. 1.3.1) allowed identifying the shortcomings of the trilateral understanding of unlawful benefits (as the subject, purpose, and means of committing a crime) and formulate a proposal to transform this feature into construction like “acts consisting in the offer or promise of providing an unlawful benefit, its provision, acceptance of the offer or promise of such benefits, its acquisition, request or demand to provide”. Another drawback of the definition of a corruption crime is that it does not cover such methods of committing illegal acts as accepting an offer or promise or receiving an unlawful benefit and requesting or demanding to provide such a benefit.

3. Set in the note to Art. 45 of the Criminal Code of Ukraine the list of corruption offences has a number of substantial drawbacks, related, on the one hand, to the fact that it does not cover all criminal offences that are classified as corruption, and on the other hand, it contains individual criminal offences that should not be considered corruption. It seems that one of the conditions for forming a scientifically substantiated list of criminal corruption offences should be the formulation of the definition of a criminal corruption offence, and possibly the development of their classification since there are criminal offences that only partially belong to corruption.

4. Criminal corruption offences according to the method of commission are proposed to be divided into: 1) illegal acquisition by abuse of an official's position of certain property; 2) abuse of power, official position, or authority;

3) offer, promise to provide an unlawful benefit, and providing such a benefit for committing or omitting certain actions (active bribery); 4) accepting an offer or promise of such a benefit, receiving it, requesting or demanding to provide (passive bribery); 5) other corrupt criminal illegal acts (conditionally corrupt, quasi-corrupt and criminal offences that fell under the note of Art. 45 of the Criminal Code of Ukraine unreasonably).

5. Analysis of the negative criminal and legal consequences of a criminal corruption offence shows that the legislator in certain cases equated these torts with grievous and extremely grievous crimes. In addition, the absence of differentiation of criminal-legal consequences for different types of criminal corruption offences in certain cases does not correspond to the principle of fairness.

The refusal in the draft Criminal Code of Ukraine from restrictions on criminal corruption offences, which are enshrined in the Criminal Code of Ukraine, cannot be assessed unambiguously. On the one hand, the criminal-legal consequences of committing these torts violate the principles of criminal law, and therefore, it would probably be possible to predict that the Constitutional Court of Ukraine could eventually declare them unconstitutional. Although, on the other hand, they have a certain po-

tential to deter from committing corrupt criminal offences.

6. In the context of criminal law reform, attention should be focused on improving the grounds for applying different types of confiscation, but it is important that they do not contend with each other and that they are not used for committing the same act, since this may lead to a violation of the “ne bis in idem” principle. For persons who have committed corrupt criminal offences, lifetime bans on engaging in certain activities or holding certain positions can be applied as a punishment, or at least increase the minimum and maximum limits of this punishment provided for in part 1 of Art. 55 of the Criminal Code of Ukraine. The criminalization of concealing a corrupt criminal offence within an independent form of the objective side of a criminal offence also requires attention.

## References

- [1] Cherniavskiy, S.S., & Vozniuk, A.A. (2019). Foreign experience of legal counteraction to illicit enrichment. *Law Journal of National Academy of Internal Affairs*, 17(1), 79-89.
- [2] Codice Penale of Italy. Aggiornato. (2020, October). Retrieved from <https://www.brocardi.it/codicepenale/libro-terzo/titolo-i/capo-i/sezione-i/art650.html>.
- [3] Dudorov, O.O., Kolomoiets, T.O., Kushnir, S.M., & Makarenkov, O.L. (2019). *General theoretical, administrative and criminal-legal bases of conceptualization of anti-corruption reform in Ukraine*. Zaporizhia: Helvetyka.
- [4] Khavroniuk, M.I. (2018). *Scientific and practical commentary to the Law of Ukraine “On Prevention of Corruption”*. Kyiv: Vaite.
- [5] Klitgaard, R. (1998). *International cooperation against corruption*. Retrieved from <https://www.imf.org/external/Pubs/FT/fandd/1998/03/pdf/klitgaar.pdf>.
- [6] Maggio, P. (2020). A critical analysis of corruption and anti-corruption policies in Italy. *Journal of Financial Crime*, 28(2), 513-530.
- [7] Muzyka, A.A., & Lashhuk, Ye.V. (2011). *The subject of the crime: The theoretical foundations of knowledge*. Kyiv: Palyvoda A.V.
- [8] Nathanson, S. (2013). Why good government matters. *Crime, Law and Social Change*, 1(60), 107-114.
- [9] The project of the new Criminal Code of Ukraine. (2020, October). Retrieved from <https://newcriminalcode.org.ua/upload/media/2020/10/21/kontrolnyj-proekt-kk-19-102020.pdf>
- [10] Rothstein, B. (2013). Corruption and social trust: Why the fish rots from the head down. *Social Research*, 4(80), 1009-1032.
- [11] Seligson, M.A. (2002). The impact of corruption on regime legitimacy: A comparative study of four Latin American countries. *The Journal of Politics*, 64(2), 408-433.
- [12] Criminal Code of the Kyrgyz Republic. (2017, February). Retrieved from <http://cbd.minjust.gov.kg/act/view/ru-ru/111527>
- [13] Criminal Code of the Republic of Kazakhstan. (2014, July). Retrieved from [https://online.zakon.kz/Document/?doc\\_id=31575252#pos=38;-50](https://online.zakon.kz/Document/?doc_id=31575252#pos=38;-50)
- [14] Vozniuk, A.A. (2019). Real causes of top corruption in Ukraine and unrealistic ways to counter it. In *Realization of the State Anti-Corruption Policy in the International Dimension: Proceedings of the 4th International Scientific-Practical Conference* (pp. 44-47). Kyiv: National Academy of Internal Affairs.

- [15] The verdict of the Dnieper Court of Appeal. No. 205/3186/20. (2020, November). Retrieved from <http://reyestr.court.gov.ua/Review/92942232>
- [16] The verdict of the Manevychi district court of the Volyn. No. 164/1490/20. (2020, November). Retrieved from <http://reyestr.court.gov.ua/Review/92948294>
- [17] Law of Ukraine "On Prevention of Corruption". No. 1700-VII. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1700-18>

### Список використаних джерел

- [1] Чернявський С. С., Вознюк А. А. Зарубіжний досвід правової протидії незаконному збагаченню. *Юридичний часопис Національної академії внутрішніх справ*. 2019. Том 17. № 1. С. 79–89.
- [2] Codice Penale of Italy. Aggiornato al 30/10/2020. URL: <https://www.brocardi.it/codice-penale/libro-terzo/titolo-i/capoi/sezione-i/art650.html>.
- [3] Дудоров О. О., Коломоєць Т. О., Кушнір С. М., Макаренко О. Л. Загальнотеоретичні, адміністративно-кримінально-правові основи концептуалізації антикорупційної реформи в Україні: колективна монографія. Запоріжжя: Гельветика, 2019. 214 с.
- [4] Науково-практичний коментар до Закону України "Про запобігання корупції" / наук. ред. М. І. Хавронюк. Київ: Ваіте, 2018. 46 с.
- [5] Klitgaard R. International cooperation against corruption. URL: <https://www.imf.org/external/Pubs/FT/fandd/1998/03/pdf/klitgaar.pdf>.
- [6] Maggio P. A critical analysis of corruption and anti-corruption policies in Italy. *Journal of financial crime*. 2020. Vol. 28. No. 2. P. 513–530.
- [7] Музика А. А., Лащук Є. В. Предмет злочину: теоретичні основи пізнання: монографія. Київ: Паливода А. В., 2011. 110 с.
- [8] Nathanson S. Why good government matters. *Crime, law and social change*. 2013. Vol. 1. No. 60. P. 107–114.
- [9] Проект нового Кримінального кодексу України станом на 19 жовтня 2020 р. URL: <https://newcriminalcode.org.ua/upload/media/2020/10/21/kontrolnyj-proekt-kk-19-10-2020.pdf>.
- [10] Rothstein B. Corruption and social trust: why the fish rots from the head down. *Social research*. 2013. Vol. 80. No. 4. P. 1009–1032.
- [11] Seligson M. A. The impact of corruption on regime legitimacy: a comparative study of four Latin American countries. *The journal of politics*. 2002. Vol. 64. No. 2. P. 408–433.
- [12] Уголовный кодекс Кыргызской Республики: Закон КР от 2 февр. 2017 г. № 19. URL: <http://cbd.minjust.gov.kg/act/view/ru-ru/111527>.
- [13] Уголовный кодекс Республики Казахстан: Закон РК от 3 июля 2014 г. № 226-V. URL: [https://online.zakon.kz/Document/?doc\\_id=31575252#pos=38;-50](https://online.zakon.kz/Document/?doc_id=31575252#pos=38;-50).
- [14] Вознюк А. А. Реальні причини топ-корупції в Україні та нереальні способи протидії їй. *Реалізація державної антикорупційної політики в міжнародному вимірі: матеріали IV Міжнар. наук.-практ. конф.* (Київ, 12 груд. 2019 р.). Київ: Національна академія внутрішніх справ, 2019. С. 44–47.
- [15] Вирок Дніпровського апеляційного суду від 18 листопада 2020 р. по справі № 205/3186/20. Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/92942232>.
- [16] Вирок Маневицького районного суду Волинської області від 19 листопада 2020 р. по справі № 164/1490/20. Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/92948294>.
- [17] Про запобігання корупції: Закон України від 14 жовтня 2014 р. № 1700-VII. URL: <https://zakon.rada.gov.ua/laws/show/1700-18>. 2016. Vol. 17. No. 5. P. 448-462.
- [29] Wolf R., Pepper I., Dobrin A. An exploratory international comparison of professional confidence in volunteer policing. *The police journal: theory, practice and principles*. 2017. Vol. 90. No. 2. P. 91-106.

# Корупційні кримінальні правопорушення: концептуальні проблеми в контексті реформування кримінального законодавства України

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## Анотація

Метою статті є виявлення проблемних питань, пов'язаних із конструюванням кримінально-правових положень, що стосуються корупційних кримінальних правопорушень, як у Кримінальному кодексі України, так і в проєкті Загальної частини Кримінального кодексу України 2020 року, а також визначення шляхів їх розв'язання. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, положення Кримінального кодексу України, а також практика його застосування. Наукова новизна статті полягає в тому, що в ній: 1) висвітлено проблеми визначення корупційного кримінального правопорушення та шляхи їх розв'язання; 2) виявлено вади у визначенні корупційного злочину, передбаченого в проєкті Загальної частини Кримінального кодексу України 2020 року, сформульовано пропозиції щодо їх усунення; 3) з'ясовано основні переваги й недоліки переліку корупційних правопорушень, що міститься в примітці до ст. 45 Кримінального кодексу України; 4) удосконалено класифікацію корупційних кримінальних правопорушень за способом і суб'єктом їх учинення; 5) визначено зміст, позитивні та негативні аспекти кримінально-правових наслідків корупційного кримінального правопорушення. За результатами здійсненого дослідження сформульовано такі висновки: 1) відсутність у Кримінальному кодексі України визначення поняття «корупційне кримінальне правопорушення» не дає змоги окреслити кримінально-правовий зміст цієї групи деліктів і встановити, які кримінальні проступки та злочини до них належать; 2) під час формування цієї дефініції слід урахувати, що вона повинна узгоджуватися з визначенням кримінального правопорушення, корупційного правопорушення та корупції; 3) концепцію тристороннього розуміння неправомірної вигоди (як предмета, мети та засобу вчинення злочину) у визначенні корупційного злочину слід трансформувати в конструкцію на кшталт «діяння, що полягають у пропозиції чи обіцянці надання неправомірної вигоди, її наданні, прийнятті пропозиції або обіцянки такої вигоди, її одержанні, проханні чи вимаганні надати»; 4) запропонований у примітці до ст. 45 Кримінального кодексу України перелік корупційних правопорушень, з одного боку, не охоплює всіх кримінальних правопорушень, які належать до корупційних, а з іншого – містить окремі кримінальні правопорушення, які не слід відносити до корупційних; 5) корупційні кримінальні правопорушення за способом учинення запропоновано поділяти на: а) незаконне заволодіння шляхом зловживання службовою особою своїм службовим становищем певним майном; б) зловживання владою, службовим становищем чи повноваженнями; в) пропозицію, обіцянку надати неправомірну вигоду, а також надання такої вигоди за вчинення чи невчинення певних дій (активний підкуп); г) прийняття пропозиції або обіцянки такої вигоди, її одержання, прохання чи вимагання надати (пасивний підкуп); д) інші корупційні кримінально-протиправні діяння (умовно корупційні, квазікорупційні та кримінальні правопорушення, які включено до примітки ст. 45 Кримінального кодексу України необґрунтовано); 6) аналіз негативних кримінально-правових наслідків корупційного кримінального правопорушення засвідчує, що законодавець у певних випадках прирівняв ці делікти до тяжких та особливо тяжких злочинів; 7) у контексті реформування кримінального законодавства необхідно вдосконалити підстави різних видів конфіскації, заборони займатися певною діяльністю чи займати певні посади, а також розглянути доцільність криміналізації приховування корупційного кримінального правопорушення

## Ключові слова:

корупція; корупційний злочин; корупційне правопорушення; протидія корупції; службова особа; конфіскація; неправомірна вигода

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# Correction and Resocialisation of Persons Sentenced to Imprisonment in the System of Means of Implementing the Tasks of Criminal Executive Legislation

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## Abstract

Any area of legal regulation, in particular the execution of criminal sentences, is necessarily based on fundamental constitutional principles, which are the basis for the development of relations between the rule of law and the individual. These principles include: the inseparability and inviolability of rights and freedoms of the individual; the rule of law; mutual responsibility of the state and the individual; limited and subordinate state power; strict subordination to the law in the activities of all state bodies and officials, etc. At present, the problems of compliance with the rights and legal interests of citizens in places of detention are urgent. Based on the results of empirical research on the correction and resocialisation of convicts to imprisonment in the system of means of implementing the tasks of the criminal-executive legislation, the author's interpretation of the concept of "resocialisation of convicts to imprisonment" is proposed, according to which, it is a process of positive changes in the personality of a convicted person due to the application of legal, organisational, pedagogical, psychological, educational, and other measures of influence to eliminate the negative value orientations of convicts, the consequences of their isolation, fixing the results of correction, providing them with assistance after serving their sentence and promoting their adaptation in the social environment. It is proved that when determining the type of penitentiary institutions, it is advisable to apply the criterion of openness/closeness of these institutions only to institutions that execute sentences in the form of imprisonment. The formulated conclusions deepen knowledge about the object of research and contribute to the study of the process of execution and serving sentences by convicts. The purpose of the study is to determine the specific features of correction and resocialisation of persons sentenced to imprisonment in the system of means of implementing the tasks of the criminal-executive legislation. During the preparation of the study, general and special scientific methods of cognition were used, in particular: historical, philosophical and legal, comparative, systemic, functional, and generalisation. The criminal-executive legislation of Ukraine regulates the procedure and conditions for the execution and serving of criminal sentences to protect the interests of the individual, society, and the state by directing efforts to correct and resocialise convicted persons, prevent the commission of new criminal offences by both convicted and other persons, and prevent torture and inhuman or degrading treatment of convicted persons. The state respects and protects the rights, freedoms, and legal interests of convicts, provides the necessary conditions for their correction, resocialisation, social and legal protection, and personal safety. The main tasks of resocialisation of convicts can be considered the restoration and expansion of their positive ties and relations with society, the development of an integral personality capable of an objective attitude both to the surrounding world and to oneself; changing the orientation of the individual; creating a system of moral, ideological, legal beliefs in accordance with the norms and values accepted in society; the development of the ability of stable independent law-abiding behaviour for persons serving sentence after serving a sentence

## Keywords:

resocialisation; regime of execution of punishment; detention; sentenced to imprisonment; correctional colony; legal status; penitentiary institutions

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## Introduction

In countering crime, the state applies a substantial number of economic, social, legal, organisational, political, cultural, and educational measures. Punishment in this case is a means of protecting society and citizens from criminal encroachments. The application of this measure is conducted both by threatening such punishment as is included in the sanction of each criminal legal regulation and by implementing it, that is, further resocialisation of persons who have already committed crimes.

Resocialisation is the process of an individual's acceptance of social norms and cultural values that have been lost, improperly learned earlier, or updated at a new stage of social development. In a way, resocialisation involves the individual's assimilation of certain values and norms that are radically different from those acquired earlier. Resocialisation is associated with the destruction of negative anti-social standards and values learned by an individual in the process of associalisation, desocialisation, instilling values and actions accepted by society; it resembles primary socialisation since it must radically place the accents of reality in a new way [1].

*The purpose of the study* is to determine the specific features of correction and resocialisation of persons sentenced to imprisonment in the system of means of implementing the tasks of the criminal-executive legislation.

## Results and Discussion

Resocialisation should be considered the renewal of lost social values and experience of communication, behaviour, and life activity, as a process that occurs within the framework of readaptation and contributes to the restoration of adaptive capabilities of a person to existing norms and rules of behaviour. However, it is impossible to create a certain resocialisation environment without first achieving the creation of normal living conditions for a person in a penitentiary institution (PI): safe living, healthy nutrition, free access to objective information about life outside the PI, high-quality medical care, fair treatment of PI personnel, organisation of the regime, etc.

In working with convicts and in the conditions of the penitentiary system, this process involves several interdependent planes: as the main goal of the social and psychological service of the PI, as a psychological and pedagogical process that ensures the achievement of this goal, as an internal process of qualitative changes in consciousness, feelings, and behaviour of the individual. Resocialisation of convicts is the restoration of their socialisation within the framework of social forms of life activity and motivation for socially useful activities.

According to Yu. Baranov [2], the means of resocialisation of convicts are: the regime (the established

procedure for the execution and serving of sentences), pedagogical work, education, professional training and labour education, and restoration of ties with representatives of society. Means of resocialisation of convicts are used considering the type of punishment, the personality of the convicted person and the desire to return to socially acceptable forms of life.

Resocialisation of convicts serving sentences in the form of imprisonment is quite difficult since the loss of social connections and socially useful traits are deep, and sometimes irreversible [3].

The need to examine the problems of resocialisation of convicts increases in connection with the further reform of the Ukrainian penitentiary system, the priority area of which is the application and implementation in the national criminal-executive legislation of international standards of detention of convicts, which are aimed at ensuring the successful adaptation of convicts to conditions of isolation, and to form models of behaviour necessary for successful entry into society after their release.

Resocialisation is not a one-time instant procedure, it occurs in two stages: during the serving of the sentence and after it. The main tasks of the first stage of resocialisation of convicts are to level out or minimise the negative aspects caused by the isolation of the convicted person from society, prepare them for a law-abiding life in freedom, and the second – to help them in social adaptation after release from serving their sentence. It is resocialisation that should ensure the restoration and expansion of socially useful ties and relations with the society of a person released from prison, the development of an integral personality capable of an objective attitude both to the world around them and to oneself, a worldview choice focused on universal and national values [4].

Effective resocialisation of convicts to imprisonment can only be provided on the basis of: maximum consideration of the specific features of the psyche of convicts, age, gender, health status, interests, prospects for further life in society; creation of a system of individual and differentiated influences of social, pedagogical, psychological, legal area; considering the level and nature of social behaviour, and the specific features of responding to specific psychological and pedagogical situations of convicts. In places of detention, resocialisation is considered an integral process of correction, re-education, social and pedagogical support of a convicted person using punitive, educational, occupational therapy, and other technologies in the PI [5].

During the implementation of resocialisation, the main activities of the PI are also determined, which consist of the assimilation by convicts of elementary norms, values, and knowledge necessary and sufficient to be included in life in society.

Therewith, it sets specific requirements for the conditions of serving sentences. They must be sufficient at least to ensure that the convicted person does not lose the skills and abilities of behaviour practised in the normal conditions of society.

In isolation from society, the personality of the convicted person undergoes significant changes, as a result of which the values that ensure individual existence become the most significant for them, and the values that reflect the social essence of a person become secondary. This fact is confirmed by numerous studies by both foreign and Ukrainian researchers.

In conditions of isolation, convicts create the necessary conditions for stimulating their lawful behaviour and achieving the ultimate goal of the criminal-executive legislation – protecting the interests of the individual, society, and the state. The implementation of such a goal is conducted through the prism of fulfilling the tasks that arise before the criminal-executive legislation, in particular through the definition of the principles of the execution of criminal punishment, where differentiation and individualisation of the execution of punishments contribute to the implementation of its other components. After the end of the sentence, the convicted person again enters society, the norms of which they must adhere, but due to certain reasons, they are not always able to comply with them, because it becomes a difficult task for such a person to adapt to society. That is why the problem of resocialisation of convicts is a priority in the work of the PI.

According to N.Ye. Kolesnikova [6], resocialisation can be considered a multifunctional concept: it can be interpreted as a function of the PI, as a task of specialists of the penitentiary system, as a process of transformation of a person's life experience to change social behaviour, as a tool for managing the process of reintegration of criminals into society, as a technology for working with convicts or as an alternative to serving a sentence.

Therewith, M.S. Rybak [7] interprets resocialisation as an adjustment of the personality traits of a convicted person in giving it features necessary and sufficient for life in a certain positive or neutral, from the standpoint of public safety, social group.

In turn, N.O. Krainova [8] suggests considering the resocialisation of convicts a process of restoring a socialised individual, conducted by applying to a person who has committed a crime and is convicted of it, a set of legal, organisational, psychological, pedagogical, educational, and other measures of influence at various stages of criminal liability to prevent the repeated commission of illegal acts.

In turn, N.F. Ufimtseva [9] considers the resocialisation of convicts to be a long process, which is a complex set of psychological, pedagogical, economic, medical, legal, and organisational measures aimed

at forming each convicted person's ability and readiness to include after serving a sentence in the usual living conditions of society. The researcher assumes that resocialisation determines the main activities of correctional institutions. It involves the assimilation of basic norms, values, and knowledge necessary and sufficient to be included in the life of society. This will help the convicted person at the first stages to relatively successfully perform the necessary number of roles in the normal conditions of society, and in the future, it will serve as a basis for restoring the appropriate functions of a normal member of society.

Resocialisation is a complex (system) of legal, organisational, pedagogical, psychological, educational, and other measures of influence that are conducted at various stages of the implementation of criminal liability to change antisocial attitudes, systems of value orientations, counteract antisocial degradation of the individual, correct illegal behaviour, prevent crimes, create normal conditions for further socialisation.

O.I. Osaulenko [10] notes that resocialisation is the process of forming positive traits in a person that contribute to a respectful attitude towards the person, society, work, moral norms, customs, traditions, and stimulate law-abiding behaviour; in this sense, it is the purpose the correction process.

The process of resocialisation is complex and time-consuming. Therefore, on the way to achieving the goal of the sentence, there are certain difficulties in implementing this procedure. In this regard, several main problematic aspects can be distinguished, related to: the development of positive attitudes in the convicted person, poor-quality training of PI employees, isolation of the convicted person and, as a result, the inability to overcome their personal psychological problems, etc. Undoubtedly, all these factors complicate the process of resocialisation in both psychological and social areas. In working with convicts in the conditions of the penitentiary system, this process is non-stop and has several interdependent planes: it appears as the main goal of the social and psychological service of the PI; as a psychological and pedagogical process that ensures the achievement of this goal; as an internal process of qualitative changes in consciousness, feelings, and behaviour of a person. Considering the above, the resocialisation of those sentenced to imprisonment should be considered the process of positive changes in the personality of the convicted person as a result of applying legal, organisational, pedagogical, psychological, educational, and other measures of influence to eliminate the negative value orientations of convicts, the consequences of their isolation, fixing the results of correction, providing them with assistance after serving their sentence and assist in their adaptation in the social environment.

Resocialisation is a rather complex and contradictory phenomenon not only in terms of theoretical justification but also for practical implementation, first of all – for the staff of bodies and PI and those employees who are involved in working with convicted persons released from prison. On the one hand, such a situation can be interpreted as the result of the establishment of the concept of "resocialisation" of convicts, which is one of the main categories of the national science of criminal-executive law; at the same time, such a situation cannot have a positive impact on the practice of execution-serving a sentence in the form of imprisonment.

In Article 6 of the Criminal Executive Code of Ukraine, the main means of correction and resocialisation of convicts define the established procedure for performing and serving sentences (regime), socially useful work, social-educational work, general education, vocational training, and public influence.

It is the regime that is the tool by which convicts are resocialised and punished while the convicted person is serving a criminal sentence. Execution and serving of a criminal sentence are conducted under the conditions of the regime established in places of detention, which, being a certain procedure for the execution and serving of a sentence in terms of legal content, are regulated by the norms of criminal-executive law. The regime of detention is a complex legal phenomenon, which should provide for a clear concept fixed at the normative level since the regime of execution and serving of a sentence in the form of detention should ensure the implementation of the most important functions, the achievement of which will also determine the achievement of the tasks of punishment. In places of detention, the regime performs several functions, first of all, it is punishment for the crime committed.

According to O.G. Kolba [11], punishment as an element of the purpose of a sentence is, on the one hand, a forced necessity of the state to respond to the criminal behaviour of guilty persons, and on the other – a preventive measure, a prerequisite for the correction and resocialisation of convicted persons by restraining the desire to commit a new crime and inhibiting their destructive actions. The preventive content of the application of punishment involves preserving the socially useful properties of the convicted person, limiting their criminogenic properties, preventing torture and inhuman or degrading treatment by the staff of the PI, and countering the commission of crimes and other offences among other persons in isolation from society [11].

The regime is also one of the most concentrated means of implementing punishment and coercion. It provides for the isolation of convicts established by the relevant regulatory regulations, constant

supervision of them, fulfilment of their duties, realisation of their rights and legal interests, observance of personal safety of convicts and staff, separate detention of different categories of convicts, different conditions of detention depending on the type of CI, changing the conditions of serving sentences.

According to O.S. Steblinska [12], detention is an extreme measure of the response of the state to the commission of a crime by a person. Serving this type of sentence in the PI entails restrictions on the convicted person, including isolation, regime, constant supervision, and control. Such conditions affect the individual in different ways, and therefore the consequences of this influence are diverse.

O.V. Khoroshun [13] considers characteristics of the regime of execution and serving of a sentence in the form of detention to be strict and precise legal regulation of the regime of serving a sentence; the possibility of applying coercive measures to ensure compliance with the rules of the regime in case of their non-compliance by a convicted person; the factual implementation of the rules of the regime in the process of executing and serving a sentence.

In the criminal-executive legislation, there are several positions on the definition of the concept of "regime". It is defined as the order and conditions in places of detention, the rules of conduct established in the PI, and some researchers consider the regime in a narrow and broad sense.

In particular, M.O. Struchkov proposes that the regime, labour, and political-educational work are the main and mandatory means of the process of correctional labour influence on convicts. This position was also supported by O.S. Mikhlina, actively using the concepts of "order" or "rules of behaviour", rather than "regime" in the papers.

The regime of detention is one of the main measures to correct convicted persons, to encourage their law-abiding behaviour, which is directly provided for by the criminal-executive law. In penal institutions, the regime is a procedure of treatment established and regulated by the norms of law, mandatory for convicted persons, containing elements of punishment, which is aimed at achieving the tasks of detention. The regime is a procedure regulated by the norms of criminal-executive law for the execution and serving of a sentence, which ensures the correction of a convicted person and preparation for life in society.

The main purpose of the regime of serving a sentence is educational influence on convicts, and compulsory regulation of their way of life teaches order and conscious compliance with the established rules of behaviour, disciplines and accustoms them to the need for work, respect for the law, norms of coexistence established in society, and other positive features.

A regime in a broad sense is considered to be a set of measures by which the process of correcting prisoners is conducted. The regime in this context provides for the regulation of all aspects of the life of prisoners in the PI, in particular, socially useful and educational work. The regime in a narrow sense provides for the establishment of certain rules for the isolation of convicts, their behaviour, rights, and obligations due to the fact of serving a sentence, regulating the order of mobility within the place of detention, regulating the forms of communication of prisoners with the surrounding world, a system of measures of punishment and encouragement [14].

The conditions for serving a sentence in the PI determine the legal provisions that establish the right of restriction and obligations regulated by the current legislation for convicts, the fulfilment of which is ensured by the possibility of applying coercive measures established by the criminal-executive legislation. The regime simultaneously plays an active role in the system and interaction of fixed assets of correction and resocialisation of convicts. Different conditions of detention in places of detention are created for convicts depending on conscientious behaviour, responsible attitude to work, compliance with the established rules (tasks), or the type of the colony. Among the functions of the regime in places of detention, it is important to distinguish between the main ones – those for which it is created and regulated by law, and those that ensure its implementation. First of all, the regime provides for a punitive function, since criminal law is implemented through regime requirements and the right of restrictions. By implementing punishment, the rules of the regime encourage the convicted person to comply with the requirements of the law, and not to violate discipline.

Therewith, the regime is also a means of correcting convicts, and it also creates legal and organisational conditions for other means of correctional influence on convicts (educational, socially useful

work, general education and vocational training), establishing a compulsory procedure for their application. This is the main function of the regime. The most important of them is preventive, related to the prevention of offences both on the part of convicts and on the part of other persons. Regime norms require compliance with the relevant rules not only for convicts and the administration but also for other persons located on the territory of the colony or on premises where regime requirements are established.

Based on an empirical study of the correction and resocialisation of convicts to imprisonment in the system of means of implementing the tasks of criminal executive legislation, the author's interpretation of the concept of "resocialisation of convicts to imprisonment" is proposed, according to which it is a process of positive changes in the personality of the convicted person due to the application of legal, organisational, pedagogical, psychological, educational, and other measures of influence to eliminate negative value orientations of convicts, the consequences of their isolation, fixing the results of correction, providing them with assistance after serving their sentence and promoting their adaptation in the social environment [15].

## Conclusions

The criminal-executive legislation of Ukraine regulates the procedure and conditions for the execution and serving of criminal sentences to protect the interests of the individual, society, and the state by directing efforts to correct and resocialise convicted persons, prevent the commission of new criminal offences by both convicted persons and other persons, and prevent torture and inhuman or degrading treatment of convicted persons. The state respects and protects the rights, freedoms, and legal interests of convicts, provides the necessary conditions for their correction and resocialisation, social and legal protection, and their personal safety.

## References

- [1] Antypenko, V.F. (Eds.). (2011). *International criminology – a problematic field of international research*. Kyiv: Stal.
- [2] Baranov, Iu.V. (2008). *Extended abstract of candidate's thesis*. Moscow: National University.
- [3] Dromin, V.M. (2007). The evolution of punishment in the context of preventive opportunities: from imprisonment to probation. *Actual Problems of the State and Law*, 32, 259-265.
- [4] Khoroshun, O.V. (2012). Some issues of the regime of execution of punishment and serving of criminal punishment in the form of life imprisonment. *Bulletin of Zaporizhia National University*, 1(2), 257-261.
- [5] Kolb, O.H. (2005). *Prevention of crime in places of imprisonment*. Lutsk: Vezha.
- [6] Kolesnikova, N.E. (2011). *Social and psychological resocialization of convicted men in a correctional institution*. Saint Petersburg: St Petersburg University.
- [7] Kraynova, N.A. (2002). *Problems of resocialization of repeatedly convicted persons*. Vladivostok: National University.
- [8] Nalyvaiko, V.S. (2000). *Criminological problems of resocialization of the persons released from places of imprisonment*. Kyiv: National University.

- [9] Osaulenko, O.I. (2002). Differentiation and individualization of execution of criminal punishments in the form of imprisonment. *Problems of Penitentiary Theory and Practice*, 7, 59-64.
- [10] Perinskaia, N.A. (2005). Resocialization. *Knowledge. Understanding. Skill*, 4, 161-162.
- [11] Romaniuk, O.V., & Chovhan, V.O. (2016). *International standards, principles and recommendations in the field of execution of punishments and activity of bodies and establishments of execution of punishments*. Bila Tserkva: Publishing house.
- [12] Rybak, M.S. (2004). *Resocialization of those sentenced to imprisonment: Problems of theory and practice*. Saratov: SGAP.
- [13] Steblynska, O.S., & Yarmoliuk, O.V. (2016). Some questions of escape from places of imprisonment or from custody. *Law*, 1(13), 253-259.
- [14] Ufimtseva, N.F. (2003). Peculiarities of re-socialization of convicts in penitentiary institutions in Germany (on the example of the state of Lower Saxony. In *Social Work in the Urals: Historical Experience and Modernity: Interuniversity Scientific Conference* (pp. 231-248). Yekaterinburg: National University.
- [15] Zlyvko, S.V., & Tkachenko, O.H. (2011). Legal regime in penitentiary institutions and pre-trial detention centers as a type of administrative-legal regime. *Law and Management*, 1, 172-178.

### Список використаних джерел

- [1] Міжнародна кримінологія – проблемне поле міжнародних досліджень: матеріали наук.-практ. семінару / за заг. ред. В. Ф. Антипенка. Київ: Сталь, 2011. 236 с.
- [2] Баранов Ю. В. Ресоциализация осужденных к лишению свободы и освобожденных от этого наказания: теоретико-методологические и правовые основы: автореф. дис ... канд. юрид. наук: 12.00.08. Москва, 2008. 19 с.
- [3] Дрьомін В. М. Еволюція покарання в контексті запобіжних можливостей: від позбавлення волі до умовного випробування. *Актуальні проблеми держави і права*. 2007. Вип. 32. С. 259–265.
- [4] Хорошун О. В. Деякі питання режиму виконання покарання та відбування кримінального покарання у виді довічного позбавлення волі. *Вісник Запорізького національного університету*. 2012. Вип. 1. № 2. С. 257–261.
- [5] Колб О. Г. Запобігання злочинності у місцях позбавлення волі : навч. посіб. Луцьк: Вежа, 2005. 494 с.
- [6] Колесникова Н. Е. Социально-психологическая ресоциализация осужденных мужчин в исправительном учреждении: автореф. дис ... канд. психол. наук: 19.00.05. СПб., 2011. 24 с.
- [7] Крайнова Н. А. Проблемы ресоциализации неоднократно судимых лиц: автореф. дис. ... канд. юрид. наук: 12.00.08. Владивосток, 2002. 23 с.
- [8] Наливайко В. С. Кримінологічні проблеми ресоціалізації осіб, звільнених з місць позбавлення волі : дис. ... канд. юрид. наук: 12.00.08. Київ, 2000. 142 с.
- [9] Осауленко О. І. Диференціація та індивідуалізація виконання кримінальних покарань у виді позбавлення волі. *Проблеми пенітенціарної теорії і практики*. 2002. № 7. С. 59–64.
- [10] Перинская Н. А. Ресоциализация. *Знание. Понимание. Умение*. 2005. № 4. С. 161–162.
- [11] Романюк О. В., Човган В. О. Міжнародні стандарти, принципи і рекомендації в галузі виконання покарань та діяльності органів і установ виконання покарань : метод. рек. Біла Церква, 2016. 131 с.
- [12] Рыбак М. С. Ресоциализация осужденных к лишению свободы: проблемы теории и практики / под ред. В. П. Малкова. 2-е изд., испр. и доп. Саратов: СГАП, 2004. 480 с.
- [13] Стеблинська О. С., Ярмолук О. В. Окремі питання втечі з місць позбавлення волі або з-під варти. *Право*. 2016. Вип. 1. № 13. С. 253–259.
- [14] Уфимцева Н. Ф. Особенности ресоциализации осужденных в пенитенциарных учреждениях Германии (на примере земли Нижняя Саксония). *Социальная работа на Урале: исторический опыт и современность: межвуз. сб. науч. тр. Екатеринбург, 2003. С. 231–248.*
- [15] Зливко С. В., Ткаченко О. Г. Правовий режим в установах виконання покарань та слідчих ізоляторах як вид адміністративно-правового режиму. *Право та управління*. 2011. № 1. С. 172–178.

# Виправлення та ресоціалізація засуджених до позбавлення волі в системі засобів реалізації завдань кримінально-виконавчого законодавства

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## Анотація

Будь-яка сфера правового регулювання, зокрема виконання кримінальних покарань, неодмінно ґрунтується на основоположних конституційних принципах, які є підґрунтям для розвитку відносин між правовою державою та особою. До таких принципів належать: невід'ємність, непорушність і недоторканність прав та свобод особи; верховенство права; взаємна відповідальність держави й особи; обмеженість і підзаконність державної влади; суворе підпорядкування закону в діяльності всіх державних органів і посадових осіб тощо. Нині актуальними є проблеми дотримання прав і законних інтересів громадян, що опинилися в місцях позбавлення волі. Метою статті є визначення особливостей виправлення та ресоціалізації засуджених до позбавлення волі в системі засобів реалізації завдань кримінально-виконавчого законодавства. Під час підготовки статті використано окремі загальнонаукові та спеціально-наукові методи пізнання, зокрема: історичний, філософсько-правовий, порівняльний, системний, функціональний, узагальнення. За результатами емпіричного дослідження виправлення та ресоціалізації засуджених до позбавлення волі в системі засобів реалізації завдань кримінально-виконавчого законодавства запропоновано авторське трактування поняття «ресоціалізація засуджених до позбавлення волі», згідно з яким це процес позитивних змін особистості засудженого внаслідок застосування правових, організаційних, педагогічних, психологічних, виховних та інших заходів впливу з метою усунення негативних ціннісних орієнтирів засуджених, наслідків їхньої ізоляції, закріплення результатів виправлення, надання їм допомоги після відбуття покарання та сприяння їхній адаптації в соціальному середовищі. Доведено, що під час визначення виду установ виконання покарань критерій відкритості/закритості цих установ доцільно застосовувати лише до установ, що виконують покарання у виді позбавлення волі. Сформульовані висновки поглиблюють знання про об'єкт дослідження, сприяють вивченню процесу виконання та відбування покарання засудженими. Кримінально-виконавче законодавство України регламентує порядок й умови виконання та відбування кримінальних покарань з метою захисту інтересів особи, суспільства й держави завдяки спрямуванню зусиль на виправлення та ресоціалізацію засуджених, запобігання вчиненню нових кримінальних правопорушень як засудженими, так й іншими особами, а також запобігання тортурам і нелюдському або такому, що принижує гідність, поводженню із засудженими. Держава поважає та охороняє права, свободи й законні інтереси засуджених, забезпечує необхідні умови для їх виправлення і ресоціалізації, соціальну й правову захищеність, їхню особисту безпеку. Головними завданнями ресоціалізації засуджених можна вважати відновлення та розширення її соціально корисних зв'язків і відносин із суспільством, розвиток цілісної особистості, здатної до об'єктивного ставлення як до навколишнього світу, так і до себе; зміна спрямованості особистості; створення системи її моральних, ідейних, правових переконань відповідно до прийнятих у суспільстві норм і цінностей; формування в осіб, які відбувають покарання, здатності до стабільної самостійної законослухняної поведінки після відбування покарання

## Ключові слова:

ресоціалізація; режим виконання покарання; позбавлення волі; засуджений до позбавлення волі; виправна колонія; правовий статус; установи виконання покарань

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# Proceedings in Cases of Violation of the Quarantine Rules

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## Abstract

The relevance of the study lies in the formulation of scientifically established recommendations for improving the effectiveness of proceedings in cases of violation of the quarantine rules and maximising the achievement of the principles of fairness and objectivity in this process based on the study of judicial practice and foreign experience. The purpose of the study is to clarify the main problems arising in cases of violation of the quarantine rules based on the analysis of relevant court decisions and to provide proposals for their elimination. The study uses a set of scientific methods, namely: comparative-legal, system-structural, and formal-logical document analysis. The theoretical basis of the study consists of the papers of Ukrainian and foreign researchers, the provisions of the Code of Ukraine on Administrative Offenses, and the practice of their application. The results of the study formulated the following conclusions: 1) the practice of using Art. 44-3 of the Code of Ukraine on Administrative Offenses indicates the presence of substantial deficiencies in the bringing to administrative responsibility for violation of the quarantine rules; 2) part of them are related to deficiencies in Art. 44-3 of the Code of Ukraine on Administrative Offenses: a) the presence of blanket disposition of the article, hence the need to specify the regulation, providing for the offence committed by the person, relevant articles, parts, and points in the protocol; b) excessively strict uncontested sanctions are likely to induce the court to close the case in relation to insignificance; 3) another part of the problems associated with the deficiencies in the units of the National Police of Ukraine drawing a protocol on administrative offence and gathering the necessary evidence: failure to submit required evidence of the commission of administrative violations, errors in drawing a protocol on administrative offence, incorrect interpretation of Art. 44-3 of the Code of Ukraine on Administrative Offenses; 4) these and other shortcomings deprive the court of the ability to make the necessary decision in the case and to reach a definite legitimate and reasoned conclusion about the presence or absence of fault of the particular person in the violation or cause the court to close the proceedings; 5) the problems identified can be overcome in a complex manner: on the one hand, by improving the legal standards under Art. 44-3 of the Code of Ukraine on Administrative Offenses, and on the other by increasing the skill level of the police

## Keywords:

administrative responsibility; proceeding; quarantine; COVID-19; administrative offence; infectious diseases; quarantine rules; police; protocol

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## Introduction

The unprecedented spread of the acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus has demonstrated the scale of both real and potential harm to life and health not only to the population of a particular country but the entire world community. From the very beginning of the pandemic, public authorities have been taking active measures to prevent the rapid spread of this disease, eliminate the causes that cause it, and the conditions and factors that contribute to it. In such circumstances, it is important to clarify the role of judicial and law enforcement agencies in this process. At the forefront of the fight against COVID-19, in addition to doctors, there are police officers who were put on duty by the state to ensure compliance with quarantine. However, with the expansion of such powers of law enforcement officers, problems have arisen in the field of citizens' rights and freedoms. They can be clearly traced in cases of violation of the quarantine rules.

It is true that the effectiveness of police response to administrative and criminal offences, in particular violations of the rules of quarantine, is impossible without several key elements: knowledge, skills, and abilities to implement the powers of the police to ensure public safety, detection, and suppression of administrative offences, implementation of preventive activities to identify and eliminate the causes and conditions that contribute to the commission of violations of the quarantine rules, as an administrative offence [1].

The problem is aggravated by the shortcomings of the construction of the administrative and legal provision of Art. 44-3 of the Code of Ukraine on Administrative Offenses. In this regard, S.S. Kovaleva rightly notes that the current legislation of Ukraine on determining responsibility for violation of quarantine and sanitary rules and norms for the prevention of COVID-19, in general, ensures proper resolution of this problem. However, considering the need for timely and prompt adoption of relevant regulations on this issue in the context of the rapid spread of COVID-19 in Ukraine, there is now a situation in which a number of provisions of these acts contain a complex of legal conflicts, contradictions, and gaps [2]. Some of them are caused by forced restrictions on the rights and freedoms of citizens, as evidenced by relevant Ukrainian and international studies [3-5]

In the theory of administrative law, these issues were investigated by the following researchers: S.S. Kovalyova [3], V.V. Krykun [4], Ye.V. Kurinnyi [5] and others.

However, there are problematic issues that arise in cases of violation of the quarantine rules that need to be resolved, which determines the relevance of the study.

*The purpose of the study* is to identify the main problems arising during proceedings on violations of the quarantine rules based on the analysis of court decisions and provide suggestions for their elimination.

## Results and Discussion

The analysis of court decisions in cases of administrative offences under Art. 44-3 of the Code of Ukraine on Administrative Offenses outlines certain problems faced by employees of the National Police of Ukraine: incorrect qualification of the acts committed; flaws in drawing protocols on administrative offences; lack of appropriate and acceptable evidence. Therewith, even if the police respond professionally to these administrative offences, the courts quite often close cases due to insignificance, resorting to verbal comments for offenders. It is advisable to take a closer look at these questions.

Many problems in bringing people to administrative responsibility for violating the quarantine rules arise at the stage of preparing for consideration of a case of an administrative offence under Art. 44-3 of the Code of Ukraine on Administrative Offenses.

At this stage of preparation for consideration of an administrative offence case, the judge resolves the following issues:

- whether it is within their competence to consider the case;
- whether the protocol and other materials of the administrative offence case were drawn correctly;
- whether the persons taking part in the consideration of the case were notified of the time and place of its consideration;
- whether the necessary additional materials have been requested;
- whether the application of the person brought to administrative responsibility, the victim, their legal representatives, and a lawyer are subject to approval (Art. 278 of the Code of Ukraine on Administrative Offenses).

