Ministry of Internal Affairs of Ukraine
THE DNIPROPETROVSK STATE UNIVERSITY
OF INTERNAL AFFAIRS

# S C I E N T I F I C  B U L L E T I N
# of the Dnipropetrovsk State University of Internal Affairs

***Scientific Journal***

2018

SPECIAL ISSUE № 2 (92)

*Recommended for printing and distribution*
*via the Internet by the Academic Board*
*of the Dnipropetrovsk State University of Internal Affairs*
*(protocol No. 1, September 20, 2018)*

Dnipro
2018

**Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs** : Scientific Journal. – 2018. – Special Issue № 2 (92). – 244 p.

Scientific Edition • Founder and publisher – the Dnipropetrovsk State University of Internal Affairs • Certificate of state registration – КВ 20781-10581ПР from 08.05.2014 • Issued quarterly • Circulation – 100 copies. • Editorial address: 26, Gagarina av., Dnipro, 49005, Ukraine, tel. +38056-370-96-59

**The Journal is enlisted of scientific professional editions of Ukraine in which researchers may published the results of their dissertation papers for scientific degrees of doctor and candidate of sciences (legal sciences)**
(Annex 11 to the Order of the Ministry of Education and Science of Ukraine of 10.07.2015 № 1021).

***The Journal is evaluated annually in INDEX COPERNICUS INTERNATIONAL & registered in CROSSREF***

***DOI**: 10.31733/2078-3566*

*The Journal is a collection of scientific articles, first published in English, dealing with current problems of law and law-enforcement. There are also publications covering issues of legal education. The journal contains reviews on scientific editions.*

*It may be used by scholars, legal and law-enforcement practitioners, and postgraduates.*

*Вміщено англійською мовою наукові статті вчених, викладачів і здобувачів університету, навчальних закладів системи МВС та інших центральних органів виконавчої влади, працівників правоохоронних органів. Розглянуто питання держави та права, окремих галузей законодавства, проблеми правоохоронної діяльності та юридичної освіти.*

*Призначено для науковців, юристів-практиків, працівників правоохоронних органів та всіх, хто цікавиться питаннями науки і права.*



ISSN 2078-3566

**C O N T E N T**

ORGANIZATIONAL-TACTICAL
AND INFORMATION-TECHNICAL SUPPORT of PREVENTION,
DETECTION AND INVESTIGATION OF CRIMES



ISSUES OF THEORY, PHILOSOPHY AND HISTORY OF LAW,
CONSTITUTIONAL LAW AND PUBLIC ADMINISTRATION

CRIMINAL LAW AND CRIMINOLOGY.
CRIMINAL PROCEDURE AND FORENSIC SCIENCES

POLICING: LEGAL,ORGANIZATIONAL
AND STAFFSUPPORT

## ORGANIZATIONAL-TACTICAL AND INFORMATION-TECHNICAL SUPPORT OF PREVENTION, DETECTION AND INVESTIGATION OF CRIMES

**Andrii Fomenko,** Ph.D.

**Volodymyr Vyshnya**
Dr of Eng-ng., Prof.

*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-7-11*

## USE OF TECHNICAL MEANS OF WEIGHT CONTROL FOR THE PREVENTION AND DETECTION OF OFFENSES IN THE FIELD OF ROAD TRANSPORT

**Фоменко А., Вишня В. ВИКОРИСТАННЯ ТЕХНІЧНИХ ЗАСОБІВ ВАГОВОГО КОНТРОЛЮ ДЛЯ ПОПЕРЕДЖЕННЯ ТА РОЗКРИТТЯ ЗЛОЧИНІВ У СФЕРІ АВТОПЕРЕВЕЗЕНЬ**. Досліджено особливості боротьби з крадіжками вантажів при використанні вантажного автотранспорту, аналізу особливості використання технічних засобів зважування у боротьбі з цими злочинами.

Автори наводять класифікацію таких злочинів на відкриті і замасковані, розкривають складність виявлення останніх. та пояснюють, чому дієвим засобом боротьби з цими злочинами, сьогодні, вважається використання на автошляхах технічних засобів вагового контролю (ваговимірювальних систем).