Many questions are related to the incorrect drawing a protocol for an administrative offence. A large number of them is due to the blanket disposition of Art. 44-3 of the Code of Ukraine on Administrative Offenses.

In practical application, there are cases when the protocol on an administrative offence does not indicate which norm of the law was violated. When formulating the essence of an offence, law enforcement agencies must indicate the normative act, its articles, parts, paragraphs, and requirements that have been violated. This is due to the fact that the disposition of Art. 44-3 of the Code of Ukraine on Administrative Offenses is a blanket norm, as researchers have repeatedly noted.

According to V.V. Krykun [6], this negatively affects the differentiation of the competence of those

bodies that, according to the law, have the right to draw protocols on administrative offences under the above-mentioned article of the Code of Ukraine on Administrative Offenses.

In turn, S.S. Kovaleva [3] claims that the norm of Art. 44-3 of the Code of Ukraine on Administrative Offenses is blanket, that is, it refers to a substantial number of regulations regarding the quarantine, sanitary-hygienic, and sanitary-anti-epidemic rules and norms both national and issued by local self-government bodies, which later led to substantial difficulties in the process of qualifying this type of offence.

Ye.V. Kurinnyi [5] rightly notes that it is necessary to consider the blanket nature of the content of the disposition of Art. 44-3 of the Code of Ukraine on Administrative Offenses, which substantially complicates the independent acquaintance of most citizens with the current prohibitions, which contain several normative regulations, including the bylaw level.

Therewith, A.A. Voznyuk & S.S. Chernyavskiy [7] emphasises on the problem of constant changes in relevant regulations, primarily due to changes and additions to certain articles. The rules that were in force at the beginning of the quarantine were constantly changing during the restrictive measure, therefore, taking a balanced approach to bringing violators to legal responsibility is necessary, since they may have been unaware of the modification of a certain ban.

The disposition of Art. 44-3 of the Code of Ukraine on Administrative Offenses provides for liability for violation of the quarantine, sanitary-hygienic, and sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine "On the protection of the population from infectious diseases", other legislative acts, and decisions of local self-government bodies on the fight against infectious diseases.

The norm of Art. 44-3 of the Code of Ukraine on Administrative Offenses has a blanket character, and therefore among the signs of the essence of such an administrative offence must be a reference to the article of the Law of Ukraine "On the protection of the population from infectious diseases", which establishes the relevant quarantine, sanitary-hygienic, and sanitary-anti-epidemic rules and norms, or a reference to other legislative acts (normative regulations of the highest legal force, the subject of adoption (or authorisation) of which is the parliament as a legislative body of state power), or a reference to the decision of local self-government bodies on the fight against infectious diseases, which was not observed by the person held administratively liable [8].

The absence in the protocol of information about what rules a certain person violates and what normative regulation establishes these rules determines that these materials on bringing to administrative responsibility for committing an offence under Art. 44-3 of the Code of Ukraine on

Administrative Offenses are sent for revision to the National Police of Ukraine.

Art. 44-3 of the Code of Ukraine on Administrative Offenses deprive the court of the opportunity to make a decision on the case and make an unambiguous legal and reasonable conclusion about the presence or absence of guilt of a particular person in the specified violation or force the court to close the proceedings on the case.

Competent persons of the National Police of Ukraine also make mistakes in the interpretation of Art. 44-3 of the Code of Ukraine on Administrative Offenses. Given the blanket nature of the prohibition norm, it is difficult to determine which decisions are subject to the decisions of local self-government bodies on the fight against infectious diseases. Therefore, for example, in case No. 587/572/20, the police mistakenly included the Sumy Regional Commission on Technogenic and Environmental Safety and Emergencies in local self-government bodies [9].

In certain cases, the police do not attach evidence of the offence to the protocol, as a result of which the administrative material is returned to the police for proper registration. For example, in the decision of the judge of the Kivertsivsky District Court of the Volyn region on August 5, 2020, it is indicated that the Kivertsivsky District Court of the Volyn region received materials on bringing to administrative responsibility PERSON\_1 for committing an offence under Art. 44-3 of the Code of Ukraine on Administrative Offenses. According to the results of the examination of these materials, it was established that the inspector of the patrol police response team of the Kivertsivsky Police Office in the Volyn region did not add any proper and admissible evidence regarding the commission of PERSON\_1 of an administrative offence under Art. 44-3 of the Code of Ukraine on Administrative Offenses, and characterising data on the latter. Judicial consideration of a case on an administrative offence is conducted within the limits defined in the protocol of circumstances on an administrative offence. The court is deprived of the opportunity to independently eliminate the above-mentioned shortcomings of the police officer, which they made while drawing the protocol on an administrative offence. Their elimination by the court will lead to an independent establishment of the circumstances of the case, which are not defined in the protocol on an administrative offence, and consideration of the case outside the limits defined in the protocol of circumstances on an administrative offence, which is an actual charge of committing an administrative offence, which is unacceptable.

Such circumstances indicate the incorrectly drawn protocol on an administrative offence, which the court cannot independently eliminate during

the trial, and therefore the case materials were returned for revision [10].

Sources of evidence in the case of an administrative offence under Art. 44-3 of the Code of Ukraine on Administrative Offenses are the protocol on an administrative offence; explanations of the person held administratively liable, witnesses; photos; documents confirming that a certain person is a business entity or an employee of the business entity; an identification document of the person held administratively liable, based on which the protocol on an administrative offence was drawn up, etc. Some courts also require proof of the level of epidemic danger experienced by a certain area during the commission of this administrative offence [10].

Quite often, the courts, considering the circumstances and nature of the committed offence, the identity of the violator, the degree of their guilt, property status, considering the admission of guilt, remorse, bringing to administrative responsibility for the first time, non-occurrence of socially harmful consequences in connection with the commission of an administrative offence, recognise the committed administrative offence as insignificant, and release the person from administrative responsibility, resorting to a verbal comment in accordance with Art. 22 of the Code of Ukraine on Administrative Offenses. Others believe that this is sufficient to provide educational influence and prevent the commission of new offences [11].

Based on judicial practice, researchers note that mostly the conclusions of judges regarding the insignificance of the act are established on the availability of information about mitigating circumstances, in particular, the sincere remorse of the offender, the commission of an administrative offence for the first time, the nature of the act and the circumstances of the case, etc. [9].

Staying without personal protective equipment, transporting more passengers than the number of seats provided for in the technical characteristics of the vehicle, or staying on the street without identity documents is considered insignificant.

It can be assumed that the closure of proceedings in administrative cases under Art. 44-3 of the Code of Ukraine on Administrative Offenses is to a certain extent due to the shortcomings of the sanctions of this article. This has been repeatedly noted by researchers. Ye.V. Kurinnyi [5] rightly notes that the current amount of the fine for this offence is unfair, given the number of citizens below the poverty line, and the size of the subsistence minimum at this time. For instance, R. Filippov & A. Tymchyshyn [12] believe that this is a substantial amount for an ordinary Ukrainian, but it is impossible to resort to just a verbal comment. Ultimately, it is quite logical to assume that a substantial amount of the fine is commensurate with the amount of possible public dam-

age of the offence, even with the formal composition.

Given the groundlessness of the sanctions of Art. 44-3 of the Code of Ukraine on Administrative Offenses, the courts mostly impose administrative penalties for violating the quarantine rules within the minimum limits.

The scientific originality of the results obtained consists in the formulation of scientifically based recommendations for improving the efficiency of proceedings in cases of violation of the quarantine rules, based on the study of judicial practice and foreign experience, and maximising the achievement of the principles of fairness and objectivity in this process [13; 14].

The scientifically based theoretical provisions, conclusions, and proposals formulated in the study can serve as a basis for further research on the problems of administrative responsibility for violating the quarantine rules.

## Conclusions

The practice of applying Art. 44-3 of the Code of Ukraine on Administrative Offenses indicates the presence of substantial shortcomings that prevent people from being brought to administrative responsibility for violating the quarantine rules.

A part of them is related to flaws of the Art. 44-3 of the Code of Ukraine on Administrative Offenses: 1) the presence of a blanket disposition of the article, which makes it necessary to state in the protocol a normative regulation that provides for an offence committed by a person, and indicate the relevant articles, their parts, paragraphs; 2) excessively strict non-alternative sanctions, which are likely to push the court to close the proceedings due to insignificance.

Another part of the problems is related to shortcomings in the work of the National Police of Ukraine when drawing the protocol on an administrative offence and collecting the necessary evidence: failure to provide the necessary evidence of an administrative offence, errors in drawing the protocol on an administrative offence, misinterpretation of Art. 44-3 of the Code of Ukraine on Administrative Offenses.

These and other shortcomings deprive the court of the opportunity to make the necessary decision on the case and come to an unambiguous legal and reasonable conclusion about the presence or absence of guilt of a particular person in the specified violation or force the court to close the proceedings on the case.

Thus, the problems can be overcome in a complex manner: on the one hand, by improving the legal provision of Art. 44-3 of the Code of Ukraine on Administrative Offenses, and on the other – by improving the level of qualification of police officers.

## References

- [1] Botes, W.M., & Thaldar, D.W. (2020). COVID-19 and quarantine orders: A practical approach. *SAMJ: South African Medical Journal*, 110(6), 1-4.
- [2] Chu, I.Y.H., Alam, P., Larson, H.J., & Lin, L. (2020). Social consequences of mass quarantine during epidemics: a systematic review with implications for the COVID-19 response. *Journal of Travel Medicine*, 27(7), 1-14.
- [3] Kovalova, S.S. (2020). Responsibility for violation of quarantine and sanitary rules and regulations to prevent the spread of coronavirus infection (COVID-19) in Ukraine. *Law. Human. Environment*, 11(2), 158-168.
- [4] Krykun, V.V. (2020). Objective features of administrative offenses provided for in Article 443 of the Code of Administrative Offenses of Ukraine and their impact on the sphere of authority of the National Police of Ukraine. *Bulletin of Kharkiv National University of Internal Affairs*, 89(2), 153-163.
- [5] Kurinnyi, Ye.V. (2020). On the axiological essence of administrative fines. *Bulletin of Zaporizhia National University*, 1, 144-150.
- [6] Resolution of the Kivertsy District Court of the Volyn Region in the case No. 158/2731/20. (2020, November). Retrieved from <http://reyestr.court.gov.ua/Review/92890358>
- [7] Vozniuk, A., & Cherniavskiy, S. (2020). Violation of COVID-19 prevention rules and regulations: current issues of criminal and administrative liability. *Law Journal of the National Academy of Internal Affairs*, 19(1), 8-19.
- [8] Resolution of the Kivertsy District Court of the Volyn Region in the case No. 158/2731/20. (2020, August). Retrieved from <http://reyestr.court.gov.ua/Review/92890358>
- [9] Resolution of the Starovyzhiv district court of Volyn region in the case No. 168/546/20. (2020, August). Retrieved from <http://reyestr.court.gov.ua/Review/90906425>
- [10] Resolution of the Sumy District Court of Sumy region in the case No. 587/572/20. (2020, March). Retrieved from <http://reyestr.court.gov.ua/Review/88520190>
- [11] Resolution of the Railway District Court of Lviv in the case No. 462/6924/20. (2020, November). Retrieved from <http://reyestr.court.gov.ua/Review/92874740>
- [12] Pylypiv, R., & Tymchyshyn, A. (2020). Administrative liability for violation of human quarantine rules: Problems and prospects. *Legal Bulletin*, 3, 163-169.
- [13] Sambor, M.A. (2020). The composition of administrative offense shodo violation of the rules of quarantine of people. *Bulletin of Luhansk State University of Internal Affairs named after E.O. Didorenko*, 2(90), 155-170.
- [14] Sjödin, H., Wilder-Smith, A., Osman, S., Farooq, Z., & Rocklöv, J. (2020). Only strict quarantine measures can curb the coronavirus disease (COVID-19) outbreak in Italy. *Euro Surveill*, 25(13), article number 2000280.

## Список використаних джерел

- [1] Botes W. M., Thaldar D. W. COVID-19 and quarantine orders: A practical approach. *SAMJ: South African medical journal*. 2020. Vol. 110. No. 6. P. 1–4.
- [2] Chu I. Y. H., Alam P., Larson H. J., Lin L. Social consequences of mass quarantine during epidemics: a systematic review with implications for the COVID-19 response. *Journal of travel medicine*. 2020. Vol. 27. No. 7. P. 1–14.
- [3] Ковальова С.С. Відповідальність за порушення карантину та санітарних правил і норм щодо запобігання поширенню коронавірусної інфекції (COVID-19) в Україні. *Право. Людина. Довкілля*. 2020. Вип. 11. № 2. С. 158–168.
- [4] Крикун В.В. Об'єктивні особливості адміністративних правопорушень, передбачених статтею 443 Кодексу України про адміністративні правопорушення та їх вплив на сферу повноважень Національної поліції України. *Вісник Харківського національного університету внутрішніх справ*. 2020. Вип. 89. № 2. С. 153–163.
- [5] Курінний Є.В. Про аксіологічну сутність адміністративних штрафів. *Вісник Запорізького національного університету*. № 1. 2020. С. 144–150.
- [6] Постанова Ківерцівського районного суду Волинської області від 17 листопада 2020 р. по справі № 158/2731/20. URL: <https://reyestr.court.gov.ua/Review/92890358>.
- [7] Вознюк А., Чернявський С. Порушення правил і норм щодо запобігання COVID-19: актуальні проблеми кримінальної та адміністративної відповідальності. *Юридичний часопис Національної академії внутрішніх справ*. 2020. Вип. 19. № 1. С. 8–19.
- [8] Постанова Ківерцівського районного суду Волинської області від 5 серпня 2020 р. по справі № 158/1853/20. URL: <https://reyestr.court.gov.ua/Review/90776749>.
- [9] Постанова Старовижівського районного суду Волинської області від 10 серпня 2020 р. по справі № 168/546/20. Провадження № 3/168/138/20. URL: <https://reyestr.court.gov.ua/Review/90906425>.

- [10] Постанова Сумського районного суду Сумської області від 31 березня 2020 р. по справі № 587/572/20. URL: <https://reyestr.court.gov.ua/Review/88520190>.
- [11] Постанова Залізничного районного суду м. Львова від 16 листопада 2020 р. по справі № 462/6924/20. URL: <https://reyestr.court.gov.ua/Review/92874740>.
- [12] Пилипів Р., Тимчишин А. Адміністративна відповідальність за порушення правил щодо карантину людей: проблеми та перспективи. *Юридичний вісник*. 2020. № 3. С. 163–169.
- [13] Самбор М. А. Склад адміністративного правопорушення щодо порушення правил карантину людей. *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка*. 2020. Вип. 2. № 90. С. 155–170.
- [14] Sjödin H., Wilder-Smith A., Osman S., Farooq Z., Rocklöv J. Only strict quarantine measures can curb the coronavirus disease (COVID-19) outbreak in Italy. *Euro surveill.* 2020. Vol. 25. No. 13. Article number 2000280.

## Провадження у справах про порушення правил щодо карантину людей

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### Анотація

Метою статті є з'ясування основних проблем, які виникають під час провадження у справах про порушення правил щодо карантину людей, на підставі аналізу відповідних судових рішень, а також надання пропозицій щодо їх усунення. У статті використано комплекс наукових методів, а саме: порівняльно-правовий, системно-структурний, формально-логічний, аналізу документів. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, положення Кодексу України про адміністративні правопорушення, а також практика їх застосування. Наукова новизна отриманих результатів полягає у формулюванні на підставі вивчення судової практики й іноземного досвіду науково обґрунтованих рекомендацій щодо підвищення ефективності провадження у справах про порушення правил щодо карантину людей, а також максимального досягнення принципів справедливості й об'єктивності в цьому процесі. За результатами здійсненого дослідження сформульовано такі висновки: 1) практика застосування ст. 44-3 Кодексу України про адміністративні правопорушення свідчить про наявність значних недоліків, які перешкоджають притягненню до адміністративної відповідальності за порушення правил щодо карантину людей; 2) частина їх пов'язана з вадами конструкції ст. 44-3 Кодексу України про адміністративні правопорушення: а) наявність бланкетної диспозиції статті, що зумовлює необхідність зазначати в протоколі нормативно-правовий акт, у якому передбачено правопорушення, вчинене особою, а також відповідні статті, їхні частини, пункти; б) надмірно суворі безальтернативні санкції, що ймовірно спонукають суд до закриття провадження у зв'язку з малозначністю; 3) інша частина проблем пов'язана з недоліками в роботі підрозділів Національної поліції України під час складання протоколу про адміністративне правопорушення та збору необхідних доказів: ненаданням необхідних доказів вчинення адміністративного проступку, помилками в складанні протоколу про адміністративне правопорушення, неправильним тлумаченням ст. 44-3 Кодексу України про адміністративні правопорушення; 4) ці та інші недоліки позбавляють суд можливості прийняти необхідне рішення у справі та дійти однозначного законного й обґрунтованого висновку щодо наявності чи відсутності вини конкретної особи в зазначеному порушенні або ж змушують суд закривати провадження у справі; 5) окреслені проблеми можна подолати комплексно: з одного боку, шляхом удосконалення правової норми, передбаченої ст. 44-3 Кодексу України про адміністративні правопорушення, а з іншого – шляхом підвищення рівня кваліфікації поліцейських

### Ключові слова:

адміністративна відповідальність; провадження; карантин; коронавірус; адміністративне правопорушення; інфекційні хвороби; правила карантину людей; поліція; протокол

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# Violation of the Quarantine Rules: Analysis of the Composition of the Offence

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## Abstract

The relevance of the study lies in the fact that it defines the object, objective side, subject, subjective side of an administrative offence under Art. 44-3 of the Code of Ukraine on Administrative Offences, which is a necessary condition for the effective application of this norm as a measure of administrative coercion. Some flaws in the composition of this offence, primarily related to its objective side, are identified, and ways to eliminate them are proposed. The purpose of the study is to identify problematic issues of qualification of violation of the quarantine rules, structural flaws of Art. 44-3 of the Code of Ukraine on Administrative Offences and determine ways to eliminate them. The study used a set of scientific methods: terminological, system-structural, formal-logical, and comparative-legal. The theoretical basis of the study consists of the works of Ukrainian and foreign researchers, the provisions of the Code of Ukraine on Administrative Offences, and the practice of their application. According to the results of the study, the following conclusions were formulated: 1) the direct object of an administrative offence under Art. 44-3 of the Code of Ukraine on Administrative Offences should be recognised as public relations in the field of public health protection from infectious diseases; 2) from the objective side, this offence has the following forms: a) violation of the quarantine rules; b) violation of sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine “On the protection of the population from infectious diseases”, other acts of legislation; c) violation of decisions of local self-government bodies on the fight against infectious diseases; 3) given such a variety of forms of the objective side, the name of Art. 44-3 of the Code of Ukraine on Administrative Offences needs to be clarified since it concerns only one act – violation of the quarantine rules, and therefore does not cover others; 4) from the name and disposition of Art. 44-3 of the Code of Ukraine on Administrative Offences, the word “people” should be excluded, since, in all normative regulations defining the rules of quarantine, the term “quarantine” is used, and not “quarantine of people”; 5) in the disposition of Art. 44-3 of the Code of Ukraine on Administrative Offences, the concepts of “sanitary-hygienic rules and norms” and “sanitary-anti-epidemic rules and norms” should be replaced with sanitary norms due to the fact that sanitary-hygienic and sanitary-anti-epidemic rules and norms are not clearly differentiated, they are a type of social norms; 6) administrative offences provided for in Art. 44-3 of the Code of Ukraine on Administrative Offences belong to offences with formal composition, so harm from such violations is not a mandatory feature 7) subjects of administrative offences provided for in Art. 44-3 of the Code of Ukraine on Administrative Offences may be both general subjects and officials

## Keywords:

administrative responsibility; quarantine; COVID-19; administrative offence; infectious diseases; quarantine of people

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## Introduction

Threats and risks associated with COVID-19 have led to the need to take measures aimed at protecting citizens from the spread of this disease. One of these measures was the development and submission to the Verkhovna Rada of Ukraine of a draft law on amendments to certain legislative acts of Ukraine aimed at preventing the occurrence and spread of coronavirus disease (COVID-19), which provided for the addition of the Code of Ukraine on Administrative Offences (hereinafter referred to as the Administrative Code) by Art. 44-3 "Violation of the rules on quarantine of the people" [1]. Administrative liability was established for violation of the quarantine rules, sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine "On protection of the population from infectious diseases", other legislative acts, and decisions of local self-government bodies on the fight against infectious diseases.

In practice, law enforcement agencies have faced a number of problematic issues related both to the qualification of administrative offences under this article and to bringing those guilty to administrative responsibility. This study shares the position of researchers who believe that the legality and effectiveness of the application of this norm depend on the quality of the relevant legislative provisions and their correct interpretation by law enforcement agencies. Considering the above, it is necessary to focus on the flaws of the structure of this legal prohibition, and problematic issues that arise during its implementation in practice [2].

A.A. Voznyuk, M.Yu. Gavrilyuk, V.V. Krykun, S.S. Kovalyova, S.M. Kozina, A.V. Pogoriletska, Ya.I. Rogovska, M.A. Sambor, S.S. Chernyavskiy, and others.

Given the fact that there is little scientific progress on liability for committing an administrative offence under Art. 44-3 of the Administrative Code and considering the scale of the pandemic not only in Ukraine but worldwide, it is appropriate to investigate this issue.

*The purpose of the study* is to identify problematic issues of qualification of violations of the quarantine rules, composition flaws of Art. 44-3 of the Administrative Code, and determine ways to eliminate them.

## Results and Discussion

The spread of COVID-19 in the world forces national and local government agencies to introduce social restrictive measures to stop the spread of this virus [3]. Such measures include the introduction of quarantine of people, and the establishment of sanitary-hygienic, sanitary-anti-epidemic rules and regulations.

Quarantine and isolation can be extremely effective in protecting or restoring public health. Those

are two measures that can be used to prevent or minimise the impact of infectious disease outbreaks [4]. The use of quarantine is most useful when there is substantial asymptomatic transmission [5].

Liability for violation of the quarantine rules, sanitary-hygienic, sanitary-anti-epidemic rules and norms is established in Art. 44-3 of the Administrative Code of Ukraine.

Effective application of this provision as a measure of administrative coercion requires the correct definition of the elements of the composition of this offence – the object, objective side, subject, subjective side. Therewith, a correct understanding of the signs of violation of the quarantine rules is a necessary condition for observing the principle of legality in the proceedings on an administrative offence.

***The direct object of an administrative offence.*** It is necessary to determine the object of the crime to identify what damage or threat of its occurrence is caused by its occurrence.

V.V. Krykun defines the direct object of an administrative offence under Art. 44-3 of the Administrative Code as social relations for protecting the population from infectious diseases and ensuring its sanitary and epidemic well-being [6]. This study does not share the position of the researcher. According to the disposition of the article under study, liability is established for violation of the quarantine rules, sanitary-hygienic, sanitary-anti-epidemic rules and norms provided, first of all, by the Law of Ukraine "On protection of the population from infectious diseases". This law defines the legal, organisational, and financial basis for the activities of executive authorities, local self-government bodies, enterprises, institutions, and organisations aimed at preventing the occurrence and spread of human infectious diseases, localisation, and elimination of their outbreaks and epidemics, establishes the rights, duties, and responsibilities of legal entities and individuals in the field of protecting the population from infectious diseases [7]. Analysis of the provisions of the disposition of Art. 44-3 of the Administrative Code and the Law of Ukraine "On protection of the population from infectious diseases" gives grounds to assert that this administrative offence encroaches on public relations in the field of public health protection from infectious diseases. The inclusion in the composition of the object of ensuring its sanitary and epidemic well-being, which is defined as the state of health of the population and the human environment, in which the incidence rates are at an established level for this territory, living conditions are favourable for the population, and the parameters of environmental factors are within the limits defined by sanitary standards [8], seems excessive.

The position of M.A.Sambor, who is convinced that the direct object of the offence under Art. 44-3

of the Administrative Code is precisely public relations for the protection of the population from infectious diseases, preventing the occurrence and spread of such human infectious diseases, localising and eliminating their outbreaks and epidemics, which are associated with violations of the quarantine rules, sanitary-hygienic, sanitary-anti-epidemic rules and norms is more balanced [9]. However, this definition is not without certain drawbacks. Evidently, the protection of the population from infectious diseases provides for measures to prevent the occurrence and spread of such infectious human diseases, localisation, and elimination of their outbreaks and epidemics, and therefore it is impractical to single out such measures.

Considering the above, the direct object of this administrative offence should be recognised as public relations in the field of protecting the health of the population from infectious diseases.

**The objective side of an administrative offence.** On the objective side, the offence under Art. 44-3 of the Administrative Code has three forms:

- violation of the quarantine rules;
- violation of sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine “On protection of the population from infectious diseases”, other legislative acts;
- violation of decisions of local self-government bodies on the fight against infectious diseases.

Analysis of the content of these forms of the objective side of this administrative offence shows that the main scientific and expert department rightly focuses on the fact that the title of the article is narrower than its content and does not cover such forms of the objective side of the offence as violation of sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine “On the protection of the population from infectious diseases”, other legislative acts, and decisions of local self-government bodies on the fight against infectious diseases [10].

The disposition of Art. 44-3 of the Administrative Code is blanket since it does not contain rules of conduct for which a person can be held accountable. It only summarises violations, but to specify them, it is necessary to refer to the regulations defining the rules of quarantine, the Law of Ukraine “On protecting the population from infectious diseases”, other legislative acts, and decisions of local self-government bodies on the fight against infectious diseases.

It is necessary to consider the provisions of regulatory regulations to find out the content of violations for which liability is established in Art. 44-3 of the Administrative Code:

- what are the rules for quarantining people;
- Law of Ukraine “On protection of the population from infectious diseases”;

- other legislative acts that establish sanitary-hygienic, sanitary-anti-epidemic rules and regulations;
- decisions of local self-government bodies on the fight against infectious diseases.

**Violation of the quarantine rules.** Quarantine – administrative and medical-sanitary measures used to prevent the spread of particularly dangerous infectious diseases. According to Art. 29 of the Law of Ukraine “On protection of the population from infectious diseases”, quarantine is established and cancelled by the Cabinet of Ministers of Ukraine. The decision to establish a quarantine, and to cancel it, is immediately brought to the attention of the population of the relevant territory through the mass media. In the decision to establish quarantine, they indicate the circumstances that led to this determine the boundaries of the quarantined territory, approve the necessary preventive, anti-epidemic, and other measures, their performers and dates, establish temporary restrictions on the rights of individuals and legal entities, additional duties assigned to them, the grounds and procedure for mandatory self-isolation, the person's stay in the observation, hospitalisation in temporary health care institutions (specialised hospitals). Quarantine is established for the period necessary to eliminate an epidemic or outbreak of a particularly dangerous infectious disease. During this period, the working hours of enterprises, institutions, and organisations can be adjusted, and other necessary changes regarding the conditions of their production and other activities can be made [7].

During the period of spread of acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus, the Cabinet of Ministers of Ukraine adopted several resolutions concerning quarantine:

- “On preventing the spread of the COVID-19 coronavirus on the territory of Ukraine” dated March 11, 2020, No. 211;
- “On establishing quarantine to prevent the spread of acute respiratory disease COVID-19 caused by SARS-CoV-2 coronavirus on the territory of Ukraine, and stages of easing anti-epidemic measures” dated May 20, 2020, No. 392;
- “On the establishment of quarantine and introduction of enhanced anti-epidemic measures in the territory with a substantial spread of acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus” dated July 22, 2020, No. 641 [11].

Analysis of the provisions of the resolution of the Cabinet of Ministers of Ukraine of July 22, 2020, No. 641 certifies that violations of the quarantine rules from August 1 to December 31, 2020, which relate to the entire territory of Ukraine, include, for example: a) stay in public buildings and structures, public transport without wearing personal protective equipment, in particular respirators or

protective masks covering the nose and mouth, also self-made; b) stay on the streets without identity documents confirming citizenship or its special status, without a certificate of registration of a homeless person, a certificate of applying for protection in Ukraine; c) unauthorised leaving of the place of self-isolation, observation, etc. [11].

Therewith, this resolution of the Cabinet of Ministers of Ukraine also provides for the establishment of certain rules depending on the level of epidemic danger: “green”, “yellow”, “orange”, and “red”. For example, on the territory of a region (administrative-territorial unit) where the “green” level of epidemic danger is set, it is prohibited:

- holding mass (cultural, sports, social, religious, advertising) events involving over 50 people (in the case of events with a number of participants below 50, the organiser ensures that the participants maintain a physical distance of at least 1.5 m), and the activities of cinemas, cultural institutions, and other subjects of activity in the field of culture with the fullness of cinema halls or halls of over 50 per cent of the seats in each individual cinema hall or hall;

- implementation of regular and irregular transportation of passengers by road, in particular transportation of passengers on city bus routes in the mode of the fixed-route taxi, in electric (tram, trolleybus), railway transport, in urban, suburban, intercity, intra-regional, and inter-regional communication, in an amount greater than the number of seats provided for by the technical characteristics of the vehicle, defined in the registration documents for this vehicle.

The carrier is responsible for providing drivers with personal protective equipment, in particular respirators or protective masks, and controls the use of personal protective equipment, in particular, respirators or protective masks by passengers during transportation, including self-made;

- conducting discos, operating entertainment venues (nightclubs), catering establishments with leisure activities (restaurants, cafes, bars, eateries, canteens, cafeterias, buffets, etc.);

- visiting pre-school, general secondary, extra-curricular and specialised art education institutions when over 50% of applicants and staff of the educational institution are in self-isolation due to contact with a patient with a confirmed case of COVID-19;

- work after 22 and before 7 hours of business entities providing public catering services without organising leisure activities (restaurants, cafes, bars, eateries, canteens, cafeterias, buffets, etc.), except for activities providing public catering services with targeted delivery of orders and takeaway orders.

Therewith, in the territory of the region (administrative-territorial unit) where the “yellow” level of epidemic danger is established, in addition

to the anti-epidemic restrictions established for the “green” level of epidemic danger, it is prohibited:

- visits by unauthorised persons to institutions of social protection where elderly citizens, war and labour veterans, persons with disabilities, persons with persistent intellectual or mental disabilities temporarily or permanently reside/stay, institutions that provide social services to families/persons in difficult life circumstances, except for institutions that provide social services in an emergency;

- activities of hostel hotels;

- holding mass (cultural, sports, social, religious, advertising) events involving over 30 people (in the case of events with a number of participants below 30, the organiser ensures that a physical distance of at least 1.5 m is maintained between participants) [11].

This dynamic change in quarantine rules negatively affects law enforcement. Under these circumstances, even law enforcement agencies authorised to draw up reports for committing an administrative offence under Art. 44-3 of the Administrative Code, are unable to remember all the rules of quarantine in a certain territory, not to mention ordinary citizens.

These acts are not clearly defined, they can be supplemented or reduced, since they are adopted by state and local government bodies [9]. Therefore, the position of researchers that it is necessary to differentiate responsibility for offences provided for in this article is correct [12].

The main scientific and expert department rightly emphasises that the concept of “quarantine of people” it is legally incorrect. Ultimately, the current legislation of Ukraine (primarily in the field of protecting the population from infectious diseases) does not use this term. Therewith, the draft does not provide for any changes to the Law of Ukraine “On protection of the population from infectious diseases”. The law deals with the concept of “quarantine”, which is interpreted as administrative and medical-sanitary measures used to prevent the spread of particularly dangerous infectious diseases (paragraph 17 of Art. 1 of the Law) [10]. Considering the above, appropriate changes should be made to the name and disposition of Art. 44-3 of the Administrative Code and the word “people” should be deleted from them.

***Violation of sanitary-hygienic standards, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine “On protection of the population from infectious diseases” and other legislative acts.*** State sanitary, sanitary-hygienic, sanitary-anti-epidemic, sanitary-epidemiological, anti-epidemic, hygienic-anti-epidemic rules and norms, state sanitary-epidemiological standards, sanitary regulations (hereinafter – sanitary standards) – mandatory normative regulations of the central executive authority, ensuring the development of national policy in the field of healthcare, establishing medical safety

requirements for the environment and its individual factors, non-compliance with which poses a threat to the health and life of a person and future generations, and also, the threat of the occurrence and spread of infectious diseases and mass non-communicable diseases (poisoning) among the population (Art. 1 of the Law of Ukraine “On ensuring the sanitary and epidemic well-being of the population”) [8].

Sanitary-anti-epidemic rules and norms – legal regulations (orders, instructions, rules, regulations, etc.) of the central executive authority that ensures the development of national policy in the field of healthcare, the requirements of which are aimed at preventing the occurrence and spread of infectious diseases (Art. 1 of the Law of Ukraine “On the protection of the population from infectious diseases”) [7].

The analysis of these types of sanitary standards shows that sanitary-hygienic and sanitary-anti-epidemic rules and norms are not clearly differentiated. Considering the above, in the disposition of Art. 44-3 of the Administrative Code, it is advisable to replace the concepts of “sanitary-hygienic rules and norms” and “sanitary-anti-epidemic rules and norms” with sanitary standards. The disposition of Art. 44-3 of the Administrative Code states that sanitary standards are enshrined in the Law of Ukraine “On the protection of the population from infectious diseases”. For example, in accordance with Art. 20 of this law, persons who suffer from infectious diseases or are bacterial carriers are required to:

- take measures recommended by health professionals to prevent the spread of infectious diseases;
- comply with the requirements and recommendations of medical professionals regarding the procedure and conditions of treatment, observe the working hours of healthcare institutions and scientific institutions where they are treated;
- pass the necessary medical examinations within the established time frame [7].

In this case, the term “other legislative acts” should be interpreted in an expanded way and refer not only laws to such acts, but also other normative regulations, in particular one of the Verkhovna Rada of Ukraine, the President of Ukraine, and the Cabinet of Ministers of Ukraine.

Therewith, the definitions of sanitary-hygienic, sanitary-anti-epidemic rules and norms indicate that these norms and rules are established by legal regulations (orders, instructions, rules, regulations, etc.) by the central executive authority, which ensures the development of national policy in the field of healthcare. Currently, such a body is the Ministry of Health of Ukraine

Regarding this, V.V. Krykun [6] rightly notes that the scope of such rules and regulations is too broad and may relate to sanitary requirements for

various fields of public activity. For example, the order of the Ministry of Health of Ukraine “On approval of state sanitary norms and rules sanitary-anti-epidemic requirements for healthcare institutions providing primary medical (medical-sanitary) care” dated April 2, 2013, No. 259 establishes state sanitary norms and rules for the placement, arrangement, equipment, operation of healthcare institutions providing primary medical (medical-sanitary) care. Order of the Ministry of Health of Ukraine “On approval of State sanitary norms and rules hygienic requirements for printed products for children” dated January 18, 2007, No. 13 defines requirements in the field of printing. Another order of the Ministry of Health of Ukraine “On approval of State sanitary norms and rules” On the safety and protection of employees from the harmful effects of asbestos and asbestos-containing materials” dated October 1, 2012, No. 762 defines sanitary requirements in the field of labour protection [6].

S.S. Kovaleva [13] correctly states that the multiplicity and dispersion of these norms in numerous normative regulations with the simultaneous need for special knowledge when interpreting their content led to difficulties in implementing the legal structure of Art. 44-3 of the Administrative Code in practice.

The approach of the legislator to the definition of a socially dangerous act under Art. 44-3 of the Administrative Code of administrative offences, in blanket form, according to V.V. Krykun [6], negatively affects the differentiation of competence of those bodies that, according to the law, have the right to draw up reports on administrative offences under this article of the Administrative Code.

**Violation of decisions of local self-government bodies on the fight against infectious diseases.** Local self-government is conducted by territorial communities of villages, towns, cities both directly and through village, town, city councils and their executive bodies, and through district and regional councils that represent the common interests of territorial communities of villages, towns, cities (part 2 of Art. 2 of the Law of Ukraine “On local self-government in Ukraine”) [14].

The Law of Ukraine “On local self-government in Ukraine” gives local self-government bodies certain powers to combat infectious diseases. For example, according to paragraph 2 of part 3 of Art. 43 of the Law of Ukraine “On local self-government in Ukraine”, only at plenary sessions of regional councils such issues as making decisions on combating natural disasters, epidemics, epizootics are decided within the limits defined by laws, which provide for administrative liability for their violation [14]. In accordance with subparagraph 2 of paragraph “b” of part 1 of Art. 38 of this law, the executive bodies

of village, town, city councils have the function of taking necessary measures in case of emergencies based on the law to ensure state and public order, the activities of enterprises, institutions, and organisations saving people's lives, protecting their health, and preserving material values [14].

Such powers are also enshrined in Art. 5 of the Administrative Code. According to part 1 of this article, village, town, city, regional councils have the right to make, within the limits defined by laws, decisions on the fight against natural disasters and epidemics, which provide for administrative liability for their violation, and decisions on the fight against epizootics, for the violation of which responsibility is established in Art. 107 of the Administrative Code. Part 2 of Art. 5 of the Administrative Code stipulates that village, town, and city councils establish rules in accordance with the legislation, for violation of which administrative liability is provided for in Art. 152, 159, and 182 of the Administrative Code.

M.A. Sambor [9] focuses on the need to maintain the consistency of administrative and tort legislation. Evidence of this is the failure to amend Art. 5 of the Administrative Code, and the consequence is the impossibility of applying administrative liability under Art. 44-3 of the Administrative Code, for violating restrictions established by local self-government bodies, since the norm of part 1 of Art. 5 of the Administrative Code imperatively defines that administrative liability for such restrictions can occur exclusively under Art. 107 of the Administrative Code. In turn, the norm of Art. 443 of the Administrative Code contains an indication that these rules can be established by local self-government bodies.

It is important to understand the content of the composition of an administrative offence under Art. 44-3 of the Administrative Code to comply with the fundamental principles of law and legislation, such as: respect for human and civil rights and freedoms, the rule of law, legality in the activities of state bodies, local self-government bodies, and their officials. This can be achieved if, firstly, the unification of the norms of the general and special parts of the Administrative Code, in particular, the introduction of amendments to Art. 5 of the Administrative Code, namely in part 1 of Art. 5 of the Administrative Code, which should be set out in the following wording: "Village, town, city, regional councils have the right to make decisions on the fight against natural disasters and epidemics, which provide for administrative responsibility for their violation, and decisions on the fight against epidemics, epizootics, for the violation of which responsibility is established by Art. 44-3 and 107 of this Code", and in part 2 of Art. 5 of the Administrative Code, after the word "articles", add "443", and then by the text [9].

Art. 44-3 of the Administrative Code, in fact, establishes liability for several offences. All of them relate to administrative offences with a formal composition, so the harm from such violations is not a mandatory feature of these administrative offences. Such violations can only create conditions for its occurrence. Based on the absence of mandatory consequences, an administrative offence differs from a criminal offence under Art. 325 of the Criminal Code, which is characterised by consequences in the form of causing or creating a threat of deliberately causing epidemic and other infectious diseases, and mass non-communicable diseases (poisoning) [9].

Representatives of the Central Scientific Experts Office do not approve the draft proposal to establish administrative responsibility for violating the quarantine rules, sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by "other legislative acts, and decisions of local self-government bodies on the fight against infectious diseases". This position is due to the fact that the objective signs of a certain administrative offence should be clearly stated in the article (part of the article) of the Special part of the Administrative Code and understandable for law enforcement entities. Uncertainty is unacceptable for the legislation on administrative offences [10].

Concluding on the problems of the objective side of an administrative offence under Art. 44-3 of the Administrative Code, the imperfection of the law will negatively affect the regulation of public relations, leading to the dissatisfaction of the population not only with the means of regulating public relations with the norms of the law but also with the subjects of lawmaking and law enforcement [9].

The clarity of the regulation that establishes administrative liability under Art. 44-3 of the Administrative Code of Administrative offences, as M.A. Sambor [9] states, will be provided when the administrative responsibility of individuals and officials, legal entities and individual entrepreneurs is distinguished. Therefore, Art. 44-3 of the Administrative Code should form two parts: part 1 will formulate an objective side, the subject of which is an individual, and part 2 – a legal entity or an individual entrepreneur will be determined as the subject of the act, enabling the establishment of sanctions in a differentiated way.

The subject of an administrative offence. Analysis of the forms of the objective side of an administrative offence under Art. 44-3 of the Administrative Code allow forming a certain idea of the subject of this offence. Such subjects should include not only general subjects of persons who have reached the age of 16 at the time of committing the offence but also officials who, according to Art. 14 of the Administrative Code, are subject to administrative liability

for administrative offences related to non-compliance with the established rules in the field of protection of management order, state, and public order, nature, public health and other rules, ensuring the implementation of which belongs to their official duties. This position is also confirmed by the analysis of the sanction for the corresponding offence, which provides for a differentiated fine for citizens and officials. In addition, M.A. Sambor [9] claims that the subject of administrative responsibility for committing administrative offences, responsibility for which is provided for in Art. 44-3 of the Administrative Code, is a general and special entity – a business entity; officials endowed with appropriate organisational, administrative, and managerial powers. There-with, Yu. Burchenko [15] believes that the subjects that are held accountable for non-compliance with the quarantine conditions can be individuals and legal entities, in particular individuals-entrepreneurs.

*The subjective side of an administrative offence.* On the subjective side, an offence is characterised by guilt in the form of intent or negligence. This position is also shared by other researchers [9].

The scientific originality of the study lies in the fact that it defines the object, objective side, subject, and subjective side of an administrative offence under Art. 44-3 of the Administrative Code, which is a necessary condition for the effective application of this regulation as a measure of administrative coercion. Individual flaws in the construction of the composition of this offence were identified, primarily related to its objective side, and separate ways to eliminate them were proposed.

## Conclusions

Summarising the results of the study, a number of conclusions should be formulated.

1. The direct object of an administrative offence under Art. 44-3 of the Administrative Code should be recognised as public relations in the field of public health protection from infectious diseases.

2. From the objective side, this offence has three forms: 1) violation of the quarantine rules; 2) violation of sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine “On the protection of the population from infectious diseases”, other legislative acts; 3) violation of decisions of local self-government bodies on the fight against infectious diseases.

3. Given such a variety of forms of the objective side, the name of Art. 44-3 of the Administrative Code needs to be clarified, since it concerns only one act – violation of the quarantine rules, and therefore does not cover others: a) violation of sanitary-hygienic, sanitary-anti-epidemic rules and norms provided for by the Law of Ukraine “On the protection of the population from infectious diseases”, other legislative acts; b) violation of decisions of local self-government bodies on the fight against infectious diseases.

3. The word “people” should be excluded from the name and disposition of Art. 44-3 of the Administrative Code, since all legal regulations defining quarantine rules use the term “quarantine”, and not “quarantine of people”.

4. In the disposition of Art. 44-3 of the Administrative Code, the concepts of “sanitary-hygienic rules and norms” and “sanitary-anti-epidemic rules and norms” should be replaced with sanitary standards due to the fact that sanitary-hygienic and sanitary-anti-epidemic rules and norms are not clearly differentiated and are a type of social norms.

5. Administrative offences provided for in Art. 44-3 of the Administrative Code of administrative offences relate to offences with a formal composition, so damage from such violations is not a mandatory feature.

6. Subjects of administrative offences provided for in Art. 44-3 of the Administrative Code can be both general subjects and officials.

7. On the subjective side, the offence is characterised by guilt in the form of intent or negligence.

## References

- [1] Burchenko, Yu. (2020). Subjects are held responsible for failure to quarantine conditions. *Legal Bulletin*, 3, 311-318.
  - [2] Day, T., Park, A., Madras, N., Gumel, A., & Wu, J. (2006). When is quarantine a useful control strategy for emerging infectious diseases? *American Journal of Epidemiology*, 163(5), 479-485.
  - [3] Giubilini, A., Douglas, T., Maslen, H., & Savulescu, J. (2018). Quarantine, isolation and the duty of easy rescue in public health. *Developing World Bioethics*, 18(2), 182-189.
  - [4] Kovalova, S.S. (2020). Responsibility for violation of quarantine and sanitary rules and regulations to prevent the spread of coronavirus infection (COVID-19) in Ukraine. *Law. Human. Environment*, 11(2), 158-168.
  - [5] Krykun, V.V. (2020). Objective features of administrative offenses provided for in Article 443 of the Code of Administrative Offenses of Ukraine and their impact on the sphere of authority of the National Police of Ukraine. *Bulletin of Kharkiv National University of Internal Affairs*, 89(2), 153-163.
  - [6] Resolution of the Cabinet of Ministers of Ukraine "On the establishment of quarantine and the introduction of enhanced anti-epidemic measures in the territory with a significant spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2" No. 641. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/641-2020-%D0%BF#Text>
  - [7] Pylypiv, R., & Tymchyshyn, A. (2020). Administrative liability for violation of human quarantine rules: problems and prospects. *Legal Bulletin*, 3, 163-169.
  - [8] Sambor, M.A. (2020). The composition of administrative offense shodo violation of the rules of quarantine of people. *Bulletin of Luhansk State University of Internal Affairs named after E.O. Didorenko*, 2(90), 155-170.
  - [9] Shayegh, S., & Malpede, M. (2020). *Staying home saves lives, really!* Retrieved from <https://ssrn.com/abstract=3567394>. doi: <http://dx.doi.org/10.2139/ssrn.3567394>.
  - [10] Vozniuk, A., & Cherniavskiy, S. (2020). Violation of COVID-19 prevention rules and regulations: current issues of criminal and administrative liability. *Law Magazine of the National Academy of Internal Affairs*, 19(1), 8-19.
  - [11] Opinion of the Main Scientific and Expert Department on the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" No. 3219. (2020, March). Retrieved from [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=3219&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=3219&skl=10)
  - [12] Law of Ukraine "About local self-government in Ukraine" No. 280/97-VR. (1997, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text>
  - [13] Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" No. 530-IX. (2020, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/530-20#n22>
  - [14] Law of Ukraine "On ensuring the sanitary and epidemic well-being of population" No. 4004-XII. (1994, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/4004-12#Text>
  - [15] Law of Ukraine "On protection of the population from infectious diseases" No. 1645-III. (2000, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/1645-14>
- curb the coronavirus disease (COVID-19) outbreak in Italy. *Euro Surveill*, 25(13), article number 2000280.

**Список використаних джерел**

- [1] Бурченко Ю. Суб'єкти, які притягаються до відповідальності за невиконання умов карантину. *Юридичний вісник*. 2020. № 3. С. 311–318.
- [2] Day T., Park A., Madras N., Gumel A., Wu J. When is quarantine a useful control strategy for emerging infectious diseases? *American journal of epidemiology*. 2006. Vol. 163. No. 5. P. 479–485.
- [3] Giubilini A., Douglas T., Maslen H., Savulescu J. Quarantine, isolation and the duty of easy rescue in public health. *Developing world bioethics*. 2018. Vol. 18. No. 2. P. 182–189.
- [4] Ковальова С. С. Відповідальність за порушення карантину та санітарних правил і норм щодо запобігання поширенню коронавірусної інфекції (COVID-19) в Україні. *Право. Людина. Довкілля*. 2020. Вип. 11. № 2. С. 158–168.
- [5] Крикун В. В. Об'єктивні особливості адміністративних правопорушень, передбачених статтею 443 Кодексу України про адміністративні правопорушення та їх вплив на сферу повноважень Національної поліції України. *Вісник Харківського національного університету внутрішніх справ*. 2020. Вип. 89. № 2. С. 153–163.
- [6] Про встановлення карантину та запровадження посилених протиепідемічних заходів на території із значним поширенням гострої респіраторної хвороби COVID-19, спричиненої коронавірусом SARS-CoV-2: постанова Кабінету Міністрів України від 22 липня 2020 р. № 641. URL: <https://zakon.rada.gov.ua/laws/show/641-2020-%D0%BF#Text>.
- [7] Пилипів Р., Тимчишин А. Адміністративна відповідальність за порушення правил щодо карантину людей: проблеми та перспективи. *Юридичний вісник*. 2020. № 3. С. 163–169.
- [8] Самбор М. А. Склад адміністративного правопорушення щодо порушення правил карантину людей. *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка*. 2020. Вип. 2. № 90. С. 155–170.
- [9] Shayegh S., Malpede M. Staying Home Saves Lives, Really! 2020. URL: <https://ssrn.com/abstract=3567394>.
- [10] Вознюк А., Чернявський С. Порушення правил і норм щодо запобігання COVID-19: актуальні проблеми кримінальної та адміністративної відповідальності. *Юридичний часопис Національної академії внутрішніх справ*. 2020. Вип. 19. № 1. С. 8–19.
- [11] Про внесення змін до деяких законодавчих актів України, спрямованих на запобігання виникнення і поширення коронавірусної хвороби (COVID-19): висновок Головного науково-експертного управління на проект Закону України від 16 березня 2020 р. № 3219. URL: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=3219&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=3219&skl=10).
- [12] Про місцеве самоврядування в Україні: Закон України від 21 травня 1997 р. № 280/97-ВР. URL: <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text>.
- [13] Про внесення змін до деяких законодавчих актів України, спрямованих на запобігання виникненню і поширенню коронавірусної хвороби (COVID-19): Закон України від 17 березня 2020 р. № 530-IX. URL: <https://zakon.rada.gov.ua/laws/show/530-20#n22>.
- [14] Про забезпечення санітарного та епідемічного благополуччя населення: Закон України від 24 лютого 1994 р. № 4004-XII. URL: <https://zakon.rada.gov.ua/laws/show/4004-12#Text>.
- [15] Про захист населення від інфекційних хвороб: Закон України від 6 квітня 2000 р. № 1645-III. URL: <https://zakon.rada.gov.ua/laws/show/1645-14>.

# Порушення правил щодо карантину людей: аналіз складу правопорушення

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## Анотація

Метою статті є виявлення проблемних питань кваліфікації порушення правил щодо карантину людей, недоліків конструювання ст. 44-3 Кодексу України про адміністративні правопорушення, визначення шляхів їх усунення. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, положення Кодексу України про адміністративні правопорушення, а також практика їх застосування. Наукова новизна статті полягає в тому, що в ній визначено об'єкт, об'єктивну сторону, суб'єкт, суб'єктивну сторону адміністративного правопорушення, передбаченого ст. 44-3 Кодексу України про адміністративні правопорушення, що є необхідною умовою ефективного застосування цієї норми як заходу адміністративного примусу. Виявлено окремі вади в конструкції складу цього правопорушення, пов'язані насамперед з його об'єктивною стороною, а також запропоновано шляхи їх усунення. За результатами здійсненого дослідження сформульовано такі висновки: 1) безпосереднім об'єктом адміністративного правопорушення, передбаченого ст. 44-3 Кодексу України про адміністративні правопорушення, слід визнавати суспільні відносини у сфері охорони здоров'я населення від інфекційних хвороб; 2) з об'єктивної сторони це правопорушення має такі форми: а) порушення правил щодо карантину людей; б) порушення санітарно-гігієнічних, санітарно-протиепідемічних правил і норм, передбачених Законом України «Про захист населення від інфекційних хвороб», іншими актами законодавства; в) порушення рішень органів місцевого самоврядування з питань боротьби з інфекційними хворобами; 3) з огляду на таке розмаїття форм об'єктивної сторони, потребує уточнення назва ст. 44-3 Кодексу України про адміністративні правопорушення, оскільки вона стосується лише одного діяння – порушення правил щодо карантину людей, а тому не охоплює інші; 4) з назви та диспозиції ст. 44-3 Кодексу України про адміністративні правопорушення слід виключити слово «людей», оскільки в усіх нормативно-правових актах, що визначають правила карантину, ужито термін «карантин», а не «карантин людей»; 5) у диспозиції ст. 44-3 Кодексу України про адміністративні правопорушення поняття «санітарно-гігієнічні правила та норми» і «санітарно-протиепідемічні правила і норми» доцільно замінити на санітарні норми з огляду на те, що санітарно-гігієнічні та санітарно-протиепідемічні правила й норми чітко не розмежовано, вони є різновидом соціальних норм; 6) адміністративні проступки, передбачені ст. 44-3 Кодексу України про адміністративні правопорушення, належать до правопорушень із формальним складом, тому шкода від таких порушень не є обов'язковою ознакою їхніх складів; 7) суб'єктами адміністративних правопорушень, передбачених ст. 44-3 Кодексу України про адміністративні правопорушення, можуть бути як загальні суб'єкти, так і посадові особи; 8) із суб'єктивної сторони правопорушення характеризується виною у формі умислу чи необережності

## Ключові слова:

адміністративна відповідальність; карантин; коронавірус; адміністративне правопорушення; інфекційні хвороби; карантин людей

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# Official as a Subject of Misuse of Budget Funds, Implementation of Budget Expenditures, or Provision of Loans from the Budget Without Established Budget Assignments or With Their Excess

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## Abstract

The purpose of the study is a criminal-legal analysis and characterisation of an official as a subject of misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget assignments or with their excess. The study used a set of scientific methods: terminological, system-structural, formal-logical, and comparative-legal. The list of persons who can be subjects of misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget assignments or with their excess is considered; officials of economic entities – legal entities of the non-budget field that receive subsidies or subventions as budget funds are allocated; officials of legal entities of the non-budget field, who are delegated the right to dispose of budget funds in accordance with the current legislation. The list of persons who may be accomplices in the misuse of budget funds is given – among employees of a budget institution, controlling, and financial bodies: State Audit Service of Ukraine, the State Treasury Service, and the State Treasury of Ukraine. The feature of committing misuse of budget funds by an official, conducting budget expenditures or providing loans from the budget without established budget assignments or exceeding them is determined, which consists in the adjacent commission of offences against property and official crimes. Classified officials who commit misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget assignments or with their excess: chief managers of budget funds; lower-level managers; recipients of budget funds; other officials (not managers) of state authorities, budgetary institutions, and institutions, enterprises, organisations that receive targeted budget funds

## Keywords:

budget; misuse of budget funds; subject of a crime; official; budgetary institutions

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## Introduction

In the 21<sup>st</sup> century, an unprecedented rise in the level of the economy and its globalisation is observed, especially considering the processes of trade and migration [1]. Under these conditions, the financial component of the economic system has considerable weight. Finance is the main driving force of the economy. Financial innovations and financial and digital technologies transform the way of life, work, demand, and production of goods and services [2].

Substantial transformations of the Ukrainian state, due to drastic changes in approaches to both external and internal financial and political doctrine, are designed not only to bring innovations to the development of the state but also to solve a number of problematic issues, which, accordingly, will allow Ukraine to enter the pan-European and international community, increase its investment attractiveness.

A factor influencing the country's business climate is the state investment policy, which is implemented, in particular, through budget investments aimed at stimulating economic growth in the long term. Their main goal is to ensure the development of the real sector of the economy and social field. Budget investments can also be used as a tool to accelerate growth during an economic downturn [3].

Despite certain positive findings in the public field and the implementation of social reforms, the development vector should be aimed at the economy, which will ensure the filling of budgets at all levels [4].

Admittedly, the key aspect in the implementation of innovations is the issue of legitimacy and legal protection, and the financing of measures that will contribute to the development of society. The experience of development of most European countries testifies to two main prerequisites for ensuring the financial legitimacy of transformations: the search for the latest sources of obtaining financial resources, and the fight against corruption turnover of funds, especially in the use of budget funds [5].

Thus, in 2019, 23 misuses of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget assignments or with their excess were recorded (Art. 210 of the Criminal Code of Ukraine), 4 criminal proceedings were closed, while no person was served with a notice of suspicion. However, as of May 2020, 4 crimes under Art. 210 of the Criminal Code of Ukraine were registered, only one person was served with a notice of suspicion [6].

This indicates problems in law enforcement practice regarding the disclosure of misuse of budget funds, which is mainly associated with the identification of the persons who committed them, and the establishment of an evidence base for their guilt.

Researchers and practitioners note that the purpose of mercenary crimes in the field of economy

is increasingly to withdraw funds from the budget in legal forms of economic activity or powers to control this activity using the official position of officials. Misuse of budget funds is a criminal activity that has certain characteristics. First of all, these are acts related to the commission of other crimes, such as abuse of official position, obtaining illegal benefits, evasion of taxes, fees, and other mandatory payments.

*The purpose of the study* is criminal-legal analysis and characterisation of an official as a subject of misuse of budget funds, implementation of budget expenditures, or provision of loans from the budget without established budget assignments or with their excess; classification of subjects of crime under Art. 210 of the Criminal Code of Ukraine.

## Results and Discussion

The most common type of violation of budget legislation is the misuse of budget funds as one of the components of economic crime. The state attaches great importance to the protection of economic interests and the protection of budgetary legal relations, as evidenced by the variety of types of legal liability provided for their violation [7].

The wording of the articles of the current Criminal Code of 2001, concerning the violation of the legislation on the budget system and the publication of normative legal or administrative acts that change budget revenues and expenditures contrary to the procedure established by law, with minor changes reproduced the dispositions of Art. 80-3 and 80-4 of the Criminal Code of Ukraine of 1960, which were supplemented in accordance with the Law of Ukraine of October 7, 1997, "On amendments to the Criminal and Criminal Procedure Codes of Ukraine to strengthen the fight against violations of budget legislation". Chapter 1 of the Special part of the Criminal Code of 1960 "Crimes against the state" contained Art. 80-3 and 80-4. A substantial innovation of the Criminal Code of 2001 in this aspect is the increase of large and especially large sizes as a characteristic of the subject of criminal violation of the legislation on the budget system from one hundred and a thousand non-taxable minimum incomes of citizens to, respectively, one thousand and three thousand such minimums, which means partial decriminalisation of the analysed encroachment.

The peculiarity of this crime is that the majority of persons who are brought to criminal responsibility for its commission are heads of bodies and divisions of relevant state institutions and enterprises that have the right to sign financial documents [8].

The subject of a crime under Art. 210 of the Criminal Code of Ukraine is special: it can only be recognised as an official who has the right to dispose of budget funds [5]. Such a subject can be any official who has the right to dispose of budget funds,

in particular, the relevant officials of enterprises, institutions and organisations that are financed from the budget and who, according to the current budget legislation, are managers or recipients of budget funds. Budgetary institutions represented by their managers are trustees of budget funds, authorised to receive budget allocations, take budget obligations, and conduct expenditures from the budget.

The subjects of the crime under Art. 210 of the Criminal Code of Ukraine may also be officials of economic entities – legal entities of the non-budgetary field if the subsidies or subventions received by them as budget funds are not spent by them in accordance with their intended purpose. If there are also signs of fraud with financial resources in the actions of such persons, the committed crime must be qualified according to the totality of crimes – on the relevant parts of Art. 210 and Art. 222 of the Criminal Code of Ukraine. The commission of acts provided for by the disposition of part 1 of Art. 210 of the Criminal Code of Ukraine by officials who are not managers or recipients of budget funds is qualified as the abuse of power or official authority, since they perform actions that fall within the competence of a higher official or an official of another department (while these actions, according to subparagraph “a” of section 2 of paragraph 4 of the resolution of the Plenum of the Supreme Court of Ukraine of December 27, 19956 No. 12 “On judicial practice in cases of abuse of power or official authority”, should be qualified in this way).

The legislation of Ukraine on criminal liability contains the definition of an official in a note to Art. 364 of the Criminal Code of Ukraine, according to which officials are persons who permanently, temporarily, or under special authority perform the functions of representatives of government or local self-government, and hold permanent or temporary positions in state authorities, local self-government bodies, state or municipal enterprises, institutions or organisations related to the performance of organisational-administrative or economic-administrative functions, or perform such functions under special powers, which a person is given by an authorised state authority, a local self-government body, a central public administration body with a special status, authorised a body or authorised person of an enterprise, institution, organisation, court, or law [9].

A person is an official not only when they perform the relevant functions or duties permanently, but also when they do so temporarily or under special authority, provided that these functions or duties are assigned to them in accordance with the procedure established by law by a competent body or a competent official. The holding of a certain position or assignment to temporarily perform the relevant duties must be formalised by an appropriate

decision (order, resolution, etc.). First of all, these are officials – heads and chief accountants (heads of financial divisions) of budgetary institutions authorised to receive budget allocations, take budget obligations and conduct budget expenditures.

Having analysed the judicial-investigative and operational-search practice, L. Mishchenko & M. Telitsyn [10] noted that heads of municipal and state executive authorities permitted to distribute relevant funds were mainly brought to criminal responsibility for the misuse of budget funds – 47.8% of the total number of sentences for 2019; chief doctors of healthcare institutions – 23.7%; heads of state institutions – 13.1%; heads of commercial organisations – 11.8%. Investigating this list, considering the position of the person involved in the structure of a legal entity, it was discovered that the misuse of budget funds is mainly conducted by managers (84.85%), much less by chief accountants (12.12%). Another study conducted by A.M. Kyslyi & Yu.V. Fedorchuk [11] regarding the identity of offenders who commit criminal offences related to embezzlement of budget funds during the procurement of medical equipment and medicines demonstrated that these are employees of the healthcare sector (chief physician, chief accountant, economist, lawyer, who are often members of the tender committee, and officials authorised to take medicines in terms of quantity and quality), and employees of contractors (heads of these enterprises, persons who sign acts of acceptance of inventory values in terms of quantity and quality).

The study of the provisions of the legislation of Ukraine on criminal liability has shown that criminal offences related to the misuse of budget funds are committed by officials who are authorised to conduct budget expenditures.

This is due to the requirement of part 1 of Art. 22 of the Budget Code of Ukraine (hereinafter referred to as the BC), which states that for the implementation of programmes and activities at the expense of budget funds, budget allocations are provided to budget managers. Regarding the scope of rights granted, there are head managers of budget funds and managers of budget funds at lower levels.

Researchers divide officials who commit inappropriate use of budget funds according to the following criteria:

- chief managers of budget funds, managers of budget funds of the lower level, officials of recipients of budget funds [12];
- heads and chief accountants (heads of financial divisions) of budgetary institutions authorised to receive budget allocations, take budget obligations and implement budget expenditures; officials of recipients of budget funds – business entities, public or other organisations that do not have the status of a

budget institution, but are authorised by the administrator of budget funds to implement activities provided for in the budget programme, and receive budget funds for their implementation – the distribution of these persons depending on the purpose of budget funds, the grounds for their receipt, and social and role competence (purpose, state programmes, etc.) [13];

- persons considering their official status and powers in relation to budget funds (higher and lower levels) [14];

- officials who:

- directly take part in the establishment, distribution, and use of budget funds (authorised persons);

- encroach on budget funds “from the outside”, using certain economic mechanisms (entrepreneurs) [15];

- several groups of persons according to the criterion of competence to perform operations, direct holders of budget funds, and performers of works and services [16].

The subjects of a crime under Art. 210 of the Criminal Code of Ukraine in the scientific literature are:

- officials of local financial bodies, i.e., institutions that, in accordance with the legislation of Ukraine, perform the functions of local budgeting, monitoring the expenditure of funds by budget managers, and other functions related to the management of local budget funds;

- heads of budgetary institutions and organisations that manage budget funds in accordance with approved estimates and allocation plans;

- officials of non-budgetary legal entities who, according to the current legislation, are delegated the right to dispose of budget funds (officials of non-state enterprises that provide housing and communal services and transfer budget funds to their accounts in the form of housing subsidies accrued to the population);

- officials of enterprises, institutions, and organisations without the status of budgetary, but in accordance with the established procedure through the managers of funds receive budgetary funds for certain programmes, and financial assistance at the expense of budgetary funds in the form of subsidies, subsidies, and subventions [17].

Consequently, misuse of budget funds is committed, first of all, by managers of budget funds (head managers of budget funds represented by heads of budget institutions). A business entity, public or other organisation without the status of a budget institution, is authorised by the administrator of budget funds to implement the activities provided for in the budget programme, receives budget funds for their implementation, and is the recipient of budget funds (paragraph 38 of part 1 of Art. 2 of the BC of Ukraine). As a result of applying the

programme-target method in the budget process, budget managers acquire the status of responsible performers of budget programmes (Art. 20 of the BC of Ukraine). The chief administrator of budget funds, in coordination with the central executive authority, determines the responsible executor of budget programmes that ensures the establishment of state budget policy (the local financial authority). A public or other organisation without the status of a budget institution is authorised by the administrator of budget funds to implement the activities provided for in the budget programme and receives budget funds for their implementation (paragraph 38 of part 1 of Art. 2 of the BC of Ukraine) [12].

Therewith, V.A. Nechitailo [12] divides all officials who commit these crimes into the following categories: 1) managers of budget funds: chief managers of budget funds and managers of budget funds of the lower level; 2) officials of recipients of budget funds; 3) persons who commit crimes due to official negligence.

This division is of interest for describing criminal offences related to the misuse of budget funds committed in complicity. The first group of subjects includes officials authorised by the state to use budget funds for their intended purpose (managers of budget funds and officials of recipients of budget funds). The second group includes persons who do not have the authority to use budget funds but are considered accomplices in the illegal activities of the subjects of the first group. These may be officials of the State Treasury Service of Ukraine, local financial authorities, or business entities of all forms of ownership that produce or supply goods (works, services) to meet priority state needs.

Officials who commit misuse of budget funds hold head positions in budgetary institutions, organisations, and enterprises. Accomplices are mostly their deputies, heads of departments, services, or other persons holding responsible positions in budget structures, chief accountants and their deputies, senior accountants. Criminals are persons who are well-versed in the field of their official activities, have corrupt connections in public authorities at various levels, and, above all, in law enforcement agencies.

Potential accomplices of such offences are mainly heads of economic planning departments and chief accountants of budgetary institutions involved in the use of budget funds in the field of budgeting and conducting financial and economic operations. Usually, such persons have a higher economic or other professional education and practical experience in the financial sector. Officials of the State Treasury Service of Ukraine and local financial authorities may also be accomplices in the misuse of budget funds. This is due to the fact that in compliance with the requirements of Art. 112, 113 of the BC of

Ukraine and to improve the coordination of actions of the State Treasury of Ukraine and the State Audit Service of Ukraine during the implementation of control over the accounting procedure, reporting on the implementation of budgets and estimates, conducting operations with budget funds, the State Treasury of Ukraine at the payment of bills of managers and recipients of budget funds stage in accordance with the order of the State Treasury of Ukraine and the the Main Control and Revision Office of Ukraine dated December 14, 2004, No. 215/338 "On certain issues of interaction between the State Treasury of Ukraine and the Main Control and Revision Office of Ukraine", conduct control, namely: check the sufficiency of grounds for making payments (availability of supporting documents, compliance by managers of funds with the requirements of regulations governing the budget process), compliance of payments with the requirements of accounting and control over obligations, and the correctness of registration of settlement documents. Such employees, for personal benefits, provide unjustified permits for unjustified spending of budget funds.

Moreover, the preventive function of bringing an official to criminal responsibility and assigning them a sentence is important. Ultimately, the subject of misuse of budget funds is an official of the recipient of these funds, and the presence of a criminal record for this crime will be an obstacle to the offender filling positions in the civil (municipal) service. Such a restriction is a real way to prevent the commission of crimes [18]. Evidence of the unwillingness of an official to treat the performance of their functional duties in good faith is the commission of a crime during their tenure in the civil service, which is an audacious challenge to society, and therefore requires a response from the law [19].

Officials of the State Treasury of Ukraine, in addition to crimes under Art. 210 of the Criminal Code of Ukraine, in the form of complicity in the misuse of budget funds, may also commit crimes in the field of official activity, for example, official negligence (Art. 367 of the Criminal Code), acceptance of an offer, promise, or acquisition of illegal benefits by an official (Art. 368 of the Criminal Code).

Thus, misuse of budget funds is committed, first of all, by managers of budget funds (head managers of budget funds and managers of budget funds of a lower level) and officials of recipients of budget funds. The head managers of budget funds are budgetary institutions represented by their managers, who, in accordance with the BC of Ukraine, receive powers by establishing budget assignments (paragraph 18 of part 1 of Art. 2 of the BC of Ukraine). They define the network of lower-level budget managers and recipients of budget funds, considering the requirements for the establishment of a unified

register of budget managers and recipients of budget funds and the data of such a register (part 3 of Art. 10 of the BC of Ukraine).

The scientific literature states that the abuse of budget funds by an official of an institution (organisation) who is not a manager or recipient of budget funds should be considered a separate crime in the field of official activity. The same criminal-legal assessment should be provided (if there are grounds) to the actions of officials of those enterprises (institutions, organisations) who, in accordance with the concluded contracts, perform work (provide services) for budgetary institutions or recipients of budgetary funds, since the funds transferred to the bank accounts of such enterprises (institutions, organisations) lose the status of budgetary as the subject of the crime under consideration. For example, this applies to performers of a state order – business entities of all forms of ownership that produce or supply goods (perform works, provide services) to meet priority state needs [20]. In some cases, persons who commit criminal offences related to the misuse of budget funds include officials who violate the requirements of budget legislation unintentionally due to official negligence. This refers to cases of misuse of budget funds due to non-performance (improper performance) of official duties due to improper (negligent) attitude to them.

Thus, it was established that persons who may be subjects of misuse of budget funds, implementation of budget expenditures, or provision of loans from the budget without established budget assignments or with their excess are officials of economic entities – legal entities of the non-budget field that receive subsidies, subsidies or subventions as budget funds; officials of legal entities of the non-budget field, who, according to the current legislation, are delegated the right to dispose of budget funds. Persons who may be accomplices in the misuse of budget funds are employees of a budget institution, controlling and financial bodies: the State Audit Service, the State Treasury Service, and the State Treasury of Ukraine. The specific feature of committing misuse of budget funds by an official, conducting budget expenditures or providing loans from the budget without established budget assignments or exceeding them was identified, which consists in the adjacent commission of offences against property and official crimes.

### Conclusions

Thus, officials who commit misuse of budget funds, conduct budget expenditures, or provide loans from the budget without established budget assignments or with their excess (considering their official status and competence in relation to budget funds) were classified into certain categories:

- chief managers of budget funds; heads of ministries and departments, other central bodies – according to the state budget (the list of which is defined by the BC, provided that during this budget period the law or budget decision establishes budget assignments for them); heads of local bodies – local budgets;

- lower-level managers whose management area includes other lower-level managers: heads of state executive bodies at the regional level – according to the state budget; heads of district bodies – local budgets; heads of budgetary institutions;

- recipients of budget funds; heads of enterprises, institutions, and organisations, regardless of the form of ownership, who receive budget funds as various types of targeted financial assistance – subsidies, subventions, loans, budget loans, and for conducting centralised

- activities or implementation of programmes provided for in the budget;

- other officials (not executives) of state authorities, budgetary institutions, enterprises, organisations

that receive targeted budget funds: chief accountants, heads of financial and economic divisions, heads of structural divisions of institutions that are not themselves managers (recipients) of budget funds; officials of departments of the Ministry of Finance of Ukraine, local bodies of the State Treasury of Ukraine, who, in accordance with the legislation, are required to perform functions to ensure the targeted use of financing budget expenditures, servicing accounts of state and local budgets, budget and non-budget institutions.

The commission of misuse of budget funds, the implementation of budget expenditures or the provision of loans from the budget without established assignments or with their excess is a fragrant violation by officials of budget legislation and the commission of related offences in the field of property and official crimes. Such officials, in addition to crimes under Art. 210 of the Criminal Code of Ukraine, in the form of complicity in the misuse of budget funds, also commit crimes in the field of official activity.

## References

- [1] Babiak, A.V., Zhyvko, Z.B., & Yosypiv, A.O. (2010). *Counteraction to crimes committed in the budget sphere*. Lviv: Lviv State University of Internal Affairs
- [2] Baier, F.J. (2020). Foreign Direct Investment and Tax: OECD Gravity Modelling in a World with International Financial Institutions. *Athens Journal of Business & Economics*, 6(1), 45-72.
- [3] Dehtiar, Ya.R. (2016). Budget offenses as grounds for liability under current legislation of Ukraine. *Economics and Law*, 1(43), 19-24.
- [4] Dovban, I.M. (2019). Crime of civil servants as a holistic complex phenomenon. *South Ukrainian Law Journal*, 4(1), 102-104.
- [5] Filippov, D.I. (2019). Financial innovations in terms of development of digital economy. *Creative Economy*, 8(3), 1503-1520.
- [6] Khomenko, V.P. (2016) Criminal liability for misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget allocations or with their excess. *Scientific Bulletin of the National Academy of Internal Affairs*, 1, 120-131.
- [7] Khomutenko, V., & Khomutenko, A. (2020). Budget investments in the context of investment attractiveness of Ukraine. In *Formation of Modern Scientific Thought: Proceedings of the International Scientific Conference* (pp. 17-19). Kropyvnytskyi: National University.
- [8] Criminal Code of Ukraine. No. 2341-III. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>
- [9] Kulakov, V.V., Len, V.V., & Miroshnychenko, S.S. (2011). *Prevention of crimes related to illegal use of budget funds*. Zaporizhzhia: Dniprmetallurh.
- [10] Kyslyi, A.M., & Fedorchuk, Yu.V. (2017). Operational and investigative description of crimes related to embezzlement of budget funds during the procurement of medical equipment and medicines. *Legal Journal of the National Academy of Internal Affairs*, 2(14), 218-230.
- [11] Melnyk, M.I., & Khavroniuk, M.I. (2012). *Scientific and practical commentary on the Criminal Code of Ukraine*. Kyiv: Yuryd. dumka.
- [12] Mischenko, L., & Telicyn, N. (2019). Features of operational-investigative characteristics of crimes related to misappropriation of budget funds and state extra-budgetary funds, posing a threat to the economic security of the state. *The Economy Under Guard*, 3(10), 25-31.
- [13] Moisieiev, Ye.M., Tatsii, V.Ya., & Shemshuchenko, Yu.S. (2009). *International police encyclopedia*. Vol. 1-10. Kyiv: Atika.
- [14] Nechytailo, V.A. (2013). Characteristics of persons who commit misuse of budget funds. *Scientific Bulletin of the National Academy of Internal Affairs*, 4, 133-143.

- [15] Pasichnyk, Yu.V. (2018). Budget levers have an impact on life expectancy. *Scientific Notes of the National University "Ostroh Academy"*, 8(36), 69-73.
- [16] Pastushenko, A.A. (2019). Exemption from criminal liability with the imposition of a court fine for misappropriation of budget funds. *Legal Science and Practice*, 1(15), 63-67.
- [17] Stepaniuk, R.L. (2012). *Ensuring the investigation of crimes committed in the budget sphere of Ukraine*. Kharkiv: NikaNova.
- [18] Vasylynchuk, V.I. (2012). *Operational and investigative prevention of crimes in the budget sphere*. (2<sup>nd</sup> ed.). Kyiv: Zahrai.
- [19] Volobuiev, A.F., & Stepaniuk, R.L. (2003). Features of the mechanism of criminal violations of budget legislation. *Bulletin of the Academy of Legal Sciences of Ukraine*, 4(35), 198-208.
- [20] Unified reports of the Office of the Prosecutor General on criminal offenses in Ukraine for 2019 and January-May 2020). (2020). Retrieved from [https://old.gp.gov.ua/ua/stst2011.html?\\_dir\\_id=114140&libid=100820&c=edit&\\_c=fo](https://old.gp.gov.ua/ua/stst2011.html?_dir_id=114140&libid=100820&c=edit&_c=fo)

### Список використаних джерел

- [1] Babiak, A.V., Zhyvko, Z.B., & Yosypiv, A.O. (2010). *Counteraction to crimes committed in the budget sphere*. Lviv: Lviv State University of Internal Affairs
- [2] Baier, F.J. (2020). Foreign Direct Investment and Tax: OECD Gravity Modelling in a World with International Financial Institutions. *Athens Journal of Business & Economics*, 6(1), 45-72.
- [3] Dehtiar, Ya.R. (2016). Budget offenses as grounds for liability under current legislation of Ukraine. *Economics and Law*, 1(43), 19-24.
- [4] Dovban, I.M. (2019). Crime of civil servants as a holistic complex phenomenon. *South Ukrainian Law Journal*, 4(1), 102-104.
- [5] Filippov, D.I. (2019). Financial innovations in terms of development of digital economy. *Creative Economy*, 8(3), 1503-1520.
- [7] Хомутенко В., Хомутенко А. Бюджетні інвестиції в контексті інвестиційної привабливості України. *Формування сучасної наукової думки: матеріали Міжнар. наук. конф. МЦНД (Кропивницький, 31 січ. 2020)*. Кропивницький, 2020. С. 17–19.
- [8] Кримінальний кодекс України: Закон України від 5 квітня 2001 р. № 2341-III. URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- [9] Запобігання злочинам, пов'язаним з незаконним використанням бюджетних коштів: наук.-практ. посіб. / В.В. Кулаков, В.В. Лень, С.С. Мірошніченко. Запоріжжя: Дніпр. металург, 2011. 289 с.
- [10] Кислий А.М., Федорчук Ю.В. Оперативно-розшукова характеристика злочинів, пов'язаних із розкраданням бюджетних коштів під час проведення закупівель медичного обладнання та ліків. *Юридичний часопис Національної академії внутрішніх справ*. 2017. Том 2. № 14. С. 218–230.
- [11] Науково-практичний коментар Кримінального кодексу України. 9-те вид., переробл. та доповн. / за ред. М.І. Мельника, М.І. Хавронюка. Київ: Юридична думка, 2012. 1316 с.
- [12] Mischenko L., Telicyn N. Features of operational-investigative characteristics of crimes related to misappropriation of budget funds and state extra-budgetary funds, posing a threat to the economic security of the state. *The economy under guard*. 2019. Vol. 3. No. 10. P. 25–31.
- [13] Міжнародна поліцейська енциклопедія: у 10 т. / відп. ред. Є.М. Мойсєєв, В.Я. Тацій, Ю.С. Шемшученко. Київ: Атіка, 2009.
- [14] Нечитайло В.А. Характеристика осіб, які вчиняють нецільове використання бюджетних коштів. *Науковий вісник Національної академії внутрішніх справ*. 2013. № 4. С. 133–143.
- [15] Пасічник Ю. В. Бюджетні важелі впливу на тривалість життя населення. *Наукові записки Національного університету «Острозька академія»*. 2018. Вип. 8. № 36. С. 69–73.
- [16] Пастушенко А.А. Освобождение от уголовной ответственности с назначением судебного штрафа за совершение нецелевого расходования бюджетных средств. *Юридическая наука и практика*. 2019. Том 15. № 1. С. 63–67.
- [17] Степанюк Р.Л. Забезпечення розслідування злочинів, вчинених у бюджетній сфері України : монографія / за заг. ред. А. Ф. Волобуєва. Харків: НікаНова, 2012. 382 с.

- [18] Василичук В.І. Оперативно-розшукова профілактика злочинів у бюджетній сфері: монографія. 2-ге вид. Київ: Заграй, 2012. 344 с.
- [19] Волобуєв А.Ф., Степанюк Р.Л. Особливості механізму злочинних порушень бюджетного законодавства. *Вісник Академії правових наук України*. 2003. Вип. 4. № 35. С. 198–208.
- [20] Єдині звіти Офісу Генерального прокурора про кримінальні правопорушення в Україні за 2019 рік і січень–травень 2020 року. URL: [https://old.gp.gov.ua/ua/stst2011.html?dir\\_id=114140&libid=100820&c=edit&c=fo](https://old.gp.gov.ua/ua/stst2011.html?dir_id=114140&libid=100820&c=edit&c=fo)

## Службова особа як суб'єкт нецільового використання бюджетних коштів, здійснення видатків бюджету чи надання кредитів з бюджету без встановлених бюджетних призначень або з їх перевищенням

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### Анотація

Метою публікації є кримінально-правовий аналіз і характеристика службової особи як суб'єкта нецільового використання бюджетних коштів, здійснення видатків бюджету чи надання кредитів з бюджету без встановлених бюджетних призначень або з їх перевищенням. У статті використано комплекс наукових методів: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Розглянуто перелік осіб, які можуть бути суб'єктами нецільового використання бюджетних коштів, здійснення видатків бюджету чи надання кредитів з бюджету без встановлених бюджетних призначень або з їх перевищенням; виокремлено службових осіб суб'єктів господарської діяльності – юридичних осіб небюджетної сфери, що одержують дотації, субсидії чи субвенції як бюджетні кошти; службових осіб юридичних осіб небюджетної сфери, яким згідно з чинним законодавством делеговано право розпоряджатися бюджетними коштами. Наведено перелік осіб, які можуть бути співучасниками нецільового використання бюджетних коштів – як серед працівників бюджетної установи, так і контролюючих та фінансових органів: Державної аудиторської служби, Державної казначейської служби, Державного казначейства України. Визначено особливості вчинення службовою особою нецільового використання бюджетних коштів, здійснення видатків бюджету чи надання кредитів з бюджету без встановлених бюджетних призначень або з їх перевищенням, що полягає в суміжному вчиненні правопорушень проти власності та службових злочинів. Класифіковано службових осіб, які вчиняють нецільове використання бюджетних коштів, здійснення видатків бюджету чи надання кредитів з бюджету без встановлених бюджетних призначень або з їх перевищенням: головні розпорядники бюджетних коштів; розпорядники нижчого рівня; одержувачі бюджетних коштів; інші службові особи (не керівники) органів державної влади, бюджетних установ, а також установ, підприємств, організацій, які одержують цільові бюджетні кошти

### Ключові слова:

бюджет; нецільове використання бюджетних коштів; суб'єкт злочину; службова особа; бюджетні установи

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# Features of Notification of Suspicion to a Person, Located in the Temporarily Occupied Territories in the Donetsk and Luhansk Regions

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## Abstract

The relevance of the study lies in the systematic analysis of the criminal procedural legislation of Ukraine based on the requirements of international treaties, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine, and in the definition of theoretical and practical problems, without overcoming which the procedural activity of the prosecution during the serving of a written notice of suspicion to a person whose place of residence and/or stay is in the temporarily occupied territories in Donetsk and Luhansk regions, will not meet the tasks of criminal proceedings and guarantees defined by international treaties. Ways to overcome this practical problem are proposed. The purpose of the study is to analyse the specific features of legal regulation of notification of suspicion to a person whose location is established, whose place of residence and/or stay is located in the temporarily occupied territories in Donetsk and Luhansk regions, and to highlight actual theoretical and practical problems that arise during the serving of a written notice of suspicion to a person who is located in the temporarily occupied territories in Donetsk and Luhansk regions. Methodological tools were chosen considering the set goal, the specific features of the object and the subject of research. During the research, a system of methods of scientific cognition was used: formal logic (abstraction, analogy, deduction, induction, synthesis) to clarify the content of the question under study; system analysis – to formulate research conclusions and outline areas for improving the criminal procedure legislation of Ukraine; theoretical – in the process of research of scientific and educational literature. Based on the results of the conducted research, the conclusions were formulated: 1) since the obligation to serve a written notice of suspicion as an integral component of the implementation of notification to a person of suspicion is assigned to the prosecution, in the case of establishing information about the location of a person whose place of residence and/or stay is in the temporarily occupied territories in Donetsk and Luhansk regions, it is the state of Ukraine that should take all available measures to promote and protect the rights of citizens in the temporarily uncontrolled territory, by applying the investigator, prosecutor of the provisions of Section IX of the Criminal Procedure Code of Ukraine; 2) if the prosecution establishes information about the location of a person whose place of residence and/or stay is on the temporarily occupied territories in Donetsk and Luhansk regions, the investigator, prosecutor is obliged to apply to the Russian Federation with a request for international legal assistance to perform certain procedural actions, namely, serving a person with a notice of suspicion, since the Russian Federation exercises “effective control” in the temporarily occupied territory of Ukraine, in connection with which it is obliged to guarantee the implementation of Art. 1 of the Convention; 3) the procedure for reporting suspicion to a person who is in the temporarily occupied territories in Donetsk and Luhansk regions, requires legal improvement by making appropriate changes to the Criminal Procedure Code of Ukraine or special laws. It is necessary to consider the practice of the European Court of Human Rights and the requirements of international treaties, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine

## Keywords:

suspicion; notification; suspect; written notification; serving suspicion; temporarily occupied territory; Donetsk region; Luhansk region

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## Introduction

Eight years have passed since the entry into force of the Criminal Procedure Code (CPC) of Ukraine No. 4651-VI of April 13, 2012 [1]. During this period, the new CPC of Ukraine has undergone numerous changes and additions, including the institution of notification of suspicion and its integral component – the serving of a written notice of suspicion. This was due to the new conditions of socio-political, military, and economic orientation, which made it necessary to introduce concepts into the procedural legislation that had not yet been regulated.

Despite the substantial achievements of researchers, constantly investigating the problems of the practical application of the norms of the CPC of Ukraine [1] and suggesting ways to improve them to harmonise them with other national legal institutions and European standards, in the vast majority of cases they remain without the attention of the legislator. Instead, changes are made without considering the positions of specialists and system analysis with other institutions of criminal procedure legislation of Ukraine [1]. This practice does not contribute to improving the standards but raises new questions for specialists and researchers that require further scientific understanding and identification of ways to solve them.

*The purpose of the study* is to conduct a comprehensive scientific analysis of the criminal procedural legislation of Ukraine in terms of the procedural activities of the prosecution when serving suspicion to a person whose location is established, whose place of residence and/or stay is in the temporarily occupied territories in Donetsk and Luhansk regions; clarification of current theoretical and practical problems regarding the serving of a written notice of suspicion to a person who is in the temporarily occupied territories in Donetsk and Luhansk regions, and compliance of current legislation with the provisions of international treaties, consent to be bound by which is provided by the Verkhovna Rada of Ukraine.

## Results and Discussion

Following amendments to the code of Criminal Procedure of Ukraine, in accordance with the Law of Ukraine “On amendments to the criminal and Criminal Procedure Codes of Ukraine regarding the inevitability of punishment for certain crimes against the foundations of national security, public security, and corruption crimes” of October 7, 2014, No. 1689-VII [2], which introduced the form of criminal proceedings in the absence of a suspect or accused (in absentia), the concept of the suspect was expanded (a person towards whom a notice of suspicion was drawn up, but it was not served to them due to the failure to establish the location of

the person, but measures were taken to serve in the manner provided for CPC of Ukraine for serving notifications). These changes have caused additional problems in the enforcement of the institution of notification of suspicion.

Since the actual problems of applying such new legislation as the acquisition of the status of a suspect by a person whose location has not been established, but measures have been taken to serve in the way provided for by the CPC of Ukraine [1] for serving messages, were the subject of previous publications, the purpose of this study is to choose the specific features of the legal regulation of notification of suspicion to a person whose location is established, whose place of residence and stay is located in the temporarily occupied territories in Donetsk and Luhansk regions.

Based on a systematic analysis of Art. 42, 276, 278 of the CPC of Ukraine [1], provide the serving of a notice of suspicion, and not its delivery in any way. Therewith, Art. 278 of the CPC of Ukraine [1] provides that if such serving is impossible – in the manner provided for by this Code for the serving of notifications. Only one case of impossibility of such serving has been identified – failure to serve a notice of suspicion to a person due to failure to establish the person's location (Art. 42 of the CPC of Ukraine). Therefore, if the location of a person is established, namely, the prosecution has information about the place of work, place of residence or temporary stay of the person, then it is impossible to serve them with a notice of suspicion in the way provided for by the CPC of Ukraine for serving notifications. Therefore, if the investigator or prosecutor has established information about the location of a person, then, considering the content of part 1 of Art. 42 of the CPC of Ukraine [1], measures cannot be taken to serve them in the manner provided for by the CPC of Ukraine for serving messages. The “general” procedure for a personal (direct) serving of a written notice of suspicion to such a person is subject to application.

However, in practice, there are cases of establishing the location of a person whose place of residence and/or stay is located in the temporarily occupied territory of Ukraine, namely in certain territories in the Donetsk and Luhansk regions, the factual access to which is restricted.