У статті детально розглянуто конструктивні елементи ваговимірювальних систем, що застосовуються для зважування автомобілів у статиці і в русі, та приводяться аналітичні математичні розрахунки похибки електронних ваг з поосьовим зважуванням. У разі визначення, що автомобіль рухається з нерівномірною швидкістю, використовується метод корекції нерівномірності руху вантажного автомобіля, та розраховуються аналітичні залежності для коригування обмірюваної маси з урахуванням нерівномірної швидкості прямування автомобіля по платформам.

***Ключові слова:*** *викрадання, вантажі, способи, автотранспорт, правоохоронні органи, злочини, нерівномірна швидкість, корегування маси, метод корекції.*

**Formulation of the problem**. One of the areas of the fight against economic crime is the prevention and disclosure of property abductions by means of motor vehicles, in particular freight motor vehicles. Today, they are involved with the traffic police and the National Police's economic crime units. Most likely, some part of the solution of these tasks will be assigned to the special units of the financial investigation service, which is being created in the near future.

Regarding the general classification of the crimes in question, the legitimate distribution of them into open and disguised [1]. The first involves the transportation of abducted material assets without accompanying documents. The disclosure of such crimes is not complicated and well regulated.

It is more difficult to disclose masked stolen documents when there is a document for the transported cargo, but the data in them is different from the actual one. On roads where the economic control posts are usually located, it is quite difficult to determine unequivocally

whether the mass of the goods actually transported specified in the consignment note is identical. This complicates the adoption of disclosure and prevention of such crimes. At the same time, today such methods are widely used for the abduction and smuggling of scrap metal, coal, grain and other agricultural products.

The most effective means of combating these crimes today is the use of weighing systems on highways, which allows:

- eliminate possible conflict situations related to the subjective visual assessment by police officers of the cargo carried by the car, in case of discrepancy with the data of the accompanying documents;
- to carry out operational control of sealed cargoes;
- to control the cargo, which is not quantitative miscalculation;
- to create a legal basis for preventing violations of law in the carriage of goods.

Together with the solution of issues of combating economic crimes the use of weighing instruments can simultaneously solve the issues of road safety, and, therefore, the safety of cargoes and roads, accident and other. Road police of the western countries, as well as Russia, Belarus successfully applies stationary car scales for axial weighing in the static of heavy trucks in order to control their overload.

**Presentation of the main research material**. Our weight measuring system (device) can consist of two weight platforms and a portable secondary device that connects to the platforms. Weighing platforms with built-in pressure sensors (each weighing not more than 10-15 kg) are placed on a selected section of the road at a distance corresponding to the axial size of the controlled vehicles. Cars alternately go to weight platforms with all wheels (axial pairs). Pressing a button on a portable secondary device initiates a load control (static) on the weight platform. After completing the last axle weighing, the gross vehicle weight (gross) is automatically recorded.

If using the numeric keypad available in the device to enter the weight of the packagings registered in the transport documents for the car, we will get the weight of the transported cargo (net). The result of such weighing gives supervisors the basis for adopting one or another solution (action), eliminates the possible conflict situations related to the subjective visual assessment of the mass of cargo transported [1].

The proposed technical solution to prevent theft of material assets using vehicles seems quite effective, as it is mobile (it is easy to transport to any part of the road), does not require significant financial expenses, easy to set up and maintain.

However, for its rational use, it is necessary for each vehicle, in the accompanying documents, to indicate the weight of the container. It's no secret that truck drivers used for the transportation of bulk goods (coal, agricultural products) are widely used different ways to artificially increase the weight of the container before loading (from below suspended metal bells, filled with water additional fuel tanks), receiving on their personal disposal surplus cargo Therefore, it is necessary that each vehicle for the transportation of goods by special (competent) authorities issued a document (whether marking in the documents available on the car) about the actual weight of the packagings.

In case of any repair work on the car, which leads to a change in the weight of the packaging (installation of a tent, badge of the sides), correction of these documents is necessary. Failure to comply with these requirements should be considered as a violation, which entails strictly defined consequences.

The presence of weighing instruments in law enforcement units allows not only to control the cargo that can not be quantified (bulk cargoes, scrap), but also to solve the problem of controlling sealed cargoes transported, for example, by TIR vehicles. At this time, the police officer needs to fill in a special driver document containing information on the purpose and purpose of cargo control, the identity of the controller (this is the case for the driver to determine which cargo is carried in such a truck (let alone check it) is associated with a large number of cases of robbery on the roads "on the alert").