When investigating the issue of how a notice of suspicion should be served if the prosecution establishes information about the location of a person whose place of residence and/or stay is located in the temporarily occupied territories in the Donetsk and Luhansk regions, it is necessary to consider the following. According to Art. 1 of the Law of Ukraine “On the specific features of national policy to ensure the state sovereignty of Ukraine in the temporarily

occupied territories in Donetsk and Luhansk regions” of January 18, 2018, No. 2268-VIII (hereinafter – Law No. 2268-VIII) [3], temporarily occupied territories in Donetsk and Luhansk regions on the day of adoption of this law are recognised as parts of the territory of Ukraine, within which the armed formations of the Russian Federation and the occupation administration of the Russian Federation have established and exercise general control. The borders and list of districts, cities, towns and villages, parts of their territories temporarily occupied in Donetsk and Luhansk regions are determined by the President of Ukraine on the recommendation of the Ministry of Defence of Ukraine, prepared based on proposals of the General Staff of the Armed Forces of Ukraine [3], 2018. The decree of the President of Ukraine “On the borders and list of districts, cities, towns and villages, parts of their territories temporarily occupied in Donetsk and Luhansk regions” dated February 7, 2019, No. 32/2019 [4] approved the borders and list of districts, cities, towns and villages, parts of their territories temporarily occupied in Donetsk and Luhansk regions. According to Art. 2 of Law No. 2268-VIII [3], the legal status of the temporarily occupied territories in Donetsk and Luhansk regions, the Autonomous Republic of Crimea and the city of Sevastopol, and the legal regime in these territories are determined by this Law, the Law of Ukraine “On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine”, other laws of Ukraine, international treaties, the consent to be bound by which is granted by the Verkhovna Rada of Ukraine, principles and norms of international law. Within the temporarily occupied territories in the Donetsk and Luhansk regions, there is a special procedure for ensuring the rights and freedoms of the civilian population, defined by this Law, other laws of Ukraine, international treaties, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine, and principles and norms of international law.

In addition, paragraph 1 of part 1 of Art. 5 together with paragraph 1 of part 1 of Art. 6 of Law No. 2268-VIII [3] stipulates that to ensure the state sovereignty of Ukraine in the temporarily occupied territories in the Donetsk and Luhansk regions, state authorities and their officials, acting on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine, take measures to protect the rights and freedoms of the civilian population. The main areas of protecting the rights and freedoms of the civilian population in the temporarily occupied territories in the Donetsk and Luhansk regions are the protection of fundamental political and civil human rights and freedoms.

The Russian Federation, as an occupying state, in accordance with the IV Hague Convention on the laws and customs of war on land and its annexe (the regulation on the laws and customs of war on land of October 18, 1907, the Geneva Convention for the protection of the civilian population in the time of war of August 12, 1950 [5], and the additional protocol to the Geneva Conventions of August 12, 1950, regarding the protection of victims of international armed conflicts (Protocol I), of June 8, 1977) is responsible for violating the protection of the rights of the civilian population (part 2 of Art. 7 of Law No. 2268-VIII).

Therewith, Law No. 2268-VIII [3] does not define a special procedure for ensuring the rights and freedoms of Ukrainian citizens living in the temporarily occupied territories in Donetsk and Luhansk regions, in terms of the procedure for criminal proceedings, however, considering Art. 2, the provisions of Law No. 1207-VII [6], Art. 12 of which defines a special procedure for ensuring the rights and freedoms of Ukrainian citizens living in the temporarily occupied territory, regarding the procedure for criminal proceedings, should be applied. According to this article of Law No. 1207-VII [6], the special procedure involves only the issues of determining jurisdiction and certain aspects of the implementation of a special pre-trial investigation or special judicial proceedings, and not the procedure for conducting a pre-trial investigation in general, which is conducted according to the general rules established by the CPC of Ukraine [5]. Therefore, since neither Law No. 2268-VIII [3] nor Law No. 1207-VII [6] establish the specific features of criminal proceedings when reporting suspicion to a person whose place of residence or stay is located in the temporarily occupied territories in Donetsk and Luhansk regions, the general rules for reporting suspicion to a person established by the CPC of Ukraine should be applied.

In terms of the impossibility of taking measures to serve a notice of suspicion in the way provided by the CPC of Ukraine [1] for serving messages, if the prosecution has established information about the location of a person, namely the place of residence and stay of which is located in the temporarily occupied territories in Donetsk and Luhansk regions, which are an inseparable part of the territory of Ukraine, the serving of a notice of suspicion must be conducted directly.

However, the direct serving by an investigator or prosecutor of a notice of suspicion to a person in the temporarily occupied territory of Ukraine is hindered by high risks of certain negative consequences for officials of the prosecution, which cannot be proportional to the purpose of ensuring the rights and freedoms of citizens, in terms of the proper implementation of the notice of suspicion. The practice of

law enforcement of such legal relations has shown that the prosecution actively uses the method of informing a person of suspicion by sending a notice of suspicion by mail, with a declared value, a list of the attachment, and notification of serving [7]. By examining judicial practice, it was established that investigative judges generally share this position of the prosecution [8].

In addition, a common behaviour of the prosecution in the analysed category of criminal proceedings is:

- application of the procedure for handing procedural documents to a suspect under Art. 297-5 of the CPC of Ukraine [1];
- sending a written notice of suspicion to the embassy of the Russian Federation in Ukraine;
- failure to take any actions aimed at serving the person with a written notice of suspicion.

These approaches are groundless, erroneous, and contrary to the tasks and general principles of criminal proceedings.

First, the norms of the CPC of Ukraine [1] allow sending a notice of suspicion by means of postal communication in certain cases. Therewith, such a procedure is exclusive, it is applied only if it is impossible for the prosecution to serve a notice of suspicion on the day of its compilation. It is clear that such impossibility of serving should be objectively justified, and the investigator, prosecutor, guided by the principle of publicity, should take all measures to establish the exact location of the person and conduct (if reasonably possible) personal serving of the notice of suspicion to the person.

In any case, the prosecution's performance of the obligation to serve a notice of suspicion in the manner provided for the serving of notifications is an activity with the purpose to achieve a certain result – obtaining this written procedural decision by a person and is not an activity with a “formal composition”. An analysis of the provisions of the CPC of Ukraine gives grounds to assert that sending a notice of suspicion to a person by means of postal communication will meet the requirements of the CPC of Ukraine only if such a person receives it personally. This additionally certifies the provision of part 1 of Art. 136 of the CPC of Ukraine [1], according to which the proper confirmation of a person's receipt of a summons or acquaintance with its content in another way is the signature of the person on receipt, in particular on a postal message, a video recording of the serving of the summons to the person, any other data confirming the fact of serving the summons to the person or acquaintance with its content [9]. Therefore, only the fact of sending a notice of suspicion by mail, and confirmation of receipt of a postal item by one of the persons listed in part 1 of Art. 135 of the CPC of Ukraine [1], is not

proof of proper serving of a notice of suspicion to a person. Thus, a person acquires the status of a suspect from the moment of serving of a postal item to them personally, and not from the moment of sending such notification by the prosecution, so only after that the investigator or prosecutor can enter information about the notification of suspicion in the Unified Register of pre-trial investigations.

A similar opinion is advocated for by N.A. Lugina [9], who claims that “served” does not mean “received”, and therefore, it is advisable to consider the requirements for proper confirmation of receipt or acquaintance by a person with the content of the notice of suspicion in another way.

The approach to determining the moment when a person is notified of suspicion without considering the fact that receiving written notice of suspicion contradicts the principle of the rule of law, distorts the essence of the institution of notification of suspicion, and may actually deprive or restrict a person in the exercise of the right to be immediately and in detail informed in an understandable matter about the nature and reasons of the charge brought against them (subparagraph “a” of paragraph 3 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 No. 995\_004 (hereinafter referred to as Convention) [5] and be clearly and promptly notified of their rights provided for by law, and receive their explanations (paragraph 2 of part 3 of Art. 42 of the CPC of Ukraine).

According to the standards of proper notification of a person of suspicion developed by the European Court of Human Rights (ECHR), it is not sufficient that the information is only provided in writing, the authorities must take all reasonable measures to ensure that the suspect has been notified of their right to defence and, as far as possible, understood the consequences of their conduct during interrogation (decision in “Pishchalnikov v. Russia” case of 24 December 2009 [10]).

Art. 17 of the Law of Ukraine “On the enforcement of decisions and application of the practice of the European Court of Human Rights” of February 23, 2006, No. 3477-IV established that courts apply the Convention and practice of the European Court when considering cases, that is, judges are obliged to apply the Convention and the decision of the ECHR as a source of law at all stages of proceedings on an equal basis with the laws of Ukraine [11].

The corresponding consolidation regarding the mandatory application of the ECHR practice is also contained in part 2 of Art. 8 and part 5 of Art. 9 of the CPC of Ukraine, according to which the principle of the rule of law in criminal proceedings and the criminal procedure legislation of Ukraine are applied considering the practice of the ECHR [8].

Consequently, in the absence of documents in the materials of criminal proceedings that unequivocally certify the fact that a person received a postal item with a written notification of suspicion, they cannot be considered notified of suspicion in the manner established by law. In such circumstances, the entry of information by an investigator or prosecutor into the Unified Register of Pre-trial Investigations regarding the notification of suspicion to a person is groundless and illegal. Secondly, Ukrposhta JSC does not send mail to localities in Donetsk and Luhansk regions where state authorities temporarily do not exercise their powers [12].

Despite the fact that these circumstances indicate the impossibility of delivering postal items, which excludes the possibility of receiving a notice of suspicion in this way by a person whose place of residence and stay is located in the temporarily occupied territories in Donetsk and Luhansk regions, the prosecution chooses this method of informing a person of suspicion, and the investigating judges in the vast majority of cases recognise it as appropriate, even referring to the circumstances of the impossibility of delivering postal items in their decisions. The motivation in general is the recognition by the investigating judges of these actions of the prosecution as sufficient measures taken to serve the person with a notice of suspicion in the manner provided for by the CPC of Ukraine [1] for serving notices (Art. 42 of the CPC of Ukraine).

However, in such legal relations, the requirements of Art. 42 of the CPC of Ukraine [1] cannot be applied, since it is possible to take measures to serve a person with a notice of suspicion in the way provided for by the CPC of Ukraine for serving messages due to the inability to establish the person's location. In this case, the prosecution establishes information about the location of the person, namely the place of residence and stay in the temporarily occupied territories in the Donetsk and Luhansk regions, which are an inseparable part of the territory of Ukraine.

Thirdly, considering the requirements of Art. 2, 7, 8, 9 of the CPC of Ukraine, the activities of an investigator or prosecutor in the implementation of a notice of suspicion must comply with international treaties, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine. Most international human rights treaties contain a "jurisdiction clause", which aims to define the range of persons for which states are obliged to fulfil their human rights obligations under the relevant international treaty [13].

Art. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November

4, 1950, No. 995\_004 [5], ratified by the Law of Ukraine "On ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention" of July 17, 1997 No. 475/97-BP [11], stipulates that the High Contracting Parties guarantee everyone under their jurisdiction the rights and freedoms defined in section I of this convention [10].

The case-law of the ECHR has defined the jurisdictional competence of the state under Art. 1 of the Convention primarily as territorial. It is presumed that jurisdiction is exercised within the territory of the state. However, such a presumption may be limited in some exceptional cases, first of all, if a state is hindered from exercising power in a part of its territory, in particular as a result of: military occupation of a part of the territory by the armed forces of another state exercising effective control over such territory; military actions or uprisings; acts of a foreign state supporting the establishment of a separatist state on the territory of the state.

The court examines on the one hand, all objective facts that may limit the possibility of a state using power on its territory, and on the other, the state's actions to determine that such a situation exists. The obligations undertaken by a state, signing the Convention include, in addition to the obligation to refrain from interfering with the exercising of the rights and freedoms guaranteed by it, positive obligations regarding steps to ensure respect for such rights and freedoms in its territory. These obligations remain even if the power of the state is limited to a part of its territory, that is, the state is obliged to take all appropriate measures that are still available to it to guarantee rights and freedoms. Other "Transnistrian" cases also explicitly stated that even the existence of the "effective control" of the Russian Federation over the Pridnestrovian Moldavian Republic (PMR), which was unequivocally recognised by the court due to the military, economic, and political support of the PMR, does not exempt Moldova from fulfilling its positive human rights obligations. The ECHR reached a similar conclusion in its decision in the "Ivanțoc and Others v. Moldova and Russia" case of 4 June 2012 [14], stating that although Moldova does not have effective control over the actions of the PMR in Transdniestria, the fact that this region is recognised by international law as part of the territory of Moldova entails a duty under Art. 1 of the Convention to use all legal and diplomatic means available to it to continue to guarantee the exercise of the rights and freedoms defined by the convention to all persons residing there.

An exception to the principle of territorial jurisdiction from the opposite exists when, as a result of lawful or illegal actions, a contracting state exercises effective control over territory outside its national territory. The obligation to secure in such territory the rights and freedoms defined in the Convention stems from the fact of such control, whether it is exercised directly, through the contracting state's own armed forces, or through a subordinate local administration. Thus, the controlling state is responsible under Art. 1 of the convention, namely, it must guarantee in the territory under its control the full set of substantive rights provided for in the Convention and those additional protocols that it has ratified. This state will be responsible for any violations of such rights. The application of these approaches to the issue under study is fundamentally important for the current situation in Ukraine since part of its territory is under the control of another state. Consequently, according to the provisions of the convention, considering the practice of the ECHR, Ukraine is obliged to take all appropriate measures that are available to it to guarantee rights and freedoms, and the Russian Federation is obliged to guarantee everyone under its jurisdiction, in particular in the temporarily occupied territory of Ukraine, the rights and freedoms defined in section I of the Convention for the Protection of Human Rights and Fundamental Freedoms [11].

In such circumstances, if the prosecution establishes information about the location of a person whose place of residence and/or stay is located in the temporarily occupied territory of Ukraine, the investigator, prosecutor is obliged to take all available measures to promote the rights of a person who in the temporarily uncontrolled territory of Ukraine [15], namely, to apply the provisions of Section IX of the CPC of Ukraine regulating international cooperation during criminal proceedings, and to apply to the Russian Federation with a request for international cooperation to ensure that the person is served a written notice of suspicion.

Thus, the analysis of the procedure for serving a written notice of suspicion to a person whose location is established, whose place of residence and stay is located in the temporarily occupied territories in the Donetsk and Luhansk regions gives grounds to accept that the lack of unambiguous and uniform understanding of procedures by participants in criminal proceedings leads to a violation of the rule of law and also determines the need for further rule-making in this area of law.

The study highlights problematic issues related to the specific features of legal regulation of notification of suspicion to a person whose location is established, whose place of residence or stay is located in the temporarily occupied territories in the Donetsk and Luhansk regions and outlines actual theoretical and practical problems that arise in the case of serving of a written notice of suspicion to a person who is located in the temporarily occupied territories in the Donetsk and Luhansk regions. Difficulties in these cases are caused by the fact that the legislator did not fully adhere to the principle of legal certainty in terms of such a general legal category as "quality and accuracy of the law" [16], which is of critical importance in the development and functioning of the law system of a democratic state. In such circumstances, the practical application of these norms is not uniform, often erroneous in relation to compliance with the principles of criminal proceedings. Elimination of the investigated shortcomings is possible only by making appropriate changes to the CPC of Ukraine [1].

### Conclusions

Since the obligation to serve a written notice of suspicion as an integral part of notifying a person of suspicion is assigned to the prosecution, in case of establishing information about the location of a person whose place of residence or stay is located in the temporarily occupied territories in the Donetsk and Luhansk regions, it is the state of Ukraine that should take all available measures to ensure and protect the rights of its citizens in the territory temporarily beyond its control, by applying the provisions of Section IX of the CPC of Ukraine by an investigator or prosecutor – to apply to the Russian Federation with a request for international legal assistance to perform certain procedural actions, namely, to serve a person with a notice of suspicion, since it is the Russian Federation that exercises "effective control" in the temporarily occupied territory of Ukraine, in connection with which it is obliged to guarantee the implementation of Art. 1 of the Convention. The procedure for reporting of suspicion a person who is in the temporarily occupied territories in the Donetsk and Luhansk regions requires legal improvement by making appropriate changes to the CPC of Ukraine or the special laws mentioned above. It is necessary to consider the practice of the ECHR and the requirements of international treaties, the consent to be bound by which was provided by the Verkhovna Rada of Ukraine.

## References

- [1] Criminal Procedure Code of Ukraine. No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>
- [2] Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine Concerning the Inevitability of Punishment for Certain Crimes against the Fundamentals of National Security, Public Security and Corruption Crimes". No. 1689-VII. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1689-18#Text>
- [3] Law of Ukraine "On the peculiarities of state policy to ensure the state sovereignty of Ukraine in the temporarily occupied territories in Donetsk and Luhansk regions". No. 2268-VIII. (2018, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/2268-19#Text>
- [4] Decree of the President of Ukraine "On the boundaries and list of districts, cities, towns and villages, parts of their territories, temporarily occupied in Donetsk and Luhansk regions" No. 32/2019. (2019, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/32/2019#Text>
- [5] Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004.#Text](https://zakon.rada.gov.ua/laws/show/995_004.#Text)
- [6] Law of Ukraine "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine". No. 1207-VII. (2014, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/1207-18#Text>
- [7] Abrisketa, J., & Casas, M.N. (2016). *Extraterritorial application of human rights treaties*. Oxford: Oxford University Press.
- [8] Alenin, Yu.P., & Hloviuk, I.V. (2014). Suspicion messages: General characteristics and improvement problems. *Bulletin of the Southern Regional Center of the National Academy of Legal Sciences of Ukraine*, 1, 161-169.
- [9] Lugina, N.A. (2019). Features of delivery of the notice of suspicion and the order of a call of the persons who are in the antiterrorist operation zone. In *Reforming Criminal Proceedings in Ukraine: Criminal Procedural and Forensic Aspects: Proceedings of the International Scientific and Practical Conference* (pp. 195-199). Irpin: National University.
- [10] Case of Pishchalnikov v. Russia. Application No. 7025/04. (2009, September). Retrieved from <https://hudoc.echr.coe.int/rus#%7B%22fulltext%22:%5B%227025/04%22%5D%7D>
- [11] Law of Ukraine "On the implementation of decisions and application of the case law of the European Court of Human Rights". No. 3477-IV. (2006, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/3477-15#Text>
- [12] Notice on the official website of Ukrposhta Joint-Stock Company. (2020). Retrieved from <https://www.ukrposhta.ua/ua/news/57016-robota-ukrposhti-v-doneckij-ta-luganskij-oblastjah>.
- [13] Khakhanovskiy, V.H., Luhina, N.A., & Tupchii, V.V. (2017). Peculiarities of the procedure for summoning and notifying about suspicion of persons located in the anti-terrorist operation zone or in the temporarily occupied territory of Ukraine. *International Legal Bulletin: Current Issues (Theory and Practice)*, 1(5), 87-92.
- [14] Case of Ivanțoc and Others v. Moldova and Russia. Application No. 23687/05. (2011, November). Retrieved from <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-107480%22%5D%7D>.
- [15] Tatarov, O.Yu. (2017). Legislative tendencies in the criminal process of Ukraine. *Bulletin of Criminal Proceedings*, 3, 70-81.
- [16] Law of Ukraine "On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention". No. 475/97-VR. (1997, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80.#Text>

### Список використаних джерел

- [1] Кримінальний процесуальний кодекс України : Закон України від 13 квітня 2012 р. № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.
- [2] Про внесення змін до Кримінального та Кримінального процесуального кодексів України щодо невідворотності покарання за окремі злочини проти основ національної безпеки, громадської безпеки та корупційні злочини : Закон України від 7 жовтня 2014 р. № 1689-VII. URL: <https://zakon.rada.gov.ua/laws/show/1689-18#Text>.
- [3] Про особливості державної політики із забезпечення державного суверенітету України на тимчасово окупованих територіях у Донецькій та Луганській областях : Закон України від 18 січня 2018 р. № 2268-VIII. URL: <https://zakon.rada.gov.ua/laws/show/2268-19#Text>.
- [4] Про межі та перелік районів, міст, селищ і сіл, частин їх територій, тимчасово окупованих у Донецькій та Луганській областях: Указ Президента України від 7 лютого 2019 р. № 32/2019. URL: <https://zakon.rada.gov.ua/laws/show/32/2019#Text>.
- [5] Конвенція про захист прав людини і основоположних свобод. URL: [https://zakon.rada.gov.ua/laws/show/995\\_004.#Text](https://zakon.rada.gov.ua/laws/show/995_004.#Text).
- [6] Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України : Закон України від 15 квіт. 2014 р. № 1207-VII. URL: <https://zakon.rada.gov.ua/laws/show/1207-18#Text>.
- [7] Abrisketa J., Casas M.N. *Extraterritorial application of human rights treaties*. Oxford: Oxford University Press, 2016. 304 p.
- [8] Аленін Ю.П., Гловюк І.В. Повідомлення про підозру: загальна характеристика та проблеми удосконалення. *Вісник Південного регіонального центру Національної академії правових наук України*. 2014. № 1. С. 161–169.
- [9] Лугіна Н.А. Особливості вручення повідомлення про підозру та порядок виклику осіб, що перебувають у зоні АТО. Реформування кримінального провадження в Україні: кримінальні процесуальні та криміналістичні аспекти : *Міжнародна науково-практична конференція присвячена пам'яті професорів В.П. Бахіна, В.К. Лисиченка, І.Я. Фрідмана* (Ірпінь, 19 квітня 2019 р.). Ірпінь, 2019. С. 195–199.
- [10] Case of Pishchalnikov v. Russia. Application No. 7025/04. URL: <https://hudoc.echr.coe.int/rus#%7B%22fulltext%22:%5B%227025/04%22%5D%7D>
- [11] Про виконання рішень та застосування практики Європейського суду з прав людини : Закон України від 23 лютого 2006 р. № 3477-IV. URL: <https://zakon.rada.gov.ua/laws/show/3477-15#Text>.
- [12] Повідомлення на офіційному веб-сайті Акціонерного товариства “Укрпошта”. URL: <https://www.ukrposhta.ua/ua/news/57016-robota-ukrposhti-v-doneckij-ta-luganskij-oblastjah>.
- [13] Хахановський В.Г., Лугіна Н.А., Тупчій В.В. Особливості порядку виклику та повідомлення про підозру осіб, що перебувають у зоні АТО або на тимчасово окупованій території України. *Міжнародний юридичний вісник: актуальні проблеми сучасності (теорія та практика)*. 2017. Вип. 1. № 5. С. 87–92.
- [14] Case of Ivanțoc and Others v. Moldova and Russia. Application No. 23687/05. URL: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-107480%22%5D%7D>.
- [15] Татаров О.Ю. Законодавчі тенденції у кримінальному процесі України. *Вісник кримінального судочинства*. 2017. № 3. С. 70–81.
- [16] Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року, Першого протоколу та протоколів № 2, 4, 7 та 11 до Конвенції : Закон України від 17 липня 1997 р. № 475/97-ВР. URL: <https://zakon.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80.#Text>.

# Особливості повідомлення про підозру особі, яка перебуває на тимчасово окупованих територіях у Донецькій та Луганській областях

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## Анотація

Актуальність статті полягає в системному аналізі кримінального процесуального законодавства України на підставі вимог міжнародних договорів, згода на обов'язковість яких надана Верховною Радою України, й у визначенні теоретичних і практичних проблем, без подолання яких процесуальна діяльність сторони обвинувачення під час вручення письмового повідомлення про підозру особі, місце проживання та/або перебування якої знаходиться на тимчасово окупованих територіях у Донецькій та Луганській областях, не буде відповідати завданням кримінального провадження та гарантіям, визначеним міжнародними договорами. Запропоновано шляхи подолання окресленої практичної проблеми. Метою статті є аналіз особливостей правового регулювання повідомлення про підозру особі, місцезнаходження якої встановлено, місце проживання та/або перебування якої знаходиться на тимчасово окупованих територіях у Донецькій та Луганській областях, а також виокремлення актуальних теоретичних і практичних проблем, що постають під час вручення письмового повідомлення про підозру особі, яка перебуває на тимчасово окупованих територіях у Донецькій та Луганській областях. З огляду на поставлену мету, специфіку об'єкта та предмета дослідження обрано методологічний інструментарій. Під час дослідження використано систему методів наукового пізнання: формальної логіки (абстрагування, аналогію, дедукцію, індукцію, синтез) для з'ясування змісту досліджуваного питання; метод системного аналізу – для формулювання висновків дослідження та окреслення напрямів удосконалення кримінального процесуального законодавства України; теоретичний – у процесі дослідження наукової та навчально-методичної літератури. За результатами здійсненого дослідження сформульовано висновки: 1) оскільки обов'язок вручення письмового повідомлення про підозру як невід'ємна складова здійснення повідомлення особі про підозру покладений на сторону обвинувачення, у разі встановлення відомостей про місцезнаходження особи, місце проживання та/або перебування якої знаходиться на тимчасово окупованих територіях у Донецькій та Луганській областях, саме держава Україна має вживати всіх доступних заходів щодо сприяння забезпеченню та захисту прав громадян, які опинилися на тимчасово не підконтрольній їй території, шляхом застосування слідчим, прокурором положень розділу IX Кримінального процесуального кодексу України; 2) у разі встановлення стороною обвинувачення відомостей про місцезнаходження особи, місце проживання та/або перебування якої знаходиться на тимчасово окупованих територіях у Донецькій та Луганській областях, слідчий, прокурор зобов'язаний звертатися до Російської Федерації із запитом про міжнародну правову допомогу для виконання окремих процесуальних дій, а саме вручення особі повідомлення про підозру, оскільки Російська Федерація здійснює «ефективний контроль» на тимчасово окупованій території України, у зв'язку із чим зобов'язана гарантувати виконання статті 1 Конвенції; 3) порядок повідомлення про підозру особі, яка знаходиться на тимчасово окупованих територіях у Донецькій та Луганській областях, потребує правового вдосконалення шляхом внесення відповідних змін до Кримінального процесуального кодексу України або спеціальних законів. В обов'язковому порядку мають бути враховані практика Європейського суду з прав людини та вимоги міжнародних договорів, згода на обов'язковість яких надана Верховною Радою України

## Ключові слова:

підозра; повідомлення; підозрюваний; письмове повідомлення; вручення; тимчасово окупована територія; Донецька область; Луганська область

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# Problematic Issues of Legalisation (Laundering) of Proceeds from Crime and Improvement of Counteraction to This Phenomenon in Ukraine

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## Abstract

Based on the analysis of the current legislation and professional literature, considering the world experience, the general and problematic issues of legalisation (laundering) of proceeds from crime in Ukraine were described and ways to solve them to minimise the latency of money laundering were suggested. The methodological basis of the study consists of general and special methods of scientific cognition of socio-legal phenomena and processes, in particular: historical-legal, dialectical, formal-logical, system-structural, statistical, etc. The theoretical foundation was the papers of Ukrainian and foreign researchers on the examination of legalisation (laundering) of funds obtained by criminal means and improving the effectiveness of countering this phenomenon in Ukraine in the current conditions. The relevance of the study lies in the fact that for the first time the status and results involvement of Ukraine in intergovernmental bodies aimed at developing standards and promoting the effective application of legislative, regulatory, and operational measures in the fight against money laundering are investigated. It also provides data on official statistics for recent years regarding the exposure of legalisation by law enforcement agencies and general state financial control bodies. In addition, the interpretation of the concept of "legalisation (laundering) of proceeds from crime" has been further developed. The laundering of "dirty" money is a complex economic and legal phenomenon that has no borders. The use of international experience of state mechanisms for preventing and countering the legalisation (laundering) of proceeds from crime will provide an opportunity to develop a set of effective national levers of state regulatory influence to counteract this type of crime, and the procedure for interaction and coordination of subjects of countering the legalisation (laundering) of proceeds from crime, to increase the ability of the financial system of Ukraine in particular and public administration in general to resist the laundering of "dirty" funds

## Keywords:

money laundering; predicate act; acquisition of funds; subject of legalisation; latency; organised crime; MONEYVAL; FATF; EAG; financial transactions; counteraction

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## Introduction

The urgent issue that causes cognitive dissonance among the world community is the need for the total destruction of the shadow sector of the economy as a component of the origin of “dirty” funds and strengthening measures to counteract the legalisation of income of criminal origin.

The establishment of holistic and progressive ideas about the purpose, organisation, and functioning of the system of preventing and countering the legalisation (laundering) of corruption proceeds necessarily requires achieving a full understanding of the essence of the legalisation (laundering) of proceeds from crime, and the consequences of manifestations of this phenomenon [1].

According to the statistics of the official website of the Office of the General Prosecutor of Ukraine, for 12 months of 2018, the number of criminal offences in which pre-trial investigation was conducted by investigators of the prosecutor's office is 175 proceedings, in particular: 20 offences for which the pre-trial investigation was completed in the reporting period, 13 of which were sent to court with an indictment (Art. 291 of the CPC of Ukraine). 54 persons who committed them were identified, but the proceedings were stopped in the reporting period on the following grounds: under paragraph 2 of Art. 280 of the CPC of Ukraine in connection with the failure to establish the location of the suspect in 28 proceedings; under paragraph 3 of Art. 280 of the CPC of Ukraine to perform procedural actions within the framework of international cooperation in 5 materials of the pre-trial investigation. The amount of legalised funds and property is UAH 851.148.271. The property of UAH 38.680.000 was seized. In addition, 64 criminal offences preceded (predicate criminal offences) the legalisation (laundering) of proceeds from crime (Art. 209 of the Criminal Code of Ukraine), of which: 48 were in the field of official activity, 15 were an abuse of power or official position (Art. 364), 1 criminal offence regarding bribery (Art. 368-370), 32 other criminal offences committed in the sphere of official activity [2]. According to the results of 12 months of 2019, the number of criminal offences in which the pre-trial investigation was conducted by investigators of the prosecutor's office is 149 proceedings, in particular, 16 criminal offences for which the pre-trial investigation was completed in the reporting period, 12 of which were sent to the court with an indictment (Art. 291 of the CPC of Ukraine). The amount of income obtained by criminal means (under indictments) is 233,173 UAH. The proceeds obtained by criminal means in the amount of 219,730 UAH were seized. The number of persons who committed criminal offences is 49,

but the proceedings were stopped in the reporting period on the following grounds: in respect of 16 persons – under paragraph 2 of Art. 280 of the CPC of Ukraine – due to failure to establish the location of the suspect, in respect of 4 persons – under paragraph 3 of Art. 280 of the CPC of Ukraine to perform procedural actions within the framework of international cooperation. 47 criminal offences preceded (predicate criminal offences) the legalisation (laundering) of proceeds from crime (Art. 209 of the Criminal Code of Ukraine): abuse of power or official position (Art. 364) – 13, criminal offences regarding bribery (Art. 368-370) – 1, other criminal offences committed in the field of official activity – 31.15 persons who committed criminal offences as part of an organised group and a criminal organisation involved in the legalisation (laundering) of proceeds from crime were identified, including 6 with corrupt connections, 5 in government and administration bodies, 1 with interregional connections, 5 in the budget sector [3].

According to judicial statistics, the number of persons brought to criminal responsibility in 2018, court decisions against which entered into legal force, is 14 people, and in 2019 – 16 people [3].

In the world, according to experts of the International Monetary Fund, the annual volume of money laundering is almost 500 billion USD [4].

*The purpose of the study* is to investigate the concept, content, and essence of money laundering, and to characterise financial instruments for money laundering. The following tasks were performed to achieve this goal: the involvement and activities of Ukraine in international institutions developing measures to combat money laundering were analysed, the impact of individual factors on the spread of legalisation was considered, and appropriate proposals were developed to improve effective methods in combating money laundering.

Therewith, the intensification of global economic relations and the constant development and improvement of monetary circulation are factors indicating that a number of problems are not covered in scientific works, and the issues of combating the legalisation of “dirty” funds require further research [5].

## Results and Discussion

According to the resolution of the Plenum of the Supreme Court of Ukraine “On the practice of application by courts of legislation on criminal liability for the legalisation (laundering) of proceeds from crime” of April 15, 2005, No. 5, the legalisation (laundering) of proceeds from crime, in accordance with the paragraph e of Art. 1, Art. 2 of the Law of Ukraine “On preventing and countering the

legalisation (laundering) of proceeds from crime or the financing of terrorism” of November 28, 2002, No. 249-IV (249-15) and dispositions part 1 of Art. 209 of the Criminal Code of Ukraine (2341-14) is the commission of actions aimed at concealing or masking the illegal origin of funds or other property or possession of them, the rights to such funds or property, the sources of their origin, location, movement, and the acquisition, possession or use of funds or other property to give a legitimate appearance to the possession, their use or disposal, or actions aimed at concealing the sources of their origin, and the commission of a financial transaction with such funds or other property or the conclusion of an agreement in respect of them, provided that the person is aware that they were received by criminal means [6].

Money laundering is the act of concealing sources of income obtained in the course of criminal activity, and such income is given the characteristic of legality [7]. The best approach to combating money laundering is one that strikes a fair balance between protecting the financial system from money laundering and promoting financial inclusion [8]. Amendments to the legislation on preventing and countering the legalisation (laundering) of proceeds from crime, the financing of terrorism and the financing of the proliferation of weapons of mass destruction came into force on April 28, 2020. The history of the international introduction of measures to combat money laundering is briefly repeated below to understand the background of this crime. Thus, in the late 80s, this issue was raised in the UN Convention “On the suppression of illicit trafficking in narcotic drugs and psychotropic substances”, which began its operation in Ukraine on November 27, 1991. However, the document referred exclusively to the laundering of funds received from the sale of drugs. Subsequently, the explanation of the term “laundering” at the international level was recreated in the Council of Europe Convention “On laundering, search, seizure, and confiscation of proceeds from crime, and on the financing of terrorism” (effective in Ukraine since June 1, 2011) [9].

By the Law of Ukraine “On amendments to the Criminal and Criminal Procedure Codes of Ukraine” of January 16, 2003, No. 430-IV, to enter data in the Unified Register of pre-trial investigations under Art. 209 of the Criminal Code of Ukraine, the investigator had to establish the fact of committing a predicate act, and only then state the fact of money laundering obtained as a result of committing such an act [10].

The essence of transformations regarding compliance with Ukrainian legislation is briefly considered below. The Law of Ukraine “On prevent-

ing and countering the legalisation (laundering) of proceeds from crime, the financing of terrorism, and the financing of the proliferation of weapons of mass destruction” of December 6, 2019, No. 361-IX amends Art. 209 of the Criminal Code of Ukraine, aimed at improving and clarifying certain norms of legislation on preventing and countering the legalisation (laundering) of income, and coordinating and improving the provisions of changing legislative acts, ensuring the implementation of the provisions of new international standards in the field of countering money laundering [11]. This refers to the fact that in the wording of the amended article there is a reference to the commission of a predicate act as a mandatory element of the *corpus delicti*. Criminal proceedings under Art. 209 of the Criminal Code of Ukraine will be opened if “factual circumstances indicate that it (property) was obtained by criminal means”. In addition, there is no note that prescribes the signs of a predicate act. The new version of Art. 209 of the Criminal Code of Ukraine makes it extremely easier for law enforcement agencies to document illegal activities since it is not necessary to canonise the fact of committing a predicate act, but it will only be sufficient to certify the existence of factual circumstances that will prove that the property was obtained by criminal means, and the subjective side of the crime is reflected in the form of intent – illegal actions were committed by a person intentionally to give a legitimate appearance to the possession, use, disposal of such funds or property, their acquisition, or to hide the sources of their origin. The previous version of Art. 209 of the Criminal Code of Ukraine did not contain any mention of the subjective side.

Legalisation (laundering) of proceeds from crime is a typical conventional crime, that is, an act criminalised in connection with the entry of Ukraine into the list of parties to the relevant international legal acts [12].

Since Ukraine is a member of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, the new Law is aimed at implementing the recommendations indicated in the report of experts of this committee, provided based on the results of the 5th round of mutual assessment of Ukraine in the field of anti-money laundering/terrorist financing, approved at the 55<sup>th</sup> plenary session of MONEYVAL. The first progress report was submitted and approved in July 2019 at the 58<sup>th</sup> meeting of the MONEYVAL committee. The second report was approved as part of MONEYVAL's intersessional consultations in June 2020 and published on MONEYVAL's official website on August 28, 2020. It states that Ukraine was one of the first countries to report on its MONEYVAL

progress online under the so-called written review and decision-making procedure, which was applied in view of the COVID-19 pandemic and the restrictions imposed in this regard. According to the conclusions of the international experts of the FATF (group for the development of financial measures to combat money laundering, which issued the so-called "40 recommendations", which became the standard for anti-money laundering), Ukraine substantially implemented the norms on countering the financing of terrorism, and increased sanctions for violating the requirements of legislation in the field of countering money laundering and terrorist financing (hereinafter-AML/CFT), defining them as appropriate, convincing, and such that they will have a deterrent effect to the standards. According to Art. 32 "liability for violation of the requirements of legislation in the field of prevention and counteraction" of the Law of Ukraine "On prevention and counteraction to legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction" of December 6, 2019, No. 361-IX increased the maximum fine for violation of legislation in the field of AML/CFT to 135 million UAH (4.5 million EUR) and substantially increased the amount of fines for various violations in the field of AML/CFT (in 10, and in some cases even in 100 times). However, certain shortcomings remained: 1) only one measure of influence can be applied for one violation; 2) it is not clear how "twice the amount of benefits received by the subjects of primary financial monitoring as a result of the violation" will be determined.

Another international institution where Ukraine has been granted observer status since October 2004 is The Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG). The main area of the Working Group on Typologies and Countering the Financing of Terrorism and Organised Crime is to conduct typological studies to identify key threats and vulnerabilities inherent in the Eurasian space. Thus, in 2014, a typological study "Cybercrime and money laundering" was conducted in relation to the Ukrainian state, in 2013 – "Tax crimes and money laundering", in 2012 – "Vulnerabilities of operations with intangible assets (in particular, intellectual property) that allow them to be used for money laundering and terrorist financing" [13].

The public danger of spreading "dirty money" for the Ukrainian state lies in the high share of the cash component in the structure of the total money supply that is in circulation and, accordingly, the prospects of malefactors to legalise their illegal profits using cash. Both cash and non-cash funds serve as means of payment, which gives them a key

role. In many countries, the amount of cash is clearly limited by law, and its amount in the process of performing various operations should not exceed the threshold (amount) determined by law. It is clear that the turnover of non-cash funds is easier to control than the turnover of cash. Funds transferred from account to account can be controlled by bank institutions, regulatory and law enforcement agencies, but cash is the most convenient due to the lack of strong legal control over them. In fact, legalisation is a process by which the funds received merge with the legal circulation of money, and the real sources and channels of receipt of these funds are scrupulously hidden from external views [14].

Notably, the composition of the crime of Art. 209 of the Criminal Code of Ukraine differs from others in its unpredictability, latency, and the use of a substantial number of financial transactions. Unpredictability is manifested in the use of various non-causal ways to achieve criminal goals. Offenders are quite adept at hiding traces of illegal actions – among the mass of banking operations conducted, it is quite difficult to identify the initial source of funds received. Notably, some criminal methods by which funds were obtained do not affect the qualification of a crime under Art. 209 of the Criminal Code of Ukraine, but they create so-called "obstacles" for rapid investigation by law enforcement agencies. Legalisation contributes to the growth of organised crime and its penetration into the legal economy, and in addition, it is most often practiced by organised criminal groups, which, accordingly, increases its latency, since such groups have a well-functioning apparatus for neutralising social control, which ensures the effectiveness of committing criminal offences. Professor V.V. Sukhonos [15] rightly notes that such crimes are committed mainly by organised groups operating in the cross-border space. They criminally pump resources out of the Ukrainian economy and launder them abroad, in offshore zones. Subsequently, the capital is returned to Ukraine, but the criminals are already foreign investors [15].

The high latency of legalisation is due to a number of reasons. This is mainly due to the fact that there is no aggrieved party that could report harm to interests [16]. Detection of crimes and their prevention in the financial and banking system, in foreign economic activity, in the field of computer information, fuel, and energy complex, agro-industrial complex, in the market of metals and minerals is exceedingly difficult. The process of criminalisation of the credit-financial system is directly related to the lack of effective legislation and control over banking operations by regulatory organisations and, especially, law enforcement agencies. In the

context of confusion in the accounting and control system, it becomes difficult or even impossible to establish channels and methods of theft of state and other property. Therefore, it is logical that it is quite difficult for one state structure to overcome this phenomenon, which is why it is necessary to combine the intellectual and organisational efforts of many state institutions that can not only expose, but also stop illegal financial transactions and disguising the criminal origin of funds or other property. The reason for the increase in latency is also the growing corruption. Corruption and money laundering are inextricably linked. Corruption offences such as illegal profit or theft of public funds are usually committed for the purpose of obtaining private benefits. Money laundering is the process of concealing illegal income obtained as a result of criminal activities.

The implementation of financial transactions. According to the risk criteria for legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction, approved by the order of the Ministry of Finance of Ukraine "On approval of risk criteria for legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction" dated July 8, 2016, No. 584, a financial transaction has the risk of legalisation (laundering) of proceeds from crime, if it has a confusing or unusual character, or it is a set of related financial transactions that do not have a clear economic meaning or legitimate purpose, and also, in case of detection of the facts of repeated financial transactions, the nature of which gives grounds to believe that the purpose of their implementation is to avoid the procedures of mandatory financial monitoring or identification (verification) provided for by law [17]. The National Bank of Ukraine (hereinafter referred to as the NBU) regularly checks financial monitoring and compliance with the requirements of currency legislation concerning the conduct of financial transactions by clients of banks/non-bank financial institutions, the nature or consequences of which give grounds to believe that they may be related to the withdrawal of capital, legalisation of criminal proceeds, conversion (transfer) of non-cash funds into cash, implementation of fictitious entrepreneurship, tax evasion, etc., which may indicate organised criminal activity. This information is sent to law enforcement agencies. Thus, in 2018, the NBU sent to law enforcement officers information about suspicious transactions of clients of 50 financial institutions [18], in 2019 – the NBU provided law enforcement officers with 24 letters with information about suspicious financial transactions of cli-

ents of banks and non – bank financial institutions totalling almost 29.2 billion UAH, 98.0 million USD; currency supervision – 18 letters about large-scale transactions of bank clients in relation to financial transactions totalling about 1.4 billion UAH, 1.12 billion US dollars, 51.1 million euros, 69.6 million Russian rubles, 48 million zlotys. Therewith, during 2019, 4 reports of suspicious financial transactions were sent to the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU) [18]. In the first quarter of 2020, the NBU continued to provide law enforcement agencies with information that may indicate organised criminal activity. Thus, as of March 31, 2020, 6 letters were sent to law enforcement agencies with information about suspicious financial transactions of clients totalling over 13.5 billion UAH; currency supervision – 3 letters about large-scale transactions totalling almost 111.2 million USD, 13.6 million EUR; 2 notifications to the NABU [19]. In the second quarter of 2020, as of June 30, 2020, 4 letters were sent with information about suspicious financial transactions totalling about 4.6 billion UAH and 1 notification to the NABU totalling about 24.9 million USD [20]. In the third quarter of 2020, as of September 30, 2020, 5 letters were sent with information about suspicious financial transactions of bank clients totalling over 7.36 billion UAH and about 24.9 million USD, and 5 letters were sent on currency supervision issues that may indicate organised criminal activities and large-scale operations of bank clients totalling over 133 million USD and 0.84 million EUR [21].

Therefore, it can be argued that the phenomena of money laundering do not occur spontaneously. Ultimately, groups of people who have experience in this activity and are closely connected with financial institutions are involved in legalisation. Many financial transactions are used to mask traces of the illegal origin of income by changing the owners of funds, their physical movement, and withdrawing them in cash. It is known that criminals tend to keep their assets in liquid forms. The effectiveness of the system of countering the legalisation (laundering) of proceeds from crime can be achieved only with the coordinated functioning of the criminal-legal control mechanism and the financial monitoring mechanism.

The scientific originality of the study lies in the need to conduct a theoretical and practical analysis on countering the legalisation (laundering) of proceeds from crime in Ukraine.

## Conclusions

The analysis of current practices in Ukraine regarding the prevention, investigation, and punishment of crimes related to the legalisation of illegal income

shows that there are issues that will lead to an effective fight against these crimes on the territory of Ukraine.

Thus, given the above, it is necessary to perform the following actions:

1. Conduct training of specialists who will master various technologies for investigating crimes related to the legalisation (laundering) of illegal income, in particular, the ability to search and identify funds located in offshore zones according to the developed algorithm.

2. Borrow the best practices of interdepartmental cooperation on tools for countering the commission of economic crimes and money laundering from such crimes.

3. Optimise the interaction between bodies of the general state and special bodies that conduct financial control.

4. Bring the national financial system closer to international legal standards of transparency.

## References

- [1] Benson, K. (2020). *Lawyers and the Proceeds of Crime. Money laundering and the anti-money laundering regime*. London: Routledge.
- [2] Esoimemec, E.E. (2020). Balancing anti-money laundering measures and financial inclusion. *Journal of Money Laundering Control*, 23(1), 64-76.
- [3] Frolov, S. (2019). Criminal-legal and criminological characteristics of legalization (laundering) of proceeds from crime. *Legal Bulletin*, 4, 130-136.
- [4] Convention for Europe "On money laundering, search, seizure and confiscation of proceeds of crime and on the financing of terrorism". (2011, June). Retrieved from [https://zakon.rada.gov.ua/laws/show/994\\_948#Text](https://zakon.rada.gov.ua/laws/show/994_948#Text)
- [5] Krainyk, H.S., & Zatochna, V.O. (2019). Problematic issues of criminal liability for legalization (laundering) of proceeds from crime. *Bulletin of Luhansk State University of Internal Affairs named after E.A. Didorenko*, 1(85), 139-147.
- [6] Luhina, N.A., & Omelian, M.V. (2019). Criminological characteristics of legalization (laundering) of proceeds from crime. *Irpın Legal Journal*, 2, 158-165.
- [7] Lysenko, V.V. (2019). Situations that arise at the time of the opening of criminal proceedings for the legalization of proceeds of crime. *Bulletin of Luhansk State University of Internal Affairs named after E.A. Didorenko*, 3(87), 280-290.
- [8] Order of the Ministry of Finance of Ukraine "On Approval of the Criteria for the Risk of Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction" No. 584. (2016, July). Retrieved from [http://search.ligazakon.ua/l\\_doc2.nsf/link1/RE29177.html](http://search.ligazakon.ua/l_doc2.nsf/link1/RE29177.html)
- [9] In the first quarter of 2020, the National Bank sent information to law enforcement agencies about suspicious transactions of clients of 7 banks and 2 non-bank financial institutions. (2020). Retrieved from <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-i-kvartali-2020-roku-napraviv-pravoohorontsyam-informatsiyupro-pidozrili-operatsiyi-kliiyentiv-7-bankiv-ta-2-nebankivskih-finansovih-ustanov>
- [10] In the second quarter of 2020, the National Bank sent law enforcement officers information on suspicious transactions of customers of 3 banks and 2 non-bank financial institutions. (2020). Retrieved from <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-ii-kvartali-2020-roku-napraviv-pravoohorontsyam-informatsiyu-pro-pidozrili-operatsiyikliiyentiv-3-bankiv-ta-2-nebankivskih-finansovih-ustanov>
- [11] In the third quarter, the National Bank sent law enforcement officers information about suspicious transactions of clients of 7 banks. (2020). Retrieved from <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-iii-kvartali-napraviv-pravoohorontsyam-informatsiyu-propidozrili-operatsiyi-kliiyentiv-7-bankiv>
- [12] In 2019, the National Bank sent law enforcement officers information on suspicious transactions of clients of 35 banks and 2 non-bank financial institutions. (2020). Retrieved from <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-ikvartali-2020-roku-napraviv-pravoohorontsyam-informatsiyu-propidozrili-operatsiyi-kliiyentiv-7-bankiv-ta-2-nebankivskih-finansovih-ustanov>
- [13] Shevchenko, M.V. (2018). The essence of money laundering and the prerequisites for the introduction of measures to prevent and combat the manifestations of this phenomenon. *Bulletin of Zaporizhia National University*, 4, 92-100.
- [14] Starynskyi, M.V., & Zaichenko, Yu.S. (2019). Problematic aspects of state regulation in the field of combating legalization (laundering) of illegally obtained income. *Legal Horizons*, 16(29), 34-39.
- [15] Statistical information. (2020). Retrieved from <https://www.gp.gov.ua/ua/1stat>
- [16] Stolitnii, A.V., Shmalenia, S.V., Turkot, M.S., & Snihar, M.I. (2020). *Criminal Code of Ukraine with article-by-article materials of the practice of the Constitutional Court of Ukraine, the Supreme Court of Ukraine and the Supreme Court, the High Specialized Court of Ukraine for Civil and Criminal Cases as of November 14*. Kyiv: Norma Prava.

- [17] Judicial statistics. Comparative tables on the administration of justice. (2020). Retrieved from [https://court.gov.ua/inshe/sudova\\_statystyka](https://court.gov.ua/inshe/sudova_statystyka)
- [18] Sukhonos, V.V. (2012). Legalization of criminal proceeds in the banking sector and the fight against it. *Legal Bulletin of the Ukrainian Academy of Banking*, 1(6), 149-153.
- [19] EAG typological reports. (2020). Retrieved from <https://eurasiangroup.org/ru/eag-typology-reports>.
- [20] Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine" No. 430-IV. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/430-15#Text>
- [21] Law of Ukraine "On prevention and counteraction to legalization (laundering) of proceeds from crime, terrorist financing and financing of proliferation of weapons of mass destruction" No. 361-IX. (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/361-20#Text>

### Список використаних джерел

- [1] Benson K. Lawyers and the Proceeds of Crime. Money laundering and the anti-money laundering regime. London: Routledge, 2020. 218 p.
- [2] Esoimemec E.E. Balancing anti-money laundering measures and financial inclusion. *Journal of Money Laundering Control*. 2020. Vol. 23. Issue 1. P. 64–76.
- [3] Фролов С. Кримінально-правова та кримінологічна характеристика легалізації (відмивання) доходів, одержаних злочинним шляхом. *Юридичний вісник*. 2019. № 4. С. 130–136.
- [4] Про відмивання, пошук, арешт та конфіскацію доходів, одержаних злочинним шляхом, та про фінансування тероризму: конвенція Ради Європи від 1 червня 2011 р. URL: [https://zakon.rada.gov.ua/laws/show/994\\_948#Text](https://zakon.rada.gov.ua/laws/show/994_948#Text).
- [5] Крайник Г.С., Заточна В.О. Проблемні питання кримінальної відповідальності за легалізацію (відмивання) доходів, одержаних злочинним шляхом. *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка*. 2019. Вип. 1, № 85. С. 139–147.
- [6] Лугіна Н.А., Омельян М.В. Кримінологічна характеристика легалізації (відмивання) доходів, одержаних злочинним шляхом. *Ірпінський юридичний часопис*. 2019. № 2. С. 158–165.
- [7] Лисенко В.В. Ситуації, що складаються на момент відкриття кримінального провадження щодо легалізації доходів злочинного походження. *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка*. 2019. Вип. 3. № 87. С. 280–290.
- [8] Про затвердження Критеріїв ризику легалізації (відмивання) доходів, одержаних злочинним шляхом, фінансування тероризму та фінансування розповсюдження зброї масового знищення: наказ Міністерства фінансів України від 8 липня 2016 р. № 584. URL: [http://search.ligazakon.ua/l\\_doc2.nsf/link1/RE29177.html](http://search.ligazakon.ua/l_doc2.nsf/link1/RE29177.html).
- [9] Національний банк у I кварталі 2020 року направив правоохоронцям інформацію про підозрілі операції клієнтів 7 банків та 2 небанківських фінансових установ. URL: <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-i-kvartali-2020-roku-napraviv-pravoohorontsyam-informatsiyupro-pidozrili-operatsiyi-kliyentiv-7-bankiv-ta-2-nebankivskih-finansovih-ustanov>.
- [10] Національний банк у II кварталі 2020 року направив правоохоронцям інформацію про підозрілі операції клієнтів 3 банків та 2 небанківських фінансових установ. URL: <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-ii-kvartali-2020-roku-napraviv-pravoohorontsyaminformatsiyu-pro-pidozrili-operatsiyi-kliyentiv-3-bankiv-ta-2-nebankivskih-finansovih-ustanov>.
- [11] Національний банк у III кварталі направив правоохоронцям інформацію про підозрілі операції клієнтів 7 банків. URL: <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-iii-kvartalinapraviv-pravoohorontsyam-informatsiyu-pro-pidozrili-operatsiyi-kliyentiv-7-bankiv>.
- [12] Національний банк за 2019 рік направив правоохоронцям інформацію про підозрілі операції клієнтів 35 банків та 2 небанківських фінансових установ. URL: <https://bank.gov.ua/ua/news/all/natsionalniy-bank-u-i-kvartali-2020-roku-napraviv-pravoohorontsyam-informatsiyu-pro-pidozrili-operatsiyikliyentiv-7-bankiv-ta-2-nebankivskih-finansovih-ustanov>.
- [13] Шевченко М.В. Сутність відмивання доходів, одержаних злочинним шляхом, та передумови запровадження заходів запобігання та протидії проявам цього явища. *Вісник Запорізького національного університету*. 2018. № 4. С. 92–100.
- [14] Старинський М.В., Зайченко Ю.С. Проблемні аспекти державного регулювання у сфері протидії легалізації (відмивання) доходів отриманих незаконним шляхом. *Правові горизонти*. 2019. Вип. 16. № 29. С. 34–39.
- [15] Статистична інформація. Офіс Генерального Прокурора. URL: <https://www.gp.gov.ua/ua/1stat>.

- [16] Кримінальний кодекс України з постатейними матеріалами практики Конституційного Суду України, Верховного Суду України та Верховного Суду, Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ станом на 14 листопада 2020 року: наук.-практ. посіб. / уклад.: А. В. Столітній, С. В. Шмаленя, М. С. Туркот, М. І. Снігар ; за заг. ред. А. В. Столітнього. Київ: Норма права, 2020. 1224 с.
- [17] Судова статистика. Порівняльні таблиці щодо здійснення правосуддя. URL: [https://court.gov.ua/inshe/sudova\\_statystyka/](https://court.gov.ua/inshe/sudova_statystyka/).
- [18] Сухонос В. В. Легалізація злочинних доходів у банківській сфері та боротьба з нею. *Правовий вісник Української академії банківської справи*. 2012. Вип. 1. № 6. С. 149–153.
- [19] Типологические отчеты ЕАГ. 2020. URL: <https://eurasiangroup.org/ru/eag-typology-reports>.
- [20] Про внесення змін до Кримінального та Кримінально-процесуального кодексів України: Закон України від 16 січня 2003 р. № 430-IV. URL: <https://zakon.rada.gov.ua/laws/show/430-15#Text>.
- [21] Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдження зброї масового знищення: Закон України від 6 грудня 2019 р. № 361-IX. URL: <https://zakon.rada.gov.ua/laws/show/361-20#Text>

## Проблемні питання легалізації (відмивання) доходів, одержаних злочинним шляхом, і вдосконалення протидії цьому явищу в Україні

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### Анотація

На підставі аналізу чинного законодавства, фахової літератури та з огляду на всесвітній досвід схарактеризувати загальні й проблемні питання легалізації (відмивання) доходів, одержаних злочинним шляхом, в Україні та запропонувати шляхи їх вирішення для мінімізації латентності легалізації злочинних доходів. Методологія. Методологічну основу дослідження становлять загальнонаукові та спеціальні методи наукового пізнання соціально-правових явищ і процесів, зокрема: історико-правовий, діалектичний, формально-логічний, системно-структурний, статистичний тощо. Теоретичним підґрунтям цієї публікації стали праці вітчизняних та іноземних учених щодо питань дослідження легалізації (відмивання) коштів, одержаних злочинним шляхом, і вдосконалення ефективності протидії цьому явищу в Україні в умовах сьогодення. Наукова новизна публікації полягає в тому, що вперше досліджено статус і результати участі України в міжурядових органах, які мають за мету розроблення стандартів і сприяння ефективному застосуванню законодавчих, регуляторних та оперативних заходів у боротьбі з відмиванням грошей. Також наведено дані офіційної статистики за останні роки щодо викриття легалізації правоохоронними органами й органами загального державного фінансового контролю. Окрім цього, набуло подальшого розвитку трактування поняття «легалізація (відмивання) доходів, одержаних злочинним шляхом». Висновки. Відмивання «брудних» грошей є складним економіко-правовим явищем, що не має кордонів. Використання міжнародного досвіду державних механізмів запобігання та протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, надасть можливість розробити комплекс ефективних національних важелів державного регуляторного впливу з протидії цьому виду злочинності, а також порядок взаємодії та координації суб'єктів протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, підвищити здатність фінансової системи України зокрема та державного управління загалом протистояти відмиванню «брудних» коштів

### Ключові слова:

легалізація доходів; предикатне діяння; набуття коштів; предмет легалізації; латентність; організована злочинність; MONEYVAL; FATF; ЄАГ; фінансові операції; протидія

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# Modern Capabilities of Forensic Examinations in the Investigation of Unauthorised Interference in the Operation of Computers, Automated Systems, Computer Networks or Telecommunication Networks

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## Abstract

The purpose of the study is to highlight the possibilities of using forensic examinations in criminal proceedings regarding unauthorised interference in the operation of computers, automated systems, computer or telecommunication networks. The study applies empirical and theoretical research methods. Empirical methods include a survey of employees of operational units of the cyber police and forensic experts of the Ministry of Internal Affairs system, analysis of data from the open part of the Unified State Register of Court Decisions. Theoretical methods include analysis and synthesis, analogy, comparison, and generalisation. A methodology for investigating the trace picture of a crime under Art. 361 of the Criminal Code of Ukraine is proposed, using the capabilities of forensic expert studies of various types to fix and examine physical traces of a crime, and the appointment of a comprehensive forensic examination of computer equipment, software, telecommunications systems, and their means. The necessity of improving regulatory acts in accordance with the methodology of computer equipment and software products research is substantiated. The results of forensic research are a key element of the evidence base of the prosecution in criminal proceedings regarding unauthorised interference in the operation of computers, automated systems, computer or telecommunication networks. The use of special knowledge in the pre-trial investigation of cybercrime is an integral part of achieving the tasks of criminal proceedings. Regulatory and legal support of forensic expert activities to meet the needs of pre-trial investigation must be improved based on modern leading methods of conducting expert research

## Keywords:

computer; automated system; computer network; telecommunication network; unauthorised interference in the operation of computers; cybercrime; forensic examination

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## Introduction

Activation of the processes of integration of information technologies into public relations is one of the most substantial indicators of expanding the opportunities for self-realisation of a citizen in the legal field of the state. This is provided by the rapid informatisation of both the private and public sectors of public life since most of the functions of enterprises, institutions, or organisations are performed using computers, computer systems or networks.

The development of information technologies expands the range of possibilities of cybercrime, provides a direct possibility of effective protection against them. Now the functioning of information and computer systems is becoming increasingly important for the proper functioning of the state. Therefore, unauthorised interference in the operation of computers, automated systems, computer networks provokes and deepens public crisis phenomena, weakens the image of the state on the world stage, negatively affects economic processes, hinders the establishment of a constructive dialogue between representatives of the state power and the public, destroys the foundations of the development of a democratic state governed by the rule of law.

None of the world's information systems had and does not have absolute immunity from cyber attacks and outside interference. Only the ways in which they are committed and the attitude of the state and society to such incidents change.

In this regard, ensuring an effective and high-quality investigation of crimes in the field of information technologies, the technical aspect of which is not yet a core basis in the system of training personnel for pre-trial investigation bodies, requires investigating these issues at an in-depth scientific level. However, considering the needs of the investigative practice and the constant hyperactive development of computer technologies, there is still an urgent need to regularly improve the system of knowledge and skills of investigators regarding the specific features of working with digital information during criminal proceedings, in particular regarding its fixation, seizure, and further research during forensic examinations.

The purpose of the study is to highlight the possibilities of using forensic examinations in criminal proceedings regarding unauthorised interference in the operation of computers, automated systems, computer or telecommunication networks.

It is necessary to solve the following tasks to reach the objective:

- conduct forensic characterisation of the collection of evidence, in particular in digital (electronic) form, their seizure and research within the framework of forensic expert research in the investigation of unauthorised interference in the operation

of computers, automated systems, computer or telecommunication networks;

- determine the essence and features of forensic expert research of material and non-material (digital) components of the evidence base, coverage of methods of complex search and fixation of material (conventional) and digital (electronic) evidence;

- based on the analysis of existing practice, form practical recommendations for optimising and improving the quality of research on the traces of a crime under Art. 361 of the Criminal Code of Ukraine.

## Results and Discussion

Countering crimes in the use of computer technologies requires active implementation and application of a set of new methods and tools for effective pre-trial investigation. One of the most common crimes in the field of information technology is unauthorised interference in the operation of computers, automated systems, computer or telecommunication networks under Art. 361 of the Criminal Code of Ukraine.

According to the statistics of the National Police of Ukraine, in 2017, as a result of massive cyber attacks of the PetyaA computer virus on Ukrainian infrastructure, the number of registered criminal offences with the above qualification was 2186 against 592 in 2016. Therewith, the indicators of registered criminal offences under Art. 361 of the Criminal Code of Ukraine over the past two years remain at a fairly high level, considering statistical data. Thus, during the eleven months of 2020, 1,174 criminal offences were registered, which is comparable to 1,289 criminal offences in 2019 [1].

According to its content, Art. 361 of the Criminal Code of Ukraine provides for unauthorised interference in the operation of automated electronic computers, their systems, or computer networks, which led to the distortion or destruction of computer information or carriers of such information, and the spread of a computer virus through the use of software and technical means intended for unauthorised entry into these machines, systems, or computer networks and capable of causing distortion or destruction of computer information or carriers of such information [2].

Experts in the field of informatisation and communications claim that cyber attacks, in particular, fall under the sanction of art. 361 of the Criminal Code of Ukraine, implemented by malefactors to violate the confidentiality, integrity, or availability of public information resources (or private ones) stored, processed, and circulated in a computer/information-telecommunication system. For this purpose, they mainly use the vulnerabilities of such systems, that is, their inability to resist the implementation of a certain threat or a set of threats [3].

It is necessary to use typical investigative situations of the initial stage of the investigation to outline the range of expert studies that allow covering and proving the fact of a crime under Art. 361 of the Criminal Code of Ukraine, namely:

- committing a crime by direct (physical) access of an attacker to the hardware of a computer, connecting to a computer network through connections on electric switchboard or wired lines, which are conducted, in particular, by secret entry into the premises;
- commission of a crime by remote access to a computer, computer or automated system through other computers using telecommunications or wireless networks.

The conclusions of forensic experts in the vast majority of criminal proceedings and other types of legal proceedings play the role of the most important evidence, without which it is almost impossible to resolve a certain case [4]. The effectiveness of the investigation, according to these situations, provides for the appointment and conduct of forensic examinations – investigations based on special knowledge in the field of science, technology, art, crafts of objects, phenomena, and processes to provide an assertion on issues that are or will be the subject of judicial review [5], depending on the specific circumstances of the initial stage of the investigation, tracological, biological, and main in the process of proof – computer-technical types of forensic examinations are appointed.

According to these investigative situations, to examine the traces of illegal access to the hardware of a computer, or a computer network, it is necessary to examine the traces of criminal actions that remained on objects and their surfaces, analyse the situation of the scene: to examine the places of the possible connection to the wired lines that lead to the premise, the state of connections in electric switchboards, the intactness of door locks, the presence of traces of hands, shoes (feet), other parts of the body, hair, smell traces in possible places of physical contact of the criminal with the elements of the crime scene, etc. The presence of such traces of crime must be in the centre of attention: traces of hands (papillary patterns), traces of shoes (feet) that the offender left during access to computer equipment, or traces of breaking locks, doors, seals on electric switchboards, etc.

Sharing the opinion of O.M. Dufenyuk [6], for the methodological support of forensic expert activity in criminal proceedings, the priority is algorithmisation of expert actions, which will allow for obtaining more accurate and reliable results with fewer resources and time.

First of all, the need to conduct a tracological examination of the identified traces is established, which is aimed at identifying or determining the

generic (group) belonging of individually defined objects by materially fixed traces, in particular by the reflections of their trace-forming surfaces; diagnose the properties, condition of the object; establish the mechanism of trace formation (situational tasks), etc.

Tasks and possibilities of forensic examinations in criminal proceedings on unauthorised interference in the operation of computers, automated systems, and computer or telecommunication networks are considered below. The subject of the investigation of tracological examination during the investigation of the crime under Art. 361 of the Criminal Code of Ukraine, there are two main groups of traces: 1) human traces (traces of the human skin, shoes, clothing (gloves, etc.); 2) traces of tools (traces of tampering, traces on mechanical locks, control devices, etc.). This list is not exhaustive, it is the basis for forensic knowledge of the situation by the investigator, so to identify other traces, it is recommended to inspect the scene with the involvement of a criminalist, expert.

The task of fingerprinting is to establish a person's identity based on a set of common and individual features reflected in the handprint. Instruction on the appointment and conduct of forensic examinations and expert research, approved by Order No. 53/5 of the Ministry of Justice of Ukraine of October 8, 1998, (as amended by the order of the Ministry of Justice of Ukraine of December 26, 2012, № 1950/5) (hereinafter referred to as the Order of the Ministry of Justice No. 53/5), defines a typical list of questions that are put for the expert's decision: whether there are traces of hands on the object; whether these traces are suitable for identification; whether the traces of hands left by a specific (one) person; whether the traces left by one person in different places; what features do the hands of the person who left the traces (absence of fingers, presence of scars, etc.); as a result of what action the trace was left (grabbing, touching, etc.); whether there were traces on the surface of a particular object; whether there are signs of transfer of the traces from one surface to another, etc. [7].

In the analysed category of criminal proceedings, tracological examinations are often appointed to examine shoe traces. The following questions can be asked to solve this expert study: whether there are traces of shoes on this surface (this object) and whether these traces are suitable for identifying shoes; whether the traces are left by shoes seized from a certain person; whether the same shoe leaves traces collected from different places; what kind of shoes leave these traces, what are its characteristics, distinguishing features (size, degree of wear, etc.); what is the approximate height of the person who left the traces, etc. [7].

The diagnostic task of such a study also provides an opportunity to determine the features of a person's movement, the size of their shoes, approximate height, etc. The investigator must inform the expert about the facts of wearing or repairing the shoes provided for research after the crime and before the appointment of the expert examination to ensure the objectivity of the study.

Expert examination of tampering traces allows for identifying a specific instance or type (features) of the used tool based on the traces of its direct action. This type of tracological examination solves issues related to the establishment of the mechanism (method) of tampering, the area in which the interference was broken (from the inside or outside), the type of product that left a trace, the possible method of its manufacture, etc.

The expert is asked the following questions to perform these tasks: whether tampering or another action was committed by this tool; what kind of tool was used to commit tampering; how the object was damaged (by cutting, sawing, drilling, etc.); what kind of tool damaged the object; whether traces of tampering, collected from different places of events, were left by the same tool [7].

The expert is preferably provided with an object with traces of tampering to conduct this examination. Sometimes it is recommended to provide casts from three-dimensional objects. The realities of practical investigative activity indicate that if there is no certainty that the seized tools correspond to the detected traces of tampering, it is necessary to inform the expert and ask questions about the method and possible auxiliary elements for the committed tampering. A separate investigative situation related to secret entry into a room with computer equipment consists of de-energising alarm systems and surveillance cameras due to blocking their signal by damaging cables.

In this case, the tracological examination of cables and tools provides an opportunity to resolve the following questions: how the cable was damaged (by cutting, sawing, snapping, etc.); whether this tool damaged the cable (the part of cable with damage trace is investigated); one or more tools damaged the cable (the part of cable with damage trace is investigated); whether the cable fragments collected during (separate) inspections of the crime scene were one (dates of procedural actions) [7].

The objects of expertise of locking and safety (control) devices (means) are locks and other locking devices, seals, and control devices (means). The task of this study is to establish the fact and method of unlocking (braking) the device, the type of object used for this purpose, and its identification. In the case of examining seals, it is possible to identify the seal vice, the fact of re-glueing paper control tools,

etc. When examining locks, the expert, if possible, is sent lock picks and other items that could have been used to unlock or break the lock, and all the keys to these locks.

Tracological examination of locks provides answers to the following questions: whether the lock is in good condition; what is the cause of the malfunction of the lock; whether there are traces of foreign objects on the surfaces of the lock; if so, what objects (tools) left them; whether the lock was unlocked with a lock pick, picked, or fake key; whether it is possible to unlock the lock with the provided key (lock pick); how (the picking of the provided lock was conducted) the lock was unlocked; whether the provided lock was picked by the provided tool, etc. [7].

As part of the tracological study of seals, considering the investigative situation of the investigation of the crime under Art. 361 of the Criminal Code of Ukraine, it is necessary to determine the following questions: whether the seal was compressed with these sealing vices; whether the seals were compressed with the same sealing vice; whether the seal was opened and re-compressed after it was compressed with a sealing vice; how and with what tool the seal was opened and re-compressed; whether it is possible to extract the material used for sealing (wire, twine, cord) from this seal, without damaging it; whether the seal was opened with the provided tools [7].

The expert must, in addition to the seal, provide the seal vice with which it was supposed to be sealed, or experimental seals compressed by this vice to establish the fact of opening the seal. It should be considered that during the examination in the process of conducting expert experiments, the expert can use over 10 non-compressed seals, similar to the investigated ones, and the same number of samples of materials (wire, twine, cord) that were used during sealing.

The analysis of investigative practice shows that in criminal proceedings under Art. 361 of the Criminal Code of Ukraine, there are cases in which accomplices of the main perpetrators of a crime enter the premises (Art. 162 of the Criminal Code of Ukraine) with computer equipment or a network in a rather primitive way – by breaking the glass of a window frame, plastic partitions, etc. In such cases, the subjects of the investigation should separately consider the possibilities of tracological expertise to establish the whole in parts.

This type of research provides an opportunity to determine whether the parts of the object (found fragments, pieces, etc.) have a common line (surface) of separation, that is, whether they previously formed a single whole. The expert can be faced with the following questions: whether the found parts

formed a single whole; how its parts were separated from the object; to what type does the object, part of which was removed from the scene belong [7].

All found parts that previously may have formed one item are submitted for examination. The list of issues resolved by forensic examinations, defined by the Order of the Ministry of Justice No. 53/5, is indicative and during the investigation of unauthorised interference in the operation of computers, automated systems, computer or telecommunication networks may require clarification or adjustment on the recommendations of a specialist or expert, depending on the specific circumstances of the case.

Increased attention during the recording of criminal actions under Art. 361 of the Criminal Code of Ukraine should be focused on the possibilities of examination of biological traces of a person, which are recorded during an investigative examination.

In this regard, during the investigation of a crime under Art. 361 of the Criminal Code of Ukraine, a forensic medical examination of material evidence is typical. Depending on the type of physical evidence of biological origin, the forensic medical examination is conducted by a separate specialised department of the bureau of forensic medical examinations, in accordance with the rules for conducting certain types of examinations approved by the order of the Ministry of Health of Ukraine No. 6 of January 17, 1995, (hereinafter referred to as the order of the Ministry of Health No. 6) [8].

Considering the typical investigative situations of the initial stage of the investigation of a crime under Art. 361 of the Criminal Code of Ukraine, physical evidence of biological origin includes: traces of blood, hair, skin epithelium, saliva, tear fluid, etc. The algorithm for investigating stated physical evidence covers, in particular, detection, description, photographing, extraction, and packaging of traces of biological origin; establishing the presence of blood, hair, other biological fluids and tissues (saliva, tear fluid, etc.) in the collected expert materials; establishing the specific, sexual, group affiliation of traces (in particular, according to isoserological and immune systems); excluding or establishing the affiliation of traces of biological origin to a specific person (the importance of molecular-genetic methods) [9].

The study of traces of biological origin is conducted in accordance with the methodology approved by the order of the Ministry of Health No. 6. The list of indicative questions that are put to the decision of a forensic medical examination is not fixed at the regulatory level.

However, the results of cooperation between investigators and forensic medical experts in the investigation of crimes allowed forming typical

questions that are put to the decision of the forensic medical examination of material evidence.

Thus, forensic medical (immunological) examination of blood traces during the investigation of a crime under Art. 361 of the Criminal Code of Ukraine should answer the following questions: whether there is blood on the object; blood type; gender of the person it belongs to; whether that person is an adult or a child; what is the regional longevity of blood stain; what is the prescription of blood spots; whether the origin of blood from a particular person is possible [10].

Analysing the investigative practice, it was established that cases of collecting and analysing of hair found in places of physical access to the hardware of computers or servers is not uncommon. Such objects are sent for forensic medical (cytological) examination. In the departments of forensic cytology, studies are conducted to establish the presence of human tissue cells in traces and physical evidence, determining their specific, group, gender, and organ-tissue affiliation.

The study of hair is conducted during a forensic medical (cytological) examination, which asks the following questions: whether the provided object is hair; if so, whether it belongs to a person or animal; from what part of the body it originates; whether there is mechanical damage to it; what is the method of hair removal (dropped, torn); whether the hair has signs of chemical or thermal effects; whether there are diseases of the hair; what is its gender and individual affiliation, etc.

Comparative cytological examination based on the total characteristics establishes the similarity or dissimilarity of hair, and not its identity, since the hairs from the head of one person may differ, but the hair of different people may have the same characteristics [11]. Considering this feature, a complex of studies is conducted, which includes one of the variants of DNA analysis-polymorphism, which determines the source of hair origin. This study has the following names: DNA examination, molecular-genetic or genotyposcopic examination. The results of the molecular-genetic examination of mixed biological traces distinguish them and determine by individual characteristics the specific individuals who left them on the subject provided for research [9].

The possibility of using the examination of computer equipment and software products (in the forensic literature, the name "computer-technical expertise" is more common) and the examination of telecommunications systems and means are important while investigating criminal proceedings under Art. 361 of the Criminal Code of Ukraine. These studies are provided for in paragraphs 13 and 14 of the Order of the Ministry of Justice No. 53/5.

During the analysis of scientific sources, sub-species of expertise of computer equipment and software products are established:

- hardware examination (analysis of computer technical means);
- software examination (analysis of algorithms involved in the device and ensuring its performance);
- Information examination (installation, analysis of files operated by the user, evaluation of data functionality, their purpose, identification of belonging to the type of operational information).

The tasks of examination of computer equipment and software products are: establishing the working condition of computer-technical means; establishing circumstances related to the use of computer-technical means, information, and software; identifying information and software contained on the computer; establishing compliance of software products with certain versions or requirements for its development.

The expertise of telecommunications systems and tools was formed in the process of improving and deepening the methods of computer-technical expertise. This was due to the rapid development of types and forms of data transfer between individual computers. Mass connection of society to the global Internet, Wi-Fi and Bluetooth communication modules have determined the generally accepted norm of computer functionality. The need to examine routes and methods of information transmission formed tasks for the examination of telecommunications systems and means: determining the characteristics and parameters of telecommunications systems and means; establishing facts and methods of transmitting (receiving) information in telecommunications systems; establishing facts and methods of accessing systems, resources and information in the field of telecommunications; determining the quality of providing telecommunications services at the level of their consumption; establishing the configuration and working condition of telecommunications systems and means; establishing the type, brand, model, and other classification categories of telecommunications systems and means; investigating algorithms for information processing and protection in the field of telecommunications [7].

The Order of the Ministry of Justice No. 53/5 provides for an indicative list of questions that are put for solving by the examination of computer equipment and software tools: whether this medium contains information that interests the investigator, in what form; whether the medium of the computer under study contains information about certain user actions; whether the drive under study underwent certain procedures for the purpose of destroying information; whether the specified

information could have been created on this computer, or it was transferred from another medium; how the information was transferred to the computer (medium) under study; what is the technology and chronology of creating a certain electronic document; what attributes (time of printing, editing, creating, deleting, etc.) of files containing information that interests the investigator; whether the hard drive of the computer under study contains certain software; what functional malfunctions this computer equipment or its individual components and devices have, how these malfunctions affect the operation of the equipment in general; whether it is possible to perform certain actions using this software product; whether this software product (programme code) implements the functions provided by the technical specification for its development [7].

When conducting an expert examination of telecommunications systems and means, the object of research is telecommunications systems, means, networks, and their components, the information that they transmit, receive, and process. The examination solves the following questions: what type, brand, model of the telecommunication means (system); whether the telecommunication means (object) is in working condition; what characteristics of connections to the network the telecommunication means has; whether the user of the telecommunication network changed the settings of individual devices, at what time, what are their values; what is the general nature of connections to the telecommunication network performed by the object (telecommunication system, means); through which software tools were connected to the telecommunication network; what is the topology of the hardware combined into the telecommunication system; whether the functioning of the telecommunication means (system) corresponds to the technical documentation; what technical characteristics (parameters) has the telecommunications mean (system); whether there is a fact of access to the telecommunications system and in what way; whether the use of resources and information in the telecommunications system, in what way; whether there is a fact of transmission (acquisition) of information in the telecommunications system and in what way; whether there are signs of interference in the operation of the telecommunications system; whether the hardware could be combined into a telecommunications network and by what signs; what data routing paths in the telecommunications system, etc. [7].

The proposed list is indicative, so depending on the circumstances of the crime under investigation, the questions should be adjusted, specified, and supplemented, considering the advice of a specialist or expert who will conduct the examination. According to O.V. Yakovlev [12], it is unacceptable

from a procedural standpoint to formulate general questions for the expert, for example: "is the provided object suitable for research?", since even within the same type of expertise, the examination can be identification, classification, diagnostic, situational. Procedural extremes are caused by the question: "Does the hard magnetic disk drive provided for research contain information related to criminal proceedings?" since the expert cannot know what information concerns the pre-trial investigation.

The existence of competition between non-governmental expert institutions conducting such types of research has a positive impact on the development and professional improvement of specialists in expert research of computer technology, software, telecommunications systems, and their means. This helps to expand the capabilities of computer-technical expertise and the list of issues that it solves.

The examination of investigative and expert practice, the analysis of scientific sources demonstrated that other issues that are not provided for by the Order of the Ministry of Justice No. 53/5 are also put on the solution of computer-technical examinations, which experts successfully solve, for example: whether information with keywords "..." is contained on the media provided for research; whether the media provided for research contained files that were subsequently deleted; if so, which files and what content; from which of the computers provided for research, access to the Internet was made, at what addresses, in what period of time; whether there are software products on the computer under study designed to crack the password and unauthorised access to computer systems; whether it is possible to perform a certain task using a software product (which one is indicated); what is the level of professional training in programming and working with computer equipment of the person who performed certain actions with the computer and software; whether the programming style of the software under study corresponds to ones of a certain person; whether the programming techniques and tools used in the creation of the software product under study correspond to the techniques and tools used by a certain person [13].

Along with the main tasks of complex forensic examination of computer equipment, software, telecommunications systems, and their tools, it is possible to solve issues of an auxiliary nature regarding the level of professional training of individuals in the field of programming and working with computer equipment. For example, identification of the user through keyboard style (by the speed of typing characters, the habit of using the main or auxiliary part of the keyboard, features of "double" or "triple" keystrokes, and favourite computer control techniques. Identification of keyboard style

consists in selecting the appropriate standard from the list of standards stored in the computer's memory, based on evaluating the similarity of the handwriting parameters of one of the users who have the right to work to this standard [14].

The expediency of assigning a comprehensive forensic examination of computer equipment, software, telecommunications systems, and their means in criminal proceedings under Art. 361 of the Criminal Code of Ukraine is justified by the presence in the Register of methods for conducting forensic examinations of the Ministry of Justice of the appropriate methodology for this type of expert research. Therewith, this register does not contain a separate methodology for conducting research on telecommunications systems (equipment) and tools, in contrast to the methodology for investigating computer equipment and software products [15].

The scientific originality of the study is formed by the results of the analysis of the problems and features of fixing the traces of a crime in the investigation of unauthorised interference in the operation of computers, automated systems, computer networks or telecommunication networks, the object of encroachment is information stored in a computer, on a certain medium, and/or software. A set of measures for recording and working with material traces of a crime on the hardware component of computer equipment, and with information stored on their media and matters for pre-trial investigation, was considered. The features of using the capabilities of forensic research in the investigation of unauthorised interference in the operation of computers, automated systems, computer or telecommunication networks were highlighted, the object of encroachment is information stored in a computer, on a certain medium, and/or software. The expediency of considering the provisions of the methodology for investigating computer equipment and software products combined with the provisions of the Register of methods defined by the Ministry of Justice was substantiated. In such cases, the pre-trial investigation bodies should comply with the requirements of the current regulatory and administrative (departmental) acts of Ukraine, apply to the investigating judge with a request for the appointment of a comprehensive forensic examination of computer equipment and software products, examination of telecommunications systems and means. Such an expert statement will comply with the provisions of the Criminal Procedure legislation of Ukraine, and paragraphs 13 and 14 of the Order of the Ministry of Justice No. 53/5. Examples of storing or even hiding information of interest for pre-trial investigation on computer hard drives were considered to illustrate this position, leading to the investigation of a computer or computer network

as an environment in which unauthorised leakage, loss, forgery, blocking of information is conducted, its processing process is distorted or the established procedure for its routing is violated.

### Conclusions

Pre-trial investigation of unauthorised interference in the operation of computers, automated systems, computer networks or telecommunication networks, considering the specific features of the crime and the

methods of its commission, requires special training of the investigator, the presence of appropriate forensic knowledge, and skills and abilities. Therefore, the analysis of the possibilities of such examinations as trachological, fingerprint, forensic-medical examination of physical evidence, molecular-genetic, examination of computer equipment and software products, and examination of telecommunications systems and tools is important during the investigation of various manifestations of cybercrime in Ukraine.

### References

- [1] Arseniuk, T.M., Beliak, Yu.M., & Boiarov, V.I. (2005). *Examinations in judicial practice*. Kyiv: Yurinkom Inter.
- [2] Boichenko, S.B., Boiarov, V.I., & Budko, T.V. (2015). *Expertise in the judicial process of Ukraine*. Kyiv: Yurinkom Inter.
- [3] Borysova, L.V., Bilenchuk, P.D., & Malii, M.I. (2020). Examination as a means of establishing the facts and circumstances of committing transnational computer crimes. *Forensics and Forensics*, 65, 230-239.
- [4] Dufeniuk, O.M. (2019). Ensuring forensic activity in criminal proceedings: A systemic paradigm. *Bulletin of Lviv University of Trade and Economics*, 8, 163-173.
- [5] Kliuiev, O.M. (2019). Improving the expert support of justice: Theoretical, legal and organizational aspects. *Theory and Practice of Forensic Science and Criminology*, 19, 102-117.
- [6] Criminal Code of Ukraine No 2341-III. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14>
- [7] Marchuk, A.I. (1997). *Forensic medicine*. Kyiv: Heneza.
- [8] Mishalov, V.D., Khokholieva, T.V., & Bachynskiy, V.T. (2018). *Forensic medicine*. Chernivtsi: Misto.
- [9] Order of the Ministry of Health of Ukraine "Instructions for forensic examination" No. 6. (1995, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0254-95>
- [10] Order of the Ministry of Justice of Ukraine "Instructions on the appointment and conduct of forensic examinations and expert studies" No. 53/5. (1998, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0001-13#Text>
- [11] Disclosure of public information. (2020). Retrieved from <https://www.npu.gov.ua/activity/zviti/opriyudnennya-publichnoji-informaczi.html>
- [12] Register of methods of forensic examinations. (2020). Retrieved from <http://rmpse.minjust.gov.ua>
- [13] Salnyk, S.V., Storchak, A.S., & Kramskiy, A.Ye. (2019). Analysis of vulnerabilities and attacks on state information resources processed in information and telecommunication systems. *Information Processing Systems*, 2(157), 121-128.
- [14] Yakovliev, O.V. (2019). The role of the prosecutor – procedural manager of the pre-trial investigation in the appointment of forensic examination and evaluation of its results. *Forensics and Forensics*, 64, 350-360.
- [15] Law of Ukraine "About forensic examination" No. 4038-XII. (1994, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/4038-12>

### Список використаних джерел

- [1] Експертизи у судовій практиці : бюлетень / Т.М. Арсенюк, Ю.М. Беляк, В.І. Бояров та ін. ; за заг. ред. В.Г. Гончаренка. Київ: Юрінком Інтер, 2005. 480 с.
- [2] Експертизи в судочинстві України : наук.-практ. посіб. / С.Б. Бойченко, В.І. Бояров, Т.В. Будко та ін. Київ : Юрінком Інтер, 2015. 504 с.
- [3] Борисова Л.В., Біленчук П.Д., Малій М.І. Експертиза як засіб установлення фактів і обставин вчинення транснаціональних комп'ютерних злочинів. *Криміналістика і судова експертиза*. 2020. № 65. С. 230–239.
- [4] Дуфенюк О.М. Забезпечення судово-експертної діяльності у кримінальному провадженні: системна парадигма. *Вісник Львівського торговельно-економічного університету*. 2019. № 8. С. 163–173.
- [5] Ключев О.М. Удосконалення експертного забезпечення правосуддя: теоретичні, правові та організаційні аспекти. Теорія та практика судової експертизи і криміналістики. 2019. № 19. С. 102–117.
- [6] Кримінальний кодекс України: Закон України від 5 квітня 2001 р. № 2341-III. URL: <https://zakon.rada.gov.ua/laws/show/2341-14>.

- [7] Марчук А.І. Судова медицина: курс лекцій. Київ: Генеза, 1997. 143 с.
- [8] Судова медицина : підручник / В.Д. Мішалов, Т.В. Хохолева, В.Т. Бачинський та ін. Чернівці: Місто, 2018. 575 с.
- [9] Інструкція про проведення судово-медичної експертизи: наказ Міністерства охорони здоров'я України від 17 січня 1995 р. № 6. URL: <https://zakon.rada.gov.ua/laws/show/z0254-95>.
- [10] Інструкція про призначення та проведення судових експертиз та експертних досліджень: наказ Міністерства юстиції України від 8 жовтня 1998 р. № 53/5. URL: <https://zakon.rada.gov.ua/laws/show/z0001-13#Text>.
- [11] Оприлюднення публічної інформації. Національна поліція. URL: <https://www.npu.gov.ua/activity/zviti/opriilyudnennya-publichnoji-informacziji.html>.
- [12] Реєстр методик проведення судових експертиз. Міністерство юстиції України. URL: <http://rmpse.minjust.gov.ua>.
- [13] Сальник С.В., Сторчак А.С., Крамський А.Є. Аналіз вразливостей та атак на державні інформаційні ресурси, що обробляються в інформаційно-телекомунікаційних системах. *Системи обробки інформації*. 2019. Вип. 2. № 157. С. 121–128.
- [14] Яковлев О.В. Роль прокурора – процесуального керівника досудовим розслідуванням у призначенні судової експертизи та оцінці її результатів. *Криміналістика і судова експертиза*. 2019. № 64. С. 350–360.
- [15] Про судову експертизу: Закон України від 25 лютого 1994 р. № 4038-XII. URL: <https://zakon.rada.gov.ua/laws/show/4038-12>.