The use of portable weighing instruments allows you to control the transportation of sealed cargo, operating only with the concepts of mass without identification of the load. Only in the event of a discrepancy between the results of the weighing and the data provided by the driver may be made a decision on violation of the seal on the cargo.

In view of the above, the technical realization of automobile electronic weighing with axial weighing is offered at the Dnipropetrovsk State University of Internal Affairs of Ukraine, where the method of correction of the unevenness of the truck movement is used [1].

The proposed weight includes a weight platform, based on built-in strain gauge sensors and an electronic device of the suitcase type, which connects to the platform with the help of cable and connectors.

Structurally, the weighing platform can be stationary or portable. The stationary platform for car weights is set on a small foundation, level with an access road and has dimensions of 700x3000x200 mm. Acceptable load on the platform from one axle of the car is 20 tons.

Scales with this type of platform can be used to control the load of the object both in statics and in its movement. The number of axes of the object is not regulated, which allows you to weigh not only cars, but also auto trains.

The portable weight receiver platform of automobile weights consists of two mechanically unrelated nodes with strain gauges, which are mounted on a cloth of the road at a distance, which ensures simultaneous access to the wheels of one axle of the car. Such a design of the platform implies the presence of additional trapezoidal mechanical elements for the arrival and the rally from the platform. The portable platform design allows you to set weights in any convenient place and clean them after the control action is complete. Vehicle weighing instrument in this case is a static. The electric signal from the power measuring sensors of the weight, proportional to the load on the axis of the moving object, enters the electronic device, converted into code and fed to a load cell of saddle axes. Upon completion of the control weighing, the weight of the empty vehicle, according to the accompanying documents, or the total weight of the empty trains included in the self-propelled trailer is entered into the device in order to automatically obtain the mass of the cargo being transported (net). The identification of the load of each individual trailer is assumed.

Below are the analytical dependencies we have obtained for adjusting the measured mass, taking into account the unevenness of the car's movement during weighing.

It is known that when weighing a moving car, as a result of the fluctuation of its suspension, the signal of the power-measuring sensors of the load-receiving platform, in addition to the constant component Vm, is proportional to the mass of the car, contains the variable component Vd (dynamic error) caused by these fluctuations. Existing methods of weighing in motion are the reception of a signal from sensors of weight, the allocation of this signal of dynamic error and calculation of the value of the mass of the object on the received constant component of the signal.

However, such a model for determining the mass of the moving car, is valid only for the case of uniform motion of the platform. Otherwise, the output signal of the pressure sensors contains an additional constant component Va, due to unevenness of the car's motion on the platform. The magnitude of the measurement error made by the component Va, which is usually neglected, can reach 3 ... 10%. Particularly increases the value of the component Va, therefore, and due to this component of the error of weighing, if the driver drives sharply during the movement of the front axle of the car on the platform, and then, at the weighing of the rear axle, on the contrary, dramatically increases the speed. Therefore, known methods of axial weighing can not provide high accuracy of the mass of the moving vehicle.

In the scales proposed by us, in order to increase the accuracy of the measurement, the acceleration of the object is automatically controlled at the moments of weighing its axes, which are then taken into account when calculating the mass of the object M. For this purpose, the load-receiving platform is arranged by additional road sensors.

In fig. 1 is a diagram for explaining the proposed method of weighing. The following is indicated on the diagram: 1 - platform; 2 - car; F1 - platform reaction; F2 - path reaction; P = Mg - weight of the vehicle (object), g = 9,82 - acceleration of free fall, l - distance from the rear axle to the center of gravity, L - distance between the axles, h - height of the center of mass, a1, a2 - acceleration of the object, respectively, when weighing the front and rear axles, Fu - the force of inertia, due to the motion of the object with acceleration.

The expression for the reactions F1 and F2 is found from the equations of the sum of the moments of forces with respect to the points A and B [2]:

$$F1 = \frac{Mgl - Ma_1h}{L} \quad F2 = \frac{Mg(L-l) + Ma_2h}{L} \quad (1)$$

For axial weighing, the mass of the object is determined by the strength of the reaction:

$$M_п = (F1 + F2) /g = M + M\ h\ (a_2 - a_1)/ gL (2)$$

The second application in the last expression is an ingredient due to the unevenness of the car's motion.

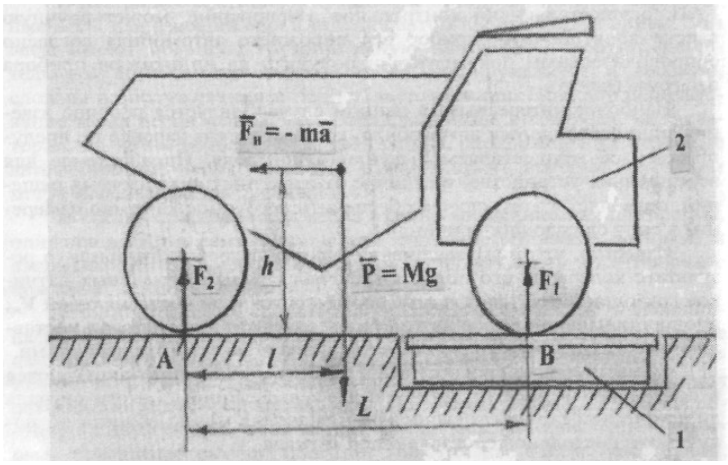



*Fig.1. Scheme of loading at the axial weighing of the car, moving with uneven velocity*

The relative error δM of the mass is determined by the expression [2]:

$$\delta M = (Mp - M) / M = h\ (a2 - a1) / gL\ (3).$$

The resulting error value can be quite large, especially when a1 and a2 have different characters. For example, at h = 1 m, L = 4.2 m (typical values for two-axle lorries) and a1 = -0.5 m / sec2, a2 = 0.5 m / sec2, the relative error due to uneven motion will reach 2 , 43%, which is several times the required accuracy of weighing.

At the same time, if the values of accelerations a1 and a2 are measured, then the actual value of the mass of the moving object M can be found with greater accuracy [2] for the measured Mn:

$$M = Mn / (1 + h\ (a2 - a1) / gL)\ (4).$$

Hence, taking into account the coefficient K of the transformation of the electric signal into mass, it follows:

M = K Vnc / (1 + h (a2-a1) / gL) (5),

where Vnc is the sum of the constant components of the signal strength sensors obtained during axle weighing.

This method of weighing well enough can be extended to more than two, the axes of the object.

In the secondary device of the offered weights it is provided to disable the mode of adjustment of the measured value taking into account the unevenness of the motion for an object with unknown parameters h and L. For typical car models, the basis of values h and L is introduced into the non-volatile memory of the secondary device .. If necessary these values can be changed using the instrument keyboard. The choice of the required h and L pair of pairs is carried out by the employee serving the weights by pressing the "AUTO TYPE" key when identifying the object subject to control (weighing).

In the case of violations detection, the maximum allowable loading rate for a driver is administrative measures (fine, unloading surplus on paid warehouses, etc.).

Conclusions In general, the use of the proposed measuring tools on the roads provides objective and effective levers for the prevention of theft using vehicles, the creation of a legal framework to prevent the violation of legality during road transport of goods.

According to the authors, the use of the proposed means of measurement on the highways of Ukraine will increase the objectivity and quality control of transported cargo, will partially eliminate the conditions for violation of legality in transport, will create prerequisites for

the rapid detection and investigation of cases of theft or abuse, improve the organization of the fight against crime on the vehicle This is a serious reason for considering the issue of the earliest possible provision of equipment by the Ministry of Internal Affairs of Ukraine.

***References***

1. Вишня В.Б., Вишня О.В. Використання технічних засобів для боротьби зі злочинами та правопорушеннями, що здійснюються з використанням автомобільного вантажного транспорту. *Оперативно-розшукова діяльність Національної поліції: проблеми теорії та практики:* матеріали Всеукр. наук-практ. конф. (м. Дніпро, 18 листоп. 2016 р.). Дніпро: ДДУВС, 2016. С. 22-24.

2. Эрдеди А.А. Теоретическая механика. Сопротивление материалов: учеб. пособие. 8-е изд. стер. М.: Изд. центр «Академия», 2007. 320 с.

*Received to editorial office 06.06.2018*

**Summary**

The article deals with the study of the features of the fight against theft of goods when using freight vehicles, analysis of the peculiarities of the use of technical means of weighing in the fight against these crimes.

The authors attribute the classification of such crimes to open and disguised, revealing the complexity of identifying the latter. and explain why the use of roadside technical means of weight control (weighing systems) is considered an effective means of combating these crimes today.