## Сучасні можливості судових експертиз у розслідуванні несанкціонованого втручання в роботу комп'ютерів, автоматизованих систем, комп'ютерних мереж чи мереж електрозв'язку

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### Анотація

Метою дослідження є висвітлення можливостей використання судових експертиз у кримінальних провадженнях щодо несанкціонованого втручання в роботу комп'ютерів, автоматизованих систем, комп'ютерних мереж чи мереж електрозв'язку. У статті застосовано емпіричні й теоретичні методи дослідження. Серед емпіричних методів використано опитування працівників оперативних підрозділів кіберполіції та судових експертів системи Міністерства внутрішніх справ, аналіз даних відкритої частини Єдиного державного реєстру судових рішень. З-поміж теоретичних методів застосовано аналіз і синтез, аналогію, порівняння, узагальнення. Запропоновано методологію дослідження слідової картини злочину, передбаченого ст. 361 Кримінального кодексу України, з використанням можливостей судово-експертних досліджень різних видів для фіксації та дослідження фізичних слідів злочину, а також призначення саме комплексної судової експертизи комп'ютерної техніки, програмного забезпечення, телекомунікаційних систем та їх засобів. Обґрунтовано необхідність удосконалення нормативних актів відповідно до методики дослідження комп'ютерної техніки та програмних продуктів. 1. Результати судово-експертних досліджень є ключовим елементом доказової бази сторони обвинувачення в кримінальних провадженнях щодо несанкціонованого втручання в роботу комп'ютерів, автоматизованих систем, комп'ютерних мереж чи мереж електрозв'язку. 2. Застосування спеціальних знань у досудовому розслідуванні кіберзлочинів є невід'ємною складовою для досягнення завдань кримінального провадження. 3. Нормативно-правове забезпечення судово-експертної діяльності для забезпечення потреб досудового розслідування потребує вдосконалення на підставі сучасних провідних методик проведення експертних досліджень

### Ключові слова:

комп'ютер; автоматизована система; комп'ютерна мережа; мережа електрозв'язку; несанкціоноване втручання в роботу комп'ютерів; кіберзлочини; судова експертиза

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# Women's Rights in the Context of Human Rights: Implementation of Fundamental Studies

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## Abstract

The relevance of the study is determined by the subject of the research and provides for: further scientific development of the doctrine of women's rights in modern society and the state; improvement of theoretical material on the essence of fundamental research and the procedure for its implementation; analysis of the effectiveness of the Verkhovna Rada of Ukraine in recent years of its work (based on the indicators of introduced and adopted bills and draft resolutions); justification of the expediency and possibility of influencing the law-making activities of public authorities of the feminist movement. The purpose of the study is to examine the methodology for improving the rights and interests of women and to introduce the results of fundamental research on this issue into the practice of state processes. The goals of the study are: to determine the importance of women's rights for modern society and the state; analyse the essence of studies; clarifying the specific features of introducing studies into the legislation of Ukraine. The research methodology consists of epistemological and ontological approaches to the subject of analysis. The long-term practice of interaction of academic personnel with public authorities shows that the final stage of developing new scientific ideas should be the introduction of regulations for consideration by state authorities. Undoubtedly, researchers should be involved in improving the current legislative acts. They resort to the implementation of studies only when their practical importance in a particular area is identified. The consistent involvement of higher educational institutions and other scientific communities in this process is still at the level of theoretical justification. The issue of women's rights is marked by a number of pressing problems that the feminist movement can solve. The key characteristics of conducting fundamental research, features of their implementation in the practice of law-making are highlighted. The activities of the Verkhovna Rada of Ukraine of the ninth convocation are analysed, in particular, quantitative and qualitative indicators of legislative work are determined. The importance of the feminist movement for optimising the rights and interests of women is argued. The forms of manifestation of feminism are investigated

## Keywords:

women's rights; feminism; law-making; state bodies; Parliament; public power

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## Introduction

The legal regulation of women's rights in Ukraine is relatively appropriate and is not inferior to international standards. Therewith, the rapid development of social life at the present stage is marked by the emergence of numerous new material and spiritual goods offered to women of all strata of the population. The inaccessibility of some of them or an insufficient measure of satisfaction with them from time to time become relevant, and sometimes with political overtones. Thus, strikes and demonstrations to protect women's rights are rarely organised, let alone revolutionary events. No political force, directing the struggle for women's rights in a conscious area, pursues a course to maintain protest moods and achieve the desired result.

The historical development of Ukraine and the civilised world, in general, has encouraged women to conduct studies on the problems of their legal status.

The practical implementation of the consequences of these fundamental studies is designed to accelerate scientific and technological progress because it allows focusing on protecting such a "valuable resource" as a woman. The use of their work should be based on the implementation of the achieved scientific results in legal regulation and law application.

Fundamental studies are characterised by certain ways of scientific investigation, determined by the logic of the development of science. Due to this, all its areas are able to quickly achieve the desired result, embodied in such a chain: theoretical research – regulatory findings – practical implementation. Among certain scientific areas, new ideas are concentrated during certain periods, given that, the possibility of practical implementation is problematic. Thus, a pragmatic assessment of the consequences of studies is not always justified, since a certain array of new scientific information has cognitive importance.

Therewith, in various areas of constitutional and legal research, there is a situation in which researchers and specialists are confident that they have objective conditions for the effective transfer of scientific achievements to the field of state-building. Such scientific areas are the closest to the field of law-making activity.

Studies and draft laws themselves do not cause changes in the constitutional order. This requires objective conditions, in particular, the readiness of public authorities, civil society institutions, and the population to master new scientific knowledge [1]. However, theoretical scientific intelligence should be considered a prerequisite for the establishment of comprehensive plans to change the legal status of women in Ukraine.

*The purpose of the study* is to examine the methodology for improving the rights and interests of women and to introduce the results of fundamental studies on this issue into the practice of state processes. Achieving the goal involves the implementation of the following tasks: determining the importance of women's rights for modern society and the state; analysing the essence of scientific investigation; clarifying the specific features of introducing studies into the legislation of Ukraine.

## Results and Discussion

Currently, the legal mechanism that regulates the implementation of the studies' achievements requires detailing and defining a number of conceptual provisions. The existing regulations lack an interpretation of the concept of "implementation of results of fundamental studies". This is probably due to the fact that the implementation process covers the activities of academic and educational institutions, state and local government bodies, and individual officials – all the main subjects of implementing scientific achievements. The presence of this definition, legalised in regulatory documents, will optimise the organisation and planning in the field of scientific research, and get rid of a number of negative factors that hinder the implementation process.

In today's conditions, even in relation to applied studies, a generally accepted interpretation, allowing unambiguously recording the content and the fact of implementing a completed study has not been developed. It is more difficult for legal experts to formulate a definition of the results of fundamental studies. According to experts, establishing the fact of implementing the results is insufficient. It should be considered that the new scientific result was tested in the conditions of experimental implementation. This criterion has become widespread in the analysis of the implementation work of individual academic institutions.

Scientific activity in higher education institutions is an integral part of the educational process and aims to integrate scientific, educational, and industrial activities in the higher education system. This intellectual creative activity is aimed at obtaining and using new knowledge and covers the following stages of obtaining scientific products:

- formulating (emergence) of the problem;
- building new hypotheses and applying existing ones;
- creating and implementing of new research methods aimed at proving hypotheses;
- generalising the results of scientific activity.

The main product that meets the goals and problems to be solved, science acquires only after the completion of the cycle in the form of laws and theories. At the intermediate stages, science receives

a by-product, part of which is used in this cycle, and the other part provides replenishment of knowledge and the establishment of new cycles. There are various types of scientific activities: investigational, scientific-organisational, scientific-pedagogical, scientific-informational, scientific-auxiliary, etc. [2].

The main objectives of scientific activity in institutions of higher education are: organic unity of the content of education and programmes of scientific activity; creation of standards of higher education, textbooks, and teaching aids considering the achievements of science and technology; introduction of the results of studies into practice; direct involvement of subjects of the educational process in the implementation of the studies conducted at the university; organisation of scientific, scientific-practical, scientific-methodological seminars, conferences, olympiads, competitions of studies, courseworks, theses, and other works of participants in the educational process.

Evidently, the prerequisite for the effectiveness of scientific activity is knowledge of its methodology, theory, technology, methods, and organisation. These aspects should be mastered by students, postgraduates, doctoral students, and employees of scientific departments of faculties, that is, all participants in educational and scientific processes [2]. Despite the general characteristics, any study, starting from the creative idea and problem statement and ending with the conclusions and the report, takes place through the prism of individual (often unique) features of the researcher [3]. Therefore, an objective result implies a combination of dogmatic and individual approaches in the study of a social phenomenon. The involvement of scientific and educational institutions in the implementation of the results of completed fundamental research can be considered confirmed if this activity provided for the materialisation of scientific knowledge in the objects of state-building practice, economic, political, socio-cultural reality. Moreover, there is no single sample of the implementation procedure. In projects for improving legislation, current regulations, and authors' reports there are various implementation options for law-making activities. A substantial amount of results are transferred to authorised entities based on clear regulatory procedures. Therewith, there are cases when civil society institutions introduce draft regulations outside of conventional organisation-legal forms.

In the science of constitutional law, the question of the content of the concept of the legislative process is debatable (notably, this type of establishment of the legislative framework is the most normatively governed and theoretically investigated). It is true that the beginning of the legislative process is associated with the introduction of a legislative initiative to the Parliament, that is, its

entire procedure is clearly defined in the legislation [4-8]. Therewith, today it is relevant to develop a unique regulation of the process of practical implementation of fundamental scientific ideas. It should consider the variety of forms of conducting such studies, economic and legal relations with the subsequent stages of the complex "science – legislation – constitutional order", reflect the specific features of relations that arise in this area, determine the procedure for financing works and their material and technical support, the responsibility of subjects who create and implement new legislation based on the achievements of fundamental sciences. This, according to the authors of these proposals, will ensure the effectiveness of studies, orient them to the needs of the state and society, create a proper basis for the preparation of a regulation that will determine the conditions for material incentives for law-making subjects to implement their results in the state and social system [8].

When analysing the content of the implementation process, it is necessary to establish the cycle of scientific results. According to some experts, the beginning of this cycle should be considered the stage of fundamental research, and the end – the transfer of a new regulation to the implementation and the subsequent termination of its legal force. With this approach, the cycle covers fundamental and applied studies.

The evolution and boundaries of the life cycle depend on the specific content of the final product. If the study is aimed at improving the current regulation, then its life cycle begins with applied research (they investigate how successful the implementation practice is). In the case of creating a new act, the cycle begins with the stage of fundamental research [9].

Calculations show that out of all the results of studies conducted by researchers of higher educational institutions and research institutions, experts of legal and scientific-expert departments, the percentage of submitted and adopted draft laws is substantial. In this context, the Verkhovna Rada of Ukraine (hereinafter referred to as the Verkhovna Rada) of the ninth convocation is quite "productive". By July 17, 2020 (the end of the third session), 2,105 draft laws were introduced, of which 253 were voted on. In addition, the Verkhovna Rada received 1,076 resolutions, of which 509 were voted on.

Analysing the results of the work of people's deputies by factions and groups, the largest number of bills was submitted by the largest faction – "Servant of the People". In total, 1,029 legislative initiatives were registered with the involvement of parliamentarians from the mono-majority, of which the Rada adopted 149.

Opposition Platform – For Life (hereinafter referred to as the OPZZh) and Batkivshchyna parties

have prepared almost the same number of draft laws: the former submitted 341 initiatives, the latter – 340. Moreover, the parliamentarians supported 28 bills from OPZZh and 31 from Batkivshchyna.

The deputy group “For the Future” submitted 263 bills, of which 22 were supported, “European Solidarity” – 233, of which 29 were voted on. The deputy group “Dovira” developed 223 draft laws, of which the Verkhovna Rada supported 18. The “Holos” faction prepared the least number of draft laws – 215 initiatives. Therewith, the Rada adopted 36 draft laws, which is more than in other opposition factions.

Most of the resolutions were also submitted by people's deputies from the “Servant of the People” – 776 (367 were adopted). The European Solidarity party submitted 104 resolutions, 52 of which were supported by the Parliament. The situation is similar with OPZZh – 46 out of 102 resolutions were adopted. Batkivshchyna submitted 94 resolutions, of which 39 were adopted. The Holos party submitted 73 resolutions, of which the Verkhovna Rada voted for 45. The deputy group For the Future – 66 resolutions, of which 18 were adopted, Dovira – 32 resolutions, of which 18 were adopted [10]. Despite the fact that the law aimed at establishing equality for women and men in all areas of society (“On ensuring equal rights and opportunities for women and men”) in Ukraine was adopted 15 years ago [11], to this day parity has not been achieved: only 20% of women in the Parliament, not a single woman among regional mayors, and the gender gap in the level of monthly wages is 21%. In addition, according to international organisations, one in two women has experienced at least one form of sexual harassment.

The Law of Ukraine “On ensuring equal rights and opportunities for women and men” aims to achieve the parity status of women and men in all areas of society by legally ensuring equal rights and opportunities for women and men, eliminating discrimination based on gender and applying special temporary measures designed to eliminate the imbalance between the opportunities of women and men for equal rights implementation.

The law provides, among other things, the following provisions: promoting gender equality; preventing and countering all forms of violence against women; ensuring equal involvement of women and men in making socially important decisions; ensuring equal opportunities for women and men to combine professional and family responsibilities; support for the family, the establishment of responsible motherhood and fatherhood; education and promotion of a culture of gender equality among the population of Ukraine etc. [12]. Evidently, the state and society should work hard

to put these regulations into practice. Most contemporaries believe that feminism is inappropriate in modern conditions, but this belief is erroneous. For centuries, women have fought for and achieved, for example, the right to vote and equal access to education, but they are still disproportionately exposed to all forms of violence and discrimination. Feminism should be seen as a movement to end sexism, sexist exploitation and oppression, and achieve full gender equality in law and practice.

If earlier the feminist movement meant mass demonstrations, newspaper publications, organised debates and the creation of international women's organisations, then in modern realities it involves the use of mass media and pop culture to promote their ideas and conduct activities (blogs, electronic magazines, and other ways of using the Internet, media technologies led to the emergence of the phenomenon of cyberfeminism – the so-called network feminism) [13].

Vivid examples of the influence of feminism on the adoption of regulations aimed at protecting women's rights are: the introduction of chemical castration for persons who have committed sexual crimes (for example, Poland, Pakistan) [14]; the regulation of prayer rights of men and women in Israel – allowing women to pray at the Western Wall in Jerusalem [15]; the right for abortion, divorce, contraception and, especially, joining the development of Tunisia after gaining independence [16].

In Ukraine, there are also substantial problems in the field of protecting women's rights. In this context, law enforcement officers should listen to the numerous suggestions of researchers expressed in the scientific literature [17; 18; 19; 20; 21].

The scientific originality is determined by the subject of the study and provides for: further scientific development of the doctrine of women's rights in modern society and the state; improvement of theoretical material on the essence of fundamental research and the procedure for its implementation; analysis of the effectiveness of the Verkhovna Rada of Ukraine in recent years of its work (based on the indicators of introduced and adopted draft laws and resolutions); justification of the expediency and possibility of influencing the law-making activities of public authorities of the feminist movement.

## Conclusions

The long-term practice of interaction of academic personnel with public authorities shows that the final stage of developing new scientific ideas should be the introduction of regulations for consideration by state authorities. Undoubtedly, researchers should be involved in improving the current legislative acts. They resort to the implementation of studies only when their practical importance in a partic-

ular area is identified. In this case, the time frame for implementing fundamentally new behaviours is substantially reduced. An effective form of optimisation of the implementation process is the creation of a scientific and practical complex following the example of interaction between academic research institutions, higher education institutions, and state bodies. However, now this model is presented only in the Parliament, whose structural divisions are the Institute of legislation, scientific-expert, and legal management. The consistent involvement of

higher educational institutions and other scientific communities in this process is still at the level of theoretical justification.

The issue of women's rights is marked by a number of pressing problems, which, among other things, can be solved by the feminist movement. Its achievements are reflected in the legislation and further practical implementation. Scientific ideas and theoretical findings are able to generalise the beliefs and aspirations of ordinary citizens and convey them in the appropriate legal form to the lawmaker.

## References

- [1] 15 years of the Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men" achievements and challenges. (2020). Retrieved from <http://womenua.today/15rokiv-zakonu>
- [2] Aleksandrov, A.P. (1983). *Science – the country. Articles and speeches*. Moscow: Nauka.
- [3] Bielkin, Ye., Yurynets, Yu., & Bielkin, M. (2019). Methodology for determining tax liability: The ratio of administrative and criminal law. *Philosophical and Methodological Problems of Law*, 1(17), 43-50.
- [4] Feminism and Women's Rights Movements. Council of Europe. (2020). Retrieved from <https://www.coe.int/en/web/gendermatters/feminism-and-women-s-rights-movements>.
- [5] How women's lives were revolutionised in Tunisia. (2019). Retrieved from <https://www.bbc.com/news/av/stories-49097786>.
- [6] Konverskyi, A.Ye. (2010). *Fundamentals of methodology and organization of scientific research*. Kyiv: Center of Educational Literature.
- [7] Lakhtin, F.A., & Pavlenko, Yu.G. (1984). Indicator of industry intensity. *Economic Issues*, 2, 34-42.
- [8] Lakhtin, G.A. (1983). *Management in a scientific institution*. Moscow: Energoatomizdat.
- [9] Ostrovska, B. (2019). Development of bioethics in international law as a global platform for solving human rights problems. *Philosophical and Methodological Problems of Law*, 1(17), 22-31.
- [10] Pakistan anti-rape ordinance signed into law by president. (2020). Retrieved from <https://www.bbc.com/news/world-asia-55314493>.
- [11] Petrov, S.H. (2020). Organizational and legal bases of counteracting cyber-encroachment in foreign countries: current examples for Ukraine. *Forum of Law*, 61(2), 114-121.
- [12] How many bills have been submitted and approved by people's deputies since the beginning of the IX convocation. (2020). *Word and Deed*. Retrieved from <https://www.slovaidilo.ua/2020/07/16/infografika/polityka/skilky-zakonoproektiv-podaly-ta-uxvalylynardepy-pochatku-ix-sklykannya>
- [13] Slovaska, I.Ye. (2010). The concept of the legislative process. In *Actual Problems of State Formation: Proceedings of the International Scientific and Practical Conference* (pp. 59-61). Kyiv: Kyiv Regional Center of the National Academy of Legal Sciences of Ukraine.
- [14] Slovaska, I.Ye. (2011). Reading of bills in the Verkhovna Rada of Ukraine. In *Tenth autumn legal readings: Proceedings of the International Scientific Conference*. (pp. 242-244). Khmelnytskyi: Khmelnytskyi University of Management and Law.
- [15] Slovaska, I.Ye. (2011). Legislative initiative is the initial stage of the legislative process. *State and Regions*, 3, 64-69.
- [16] Slovaska, I.Ye. (2011). Legislative process: Questions of interpretation. *Law and Public Administration*, 2, 5-9.
- [17] The fight for women's prayer rights in Israel. (2020). Retrieved from <https://www.bbc.com/news/av/stories-54248953>.
- [18] Vovk, V., & Oliinyk, U. (2019). Methodological bases of research of the right to freedom of thought, conscience and religion. *Philosophical and Methodological Problems of Law*, 2(18), 27-35.
- [19] Yurynets, V.Ye. (2011). *Research methodology*. Lviv: LNU I. Franka.

- [20] Zabuha, Yu.Yu., & Mykhailichenko, T.O. (2020). Forms of human exploitation. *Forum of Law*, 62(3), 29-43.
- [21] Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men" No. 2866-IV. (2005, September). Retrieved from <https://zakon.rada.gov.ua/laws/card/2866-15>

### Список використаних джерел

- [1] 15 років Закону України "Про забезпечення рівних прав та можливостей жінок і чоловіків" здобутки та виклики. Ukrainian women's congress. 9 верес. 2020 р. URL: <http://womenua.today/15rokiv-zakonu>.
- [2] Александров А.П. Наука – стране. Статьи и выступления. Москва: Наука, 1983. 224 с.
- [3] Белкін Є., Юринець Ю., Белкін М. Методологія визначення податкової відповідальності: співвідношення адміністративного та кримінального права. *Філософські і методологічні проблеми права*. 2019. Вип. 1. № 17. С. 43–50.
- [4] Feminism and Women's Rights Movements. Council of Europe. URL: <https://www.coe.int/en/web/gendermatters/feminism-and-women-s-rights-movements>.
- [5] How women's lives were revolutionised in Tunisia. 25 липня 2019 р. URL: <https://www.bbc.com/news/av/stories-49097786>.
- [6] Основи методології та організації наукових досліджень: навч. посіб. / за ред. А. Є. Конверського. Київ: Центр учбової літератури, 2010. 352 с.
- [7] Лахтин Г. А., Павленко Ю. Г. Показатель отраслевой наукоемкости. *Вопросы экономики*. 1984. № 2. С. 34–42.
- [8] Лахтин Г.А. Управление в научном учреждении. Москва: Энергоатомиздат, 1983. 144 с.
- [9] Островська Б. Розвиток біоетики в міжнародному праві як глобальної платформи для розв'язання проблем прав людини. *Філософські і методологічні проблеми права*. 2019. Вип. 1. № 17. С. 22–31.
- [10] Pakistan anti-rape ordinance signed into law by president. BBC. 15 грудня 2020 р. URL: <https://www.bbc.com/news/world-asia-55314493>.
- [11] Петров С.Г. Організаційно-правові основи протидії кіберпосяганням в іноземних державах: актуальні приклади для України. *Форум права*. 2020. Вип. 61. № 2. С. 114–121.
- [12] Скільки законопроектів подали та ухвалили нардепи з початку IX скликання. Слово і діло. 16 липня 2020 р. URL: <https://www.slovoidilo.ua/2020/07/16/infografika/polityka/skilky-zakonoproektiv-podaly-ta-uxvalyly-nardepypochatku-ix-sklykannya>.
- [13] Словська І.Є. Поняття законодавчого процесу. *Актуальні проблеми державотворення: матеріали Міжнар. наук.-практ. конф. молодих вчених (Київ, 29–30 листопада 2010 р.)*. Київ: Центр правових наукових досліджень, 2010. Т. 1. С. 59–61.
- [14] Словська І.Є. Читання законопроектів у Верховній Раді України. *Десяті осінні юридичні читання: матеріали Міжнар. наук. конф. (Хмельницький, 18–19 листопада 2011 р.)*. Хмельницький: Хмельницьк. ун-т управління та права, 2011. Ч. 2. С. 242–244.
- [15] Словська І.Є. Законодавча ініціатива – початкова стадія законодавчого процесу. *Держава та регіони*. 2011. № 3. С. 64–69.
- [16] Словська І.Є. Законотворчий процес: питання тлумачення. *Право та державне управління*. 2011. № 2. С. 5–9.
- [17] The fight for women's prayer rights in Israel. 25 вересня 2020 р. URL: <https://www.bbc.com/news/av/stories-54248953>.
- [18] Вовк В., Олійник У. Методологічні засади дослідження права на свободу думки, совісті та релігії. *Філософські і методологічні проблеми права*. 2019. Вип. 2. № 18. С. 27–35.
- [19] Юринець В. Є. Методологія наукових досліджень: навч. посіб. Львів: ЛНУ ім. І. Франка, 2011. 178 с.
- [20] Забуга Ю.Ю., Михайліченко Т.О. Форми експлуатації людини. *Форум права*. 2020. Вип. 62. № 3. С. 29–43.
- [21] Про забезпечення рівних прав та можливостей жінок і чоловіків: Закон України від 8 вересня 2005 р. № 2866-IV. URL: <https://zakon.rada.gov.ua/laws/card/2866-15>.

# Права жінок у контексті прав людини: упровадження результатів фундаментальних досліджень

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## Анотація

Висвітлено ключові характеристики проведення фундаментальних досліджень, особливості їх запровадження в практику правотворення. Проаналізовано діяльність Верховної Ради України дев'ятого скликання, зокрема визначено кількісні та якісні показники законодавчої роботи. Аргументовано значущість феміністичного руху для оптимізації прав та інтересів жінок. Досліджено форми вияву фемінізму. Мета дослідження – вивчення методології вдосконалення прав та інтересів жінок, а також запровадження результатів фундаментальних досліджень із цієї проблематики в практику державотворчих процесів. Завданнями статті є: визначення значущості прав жінки для сучасного суспільства й держави; аналіз суті наукових досліджень; з'ясування особливостей запровадження наукових досліджень у законодавство України. Методологію дослідження становлять гносеологічний та онтологічний підходи до предмета аналізу. Наукова новизна публікації зумовлена предметом дослідження та передбачає: подальший науковий розвиток доктрини прав жінок у сучасному суспільстві й державі; удосконалення теоретичного матеріалу щодо суті фундаментальних досліджень і процедури його запровадження; здійснення аналізу ефективності діяльності Верховної Ради України за останні роки її роботи (на підставі показників внесених і прийнятих законопроектів і проектів постанов); обґрунтування доцільності й можливості впливу на правотворчу діяльність органів публічної влади феміністичного руху. Висновки. Багаторічна практика взаємодії академічних кадрів з органами публічної влади засвідчує, що завершальною стадією розроблення нових наукових ідей має бути внесення правових актів на розгляд органів державної влади. Безперечно, науковці мають долучатися до вдосконалення чинних актів законодавства. До запровадження робіт вони вдаються лише тоді, коли виявлено практичну значущість досліджень у певній сфері. Долучення на постійній основі закладів вищої освіти й іншого наукового загалу до зазначеного процесу донині знаходиться на рівні теоретичного обґрунтування. Питання прав жінок означене низкою нагальних проблем, розв'язати які здатен феміністичний рух

## Ключові слова:

права жінок; фемінізм; правотворення; органи держави; парламент; публічна влада

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# Main Directions of Development of Local Self-Government in Ukraine

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## Abstract

The purpose of the article is to identify current problems and issues related to the formation and development of local self-governance in Ukraine, as well as to analyze the concept of local self-government and its features. The article uses a set of scientific methods, namely: terminological, system-structural, formal-logical, comparative-legal. The theoretical basis of the study are the works of Ukrainian and foreign scientists, the Constitution of Ukraine and the European Charter of Local Self-Government. The scientific novelty of the article is that it highlights a comprehensive study on the development of local government in the light of its modernization and integration, taking into account the latest international trends in municipal governance and domestic social transformations. The paper also proposes some solutions for building efficient and effective local self-government in Ukraine. According to the results of the study, the following conclusions were drawn: based on the experience of other West European countries, the issue of implementing economic, social and political reforms in Ukraine should be considered in the light of European integration; effective implementation of this course requires the following coordinated measures from the authorities at all levels: implementation of major institutional changes; reforming the principles and methods of work, including training, retraining and the professional development of personnel; providing financial and economic opportunities for stimulating the development of local self-government; the defectiveness of legal instruments and lack of a clear financial mechanism for implementing local self-government reform (the latter is formal, imitative nature), corruption in state authorities and local self-government bodies, no strategic vision of the country's development – all of these delay the modernization of local self-government in Ukraine

## Keywords:

local self-government; decentralization; autonomy; territorial communities; democracy; competences

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## Introduction

Local self-government is one of the fundamental democratic principles behind the constitutional system in Ukraine. That is why the processes of its constitutional reform are the most important factors in the development of the entire system of Ukrainian statehood. This issue is particularly important nowadays, when calls for federalization, violation of the constitutional order and destabilization of power resonate.

The Constitution of Ukraine [1] needs to define a decentralized model of government, which will envisage the formation of a comprehensive system of local self-government at all levels of the country's territorial structure, and the broadening of the powers, resources and responsibilities of local self-government. This will set out the conditions for achieving greater autonomy in making important managerial decisions regarding the sustainable and balanced development of the regions and in solving other issues of local importance.

The relevance of analyzing the challenges stems from the need to improve the theory and practice of modern state building caused by transformations in the political system and is also connected to the implementation of administrative, territorial and regional reforms as well as the introduction of constructive social partnership between the center and the regions. The success of all sectoral reforms depends on the successful reformation of local self-government, since it should ensure the actual participation of Ukrainian citizens in transformations that are pending.

It is important to determine the ways of developing a system of local self-government, which requires a thorough understanding of municipal policy and its conceptual foundations, as outlined in the Constitution of Ukraine [1] and the European Charter of Local Self-Government [2]. This necessitates a comprehensive analysis of the formation and functioning of self-government institutions.

*The purpose and objectives of the study.* This article aims to comprehensively analyze the problems related to the development of local self-government in Ukraine. There are a number of items that have to be reconciled in the course of this research:

- to examine the system of principles and elements of a local self-government system;
- to analyze the formation and running of self-government institutions;
- to explore topical problems and challenges related to the development of local self-governance in Ukraine.

## Results and Discussion

Local self-government belongs to the democratic principles of public affairs management. It is created on the idea of promoting community values;

namely, independence (autonomy) and a population's active participation in administering community affairs. Local self-government brings administrative management closer to the population and is the most transparent decentralized form of government.

As a complex and multifaceted phenomenon, local self-government is:

- the basis of constitutional order and one of the important principles underlying the organization and governance in the state, as well as a necessary characteristic of a democratic society;
- a form of democracy, which, in accordance with Article 5 of the Constitution of Ukraine [1], constitutes the realization of power by the people: directly and through the bodies of local self-government. At the same time, the latter occupies a separate (distinct) place in the political system and is not a part of the state mechanism, which gives grounds to consider local self-government as a separate form of the realization of power by the people;
- the right of a territorial community to independently resolve issues of local significance within the framework outlined by the Constitution and laws of Ukraine [3].

There are various definitions of "local self-government". Some authors point out that local self-government simultaneously combines state and public elements, and that bodies of local self-government perform two kinds of duties: those relating to self-government and also those delegated to them by state authorities [4].

According to Article 140 of the Constitution of Ukraine [1], *local self-government* is the right of a territorial community – the residents of a village (or a voluntary association – a rural community – created by the residents of several villages), a settlement or a city to independently resolve issues of local importance within the framework of the Constitution and laws of Ukraine. This definition does not clearly define such an important aspect of local self-government as its actual ability to manage local affairs [1].

Article 2 (Part 1) of the Law of Ukraine "On Local Self-Government in Ukraine" [5] provides a normative definition of this concept: "Local self-government in Ukraine is a state-guaranteed right and real ability of a territorial community – residents of a village or members of a voluntary association of villagers created by several villages, as well as residents of a settlement or city – to independently or within the responsibility of bodies and officials of local self-government resolve issues of local significance within the framework of the Constitution and laws of Ukraine" [5]. An analysis of the notion of local self-government and its peculiarities makes it possible to define local self-government as the right and real ability of local authorities to

independently manage a part of state affairs within the framework of the law in the interests of the population and to regulate this part.

The definition of local self-government in the Constitution and laws of Ukraine, no matter how perfect, is far from exhaustive as far as the content of this socio-political phenomenon is considered; therefore, it cannot be limited to the state-guaranteed right of territorial communities and self-governing-bodies they choose to independently decide on a part of public affairs [3].

Local self-government as a principle of organizing government directly from the ground up, in accordance with Article 2 of the European Charter, is embodied in the Constitution of Ukraine [1] (Article 7), and, consequently, has become one of the constitutional pillars of our state.

The *legal autonomy* of local self-government lies in the fact that they have their own powers as defined by the Constitution or the law. These powers, as stated in the European Charter, should be total and exclusive, that is, such that do not simultaneously belong to other bodies of authority. Within their powers, local self-government and its bodies have full freedom of action to implement their own initiatives regarding any matter assigned to the authority of local self-government. Citizens of Ukraine exercise their right to participate in local self-government by their belonging to respective territorial communities. Any restrictions on the right of Ukrainian citizens to participate in local self-government are prohibited [3].

The local self-government and its bodies should be able to define their own internal structure so that it meets local needs and provides effective management. Here we speak about *organizational autonomy*. Local self-government bodies operating within the law are not subject to the authority of other bodies, and any administrative control over their activities is possible only to ensure the lawfulness and constitutional principles of local self-government.

The *material and financial autonomy* of local self-government involves the right of territorial communities and their bodies to own use and dispose of property in their possession – the so-called communal or municipal property – as well as their own financial means sufficient for the realization of the powers of local self-government and its bodies. At least part of the said funds should originate from local taxes and fees, whose rates are to be determined within the bounds of the law by the local self-government bodies themselves [4].

The Constitution of Ukraine and the Law of Ukraine “On Local Self-Government in Ukraine” [5] (Article 4) define the organization and functioning of local self-government in Ukraine. The system of local self-government principles is not limited to

the principles outlining its legal, organizational, material and financial independence (autonomy) [5]. The law also delineates other principles that can be divided into two groups:

- those that are unique to local self-government bodies and significantly differentiate them from local executive bodies (e.g., accountability and responsibility to territorial communities, judicial protection of their rights etc.);

- those that are universal – typical for both local self-government bodies and local executive bodies (e.g., democracy, transparency, a combination of local and state interests etc.).

The main ways of resolving issues relating to the existing local self-government system are defined in the approved by the Cabinet of Ministers of Ukraine on April 1, 2014, “The Concept of Local Self-Government and Territorial Organization of Power Reform in Ukraine” [6]. The main changes can be drawn as follows: defining a thorough territorial basis for carrying out the activities of local self-government bodies and executive authorities; producing proper material, financial and organizational conditions for ensuring the implementation of inherent and delegated powers of local self-government bodies; division of powers between local self-government bodies and executive authorities at different levels of the administrative and territorial system based on the principles of subsidiarity and decentralization; maximum involvement of the population in managerial decisions, promoting the development of direct democracy [6]. The adoption of such Laws of Ukraine as “On the Cooperation of Territorial Communities”, dated June 17, 2014, No. 1508-VII [6]; “On the Voluntary Association of Territorial Communities”, dated February 15, 2015, No. 157-VII [7]; “On the Principles of State Regional Policy”, dated February 5, 2015, No. 156-VIII, targeted the development of a system of local self-government. The adoption of new legislative acts resulted in the introduction of changes to the conceptual notion of “local self-government system”, which were reflected in the amendments (adopted on February 5, 2015) to the Law of Ukraine “On Local Self-Government in Ukraine” [7].

In 2015, after the adoption of the Law of Ukraine “On the Voluntary Association of Territorial Communities” [7], Article 6 (“Territorial communities”) of this specialized law was amended. The article now states that territorial communities can be united into one rural, settlement or urban territorial community, form common bodies of local self-government and choose the village elder, settlement head or city mayor, respectively. Such voluntarily united territorial communities may withdraw from a united territorial community in the manner prescribed by law.

The opportunity for creating voluntary associations of territorial communities not only of adjacent villages, but of settlements and cities as well has been introduced into the present-day legal and regulatory field. This provision is also specified further by stating that “the united territorial community where a city is appointed to be the administrative center is defined as urban territorial community, the community where a settlement is appointed to be the center is settlement territorial community, and the community where a village is appointed to be the center is rural territorial community” [7]. That is, a change of approach to the definition of boundaries of a territorial community has taken place: it is now seen as an entity wider than one populated locality such as village, settlement or city. Accordingly, conditions are created for revising the existing territorial basis underlying the organization of local self-government, as well as for updating the “basic level” of administrative-territorial system constituted by communities as administrative-territorial units. What remains unchanged is the status of territorial community as the primary subject of local self-government, the main carrier of its functions and powers embodied in a territorial community of a village, settlement or city [8].

Raising the current problems pertaining to the establishment of operational, efficient and economic local self-government in Ukraine, it should be remarked that in Europe, local self-government is seen as a social mechanism that guarantees democratic government, whereas in Ukraine local self-government is not only a tribute to democracy, but also, to a large extent, an effective managerial mechanism. Local self-government institution has a complex nature as far as society and state are concerned. As a component of society, local self-government objectively finds itself in “constructive opposition” to the state, especially in matters related to the protection of local community’s interests. This circumstance needs to implement one of two options: either to construct a complex procedure for reconciling the interests of state and territorial communities, or to increase state authorities’ pressure on local self-government. Thus, a contradiction arises: on the one hand, in order to ensure its stability, the state is objectively interested in strengthening local self-government; on the other hand, it often responds to “constructive opposition” with pressure implemented through administrative mechanisms. Another contradiction has become clear in the process of reforming local self-government (“reform from the top down”): it concerns the methods and approaches used in the execution of local self-government powers. By its nature, local self-government contradicts the dictate of the state and can only develop on condition of its freedom. Within the framework of a unified administrative system, local self-government and state

administration is incompatible. This is indicated by the Constitution of Ukraine [1], which does not include local self-government bodies in the state’s system of authority. Local self-government must grow and develop “from the bottom up”, organically/naturally, with appropriate state support and under its control. In other words, local self-government cannot be formed without state support, but at the same time, it needs reliable protection from the state [9].

Local self-government is the basis of a constitutional system – it means we recognize establishing a democratic-decentralized-governance system founded on the principle of the independence of territorial communities and local self-government bodies in solving all issues of local importance. According to Article 5 of the Constitution of Ukraine [1], the people exercise power directly as well as through the organs of state authority and bodies of local self-government. It is clear from this constitutional provision that local self-government bodies do not belong to a single unified state mechanism; therefore, local self-government can be considered as a separate form of the realization of power by the people.

Talking about local self-government we realize it’s extremely important role of linking society and the system of state administration, between contractual self-regulation and self-organization on the one hand, and on the other hand, compulsory regulation of social relations by the state which uses its power to achieve this – it promotes the independent development of democracy. Effective functioning of local self-government bodies is only possible in the condition of developed civic society, as every citizen should not only become aware of his/her personal responsibility, but also be prepared to take these duties upon himself/herself when solving local community problems [10].

The development of local self-government bodies which constitute a factor in the mechanism of local self-organization and solving these problems are key to the success and effectiveness of public administration at its basic level of interaction with communities and individuals. Optimizing a local self-government institution in Ukraine and bringing it to the European standards level is only possible through the establishment and implementation of its legal, organizational and financial autonomy [3].

The legal autonomy of a local self-government body consists in the constitutional and legislative recognition of the rights and powers granted and delegated to it. These powers, as outlined in the European Charter of Local Self-Government, should be full and exclusive, that is, these powers do not simultaneously belong to other bodies of authority. Within the limits of its authority, a local self-government body has full freedom to act on its own initiatives regarding any matter assigned to its competence. This

rule should also apply in the case of delegated powers: in exercising them, a local self-government body must be free to adapt these to local conditions. Since Ukraine is a member of the Council of Europe, the institution of local self-government should be regulated in accordance with the European Charter of Local Self-Government [2], which our state has joined. As stipulated by the European Charter of Local Self-Government [2], in Ukraine the main powers and functions of local self-government bodies are defined by the Constitution of Ukraine and its legislation [3].

At the level of local self-government, the functions and powers of its bodies have to be streamlined, eliminating their duplication and rationalizing their distribution. Operational methods of local self-government bodies are also in need of improvement, to ensure that they correspond to its principles.

There is also a lack of trained personnel, especially in rural and territorial communities as well as the communities of small towns. The problem of synchronizing the mechanisms of public administration, local self-government and self-organization, needs to be more researched, since the lack of coordination between their activities leads to wasting already limited resources. Talking about the municipal reform in Ukraine, we can notice a lack of readiness demonstrated by a managerial elite, including that of the local level; absence of state constructed ideology; loss of municipal managerial traditions; etc. So, in order to construct operational and efficient local self-government it is necessary [11]:

- to differentiate between the competences and powers of state authorities and local self-government, as well as between different elements of a local self-government system, based on the subsidiarity principle;
- to present regional self-government or develop a mechanism for the identification and realization of territorial communities' common interests;
- to determine in accordance with the competence and functions exercised, on a long-term basis, the sources of local budgets' revenue, providing a legal mechanism for the independent formation of the latter on the grounds of social standards approved by the government;
- to ensure that local budgetary finance is sufficient for the quality provision of legal and managerial services guaranteed by law;
- to outline control mechanisms which can be used by representative authorities and the public to

monitor the quality of law-guaranteed services provided by local self-government bodies;

- to provide for the possibility of delegating powers, both from the bottom up and from top down, exclusively on the basis of agreement and with the corresponding material and financial support for their implementation;

- to develop and ensure the functioning of mechanisms for the financial and economic equalization of territorial communities as well as their development;

- to advance the mechanisms for managing budget funds and control over their spending, ensuring the transparency of the process and accountability to representative bodies.

The formulated tasks can be tackled by adopting new laws or introducing appropriate amendments to the laws currently in force.

## Conclusions

Acceleration of the reform of local self-government and territorial organization of power constitutes one of the most topical and urgent challenges which have to be resolved in order to help Ukraine develop as a modern, democratic, competitive and unified state, to ensure its sustainable economic growth. It is important to optimize the administrative-territorial structure and the current model of territorial power distribution (the current one still causes many questions and doubts); introduce local democracy mechanisms and bring them in line with European principles and international standards.

Based on the experience of other West European countries, the issue of implementing economic, social and political reforms in Ukraine should be considered in the light of European integration. Effective implementation of this course requires the following coordinated measures from the authorities at all levels: implementation of major institutional changes; reforming the principles and methods of work, including training, retraining and the professional development of personnel; providing financial and economic opportunities for stimulating the development of local self-government.

The defectiveness of legal instruments and lack of a clear financial mechanism for implementing local self-government reform, the latter is formal, imitative nature, corruption in state authorities and local self-government bodies, no strategic vision of the country's development – all of this delay the modernization of local self-government in Ukraine.

## References

- [1] Constitution of Ukraine. (1996, June) No. 254k/96-VR. Retrieved from <http://www.president.gov.ua/documents/constitution>
- [2] Himsworth, C. (2015). *The European charter of local self-government: A treaty for local democracy*. Scotland: Edinburgh.

- [3] Chernenchenko, O. (2018). Local Self-Government in Ukraine: Current State and Main Directions of Development. *Leges Si Viata*, 5, 138-143.
- [4] Vakulenko, V.M., & Orlatyi, M.K. (2010). *General principles of local self-government in Ukraine*. Kyiv: NADU.
- [5] Law of Ukraine "On local self-government in Ukraine". (1997, May). No. 280/97-VR. Retrieved from <http://zakon4.rada.gov.ua/laws/show/280/97-вр>
- [6] Order of the Cabinet of Ministers of Ukraine "On approval of the Concept of reforming local self-government and territorial organization of power in Ukraine". (2014, April). No. 333-r. Retrieved from <https://zakon.rada.gov.ua/laws/show/333-2014-р>
- [7] Law of Ukraine "On voluntary association of territorial communities". (2015, February). No. 157-VIII. Retrieved from <http://zakon4.rada.gov.ua/laws/show/157-19>
- [8] Kovbasiuk, Yu., Vashchenko, K., & Tolkovanov, V. (2014). *Local self-government in Ukraine: Current state and main directions of modernization*. Kyiv: NADU.
- [9] Kampo, V. (2002). What is state municipal policy? *Harmony*, 5(13), 12-16.
- [10] Bordeniuk, V. (2005). The mechanism of public administration as a system of executive bodies and local governments. *Law of Ukraine*, 6, 175-182.
- [11] De Vries, M. (2000). The rise and fall of decentralization: A comparative analysis of arguments and practices in European countries. *European Journal of Political Research*, (38:2), 193-224.

## Основні напрями розвитку місцевого самоврядування в Україні

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### Анотація

Метою статті є виявлення актуальних проблем і питань, пов'язаних із формуванням і розвитком місцевого самоврядування в Україні, а також аналіз концепції місцевого самоврядування та визначення її особливостей. У статті використано комплекс наукових методів: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, Конституція України та Європейська хартія місцевого самоврядування. Наукова новизна статті полягає в тому, що в ній здійснено комплексне дослідження засад розвитку місцевого самоврядування у контексті його модернізації та інтеграції, з огляду на останні міжнародні тенденції муніципального управління та внутрішніх соціальних перетворень. Запропоновано рішення для розбудови оперативного й ефективного місцевого самоврядування в Україні. За результатами здійсненого дослідження сформульовано такі висновки: з огляду на досвід інших західноєвропейських країн, питання здійснення економічних, соціальних і політичних реформ в Україні слід розглядати в аспекті європейської інтеграції; для ефективного впровадження цього курсу необхідні такі скоординовані заходи влади на всіх рівнях: здійснення основних інституційних змін; реформування принципів і методів роботи, а також підготовка, перепідготовка та підвищення кваліфікації персоналу; надання фінансово-економічних можливостей для стимулювання розвитку місцевого самоврядування; дефектність правових інструментів і брак чіткого фінансового механізму реалізації реформи місцевого самоврядування (остання має формальний, імітаційний характер), корупція в органах державної влади та місцевого самоврядування, несформованість стратегічного бачення розвитку країни – це фактори, що стримують модернізацію місцевого самоврядування в Україні

### Ключові слова:

місцеве самоврядування; децентралізація; автономія; територіальні громади; демократія; компетенція

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# Prosecutor Under the Current Criminal Procedure Code: Accuser or Supervisor?