***Keywords**: theft, cargoes, methods, motor transport, law enforcement agencies, crimes, uneven speed, mass correction, method of correction.*

**Sergiy Kotsyuba**[1]
postgraduate
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-11-16*

## TACTICS OF INTERROGATION OF THE SUSPECTED IN CASES OF ILLEGAL HOLDING OF FIREARMS BY SERVICEMAN

**Коцюба С. ТАКТИКА ДОПИТУ ПІДОЗРЮВАНОГО У СПРАВАХ ПРО НЕЗАКОННЕ ЗАВОЛОДІННЯ ВІЙСЬКОВОСЛУЖБОВЦЕМ ВОГНЕПАЛЬНОЮ ЗБРОЄЮ.** У статті сформульовані організаційно-тактичні особливості проведення допиту на початковому етапі розслідування незаконного заволодіння вогнепальною зброєю. Автор дійшов висновку, що до основних організаційно-підготовчих заходів до проведення допиту можна віднести: повне та детальне вивчення матеріалів кримінального провадження; вивчення слідчої ситуації, що сформувалася на певному етапі досудового розслідування; визначення кола осіб, які підлягають допиту; встановлення послідовності проведення допитів (якщо декілька підозрюваних осіб); визначення предмета допиту; вивчення особи допитуваного (збирання оперативної інформації про допитувану особу; її місце у складі злочинного угруповання, що займається наркобізнесом; вчинені цим угрупованням кримінальні правопорушення); визначення часу проведення допиту; встановлення місця проведення допиту; визначення способу виклику на допит; підбір речових доказів та інших матеріалів для пред'явлення допитуваному; визначення учасників проведення допиту; визначення технічних засобів фіксації допиту та їх підготовка; забезпечення сприятливих умов проведення допиту; ознайомлення зі спеціальною літературою або використання допомоги осіб, що володіють спеціальними знаннями; визначення низки тактичних прийомів, що будуть застосовані під час допиту; складання плану проведення допиту та ін.

***Ключові слова:** незаконне заволодіння вогнепальною зброєю, допит, доручення, початковий етап розслідування.*

**Formulation of the problem.** One of the separate aspects of a successful investigation into the illegal possession of firearms is to increase the effectiveness of conducting investigatory (search) actions, among which a special place is interrogated, which requires careful prepa-

[1] © Kotsyuba S., 2018

ration, a correct definition of the range of circumstances to be clarified, and a competent choice of tactical techniques. In this regard, it should be noted that the development of tactics for interrogation of suspects takes on special significance. The interrogation tactics of this category of persons has a certain specificity, since it directly depends on the investigative situation that has developed at a certain stage of the investigation, in particular, conflict or conflict-free. Based on the investigative situation prevailing between the participants in the interrogation, the investigator selects certain tactical techniques that allow obtaining true evidence of the crime. The latter circumstance determines the relevance and timeliness of the study of selected issues.

**Analysis of the latest publications that initiated the solution to this problem**. The study of the organizational and tactical aspects of conducting interrogation in criminal proceedings related to the illicit trafficking of firearms has attracted many scholars, including the works of G. O. Boyko, O. M. Vdovin, V. V. Efimenko, I. V. Kapustina, S. P. Melnichenko, S. G. Pavlikova, I. Y. Ragulina, A. S. Tarasenko, E. S. Teslenko, S. B. Fomin, M. V. Shchegoleva and others. At one time, these scientists made a scientific contribution to the study of this problem. However, a detailed analysis of the content of these works has shown that certain results of earlier studies are controversial, partly prepared taking into account the criminal status of other states, do not reflect the organizational features of conducting interrogation at the initial stage of the investigation into the illegal possession of firearms, or, in general, were left out of the attention of scientists.

**The purpose** of this article is to determine the organizational and tactical characteristics of the interrogation at the initial stage of the investigation into the illegal possession of firearms.