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## Abstract

Turbulent changes in legislation in recent years are an extensive basis for studies. Sometimes laws that regulate criminal procedural relations are adopted so quickly and spontaneously that later they only harm the interests of the state and complicate the work of the prosecutor – the procedural head during the investigation of criminal proceedings. Considering this, the issue of the role and place of the prosecutor in the mechanism for ensuring the rights and freedoms of citizens in the implementation of criminal proceedings, the implementation of its functions and powers is relevant. This is confirmed by the amendments to the Constitution of Ukraine adopted in July 2016, which still have not been implemented in other laws of Ukraine. The updated status of a prosecutor enshrined in the Basic Law creates a new basis for the procedural tactics of investigating criminal proceedings. Thus, it is worth analysing the new legislative regulation, empirical results, and practical components of the prosecutor's activity. The paper considers the functional algorithm of actions of the prosecutor – procedural head for the investigation of criminal offences. The purpose of the study is to characterise the features of the implementation of the procedural status of a prosecutor as a subject of criminal procedural activity in the investigation of crimes, the component of this activity as a supervisor or accuser in criminal proceedings, comparing such powers and determining the nature of these activities, considering their number in the law. Formal-logical, system-structural, comparative-legal, and statistical methods were used to achieve this goal. Based on the analysis of the provisions of recent changes in legislation and judicial and prosecutorial practice, the main area of the prosecutor's work as an accuser in criminal proceedings is established. The specific features of the prosecutor's procedural tactics at the stage of pre-trial investigation and in court, its focus on reasonably bringing to justice a person who has committed a criminal offence, to pass a guilty verdict of the court, are outlined. The importance and functional content of the prosecutor's criminal procedural activity in Ukrainian judicial system is established. Now they are primarily an accuser with a small number of supervisory powers, so the supervisory functions of the prosecutor are defined as secondary. Therewith, the prosecutor is the main participant in criminal proceedings, since they act at all stages from the beginning of criminal proceedings to their end

## Keywords:

prosecutor; criminal procedure activity; accuser; public accusation; prosecutor's supervision; procedural guidance

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## Introduction

The activity of the prosecutor in criminal proceedings is regulated by a number of legislative and departmental (interdepartmental) regulations, among which the basic ones are the Constitution of Ukraine (Art. 131-1) [1], the Law of Ukraine "On the prosecutor's office", the Criminal Procedure Code of Ukraine [2], orders of the General Prosecutor of Ukraine "On approval of the procedure for organising the activities of prosecutors and investigative bodies of the prosecutor's office in criminal proceedings" dated March 28, 2019, No. 51 [3], "On the organisation of prosecutor's supervision over compliance with laws by bodies conducting operational search activities" dated December 3, 2012, No. 4/1gn K [4].

The result of the constitutional reform in Ukraine in 2016, was that the prosecutor's office acquired updated powers [5]. According to Art. 131-1 of the Constitution of Ukraine, the prosecutor's office is entrusted with three basic functions: 1) maintaining public accusation in court; 2) organising and procedural management of pre-trial investigation, resolving other issues during criminal proceedings in accordance with the law, and supervising secret and other investigative and search actions of law enforcement agencies; 3) representation of the interests of the state in court in exceptional cases and in accordance with the procedure established by law.

The constitutional functions of the prosecutor in the criminal procedure field (1-2), not fully complying with those enshrined in the Law of Ukraine "On the prosecutor's office", which must be brought into compliance with the Constitution of Ukraine.

The Law of Ukraine "On the prosecutor's office" states, however, that the prosecutor's office is entrusted with the function of maintaining public accusation and supervising compliance with laws by bodies engaged in operational search activities, inquiry, and pre-trial investigation (Art. 2). Despite the fact that the last influential changes to the law [6] were made in 2019, that is, after the constitutional ones, the legislator did not bring the prosecutor's functionality in criminal proceedings in line with the Constitution.

The relevant powers of the prosecutor are specified in the Criminal Procedure Code of Ukraine, the laws of Ukraine "On operational search activities" [7], "On the Security Service of Ukraine" [8], "On the National Anti-Corruption Bureau of Ukraine" [9], etc.

However, the main purpose of the prosecutor is to achieve the tasks of criminal proceedings. The key concept that identifies the content of the criminal procedural activity of a prosecutor is the concept of functions that they perform. The subject of their implementation is exclusively the prosecutor.

Delegation of functions of the prosecutor's office, and assignment of these functions by other bodies or officials, is not legitimate.

A review of amendments to the Constitution and Ukrainian laws shows that the legislative discussion continues. The constant interest in this subject of powers and the role of the prosecutor in the system of criminal justice bodies among legal scholars in today's conditions is in an active phase [10-12]. The issues of determining the status of a prosecutor were investigated in papers by such Ukrainian and foreign researchers: S.A. Alpert, O.M. Bandurka, Yu.M. Hroshevyi, V.V. Dolezhan, M.V. Kosyuta, I.Ye. Marochkin, O.I. Medvedko, M.I. Mychko, V.V. Sukhonos, V.Ya. Tatsiy, Yu.S. Shemshuchenko, M.K. Yakymchuk and others. The legal nature of the criminal procedural activity of the prosecutor served as the subject of scientific analysis in the studies of O.S. Alexandrov, M.I. Bazhanov, V.I. Baskov, V.G. Besarabov, O.M. Vasilyev, L.Ye. Vladymyrov, S.I. Zarudnyi, G.A. Dzhanshiyev, V.S. Zelenetskyi, G.M. Korolyov, M.V. Muravyov, I.L. Petrukhin, M.M. Rozin, V.I. Rokhlin, M.V. Rudenko, V.M. Savitskyi, G.P. Sereda, O.V. Smirnov, M.S. Strogovych, A.V. Tushhev, I.Ya. Foynitskyi, S.D. Shestakova, and others. The question of the functions of the prosecutor's office was investigated by V.S. Babkova, L.R. Hrytsayenko, L.M. Davydenko, O.M. Lytvak, V.T. Malyarenko, O.R. Mykhailenko, Yu.Ye. Polyanskyi, P.V. Shumskyi, and others. In their studies, researchers have highlighted various aspects of the implementation of criminal procedural functions and powers by prosecutors. However, the issues of determining the legal status of a prosecutor under the current updated legislation are insufficiently investigated.

*The purpose of the study* is to determine the role and place of the prosecutor in criminal proceedings. This task is implemented through a thorough analysis of the procedural status of the prosecutor as a subject of criminal procedural activity, the characteristics of a component of this activity due to the presence of supervisory and accusatory powers during the investigation and maintenance of public accusation in court.

## Results and Discussion

The place and role of the prosecutor in criminal proceedings are outlined in special norms of the Criminal Procedure Code and other legislative acts. Thus, according to part 2 of Art. 36 "Prosecutor" of the Criminal Procedure Code of Ukraine [2], 20 powers are provided, due to which the prosecutor exercises their functions. According to the functional purpose, they can be divided into supervisory and accusatory ones. However, those are referred to as supervisory entities conditionally, since supervision essentially provides for two components:

verification and responsibility, and in the current Criminal Procedure Code, the responsibility of supervised entities is excluded. Therefore, the prosecutor has only the right to recommend bringing to justice for violating the law, and not actually bringing the guilty official personally.

Thus, the powers of a supervisory nature, include the following:

1) cancel illegal and unjustified decisions of investigators;

2) have full access to materials, documents and other information concerning the pre-trial investigation;

3) initiate before the head of the pre-trial investigation body the issue of removing an investigator from conducting a pre-trial investigation and appointing another investigator if there are grounds provided for in this Code for their recusal or in the case of an ineffective pre-trial investigation;

4) coordinate or refuse to coordinate the investigator's applications to the investigating judge for conducting investigative (search) actions, secret investigative (search) actions, and other procedural actions in cases provided for in this Code, or independently submit such applications to the investigating judge;

5) instruct the pre-trial investigation body to fulfil the request (instruction) of the competent body of a foreign state for international legal assistance or the adoption of criminal proceedings, to check the completeness and legality of the procedural actions, and the completeness and objectivity of the investigation in the adopted criminal proceedings; to check before sending to the prosecutor of the highest level the documents of the pre-trial investigation body on the extradition of a person (extradition), to return them to the relevant body with written instructions, if such documents are unsubstantiated or do not meet the requirements of international treaties, the consent to be bound by which is granted by the Verkhovna Rada of Ukraine, or the laws of Ukraine.

The accusatory powers are:

1) initiate a pre-trial investigation if there are grounds provided for in this Code;

2) instruct the pre-trial investigation body to conduct a pre-trial investigation;

3) instruct the investigator, the pre-trial investigation body to conduct investigative (search) actions, secret investigative (search) actions, and other procedural actions within the time period established by the prosecutor; or to give instructions on their conduct, take part in them, and if necessary – personally conduct investigative (search) and procedural actions in accordance with the procedure established by this Code;

4) instruct the relevant operational units to conduct investigative (search) actions and secret investigative (search) actions;

5) make procedural decisions in cases provided for in this Code, in particular regarding the closure of criminal proceedings and the extension of the terms of pre-trial investigation, if there are grounds provided for in this Code;

6) notify the person of suspicion;

7) file a civil claim in the interests of the state and citizens who, due to their physical condition or financial situation, not being of legal age, older age, disability, or limited ability, are unable to independently protect their rights, in accordance with the procedure provided for by this Code and the law;

8) approve or refuse to approve an indictment, applications for the application of coercive measures of a medical or educational nature, make changes to the indictment or these applications of the investigator; independently draw up an indictment or the specified applications;

9) apply to the court with an indictment, a request for the application of coercive measures of a medical or educational nature, a request for the release of a person from criminal liability;

10) support the public accusation in court, refuse to support the public accusation, change it, or bring an additional charge in accordance with the procedure established by this Code;

11) coordinate the request of the pre-trial investigation body for international legal assistance, transfer of criminal proceedings, or independently submit such a request in accordance with the procedure established by this Code;

12) instruct the pre-trial investigation bodies to search for and detain persons who have committed a criminal offence outside Ukraine, perform certain procedural actions for the purpose of extraditing a person (extradition) at the request of the competent authority of a foreign state;

13) appeal against court decisions in accordance with the procedure established by this Code;

14) exercise other powers provided for in this Code.

Thus, considering the above, it can be concluded that, firstly, the current prosecutor has substantially fewer supervisory powers than accusatory ones, and, secondly, even supervisory powers are accusatory in nature.

The status and powers of the prosecutor in criminal proceedings have changed dramatically after the constitutional reform in the field of justice. This objectively led to the institutional and functional transformation of the prosecutor's office.

The activity of the prosecutor covers the following constitutional functions of the prosecutor's office: 1) support of public accusation in court; 2) organisation and procedural management of pre-trial investigation, resolution of other issues in criminal proceedings in accordance with the law, supervision of secret and other investigative and

search actions of law enforcement agencies and meets the requirements of the Criminal Procedure Code of Ukraine.

The legally defined functions of the prosecutor correspond to the areas of their criminal procedure activity – accusatory (starting from notifying a person of suspicion of committing a criminal offence and before passing a guilty verdict of the court) and supervisory (procedural management of pre-trial investigation).

However, there is no consensus among researchers on this issue. In Particular, A. Dvornyk notes that the analysis of the positions available in the doctrine regarding the functional role of the prosecutor in pre-trial criminal proceedings allows distinguishing at least four main views: the prosecutor is the subject of supervision; the only function of the prosecutor is the accusation (criminal prosecution); the prosecutor combines supervision with the accusation (criminal prosecution); the prosecutor conducts supervision and accusation (criminal prosecution) along with other functions, in particular, procedural guidance of the investigation, protection of human and civil rights, etc. [13]. The conceptual originality of the Criminal Procedure Code of Ukraine is giving the prosecutor the authority to supervise compliance with laws during a pre-trial investigation in the form of procedural guidance (Part 2 of Art. 36).

Within the framework of supervision in the theory of criminal procedure, there are different views on the definition of the concept of prosecutor's supervision. In the legal literature, prosecutor's supervision is a type of activity of specially delegated state authorities to identify violations of laws, take measures to restore the violated rights of citizens and legal entities, and bring those responsible to justice [14]. V.M. Savytsky states that the main purpose of the prosecutor's supervision is ensuring a normal investigation, in accordance with the laws, and timely prevention of violations of procedural norms [15].

The essence of prosecutor's supervision in pre-trial proceedings, according to O.Yu. Tatarov consists, on the one hand, in monitoring that the bodies and officials whose activities are subject to supervisory powers comply with the duties and rules assigned to them, and on the other – in case of violation of these rules – in timely application of measures to restore the rule of law with bringing the perpetrators to justice. Moreover, the object of the prosecutor's supervision is the procedure established by law for resolving applications and reports of criminal offences and the process of their investigation [16].

The most controversial issue regarding the definition of the concept of prosecutor's supervision is the question of assigning it to procedural or

non-procedural activities, and the search for criteria for the correlation of prosecutor's supervision and the function of procedural management of pre-trial investigation [17]. According to part 2 of Art. 36 of the Criminal Procedure Code of Ukraine, procedural guidance is a form of prosecutor's supervision of compliance with laws during a pre-trial investigation.

The assertions of process researchers regarding the relationship between the prosecutor's supervision and procedural guidance also differ. A certain part of researchers notes that the concepts of “supervision” and “guidance” have different semantic meanings: supervision is “verification or observation for the purpose of verification”, and guidance is actually a “management process”, which consists in the implementation of “guiding activities”.

In the Western criminal procedure doctrine, the view of procedural guidance as a form of prosecutor's supervision is widespread. Experts of the Council of Europe stated that “supervision is identical to procedural guidance, and the prosecution and maintenance of public accusation in court are also identical, and, consequently, these novelties of The Criminal Procedure Code of Ukraine comply with the Constitution of Ukraine.” Experts also noted that there are no provisions in the Criminal Procedure Code of Ukraine that do not comply with the Basic Law, and the comments made in this part are questions of interpretation of certain norms [18].

The actual concept of procedural management of pre-trial investigation I. Glovyuk defines as regulated by the norms of criminal procedural legislation purposeful activity of the prosecutor to organise a quick and thorough investigation (in the form of an inquiry and pre-trial investigation) by making procedural decisions and ensuring their implementation [19].

Therewith, to understand procedural guidance, there is a need to answer the question: What does it exist for, what purpose should it solve? This type of activity of the prosecutor, and all their criminal procedural activities, is an indictment aimed at fulfilling the tasks of criminal proceedings (Art. 2 of the Criminal Procedure Code of Ukraine), namely, that everyone who has committed a criminal offence should be brought to justice in accordance with their guilt, that is, the prosecutor, using the powers granted by law, should collect as much information as possible confirming the guilt of a certain person in committing a crime.

Thus, procedural guidance is the accusatory area of the prosecutor's activity at the stage of pre-trial investigation, the essence of which is the criminal procedural activity of the prosecutor regulated by the Constitution and laws of Ukraine, which is implemented by organising supervision in

criminal proceedings and which is a component of public accusation. 68.5% of the interviewed prosecutors are inclined to this opinion.

Given the legal nature of the prosecutor's activity, they have a huge responsibility, since they must be objective and unbiased, so everyone who has committed a crime is brought to criminal responsibility, and no innocent person is accused, convicted, or subjected to unjustified procedural coercion.

Regarding the relationship between the functions of procedural guidance and accusation, the content of the prosecution is a much broader type of activity, and therefore contains procedural guidance. The current version of the Constitution of Ukraine does not entirely specify the function of prosecution. Thus, Art. 131-1 of the Constitution of Ukraine states that the prosecutor's office is charged with maintaining public accusation in court (paragraph 1), thus limiting the prosecutor's activities only to the judicial stage. Consequently, the prosecutor's implementation of the accusation function at the stage of the pre-trial investigation remains outside the scope of constitutional and legal regulation. There are several arguments in support of this thesis.

First, it is only possible to "support" the charge in court, [20], and to formulate, form, and draw up an indictment – only at the stage of pre-trial investigation. Therefore, such an accusatory criminal procedural activity should be considered in general, from the beginning of the registration of the crime to the end, and not just as an episodic final stage.

Secondly, in the Constitution, the charge is defined by the term "public", which is more complete and correct in this case, since it comes from the Latin word "publice", which means "officially on behalf of or by order of the state, in the interests of the state for the benefit of society". (This thesis was also supported by over 60% of the surveyed prosecutors.) However, the content of the indictment activity is also limited to a single judicial stage.

The question arises: does the prosecutor engage in accusation activities during the pre-trial investigation? The answer is undoubtedly positive. Even if the current Criminal Procedure Code of Ukraine does not contain the concept of a "decision to bring charges", this does not mean that the suspicion reported to a person is "exculpatory" in nature. It is the basis of further charges formulation.

Thus, the function of public accusation should be implemented by the prosecutor on behalf of the state during the pre-trial investigation and judicial proceedings. It consists of criminal procedural activities related to the prosecutor's supervision, procedural guidance, and support of the accusation in court.

The current Criminal Procedure Code of Ukraine defines the concept of prosecution more

broadly than in the Basic Law – as a statement about the commission by a certain person of an act provided for by the Law of Ukraine on criminal liability, put forward in accordance with the procedure established by the Criminal Procedure Code of Ukraine (paragraph 13 of part 1 of Art. 3), and state accusation – as a type of procedural activity of a prosecutor, which consists in bringing charges before the court to ensure criminal liability of a person who has committed a criminal offence (paragraph 3 of part 1 of Art. 3) [2]. From the legally established definitions, it is clear that the concept of public accusation in court is narrower in content than the concept of accusation, which covers all accusatory activities from the beginning of criminal proceedings to the sentencing in court and therefore relates as a part and a whole.

It was noted that the accusation is a separate criminal procedural function, the essence of which is the area of activity of the subjects of the prosecution (prosecutor, investigator, victim and civil plaintiff, their representatives) regulated by law, which is conducted by asserting the guilt of a particular person who committed a crime, and consists in formulating suspicion, accusation, applying procedural coercion measures to it, in particular preventive measures, collecting evidence of the guilt of this person and justifying the criminal responsibility of the accused before the court [21].

In legal science, there is a lot of scientific discussion about the choice of an approach to understanding "accusation" as a fundamental legal category. However, most authors agree that a public accusation in the procedural sense has pre-trial (initial) and judicial (final) components, that is, the accusation is still conducted at the stage of pre-trial investigation, and not only during the trial [22]. This study is also inclined to this opinion, but there are certain additions.

It is worth mentioning one of the conceptual innovations of the new Criminal Procedure Code of Ukraine, provided for in paragraph 2 of chapter 3, according to which the prosecutor belongs to the accusation. Since Art. 36 of the same chapter provides mainly for the powers of the prosecutor during the pre-trial investigation, this means that the involvement of the prosecutor on the accusation side is conducted at all stages of criminal proceedings, respectively the accusatory activity is conducted before the start of the trial. Only the moment of the beginning of this activity and its limits remains uncertain.

The principles of accusation begin to form at the time of registration of criminal proceedings, sufficient data indicating the presence of signs of a crime. This gives grounds for a well-founded assumption about the existence of a "future" suspect, accused, defendant, convicted person, that is, a person

to be brought to criminal responsibility. That is why the proceedings are registered to identify this person in the subsequent stages of the process and bring them to justice by handing them an indictment, and during the trial – supporting a public accusation against them.

Thus, according to the chronology of the investigation of proceedings, the first personalised procedural document of an accusatory nature, in which the future charge begins to form, is a written notice of suspicion. That is, the statement about the commission by a certain person of an act provided for by the criminal law is put forward in accordance with the procedure established by the Criminal Procedure Code of Ukraine. Only in this case does the suspect have the opportunity to fully exercise their right to defence.

Some additional arguments that only one procedural document cannot be considered the beginning of an accusation in a broad sense are provided below. Each procedural act, whether it is a decision, or an application prepared by a prosecutor or investigator, must necessarily have a description of the circumstances that indicate that a person has committed a crime, and therefore the initial indictment. This is confirmed by the legislative definition itself. Since, according to the content of the charge, the statement about the commission of an act by a certain person provided for by the Law of Ukraine on criminal liability is made in accordance with the procedure established by the Criminal Procedure Code of Ukraine (paragraph 13 of part 1 of Art. 3).

Notably, the prosecutor's accusatory function in a pre-trial investigation is completed by drawing up an indictment and applying it to the court. In addition, it is worth clarifying how the prosecution function ends. The logical conclusion of the charge is the court's guilty verdict.

After analysing the prosecutor's activities, it was concluded that their primary appointment in Ukrainian proceedings is not supervision, but the implementation of accusation.

This statement corresponds to the PACE Recommendations "On the role of the public prosecutor's service in a democratic society based on the

rule of law" [23]. The UN guidelines on prosecuting persons (prosecutors-accusators) emphasise a clear distinction between the powers of the accuser and judicial functions (Art. 10) [24].

A similar opinion is shared by international experts, who in their study on the role of the prosecutor at the pre-trial stage of criminal proceedings noted that out of over 20 powers, provided for in part 2 of Art. 36 of the Criminal Procedure Code of Ukraine, only seven can be to a certain degree attributed to supervisory [25].

Based on the above, by extrapolating the criminal procedural activity of the prosecutor through the set goal, the praxeological area of their multi-aspect work is aimed at substantiating the charge against the person and confirming it in court.

76% of the interviewed prosecutors – procedural supervisors, who conduct criminal procedural activities, stated that such activities of the prosecutor are accusatory.

Some of the prosecutorial supervision referred to in the 1960 Criminal Procedure Code has been taken over by judicial control. The prosecutor, as a party to the prosecution, performs the function of the prosecution as fundamental in criminal proceedings.

## Conclusions

Thus, having analysed the content of the criminal procedural activity of the prosecutor in the current Criminal Procedure Code, it is not supervisory, but accusatory in nature, since: firstly, the prosecutor is the subject of the accusation; secondly, among their powers enshrined in the Criminal Procedure Code of Ukraine, accusatory ones predominate; thirdly, they form the accusation by organising an effective pre-trial investigation and implementing procedural guidance; fourthly, their professional interest is to conduct the pre-trial investigation in strict accordance with the requirements of the law to form evidence of the accusation that is appropriate, permissible, reliable, and sufficient for a reasonable statement of guilt of committing a criminal offence by the accused; fifthly, they maintain a public accusation in court for the purpose of passing a guilty verdict by the court.

## References

- [1] Alenin, Yu.P. (2009). *Criminal procedure law of Ukraine*. Kharkiv: Odissei.
- [2] Dvornyk, A. (2013). Powers of the prosecutor in pre-trial criminal proceedings. *Bulletin of the Prosecutor's Office*, 8, 122-128.
- [3] Hloviuk, I. (2013). Procedural guidance of the prosecutor by pre-trial investigation. *Bulletin of the Prosecutor's Office*, 12, 79-88.
- [4] Karkach, P.M. (2018). Some issues of prosecutorial activity in the field of crime prevention. *Lawyer of Ukraine*, 2, 87-92.
- [5] Constitution of Ukraine No. 254k/96-VR. (1996, June). Retrieved from <http://zakon5.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

- [6] Criminal Procedural Code of Ukraine from No. 4651-VI. (2012, April). Retrieved from <http://zakon0.rada.gov.ua/laws/show/4651-17>
- [7] Kurbatova, I.S. (2020). *The prosecutor in criminal proceedings: theoretical and applied problems of realization by the state of the constitutional rights of the person and the citizen monohrafiya*. Irpin: Sate Tax University.
- [8] Lapkin, A.V. (2019). On determining the purpose, tasks and functions of the prosecutor's office. *Legal Horizons*, 17, 97-101.
- [9] Makbraid, Dzh. (2010) *European Convention on Human Rights and Criminal Procedure*. Kyiv: K.I.S.
- [10] Marochkin, I.E., & Karkach, P.M. (2004). *Prosecutorial supervision in Ukraine*. Kharkiv: Odissei.
- [11] Order of the Prosecutor General of Ukraine "On the organization of prosecutorial supervision over the observance of laws by bodies conducting operational and investigative activities" No. 4/1gn. (2012, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0004900-12#Text>
- [12] Order of the Prosecutor General of Ukraine "About the statement of the Order of the organization of activity of prosecutors and investigative bodies of prosecutor's office in criminal proceedings" No. 51. (2019, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0363-19#Text>
- [13] Pohoretskyi, M.A. (2015). Prosecutor in criminal proceedings: On the definition of functions. *Law of Ukraine*, 6, 86-95.
- [14] PACE Recommendation 1604 (2003) 11 "On the role of public prosecutors in a democratic society based on the rule of law" (2003, May). Retrieved from [https://www.coe.int/T/r/Parliamentary\\_Assembly/\[Russian\\_documents\]/\[2003\]/Rec1604.asp](https://www.coe.int/T/r/Parliamentary_Assembly/[Russian_documents]/[2003]/Rec1604.asp) Text
- [15] Rohatiuk, I.V. (2007). *Accusations in the criminal process of Ukraine*. Kyiv: Atika.
- [16] Rohatiuk, I.V. (2017). Prosecutors support of public prosecution in court: procedural tactics in non-standard conditions. *Law Magazine of the National Academy of Internal Affairs*, 1(13), 87-93.
- [17] Guidelines on the Role of prosecutors, The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 – September 7. (1990, September). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_859#Text](https://zakon.rada.gov.ua/laws/show/995_859#Text)
- [18] Savitskiy, V.M. (1975). *Essay on the theory of prosecutorial supervision in criminal proceedings*. Moscow: Nauka.
- [19] Tatarov, O.Yu. (2012). *Pre-trial proceedings in the criminal process of Ukraine: Theoretical, legal and organizational principles (according to the Ministry of Internal Affairs)*. Kyiv: Promin.
- [20] Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" No. 1698-VII (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1698-18#Text>
- [21] Law of Ukraine "About operativesearch activity" No. 2135-XII. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>
- [22] Law of Ukraine "On the Security Service of Ukraine". No. 2229-XII. (1992, March) Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-12#Text>
- [23] Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutors Office". No. 113-IX. (2019, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/113-20#n53>
- [24] Law of Ukraine "On amendments to the Constitution of Ukraine (on justice)" No. 1401-VIII (2016, June) Retrieved from <https://zakon.rada.gov.ua/laws/show/1401-19#n6>
- [25] Report on the results of the study 2016-2017 "The role of the prosecutor at the pre-trial stage of the criminal process". (2017). Retrieved from <https://ecpl.com.ua/analytics/rol-prokurora-na-dosudovij-stadiji-kryminalnohoptsesu/>

### Список використаних джерел

- [1] Кримінально-процесуальне право України : підручник / за ред. Ю. П. Аленіна. Харків: Одіссей, 2009. С. 183.
- [2] Дворник А. Повноваження прокурора у досудовому кримінальному провадженні. *Вісник прокуратури*. 2013. № 8. С. 122–128.
- [3] Гловюк І. Процесуальне керівництво прокурора досудовим розслідуванням. *Вісник прокуратури*. 2013. № 12. С. 79–88.
- [4] Каркач П.М. Деякі питання прокурорської діяльності у сфері протидії злочинності. *Юрист України*. 2018. № 2. С. 87–92.
- [5] Конституція України: Закон України від 28 червня 1996 р. № 254к/96-ВР. URL: <http://zakon5.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

- [6] Кримінальний процесуальний кодекс України: Закон України від 13 квітня 2012 р. № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17>.
- [7] Курбатова І. С. Прокурор у кримінальному судочинстві: теоретичні та прикладні проблеми реалізації державою конституційних прав людини і громадянина: монографія. Ірпінь: Ун-т держ. фіскал. служби України, 2020. 370 с.
- [8] Лапкін А.В. Щодо визначення мети, завдань та функцій прокуратури. *Правові горизонти*. 2019. № 17. С. 97–101. doi: <http://www.doi.org/10.21272/legalhorizons.2019.i17.p:97>.
- [9] Макбрайд Дж. Європейська конвенція з прав людини та кримінальний процес. Київ: К.І.С., 2010. 576 с.
- [10] Прокурорський нагляд в Україні: підручник / за ред. І.Є. Марочкіна, П.М. Каркача. Харків: Одиссей, 2004. 306 с.
- [11] Про організацію прокурорського нагляду за додержанням законів органами, які проводять оперативно-розшукову діяльність: наказ Генерального прокурора України від 3 грудня 2012 р. № 4/1гн. URL: <https://zakon.rada.gov.ua/laws/show/v0004900-12#Text>.
- [12] Про затвердження Порядку організації діяльності прокурорів і слідчих органів прокуратури у кримінальному провадженні: наказ Генерального прокурора України від 28 березня 2019 р. № 51. URL: <https://zakon.rada.gov.ua/laws/show/z0363-19#Text>.
- [13] Погорецький М.А. Прокурор у кримінальному процесі: щодо визначення функцій. *Право України*. 2015. № 6. С. 86–95.
- [14] Рекомендація ПАРЕ 1604 (2003) 11 «Про роль служби публічних обвинувачів в демократичному суспільстві, заснованому на верховенстві права» від 27 травня 2003 р. URL: [https://www.coe.int/T/r/Parliamentary\\_Assembly/\[Russian\\_documents\]/\[2003\]/Rec1604.asp](https://www.coe.int/T/r/Parliamentary_Assembly/[Russian_documents]/[2003]/Rec1604.asp).
- [15] Рогатюк І.В. Обвинувачення у кримінальному процесі України: монографія. Київ: Атіка, 2007. 160 с.
- [16] Рогатюк І.В. Підтримання прокурором публічного обвинувачення в суді: процесуальна тактика в нестандартних умовах. *Юридичний часопис Національної академії внутрішніх справ*. 2017. Вип. 1 № 13. С. 87–93.
- [17] Руководящие принципы, касающиеся роли лиц, осуществляющих судебное преследование приняты восьмым Конгрессом Организации Объединенных Наций по предупреждению преступности и обращению с правонарушителями, Гавана, Куба, 27 августа – 7 сентября 1990 г.: междунар. док. от 7 сентября 1990 г. URL: [http://zakon3.rada.gov.ua/laws/show/995\\_859](http://zakon3.rada.gov.ua/laws/show/995_859).
- [18] Савицкий В.М. Очерк теории прокурорского надзора в уголовном судопроизводстве. Москва: Наука, 1975. 383 с.
- [19] Татаров О.Ю. Досудове провадження в кримінальному процесі України: теоретико-правові та організаційні засади (за матеріалами МВС): монографія. Київ: Промінь, 2012. 640 с.
- [20] Про Національне антикорупційне бюро України: Закон України від 14 жовтня 2014 р. № 1698-VII. URL: <https://zakon.rada.gov.ua/laws/show/1698-18#Text>.
- [21] Про оперативно-розшукову діяльність: Закон України від 18 лютого 1992 р. № 2135-XII. URL: <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.
- [22] Про службу безпеки України: Закон України від 25 березня 1992 р. № 2229-XII. URL: <https://zakon.rada.gov.ua/laws/show/2229-12#Text>.
- [23] Про внесення змін до деяких законодавчих актів України щодо першочергових заходів із реформи органів прокуратури: Закон України від 19 вересня 2019 р. № 113-IX. URL: <https://zakon.rada.gov.ua/laws/show/113-20#n53>.
- [24] Про внесення змін до Конституції України (щодо правосуддя): Закон України від 2 червня 2016 р. № 1401-VIII. URL: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>.
- [25] Звіт за результатами дослідження 2016–2017 «Роль прокурора на досудовій стадії кримінального процесу». URL: <https://ecpl.com.ua/analytics/rol-prokurora-na-dosudovij-stadiji-kryminalnoho-protsesu/>.

# Прокурор за чинним КПК: обвинувач чи наглядач?

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## Анотація

Турбулентні зміни законодавства останніми роками є плідним підґрунтям для наукових досліджень. Інколи закони, які регулюють кримінальні процесуальні відносини, приймають так швидко й дивно, що згодом вони тільки завдають шкоди інтересам держави й ускладнюють роботу прокурора – процесуального керівника під час розслідування кримінального провадження. З огляду на це, актуальним є питання щодо ролі та місця прокурора в механізмі забезпечення прав і свобод громадян під час здійснення кримінального судочинства, реалізації його функцій і повноважень. Підтвердженням цього є зміни до Конституції України, прийняті в липні 2016 року, які вже протягом чотирьох років не імplementовані до інших законів України. Закріплений Основним Законом оновлений статус прокурора створює новий базис для процесуальної тактики розслідування кримінальних проваджень. Отже, варто дослідити нову законодавчу регламентацію, емпіричні результати та практичну складову діяльності прокурора. У роботі розглянуто функціональний алгоритм дій прокурора – процесуального керівника щодо розслідування кримінальних правопорушень. Метою статті є характеристика особливостей реалізації процесуального статусу прокурора як суб'єкта кримінальної процесуальної діяльності під час розслідування злочинів, складова цієї діяльності як наглядовця чи обвинувача в кримінальному судочинстві, зіставлення таких повноважень і визначення характеру зазначеної діяльності з огляду на їх кількість у законі. Для досягнення поставленої мети застосовано формально-логічний, системно-структурний, порівняльно-правовий та статистичний методи. На підставі аналізу положень останніх змін у законодавстві та судової і прокурорської практики встановлено основний напрям роботи прокурора як обвинувача в кримінальному провадженні. Окреслено специфіку процесуальної тактики прокурора на стадії досудового розслідування та в суді, його спрямованість на обґрунтоване притягнення до відповідальності особи, яка вчинила кримінальне правопорушення, з метою винесення обвинувального вироку суду. Встановлено значення та функціональне наповнення кримінальної процесуальної діяльності прокурора в українському судочинстві. Наразі він є передусім обвинувачем із незначною кількістю наглядових повноважень, тому наглядові функції прокурора визначено як другорядні. Водночас прокурор є основним учасником кримінального провадження, оскільки діє на всіх його етапах з початку кримінального провадження та до його закінчення

## Ключові слова:

прокурор; кримінальна процесуальна діяльність; обвинувач; публічне обвинувачення; прокурорський нагляд; процесуальне керівництво

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# Comparative Analysis of Criminal Proceedings in Absentia in the Legislation of Federal Republic of Germany and Ukraine

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## Abstract

Turbulent changes in legislation in recent years are an extensive basis for studies. Sometimes laws that regulate criminal procedural relations are adopted so quickly and spontaneously that later they only harm the interests of the state and complicate the work of the prosecutor – the procedural head during the investigation of criminal proceedings. Considering this, the issue of the role and place of the prosecutor in the mechanism for ensuring the rights and freedoms of citizens in the implementation of criminal proceedings, the implementation of its functions and powers is relevant. This is confirmed by the amendments to the Constitution of Ukraine adopted in July 2016, which still have not been implemented in other laws of Ukraine. The updated status of a prosecutor enshrined in the Basic Law creates a new basis for the procedural tactics of investigating criminal proceedings. Thus, it is worth analysing the new legislative regulation, empirical results, and practical components of the prosecutor's activity. The paper considers the functional algorithm of actions of the prosecutor – procedural head for the investigation of criminal offences. The purpose of the study is to characterise the features of the implementation of the procedural status of a prosecutor as a subject of criminal procedural activity in the investigation of crimes, the component of this activity as a supervisor or accuser in criminal proceedings, comparing such powers and determining the nature of these activities, considering their number in the law. Formal-logical, system-structural, comparative-legal, and statistical methods were used to achieve this goal. Based on the analysis of the provisions of recent changes in legislation and judicial and prosecutorial practice, the main area of the prosecutor's work as an accuser in criminal proceedings is established. The specific features of the prosecutor's procedural tactics at the stage of pre-trial investigation and in court, its focus on reasonably bringing to justice a person who has committed a criminal offence, to pass a guilty verdict of the court, are outlined. The importance and functional content of the prosecutor's criminal procedural activity in Ukrainian judicial system is established. Now they are primarily an accuser with a small number of supervisory powers, so the supervisory functions of the prosecutor are defined as secondary. Therewith, the prosecutor is the main participant in criminal proceedings, since they act at all stages from the beginning of criminal proceedings to their end

## Keywords:

prosecutor; criminal procedure activity; accuser; public accusation; prosecutor's supervision; procedural guidance

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## Introduction

In the criminal legislation of the Federal Republic of Germany (hereinafter – FRG), the procedure of criminal proceedings in the absence of a person is effectively operating for a long time.

Therewith, the Criminal Procedure Code of Ukraine, which gained legal force on November 19, 2012, did not provide for the possibility of completing a pre-trial investigation and passing a sentence in the absence of a suspect (accused) until January 2014. A separate institution of special pre-trial investigation as a component of criminal proceedings in the absence of a suspect or accused (in absentia) was introduced in October 2014.

Aspects of the criminal procedure legislation of Ukraine concerning criminal proceedings in the absence of a suspect, accused in criminal proceedings were investigated by various researchers, including: V.V. Afanasyev, O.V. Baulin, I.V. Glovyuk, V.V. Zuyev, O.S. Mazur, G.V. Matviyevska, O.O. Nahornyyuk-Danylyuk, R.G. Piestsov, V.O. Popeliushko, O.Yu. Tatarov, V.M. Trofimenko, L.D. Udalova, O.G. Shilo, S.L. Sharenko, D.M. Shyshman, and others.

The specific features of the criminal procedure legislation of the FRG in different periods were investigated by such researchers as L.V. Golovko, K.F. Gutsenko, V.O. Popeliushko, Yu. Pikh, V.A. Savchenko, Ya.I. Soloviy, B.A. Filimonov, V.I. Felik, V.D. Yurchishyn, and others. Therewith, the issue of comparative analysis of criminal proceedings in the absence of a suspect or accused in absentia in the criminal procedure legislation of Ukraine and the FRG has not been investigated, so it requires a detailed analysis for the purpose of scientific understanding.

*The purpose of the study* is a comparison of the criminal procedure legislation of the FRG and Ukraine in relation to criminal proceedings in the absence of a suspect or accused both at the stage of pre-trial investigation and trial, and determination of the compliance of the legislation of these countries with international documents that establish criteria regulating consideration in the order of in absentia and the practice of the European Court of Human Rights.

## Results and Discussion

The main source of German criminal procedure laws is the Criminal Procedure Code of the FRG (ger. Strafprozessordnung für die Bundesrepublik Deutschland), adopted on February 1, 1877. Other sources of German criminal procedure legislation are: the Judiciary Act of 1877, the Criminal Code of 1871, the Law on Judges of 1961, the Juvenile Courts Act of 1974, and the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by the Bundestag in 1952 [1], and the practice of the European Court of Human Rights, which are essential in German law [2].

In general, German criminal procedure legislation is stable and dynamic, as it was constantly improved and supplemented with provisions required by the present [3].

The purpose of criminal proceedings in the German procedural literature is mainly recognised as truth [4], justice, and legal stability as necessary prerequisites for resolving a criminal dispute, and therefore for restoring and maintaining public order [5].

The Criminal Procedure Code of the FRG of 1877 in its original version allowed absentee proceedings only in not very important cases, in which the punishment was reduced to a monetary penalty [6].

In modern German legislation, the involvement of accused persons in criminal proceedings is linked to the constitutional obligation of the state to respect human dignity and, therefore, the right to a fair hearing and the principle of guilt. In addition, with the exception of some alternative proceedings, German legislation provides for the personal presence of the accused (defendant) throughout the entire trial [7].

The presence of the accused is important in German Criminal Procedure, [8] and this indicates that the illegal absence of the accused in a substantial part of the trial is “an absolute basis for appeal” [9].

According to the decisions of the Federal Constitutional Court, the personal involvement of the accused in criminal proceedings under the procedural legislation of Germany serves not only to ensure the rights to defence but also to establish the facts more reliably, reflecting the constitutional opinion that the position of the accused is an essential part of the court proceedings [8].

In the Criminal Procedure Code of the FRG, the concept of “abwesenheit” is used to refer to criminal proceedings in the absence of a person. In the generally recognised practice of the European Court of Human Rights, the term “in absentia” is used to refer to criminal proceedings in the absence of a suspect (accused, defendant), so this concept will be used when comparing the criminal process of Ukraine and Germany.

Therewith, the procedure for criminal proceedings on the territory of Ukraine, in accordance with Art. 1 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) [10], is recognised only by the criminal procedure legislation of Ukraine, which covers the relevant provisions of Constitution Of Ukraine, international agreements, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine, the Criminal Procedure Code of Ukraine, and other laws of Ukraine.

At the initial stage of the CPC of Ukraine, which gained legal force on November 19, 2012, and is still in force today, it does not provide for the possibility of conducting pre-trial investigation and judicial

proceedings in the absence of a suspect, accused, due to the lack of a procedure for bringing to criminal responsibility persons who evade arrival at the pre-trial investigation bodies or the court.

The first attempt to overcome this gap was the Law of Ukraine No. 725-VII of January 16, 2014, which introduced criminal proceedings in absentia. However, these amendments to the Criminal Procedure Code of Ukraine entered into force on January 22, 2014, and on February 2, 2014, they became invalid on the grounds of the law of Ukraine of January 28, 2014, No. 732-VII.

Only the law of Ukraine "On amendments to the criminal and criminal procedure codes of Ukraine regarding the inevitability of punishment for certain crimes against the foundations of national security, public security and corruption crimes" of October 7, 2014, No. 1689-VII [11] introduced the institution of criminal proceedings in the absence of a suspect or accused, which in the CPC of Ukraine was called special pre-trial investigation and special court proceedings (in absentia).

Consequently, the criminal procedure legislation of both FRG and Ukraine provide for a certain procedure for conducting criminal proceedings in the absence of a suspect or accused (in absentia). However, Ukraine in absentia is a relatively new institution that is at the stage of development, while in Germany it is a traditional institution of criminal procedure, which has been operating for a long time and has a well-established practice of law enforcement.

At the stage of pre-trial investigation, before the presentation of a public charge, which is the moment when the prosecutor's office transfers the indictment to the court, in the absence of the accused for these reasons, the prosecutor's office is granted the right to temporarily close the proceedings, but only after the factual circumstances of the case have been investigated to the extent possible, and the evidence has been provided procedurally to the extent necessary [6].

Therewith, based on the analysis of chapter 24 of the CPC of Ukraine "Features of special pre-trial investigation of criminal offences" (Art. 297-297), it is provided that a special pre-trial investigation (in absentia): 1) is conducted only in relation to a person who has acquired the status of a suspect in the presence of sufficient evidence on ensuring the person's awareness of the existing criminal proceedings, in particular by serving them notice of suspicion and summons [12]; 2) in relation to clearly defined categories of criminal offences [13], which relate mainly to grievous and extremely grievous crimes; 3) in the case of hiding of suspect from pre-trial investigation bodies and the court to evade criminal liability and putting them on the interstate or international wanted list [14];

4) with the mandatory involvement of a defence lawyer, in particular, by ensuring their involvement by the investigator, prosecutor [15]; 5) subject to compliance with additional, in comparison with the general procedure of criminal proceedings, guarantees of ensuring the rights of the suspect, accused, defendant [16]. Consequently, the German CPC does not actually provide for the possibility of conducting a pre-trial investigation in the absence of a person, which substantially contrasts it with the CPC of Ukraine, which defines the procedure for a special pre-trial investigation (in absentia).