**Presentation of the main research material**. The questioning is a ISA, the content of which is the receipt of testimony from a person possessing information that is relevant for establishing the truth in a criminal proceeding. The complexity of this ISA consists in the fact that interrogation is a form of communication strictly regulated by the criminal procedural rules, which always has a forced character and is conditioned by necessity. Such a situation excludes the psychological closeness of people, "causes" additional communicative obstacles, which in some cases contributes to the concealment of truth in the case [1]. In addition, the complexity of this ISA in investigating crimes committed by the mass media depends, first and foremost, on the volume and quality of investigative information received as a result of operational investigations, ISA and SISA, the personal qualities of the interrogator, his procedural status (suspect, witness, victim), places in the hierarchical structure of the criminal community (organizer, leader, participant), criminal orientation etc. [2, p. 94]. It is on overcoming these and other negative circumstances (obstacles) and directed the tactics of interrogation.

However, interrogation is a central investigative (search) action, which allows: to establish the circumstances of the crime; promptly put forward investigative versions; get information about members of the MU and their leaders; determine the sequence and tactics of other procedural actions, etc. The interrogation of a person in a criminal proceeding is directly aimed at finding and consolidating evidence. According to some scholars, he can take about 25% of the entire time of the investigator [3, p. 282]. The result of this investigative (wanted) action often depends on the adoption of weighty procedural decisions.

The main purpose of the investigation (investigation) action is the truth in criminal proceedings and questioned receipt of complete and those that objectively reflect the reality of indications [4, p. 129].

Individual scholars define interrogation as a process for obtaining information from the interrogated person [5, p. 283; 6, p. 249; 7, p. 131; 8, p. 6], others - emphasize the procedural regulation of this investigative action [9, p. 9]. In general, agreeing with the views of scholars have noted that, in our opinion, is a more complete definition of interrogation, which focuses on the psychological component relationships investigator questioned.

In our opinion, the definition of interrogation proposed by M.O. Yankov, "regulated by criminal procedure law process specific verbal interaction with the interrogation, during which the investigator (investigator, prosecutor, judge) using legal tactics and methods of psychological influence, receives questioned and records in the record oral information known to him circumstances which are important for the investigation of a crime "[10, p. 10].

In general, the questioning consists of three main stages: preparation for interrogation (preparatory); direct interviewing (worker); fixing the course and the results of the interrogation (final) [11].

At the initial stage of the investigation into the illicit use of firearms committed by crim-

inal organizations, the quality of organizational and preparatory measures to conduct interrogation is important.

According to K.O. Chaplinskyi, timely, thorough and comprehensive preparation for interrogation is a prerequisite for obtaining the most complete and objective evidence in criminal proceedings. According to the scientist, the preparation for interrogation can be divided into three main levels: cognitive (studying materials of criminal proceedings, collecting information about the person of the offender, acquaintance with operational intelligence); prognostic (determining the subject of interrogation, the range of persons subject to interrogation, and the sequence of their conduct); synthesizing (determining the place and time of the investigative action, the method of calling for questioning, drawing up a questioning plan) [12, p. 148].

V.K. Veselsky, V.S. Kuzmichov, V.S. Matsishin and A.V. Staryushkevich distinguishes the following three main levels of planning and preparation for interrogation: organizational - providing a rational conduct of the interrogation (where and where it is expedient to hold it from the point of view of rational use of the budget of the time and opportunities of the investigator - today, tomorrow, in the morning, to use scientific and technical means, etc.) ; meaningful - determination of the completeness and interconnection of circumstances that are subject to establishment; tactical - the establishment of appropriate means and methods for solving specific tasks interrogation [13, p. 61].

In scientific literature, scientists are differently suited to the consideration of preparatory measures for interrogation.

So, according to V.D. Bernasa, V.V. Biryukova and A.F. Volobuyev, preparation for interrogation should consist of the following organizational measures: thorough, complete and comprehensive study of materials of criminal proceedings; determining the order of interrogation (that is, the circles of persons subject to interrogation, and the sequence of their conduct); obtaining information about the interrogated person; familiarization with some special issues; invitation of persons, participation in interrogation of which is obligatory; planning interrogation; determining the time and place of the interrogation; preparation of a workplace for interrogation [14].

M.T. Kuts adds the following organizational and preparatory measures for the conduct of the interrogation: the establishment of motives for giving knowingly false testimony or refusing them; establishment of information characterizing the nature of the relationship between the suspect and the victim; Identification of possible contradictions in the testimony of the interrogators to establish false testimony.

S.S. Cherniavskyi believes that the preparation for interrogation should consist of the following main elements: careful examination of the materials of the criminal proceedings; study of the person being interrogated; preparation of special questions; drafting a plan for interrogation [15, p. 532].