The CPC of the FRG notes V.O. Popeliushko, suggests several varieties of the main trial in absentia [17]:

- in cases where the defendant leaves the trial or does not appear for the continuation of the postponed main trial. In such cases, the trial may end in the absence of the defendant, if the defendant has already been questioned on the merits of the charge and the court does not consider their continued presence necessary (CPC of the FRG). Such a procedural mechanism is aimed at preventing obstruction or undue prolongation of judicial proceedings. The main hearing may end in the absence of a person, if the defendant is absent or does not appear, or when the interrupted main hearing continues. It is necessary for the court of the first instance to already consider the person on the charge, that is, the defendant was given the opportunity to respond to the indictment after it was read at the beginning of the main hearing to do this [18];

- when a defendant intentionally put themselves in a state of procedural incapacity and thus intentionally prevents the proper conduct or continuation of the trial in their presence, provided that they have not yet been questioned on the merits of the charge, although after the opening of the main trial they had such an opportunity (CPC of Germany). The absence of defendants is considered guilty if, after being considered on the indictment, they have placed themselves in a condition that prevents them from being eligible for trial [9];

- in case of removal of the defendant from the courtroom to pre-trial detention on account of their inappropriate behaviour, if the person seriously violates the procedure for the hearing (§ 177 of the law on the judicial system, § 231b of the CPC of the FRG) [19]. In such a case, the trial may continue in their absence, if the court does not consider their further presence necessary, and for as long as the court has concerns that the presence of the defendant may seriously damage the process of the main trial [8]; if necessary, protect the interests of justice by considering the interests of other defendants, witnesses, and the interests of the defendant during the questioning of these persons (§ 247 of the CPC of the FRG). The law also allows a defendant to be

removed from the courtroom during part of a hearing to reveal the truth or protect witnesses or defendants. The defendant may be ordered to leave the courtroom during the examination, if, based on specific facts, there are grounds that the witness or co-defendant would not tell the truth or refuse to give evidence in the presence of the defendant [20];

- if the court releases the defendant, at their request, from appearing at the main trial (§ 233 of the CPC of the FRG). According to § 233 of the CPC of the FRG, a defendant may, at their own request, lodge an application with a court for exemption from the obligation to appear at the main hearing if, as a result of the proceedings alone or in aggregate, only a penalty of imprisonment up to six months, a monetary fine of up to one hundred and eighty day rates, a warning with a penalty clause, a prohibition on driving a vehicle, confiscation of what was acquired by criminal means, seizure, destruction or reduction in disrepair of the objects and means of committing the act is expected.

Such a statement can be extremely useful if the defendant prefers to refrain from appearing in person due to the considerable distance between their place of residence and the court for reasons of poor health, professional, or private reasons;

- if the main trial is conducted against several defendants, but separate court sessions do not concern a specific defendant (§ 231c of the CPC of the FRG). Conditional type of proceedings in absentia;

- if the defendant uses the right to take part in the main court proceedings (§ 232 of the CPC of the FRG). This type of proceeding, in absentia, is based on the right to take part in the trial of their case if they were properly summoned and that, as a result of the trial, alone or in aggregate, only a penalty is expected, mainly in the form of a monetary penalty.

In turn, the CPC of Ukraine distinguishes two types of criminal proceedings in the absence of a suspect or accused (in absentia): special pre-trial investigation (Art. 297-1-297-5) and special court proceedings (Art. 323) depending on the stages of criminal proceedings.

According to Art. 323 of the CPC of Ukraine, judicial proceedings in criminal proceedings concerning crimes specified in part 2 of Art. 297-1 of this Code can be conducted in the absence of the accused (in absentia), except for a minor who is hiding from the investigating authorities and the court to evade criminal liability (special court proceedings) and is put on the interstate or international wanted list.

Thus, the criminal procedure legislation of the FRG, in contrast to the CPC of Ukraine, provides for several types of judicial proceedings in absentia.

According to the provisions of the CPC of the FRG, in cases where the accused evades investigation or trial by staying abroad, regardless of whether or not the issue of their extradition by a foreign state is

resolved, and in cases in which their place of stay is unknown, the law does not provide for the proceedings in absentia. Such cases are considered in German law as temporary surmountable procedural obstacles, for overcoming which the CPC of the FRG provides for separate proceedings (book 2, section VIII, §§ 276-295 of the CPC of the FRG) [6].

This separate proceeding is considered as an alternative for in absentia, in particular, “special pre-trial investigation” and “special judicial proceedings” (chapter 24-1 and Art. 323 of the CPC of Ukraine) – “proceedings against absent persons” (Book 2, Section VIII, §§ 276-295 of the CPC of the FRG). It is conducted separately from the main court proceedings, it aims to provide evidence in case of the upcoming appearance of the absent accused (§ 285 of the CPC of the FRG). However, the law also defines another task, namely to induce the accused to appear in court by, on the one hand, temporary confiscation of their property (§§ 290-293 of the CPC of the FRG), and on the other – by applying an incentive measure in the form of a guarantee of inviolability (§ 295 of the CPC of the FRG) [6].

The analysis of §§ 276, 285 of the CPC of the FRG demonstrates that separate proceedings are used to preserve evidence when the location of the accused is unknown, or the accused is not accessible to the German authorities in other circumstances.

In all cases, with the exception of those where a criminal act committed by an absent person is punishable by imprisonment for up to six months or a monetary fine of up to one hundred and eighty daily rates, if there are suspicions against the absent accused that would justify the issuance of a pre-trial detention order, a court order may impose a temporary confiscation of their property within the scope of the CPC of the FRG (§ 290 of the CPC) [17]. The purpose of the temporary confiscation of the property of “Vermögensbeschlagnahme” is to force the absent accused to appear in court by seizing their property and financial resources and thus securing the main trial. This measure can be applied regardless of the possibility of extradition of the accused by a foreign state or the refusal of the accused to return to Germany, even in the event of loss of property. However, it cannot be applied if the presence of the accused cannot be ensured by applying this measure. An example is an absence due to reasons beyond the control of the accused (illness, detention against their will, etc.). The purpose of this measure cannot be achieved either if the value of the property is so insubstantial that its confiscation cannot encourage the accused to appear [21].

Based on the analysis of the CPC of the FRG, the resolution on temporary confiscation of property will be published in the Federal Gazette and, at the discretion of the court, published in another

appropriate way. From the moment of its first publication in the Federal Gazette, the accused loses the right to dispose of confiscated property by entering into transactions [17].

In addition, the procedural law provides for the involvement of persons in the main hearing who are not charged, but may be adversely affected by the confiscation order of the criminal court, since they are the owners of this property or have another right to it. In this case, the court obliges such a person to take part in the proceedings [19].

In such proceedings, the accused may be represented by a defence lawyer and even relatives. If charges have already been brought against an absent accused, the totality of the accused's property located within Germany may be seized by the court to force them to appear, if the grounds of suspicion justify the issuance of an arrest warrant [22], [9].

The decision on the application of the temporary confiscation of property is brought to the attention of the agency to which the institution of supervision of the seized property of the persons present is subordinate (§ 292 paragraph 2 of the CPC of the FRG) [17]. According to § 293 of the CPC of the FRG, temporary confiscation is cancelled when there are no grounds for it anymore. Cancellation will be announced the same way as the application. An order to remove the resolution from the Federal Bulletin, which is executed within a month is conducted to do this [21].

In addition to the special confiscation of property in the framework of proceedings against absent persons, according to § 295 of the CPC of the FRG, the court has the right to issue a written guarantee of inviolability to the absent accused, which may be associated with the fulfilment of certain conditions. Such a guarantee provides an exemption from pre-trial detention as a preventive measure, but only in relation to the criminal act in connection with which it was granted. The guarantee loses its validity in the event of a guilty verdict with a custodial sentence, or if the accused makes preparations to escape, or if they do not fulfil the conditions on which the guarantee of inviolability depended [1].

Thus, the task of the separate proceedings under the CPC of the FRG, which is considered as an alternative for in absentia, is to induce the accused to appear in court by both temporary confiscations of their property and applying an incentive measure in the form of a guarantee of inviolability.

Alternative legal mechanisms in criminal proceedings in the absence of a suspect (accused), except for a special pre-trial investigation or special court proceedings, are not provided for in the CPC of Ukraine, and any mechanisms for inducing a suspect (accused) to appear to an investigator, prosecutor, or court during a special pre-trial investigation and special court proceedings.

According to the criminal procedure legislation of Germany, absentee court proceedings are allowed under certain circumstances.

After a public accusation is made, which is the moment when the prosecutor's office transfers the indictment to the court, the court is ex officio obliged to check the existence of procedural prerequisites for the process. If a temporary procedural obstacle is established, which is the absence of the accused for the above reasons, the court has the right, based on § 205 of the CPC of the FRG, to decide on the temporary closure (suspension) of the trial [6].

The CPC of the FRG, namely § 276, defines a temporarily absent person. Thus, the accused is considered absent if the place of their stay is unknown or if they are abroad and it is impossible to bring them to the court to which their case is being considered.

Unlike the CPC of the FRG, the criminal procedure legislation of Ukraine does not cover the concept of "hiding of a suspect from pre-trial investigation bodies and the court to evade criminal liability", which creates problems in the law enforcement of the institution in absentia.

Therewith, according to § 287 of the CPC of the FRG, if the place of stay of the accused is known, the judge of the court who has jurisdiction over the case opens "proceedings against the absent person", sends the absent person a corresponding notification about the progress of the proceedings, against which the accused cannot make claims. In the event that a public charge is brought against the absent person, and the place of their stay is unknown, the judge, having opened the relevant proceedings, conducts the so-called requirement to appear by notifying one or more public mass media (in newspapers, on radio, television, or even by attempting to establish contact with the absent person by other suitable means with a request to appear in court or inform the place of their stay (§ 288 of the CPC of the FRG) [21].

When the absence of the defendant is discovered only after the opening of the main court proceedings, the court decides to suspend it (§ 205 of the CPC of the FRG), but for the purpose of providing procedural evidence through an authorised judge of the court conducting the trial, or at their request through an authorised judge of another court (simultaneously with the initiation of "proceedings against the absent person") conducts their investigation (§ 289 of the CPC of the FRG, § 157 of the Law on the judicial system) [17].

The main trial may be conducted without the defendant, if they were properly summoned and the summons (but not based on a summons via public notice) stated that the trial may be conducted in the defendant's absence, and the results of the trial alone or in aggregate will only impose a penalty of a

monetary fine of up to one hundred and eighty day rates, a warning with a penalty clause, a prohibition to drive a vehicle, confiscation of what was acquired by criminal means, seizure, destruction, or reduction in disrepair of objects and means of committing the act. The imposition of a more severe penalty or correction measure in such proceedings is impossible, and the deprivation of a driver's license is allowed if the possibility of this was indicated in the subpoena (paragraphs 1, 2 § 232 of the CPC of the FRG) [6].

The court must be sure that the person deliberately ignores the obligation to be present without valid reasons [23]. The court may not apply a higher fine or penalty than those indicated above, in particular, a penalty of imprisonment [19]. The presence of all these conditions does not allow a person not to appear, but only authorises the court to hold the main hearing in the absence of the defendant [28]. Even if the above conditions for a hearing in absentia are met, the court may order to bring the defendant to it, first of all, if it considers that the presence of the defendant is necessary to reveal the truth [19].

In the criminal procedure legislation of Ukraine, the procedure for judicial proceedings in the absence of the accused is called special judicial proceedings (in absentia).

According to the provisions of the CPC of Ukraine, judicial proceedings in criminal proceedings can be conducted in the absence of the accused (in absentia), except for a minor, only in respect of clearly defined crimes, which mainly belong to grievous and extremely grievous crimes, who is hiding from the investigating authorities and the court to evade criminal liability and is put on the interstate and international wanted list (part 3 of Art. 323 of the CPC of Ukraine).

The prosecutor submits a petition to the court, to which they add materials stating that the accused knew or should have known about the criminal proceedings initiated to apply the procedure of special judicial proceedings. Based on the results of this request, the court issues a decision on the implementation of special court proceedings against such an accused (part 3 of Art. 323 of the CPC of Ukraine) in case of its satisfaction, or a decision on refusal to satisfy the request for special court proceedings, declaring the accused wanted and suspending criminal proceedings (Art. 335 of the CPC of Ukraine).

Summons for the accused in the event of special judicial proceedings are sent to the last known place of their residence or stay, and the procedural documents to be served to the accused are sent to the defence lawyer. Information about such documents and summons for the accused must be published in the mass media of the national field of distribution. From the moment of publication of the summons in the mass media of the general state

field of distribution, the accused is considered to be properly informed with its content.

Thus, according to the criminal procedure legislation of Germany, holding a full main hearing in the absence of the accused is permissible in the interests of protecting the functioning of the criminal justice system, if they were properly summoned, for this purpose the location of the defendants must be known to the court, thereby they must be warned that the hearing can take place in their absence [8] in cases, according to the results of the trial of which, punishment can be imposed in the form of a predominantly monetary penalty.

In turn, the CPC of Ukraine provides for conducting a trial in the absence of the accused, who is hiding from the investigating authorities and the court to evade criminal liability and is put on the interstate and/or international wanted list in the absence of the accused in proceedings only related to grievous and extremely grievous crimes. Attention is also drawn to the issue of the involvement of a defence lawyer in criminal proceedings in the absence of the accused (defendant) in the CPC of the FRG. Thus, according to § 286 of the CPC of the FRG, a defence lawyer can act for an absent accused (defendant), and their relatives are allowed as representatives even without a power of attorney.

In all cases of absentee proceedings to the extent that the main trial can be conducted in the absence of the defendant, they have the right to entrust their representation in court to the defence lawyer, issuing them a written order for this, and if they do not have a defence lawyer, give their consent to this. If the defence is conducted as intended, the defendant's consent to this is not necessary (§§ 234, 234A of the CPC of the FRG) [17].

If such representation is possible, that is, when the main hearing can be held in the absence of the accused, and the defence lawyer has received a power of attorney from such a person, the former has the right to exercise all the procedural rights of the defendant, in particular, to make a statement of accusation on behalf of such a person [8]. Therewith, the presence of a defence lawyer at the hearing is not a substitute for the presence of the defendant. Undoubtedly, the absent defendant loses the opportunity to contribute to the clarification of the facts at the main hearing [18]. However, according to §§ 240, 257, the defence lawyer can exercise most of these rights of involvement, regardless of whether the defendant is present, in particular, the right to ask questions to witnesses and experts and comment on the evidence. According to part 2 of Art. 297-3, part 3 of Art. 323 of the CPC of Ukraine, the involvement of a defence lawyer during a special pre-trial investigation from the moment the investigating judge considers the request and special court proceedings is mandatory.

Fixing in the CPC of Ukraine the requirement for mandatory involvement of a defence lawyer in criminal proceedings against persons in respect of whom a special pre-trial investigation and special judicial proceedings (in absentia) are conducted, aimed at ensuring the right to defence of a suspect or accused. However, the impossibility of communication of a defender appointed by the relevant body (institution) authorised by law to provide free legal assistance with a suspect or accused who haven't met before, excludes the possibility of coordination between these persons of a legal position and substantially complicates the exercise by the defender of their powers, in particular, to establish information about circumstances, factual data that could have been communicated to them exclusively by the client [16]. This may lead to a violation of the right to defence, namely the "right to effective defence", the concept of which defined by the practice of the European Court of Human Rights.

Consequently, the criminal procedure legislation of both Germany and Ukraine provides for the right to defence for a suspect accused in criminal proceedings in absentia, but during law enforcement, there are problems in ensuring this right under the CPC of Ukraine in the case of defence by a lawyer appointed by the relevant body (institution) authorised by law to provide free legal assistance.

Under § 235 of the CCP of the FRG, if the main hearing was held in the absence of the defendant, they may, within one week after the sentence was served, request that the proceedings be annulled and returned to the previous stage under the same conditions as those established in the event of non-compliance with the time-limits; if the summoning of the defendant to the main trial was not communicated to them, they may claim that the proceedings were returned to the previous stage.

According to the CPC of the FRG, if it is allowed to hold the main hearing in the (permanent or temporary) absence of the defendant, further judicial means are the same as those applied to court decisions after the usual main hearing: review (i.e., appeal only on matters of law), and in some cases – appeal (i.e., appeal on matters of fact and law) [19].

According to paragraph 1 of part 1 of Art. 392 of the CPC of Ukraine, court decisions that were adopted by the courts of the first instance and did not enter into legal force, namely sentences adopted as a result of special court proceedings, may be appealed.

According to part 3 of Art. 400 of the CPC of Ukraine, if an appeal is filed by an accused against whom the court has issued a verdict based on the results of special court proceedings, the court resumes the term, provided that the accused are provided with confirmation of the existence of valid reasons and sends the appeal together with the ma-

terials of the criminal proceedings to the Court of Appeal, observing the relevant rules.

The content of this legal provision certifies that the time limit for the appeal must be restored by the court that issued such a verdict that contradicts the principles of proceedings in the Court of Appeal, defined in chapter 31 of the CPC of Ukraine.

Therewith, the CPC of Ukraine, apart from the appeal against a verdict adopted as a result of special judicial proceedings with certain restrictions, does not provide for a separate procedural mechanism for re-examination in the event that the accused has not been properly notified about the trial.

An international document defining certain requirements for criminal proceedings in the absence of a suspect (in absentia) is Resolution (75) 11 of the Committee of Ministers of the Council of Europe

"On the criteria governing proceedings conducted in the absence of the accused", adopted on January 19, 1973. According to this document, non-compliance with the requirement for the mandatory presence of an accused during the consideration of their case in court is permissible only in exceptional cases; ways and means must be found to ensure the rights of the accused to be heard and to be present during the consideration of their case; the case of the accused is not considered in their absence if it is possible to move the proceedings to the territory of another state or make a request for extradition; everyone whose case was considered in their absence should be able to challenge this judicial decision by any means available to them if they were present; a person whose case was considered in their absence and who was not served with a summons in a due way must have a legal remedy that allows it to annul the court decision [24].

Certain criminal procedure criteria for criminal proceedings in absentia are also contained in Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe to member states "On the simplification of criminal justice" of September 17, 1987 [25].

In particular, this document emphasises that member states should consider and allow first-instance courts to hear and decide on cases in the absence of the accused, at least regarding minor offences, and consider the penalty that may be imposed, provided that the accused has been properly informed of the date of the hearing and the right to legal or other representation [25].

The analysis of the CPC of the FRG shows the general compliance of the criminal procedure legislation of this country with the criteria defined by international documents.

In turn, the procedure for special pre-trial Investigation, special court proceedings defined by the CPC of Ukraine, do not meet the following criteria,

in particular with regard to: the severity of crimes, proceedings which can be conducted in absentia; the impossibility of conducting if the location of the suspect or accused is known outside Ukraine; the severity of the punishment that can be imposed as a result of special court proceedings; the lack of a defence method that allows reviewing the verdict.

The European Court of Human Rights, in its practice, has developed certain criteria for compliance of the in absentia procedure with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular in the cases of *Sejdovic v. Italy*, *Medenica v. Switzerland*, *Haralampiev v. Bulgaria* [7].

Thus, the accused may voluntarily waive the right to appear in person at the trial, directly or tacitly, provided that the refusal is established unequivocally and that the accused can reasonably foresee the consequences of their non-appearance. The European Court of Human Rights has repeatedly analysed German criminal procedure law, which deals with certain aspects of criminal proceedings in the absence of the accused. Given the strict requirements for criminal proceedings in absentia, German legislation seems to mostly meet the standards of the European Court of Human Rights [26], but there are some problematic aspects. Thus, the European Court of Human Rights in the case of *Schatschaschwili v. Germany* identified that Germany had violated § 1 Art. 6 and § 3(d) Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms on account of the failure to examine during the trial the absent key prosecution witnesses, whose statements had a substantial impact on the applicant's guilty verdict, who had been questioned by the investigating judge at the pre-trial investigation stage in the absence of the accused and their defence lawyer, since neither the accused nor the defence lawyer had had the opportunity to put questions to the witnesses, rendering the trial unfair [7].

This reinforces the criticism expressed by the European Court of Human Rights earlier in the *Hümmer v. Germany* decision, in which a violation of Art. 6 of the Convention was identified, since no defence lawyer was appointed to take part in the pre-trial questioning of the key accusation witness by a judge, and this witness then did not give evidence at the main hearing [7].

Regarding the appeal proceedings in the absence of a person, the European Court of Human Rights in *Neziraj v. Germany* case, found a violation of § 1 Art. 6, § 3(c) Art. 6 of the Convention regarding the rejection of the defendant's appeal in connection with their inability to appear at the court session of the appellate instance, since, according to the CPC of the FRG, the Court of Appeal was obliged to reject the appeal filed by the defendant without

making a decision on its merits, if the latter did not appear at the appeal hearing [7].

Following the decision of the European Court of Human Rights in 2012, the German legislator changed the procedural rules in appeal proceedings, allowing an appeal to be heard in absentia, primarily if the defendant is represented by a defence lawyer, and the presence of the defendant is not considered necessary to reveal the truth. So far, the European Court of Human Rights has not made a single decision against Ukraine in which it has assessed any aspects of the special pre-trial investigation, special judicial proceedings (in absentia).

However, the Office of the United Nations High Commissioner for Human Rights in its reports on the human rights situation in Ukraine has repeatedly emphasised that the provisions of the criminal procedure legislation on special pre-trial investigation, special judicial proceedings do not provide sufficient guarantees to protect the right to a fair trial and due process, and therefore the current procedure for proceedings in absentia does not comply with the legal practice of the European Court of Human Rights [27].

Thus, the position of V.O. Popeliushko is reasonable, who believes that absentee proceedings in German criminal proceedings are regulated considering both the interests of justice and the interests of the accused. Proceedings against absent persons, which do not concern the issue of guilt or innocence of the accused, and thus exclude the possibility of violating the rights that they are endowed with in the main trial, are an effective legal mechanism for ensuring their appearance in court and thereby resolving the criminal case on its merits in compliance with all procedural guarantees [17].

Since the criminal procedural legislation of Ukraine is at the stage of development and does not fully comply with the international standards that are brought to criminal proceedings in the absence of a suspect, accused (in absentia), to ensure the achievement of the tasks of criminal proceedings defined in Art. 2 of the CPC of Ukraine, and the development of criminal procedural legislation of Ukraine in absentia, certain legal provisions of the CPC of the FRG can be borrowed.

The scientific originality consists in a comprehensive analysis of criminal proceedings in the absence of a suspect or accused in the criminal procedure legislation of Germany and Ukraine, the examination of the criminal process of Germany to clarify all its features and determine further ways of developing the criminal procedure legislation of Ukraine.

## Conclusions

1. The criminal procedure legislation of both Germany and Ukraine provides for a certain procedure

for conducting criminal proceedings in the absence of a suspect or accused (in absentia).

2. The CPC of the FRG does not provide for the possibility of conducting a pre-trial investigation in the absence of a person, which substantially distinguishes it from the CPC of Ukraine, which defines the procedure for special pre-trial investigation (in absentia).

3. The criminal procedure legislation of the FRG, in contrast to the CPC of Ukraine, provides for so-called separate proceedings aimed at encouraging the accused to appear in court.

4. According to the criminal procedure legislation of the FRG, in contrast to Ukraine, holding a full main hearing in the absence of the accused (de-

fendant) is possible in certain cases, provided that proper notification is given in cases, as a result of judicial consideration of which, a punishment in the form of mainly monetary penalties can be imposed.

5. The CPC of the FRG mostly complies with the standards of the European Court of Human Rights.

6. The criminal procedural legislation of Ukraine is at the stage of development and does not fully comply with international standards that are brought to criminal proceedings in the absence of a suspect, accused (in absentia), and therefore for the development of criminal procedural legislation of Ukraine in absentia, certain legal provisions of the CPC of the FRG can be borrowed.

## References

- [1] Afanasiev, V.V. (2018). Problems of conformity of the special criminal proceedings (in absentia) of the Convention for the Protection of Human Rights and Fundamental Freedoms. *Yuryst Ukrainy, Lawyer of Ukraine*, 1, 35-42.
- [2] Börner, R. (2005). *Die Vermögensbeschlagnahme nach § 290 ff. StPO*. Berlin: NSTZ.
- [3] Deiters, M. (2015). *Systematischer Kommentar zur Strafprozessordnung. A.H. Albrecht (et al.). (Eds.). (Vol 4) (5<sup>th</sup> edn.)*. Berlin: StPO.
- [4] Diemer, H. (2013). *Karlsruher Kommentar zur Strafprozessordnung (7<sup>th</sup> edn.)*. R. Hannisch (Ed.). Berlin: Duncker & Humblot.
- [5] Reports of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Ukraine (2016, February-May; 2016, August – 2017, May; 2017, November – 2018, February). Retrieved from [http://www.ohchr.org/Documents/Countries/UA/Ukraine\\_14th\\_HRMMU\\_Report\\_UKRANIAN.pdf](http://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report_UKRANIAN.pdf); [http://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport\\_ukr.pdf](http://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport_ukr.pdf); [http://www.ohchr.org/Documents/Countries/UA/UAReport18th\\_UKR.pdf](http://www.ohchr.org/Documents/Countries/UA/UAReport18th_UKR.pdf); <https://vkksu.gov.ua/userfiles/ReportUkraineUKR.pdf>.
- [6] Eisenberg, U. (2012). *Sich-Entfernen bzw. Fernbleiben whrend der Hauptverhandlung*. Berlin: NSTZ.
- [7] Gmel, D. (2013). *Karlsruher Kommentar zur Strafprozessordnung (7<sup>th</sup> edn.)*. R. Hannisch (Ed.). Berlin: Duncker & Humblot.
- [8] Golovnenkov, P., & Spitsa, N. (2012). *Code of Criminal Procedure of the Federal Republic of Germany*. Moscow: MGIUA.
- [9] Gutsenko, K.F., Golovko, L.V., & Filimonov, B.A. (2002). *Criminal process of Western states (2<sup>nd</sup> ed., rev.)*. Moscow: Zertsalo-m.
- [10] Kozachenko, V.I. (2018). The principle of legality in the criminal proceedings of Ukraine and Germany, its structural components. *Constitutional State*, 31, 101-108.
- [11] Criminal Procedural Code of Ukraine. No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#n3069>
- [12] Lapkin, A.V. (2018). The prosecutor in a special pre-trial investigation (in absentia). *Legal Horizons*, 13(26), 107-111.
- [13] Laue, C. (2010). *Die Hauptverhandlung ohne den Angeklagten. JA*. Berlin: Duncker & Humblot.
- [14] Meyer-Goßner, L., & Schmitt, B. (2016). *Strafprozessordnung (59<sup>th</sup> edn.)*. Berlin: Duncker & Humblot.
- [15] Nazarov, V.V. (2019). Principles of criminal proceedings and problems of their implementation during the pre-trial investigation. *Constitutional State*, 34, 76-82.
- [16] Omelchuk, L.V. (2019). Problematic provisions of the Institute of Special Criminal Procedure in Ukraine. *International Legal Bulletin: Current Problems of Our Time (Theory and Practice)*, 15, 182-191.
- [17] Pikh, Yu. (2019). Material truth as the purpose and principle of criminal proceedings in the Federal Republic of Germany. *Bulletin of Lviv University*, 69, 161-172.
- [18] Popeliushko, V.O. (2015). Alternatives to absentee proceedings: in the experience of Germany. *Bulletin of the Academy of Advocacy of Ukraine*, 12(2(33)), 138-144.
- [19] Popeliushko, V.O. (2015). Proceedings in absentia in the criminal process of Germany. *Law of Ukraine*, 7, 34-42.

- [20] Quattrocchio, S., & Ruggeri, S. (2019). Personal Participation in Criminal Proceedings. *Legal Studies in International, European and Comparative Criminal Law*, 2, 123-164.
- [21] Recommendations № R (87) 18 of the Committee of Ministers of the Council of Europe to member states on the simplification of criminal justice. (1987, October). Retrieved from [https://zakon.rada.gov.ua/laws/show/994\\_339](https://zakon.rada.gov.ua/laws/show/994_339)
- [22] Resolution 75 (11) of the Committee of Ministers of the Council of Europe "On the criteria governing proceedings in the absence of the accused" (1973, January). Retrieved from [http://echr-base.ru/res75\\_11.jsp](http://echr-base.ru/res75_11.jsp)
- [23] Roxin, C., & Schünemann, B. (2018). *Strafverfahrensrecht (28<sup>th</sup> edn.)*. Berlin: Duncker & Humblot.
- [24] Savchenko, V.A., Solovii, Ya.I., Felyk, V.I., & Yurchyshyn, V.D. (2017). *Fundamentals of the criminal process of the Federal Republic of Germany*. Kharkiv: Pravo.
- [25] Shyshman, D.M. (2019). The suspect's awareness of the criminal proceedings initiated as a prerequisite for a special pre-trial investigation (in absentia). *Entrepreneurship, Economy and Law*, 10, 179-183.
- [26] Strafprozessordnung für die Bundesrepublik Deutschland. (2020). Retrieved from <https://www.gesetze-im-internet.de/stpo/>.
- [27] Trahniuk, R.R. (2018). Compliance with the guarantees of a fair trial during the special pre-trial investigation and special trial (in absentia). *Lawyer of Ukraine*, 2(37), 128-137.
- [28] Law of Ukraine "About modification of the Criminal and Criminal procedural codes of Ukraine concerning inevitability of punishment for separate crimes against bases of national safety, public safety and corruption crimes" No. 1689-VII. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1689-18#Text>.

### Список використаних джерел

- [1] Афанасьев В. В. Проблемы відповідності спеціального кримінального провадження (in absentia) Конвенції про захист прав людини і основоположних свобод. *Юрист України*. 2018. № 1. С. 35–42.
- [2] Börner R. Die Vermögensbeschlagnahme nach § 290 ff. StPO. NStZ. 2005. 791 p.
- [3] Deiters M. Systematischer Kommentar zur Strafprozessordnung / In: A. H. Albrecht et al. (Eds.). Vol. 4. 5-th edn. § 198–246. StPO, 2015. 896 p.
- [4] Diemer H. Karlsruher Kommentar zur Strafprozessordnung, 7th edn. / R. Hannisch (Ed.). 2013. 357 p.
- [5] Доповіді Управління Верховного комісара Організації Об'єднаних Націй з прав людини щодо ситуації з правами людини в Україні 16 лютого – 15 травня 2016 р., 16 травня – 15 серпня 2016 р., 16 лютого – 15 травня 2017 р., 16 листопада 2017 року – 15 лютого 2018 р. URL: <http://www.ohchr.org/Documents/Countries/UA/Ukraine14-thHRMMUReportUKRANIAN.pdf>; [http://www.ohchr.org/Documents/Countries/UA/Ukraine15-thReport\\_ukr.pdf](http://www.ohchr.org/Documents/Countries/UA/Ukraine15-thReport_ukr.pdf); [http://www.ohchr.org/Documents/Countries/UA/UARepor18th\\_UKR.pdf](http://www.ohchr.org/Documents/Countries/UA/UARepor18th_UKR.pdf).
- [6] Eisenberg U. Sich-Entfernen bzw. Fernbleiben whrend der Hauptverhandlung. Berlin: NStZ, 2012. 755 p.
- [7] Gmel D. Karlsruher Kommentar zur Strafprozessordnung, 7th edn / In: R. Hannisch (Ed.). 2013. 3180 p.
- [8] Головненков П., Спица Н. Уголовно-процессуальный кодекс Федеративной Республики Германия: науч.-практ. коммент. и перевод текста закона. Москва: МГЮА, 2012.
- [9] Гуценко К. Ф., Головка Л. В., Филимонов Б. А. Уголовный процесс западных государств: учеб. пособие. 2-е изд., доп. и испр. Москва: Зерцало-М, 2002. 528 с.
- [10] Козаченко В. І. Засада законності в кримінальному провадженні України та ФРН, її структурні складові. *Правова держава*. 2018. № 31. С. 101–108.
- [11] Кримінальний процесуальний кодекс: Закон України від 13 квітня 2012 р. № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#n3069>.
- [12] Лапкін А. В. Прокурор у спеціальному досудовому розслідуванні (in absentia). *Правові горизонти*. 2018. Вип. 13. № 26. С. 107–111.
- [13] Laue C. Die Hauptverhandlung ohne den Angeklagten. JA. Berlin: Duncker & Humblot, 2010. 394 p.
- [14] Meyer-Goßner L., Schmitt B. Strafprozessordnung, 59th edn. Berlin: Duncker & Humblot, 2016. 284 p.
- [15] Назаров В. В. Засади кримінального провадження та проблеми їх реалізації під час досудового розслідування. *Правова держава*. 2019. № 34. С. 76–82.
- [16] Омельчук Л. В. Проблемні положення інституту спеціального кримінального провадження в Україні. *Міжнародний юридичний вісник: актуальні проблеми сучасності (теорія та практика)*. 2019. Вип. 15. С. 182–191.

- [17] Піх Ю. Матеріальна істина як мета та засада кримінального провадження Федеративної Республіки Німеччини. *Вісник Львівського університету*. 2019. Вип. 69. С. 161–172.
- [18] Попелюшко В. О. Альтернативи заочному провадженню (in absentia): на досвіді Німеччини. *Вісник Академії адвокатури України*. 2015. Т. 12. № 2. С. 138–144.
- [19] Попелюшко В. О. Провадження in absentia у кримінальному процесі Німеччини. *Право України*. 2015. № 7. С. 34–42.
- [20] Quattrocchio S., Ruggeri S. Personal participation in criminal proceedings. *Legal studies in international, European and comparative criminal law*. 2019. Vol. 2. P. 123–164.
- [21] Рекомендації № R (87) 18 Комітету міністрів Ради Європи державам-членам «Стосовно спрощення кримінального правосуддя»: міжнар. док. від 17 вересня 1987 р. URL: [https://zakon.rada.gov.ua/laws/show/994\\_339](https://zakon.rada.gov.ua/laws/show/994_339).
- [22] О критериях, регламентирующих разбирательство, проводимое в отсутствие обвиняемого: Резолюция 75 (11) Комитета Министров Совета Европы от 19 января 1973 URL: [http://echr-base.ru/res75\\_11.jsp](http://echr-base.ru/res75_11.jsp).
- [23] Roxin C., Schünemann B. Alternative systems of crime control. National, transnational, and international dimensions. Berlin: Duncker & Humblot, 2018. 343 p.
- [24] Савченко В. А., Соловій Я. І., Фелик В. І., Юрчишин В. Д. Основи кримінального процесу Федеративної Республіки Німеччина: навч. посіб. Харків: Право, 2017. 372 с.
- [25] Шишман Д. М. Обізнаність підозрюваного про розпочате кримінальне провадження як обов'язкова умова для здійснення спеціального досудового розслідування (in absentia). *Підприємництво, господарство і право*. 2019. № 10. С. 179–183.
- [26] Strafprozessordnung für die Bundesrepublik Deutschland. URL: <https://www.gesetze-im-internet.de/stpo/>.
- [27] Трагнюк Р. Р. Додержання гарантій справедливого судочинства під час здійснення спеціального досудового розслідування та спеціального судового провадження (in absentia). *Юрист України*. 2018. Вип. 2. № 37. С. 128–137.
- [28] Про внесення змін до Кримінального та Кримінального процесуального кодексів України щодо невідворотності покарання за окремі злочини проти основ національної безпеки, громадської безпеки та корупційні злочини: Закон України від 7 жовтня 2014 р. № 1689-VII. URL: <https://zakon.rada.gov.ua/laws/show/1689-18#Text>.

# Порівняльний аналіз кримінального провадження *in absentia* в законодавстві ФРН та України

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## Анотація

Метою статті є порівняння кримінального процесуального законодавства Федеративної Республіки Німеччини та України щодо кримінального провадження за відсутності підозрюваного чи обвинуваченого на стадії як досудового розслідування, так і судового розгляду, а також дослідження відповідності законодавств цих країн міжнародним документам, у яких визначено критерії, що регламентують розгляд у порядку *in absentia* та практиці Європейського суду з прав людини. З огляду на поставлену мету, особливості об'єкта й предмета дослідження, обрано методологічний інструментарій. Під час дослідження використано систему методів наукового пізнання: формальної логіки (абстрагування, аналогію, дедукцію, індукцію, синтез) – для з'ясування змісту розглядуваного питання; теоретичний – у процесі дослідження наукової та навчально-методичної літератури. Наукова новизна полягає в комплексному дослідженні кримінального провадження за відсутності підозрюваного чи обвинуваченого в кримінальному процесуальному законодавстві Федеративної Республіки Німеччини та України, причому увагу акцентовано на кримінальному процесі Федеративної Республіки Німеччини для з'ясування всіх його особливостей з метою визначення подальших шляхів розвитку кримінального процесуального законодавства України. За результатами здійсненого дослідження сформульовано висновки: 1) кримінальне процесуальне законодавство як Федеративної Республіки Німеччини, так й України передбачає певний порядок здійснення кримінального провадження за відсутності підозрюваного, обвинуваченого (*in absentia*); 2) Кримінальний процесуальний кодекс Федеративної Республіки Німеччини фактично не передбачає можливості проведення досудового розслідування за відсутності особи, що суттєво відрізняє його від Кримінального процесуального кодексу України, який визначає порядок спеціального досудового розслідування (*in absentia*); 3) кримінальне процесуальне законодавство Федеративної Республіки Німеччини, на відміну від Кримінального процесуального кодексу України, передбачає так зване окреме провадження, спрямоване на спонукання обвинуваченого до явки в суд; 4) за кримінальним процесуальним законодавством Федеративної Республіки Німеччини, на відміну від України, проведення повного основного слухання за відсутності обвинуваченого (підсудного) можливе в певних випадках, за умов належного повідомлення у справах, за результатами судового розгляду яких може бути призначено покарання у вигляді переважно грошового стягнення; 5) Кримінальний процесуальний кодекс Федеративної Республіки Німеччини здебільшого відповідає стандартам Європейського суду з прав людини; 6) кримінальне процесуальне законодавство України знаходиться на стадії становлення і не цілком відповідає міжнародним стандартам, які пред'являють до кримінального провадження за відсутності підозрюваного, обвинуваченого (*in absentia*), а тому для розвитку кримінального процесуального законодавства України *in absentia* певні правові норми Кримінального процесуального кодексу Федеративної Республіки Німеччини може бути запозичено

## Ключові слова:

спеціальне досудове розслідування; спеціальне судове провадження, *in absentia*; підозрюваний; обвинувачений; конфіскація; КПК ФРН

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# Review of the Book by V.V. Vasilevich Criminological Policy of Ukraine Legal Analysis of Criminological Policy of Ukraine

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At the beginning of the 21<sup>st</sup> century, the globalised world underwent drastic social transformations. The systemic financial and economic crisis and the spread of COVID-19 became another challenge for Ukraine and the world community in general. Among the threats to the security of most countries, the circulation of weapons of mass destruction, international terrorism, transnational organised crime, and illegal migration have become large-scale. There is a dangerous tendency to "revise" national borders contrary to the norms of international law, which leads to a surge in manifestations of separatism and extremism as a consequence of ethnic, confessional, and civil conflicts.

The criminal situation in Ukraine has remained consistently tense over the past five years. Its complication, among other things, is caused by military operations in the East of the country, lack of control over part of the territory and the state border, activation of internal population movement processes, economic instability, and the use of inefficient methods of financial and economic activity, inconsistency in the reforms of the law enforcement and judicial systems, education and health care, rising unemployment and substantial social stratification of the population, imperfect public administration in the field of environmental protection and regulation of the use of natural resources, etc. Indicators of the crime rate now show that it is acquiring a fundamentally new quality, transforming into transnational, organised, corrupt criminal organisations.

The legal and institutional changes declared in the National Security Strategy (Presidential Decree No. 287/2015), the Law of Ukraine "On national security of Ukraine", as well as previously adopted state-wide integrated target programs (1993, 1996, 2000 and 2006), concepts (2010 and 2011) mostly remain unrealised. Despite the sufficient renewal of the criminal justice system, modernisation of law enforcement institutions, judicial proceedings, and substantial strengthening of the capacity of the bodies of the system of the Ministry of Internal Affairs of Ukraine, the activities of subjects of crime prevention are negatively affected by the underestimation of criminological potential in terms of monitoring and forecasting the criminal situation both in the whole country and within individual regions, the discrepancy between the national policy of combating crime, criminological policy, threats of a criminal nature, and the low effectiveness of government programs in this area, which requires an active strategy to prevent crimes. Therewith, the state still does not have a proper system for crime prevention, its legislative principles are imperfect, and the means used are often ineffective. This confirms the need to create a reliable scientific and practical basis for improving the forms, methods, and measures of preventive activities.

Thus, today one of the priorities in the field of ensuring the country's security should be the state criminological policy as a coordinated activity of all branches of government and civil society institutions aimed at identifying and eliminating the

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causes and conditions of crimes, predicting possible changes in the criminal situation, adjusting the strategic areas of managing the criminal justice system. In addition, the uncertainty of the goals, objectives, principles, and means (in particular, legal, informational, preventive, repressive, predictive) of state influence on crime identifies existing gaps and causes new problems of a doctrinal, legal, and organisational nature, which in practice require urgent solutions.

The study of V.V. Vasilevich corresponds to modern trends, in which legal science is increasingly turning to the problems of the effectiveness of the national policy of combating crime – criminological (anti-criminogenic) policy. This is due to the high level of threats facing national security due to the genesis of crime, the manifestations of which are becoming increasingly dangerous, as well as the low effectiveness of government programs aimed at combating this illegal phenomenon. In the context of the unstable socio-political situation in the country and the deepening economic crisis, the study of these problems is undoubtedly relevant. The monograph, based on the analysis of legislation and regulations, scientific and historiographical sources, generalisation of the practice of criminal justice bodies and foreign experience, highlights the legal and organisational foundations and areas for improving law enforcement activities on crime prevention. Considering the specific features of the subject under study, the author's position on the content of a number of categories of criminological activity is justified and confirmed by procedural practice.

Monograph by V.V. Vasilevich is one of the first comprehensive scientific studies in Ukraine, which from the standpoint of a systematic approach defines the concept of criminological policy as based on the idea of humanism and the principles of the rule of law, a strategic component of the domestic and foreign anti-criminal policy of the state, the definition of which is to form doctrinal foundations in the field of combating crime and its practical implementation in the system of bodies and institutions of criminal justice in accordance with the provisions of criminal-legal, criminal-procedural, and criminal-executive policy, and legislation of Ukraine.

The optimal structure and content of the monograph allowed comprehensively covering the issue under study. The paper analyses the correlation of theoretical issues and practical tasks, the level of which mainly depends on the clarification of the concept and content, the relationship and interdependence of criminal and criminological policy of the state, the procedure for forming based on scientific provisions that are key to the epistemological process of cognition and practical implementation

of the latter. The state of scientific development, terminology, and methodology for the establishment of constituent elements of criminological policy, debatable issues of its theoretical justification and practical implementation in Ukraine and abroad are comprehensively examined. Based on the results of the analysis of Ukrainian and international scientific and regulatory sources, the author's work experience in law enforcement agencies, elements (levels), methods, and principles of the criminological policy are determined. The monograph identifies the prerequisites and main stages of the establishment and development of the latter, determines its relationship with other types of the anti-criminal policy of the state, and examines the features of its establishment, areas of improvement, and ways of implementation in the criminal, criminal-procedural and criminal-executive legislation of Ukraine; the proposals for further development of criminological theory and practice were formulated. It is emphasised that the function of protecting human and civil rights and freedoms is one of the main functions of the rule of law and reducing the crime rate primarily depends on the coordinated activities of the system of subjects of establishment and implementation of criminological policy, effective legal, organisational, and informational support for it. Attention is focused on the specific features of the establishment and implementation of criminological policy according to the criminological situation in the country.

The empirical basis of the study consists of official statistics, materials of criminal proceedings, and summary data from surveys of employees of the National Police of Ukraine and the prosecutor's office. The presented material is substantiated with a thorough systematic analysis of legislative and other regulatory acts, special scientific literature. The conclusions of the monograph are based on Ukrainian and foreign criminal legislation, criminal-legal and criminological doctrine, and judicial practice. The substantial results were obtained through the application of an integrated approach to the analysis of problems with the systematisation of relevant scientific knowledge and the identification of prospects for further scientific examination.

The complex nature of the investigation, the importance of the results of this study for improving political, legal, socio-economic, legislative, and government decisions aimed at identifying and eliminating the causes and conditions of crimes, optimising the fight against crime, enabling the classification of the monograph as an interesting study on the chosen problem, recognising it as timely and relevant. It is characterised by the thoroughness of legal analysis, the balance and correctness of scientific polemics,

and the proper material selection. The scientifically based results obtained by the author contribute to solving an important problem for legal science and law enforcement activities. The study defines, supplements, and clarifies a number of provisions of a theoretical, legal, and methodological nature. It can be

useful for researchers, teachers, postgraduates, and students of higher educational institutions of the legal profile, practitioners of law enforcement agencies, specialists of state authorities, judges, and anyone who is interested in finding effective measures to protect people, society, and the state from criminal offences.