On the basis of the generalization of the scientific views of scientists and materials of criminal proceedings on crimes related to the illegal transport of narcotic drugs by rail, O. A. Vovchanska came to the conclusion that the main organizational and preparatory measures for interrogation include: full and detailed study of materials criminal proceedings; study of an investigative situation that was formed at a certain stage of pre-trial investigation; determining the range of persons to be questioned; Establishing a sequence of interrogation (if several suspects); definition of the subject of interrogation; investigation of the person being interrogated (collection of operational information about the interrogated person, his place in the criminal group involved in drug trafficking, criminal offenses committed by this group); determining the time of interrogation; establishment of the place of interrogation; determining the method of calling for questioning; selection of material evidence and other materials for presentation to the interrogator; definition of participants in the interrogation; definition of technical means for recording interrogation and their preparation; Providing favorable conditions for interrogation; acquaintance with special literature or use of the help of persons with special knowledge; definition of a number of tactical methods to be used during interrogation; drafting a plan for conducting interrogation [4, p. 130-132].

In our view, interesting in this regard is the point of view of A.V. Hirschina, who highlights the following main organizational and preparatory measures for interrogation: timely and thorough preparation for interrogation; immediate interrogation after the arrest of the offender (at the place of his detention); prevention of possible counteraction to pre-trial investigation and its immediate neutralization; prevention of information contacts between detained persons; conducting an intelligence conversation before interrogation; the differentiation of the interro-

gators depending on the evidence available in the investigative system for each participant in the criminal group; the use of conflicts and contradictions between members of the criminal group [16, p. 11].

It should be noted that the use of a surprise factor during interrogation becomes important. According to V.P. Bahina, V.S. Kuzmichova and E.D. Lukianchikov, his implementation is characterized by the regularity, the essence of which is that the effectiveness of suddenness is limited by the time necessary to rearrange the person's actions and intentions, the choice of means and methods of counteracting abruptness. After that, suddenness ceases to act. Loss of investigative time leads to his winning by the suspect, which enables him to analyze the situation, choose a new line of conduct and coordinate his actions with accomplices and other interested persons. That is why the untimely conduct of investigative action or the use of tactical reception (the attitude of the question, the presentation of the subject, the document) often leads to the loss of surprise, complicates the process of gathering evidence [17, p. 23-24]. Therefore, the effect of the factor of surprise should be taken into account when selecting the moment of interrogation among other investigative (search) actions, as well as when forming the range of issues that is planned to be put before the interrogator, and the range of available evidence potentially capable of being presented to him during the interrogation.

Such a tactical method, in our opinion, should be applied not only to the suspect, but also to witnesses who, over time, change due to various reasons (including because of fear of members of criminal organizations that commit illicit use of firearms) your attitude to the need to give testimony. Therefore, the most effective is conducting interrogation at the site of the event while leaving the next IOG. The vast majority of victims are not interested in giving false testimony. Typically, such a category of individuals tries to help the investigator establish all the circumstances of the case in order to expose the offenders and return the property.

However, the testimony of the victim and the witness may contain certain gaps and inaccuracies. Victims and witnesses give incomplete indications due to the negative influence or fear of revenge by members of the criminal association.

In addition, as V.V. Yefimenko [18] are also possible other investigative situations, for example: theft of weapons was accompanied by desertion; the crime was committed by a military official who, in his official capacity, was to ensure the preservation of firearms.

It should not be forgotten about the need to identify lies in the testimony of the victim, since the statement (notification) on the commission of theft of weapons, provided by the victim's information may be erroneous. A knowingly false declaration of theft could be dictated by the fact that, for example, the owner, using his weapon, committed a crime (or gave his weapon to commit a crime to another person), and in order to provide himself with an alibi, he told the law enforcement authorities that the weapons he was kidnapped. An erroneous application for theft of weapons may be made by its owner in order to discuss a particular person. The victim may give false testimony about the conditions of the storage of weapons, to conceal that the weapon was not kept properly. Not in the interests of the victim to talk about his own wrong behavior, which the victim provoked the commission of theft of weapons [19].

In this regard, the investigator must be aware of the possibility of the crime of staging the victim and that the latter may be one of the members of the criminal association. Therefore, interrogation, depending on the personality of the applicant, his psychological qualities, marital status and relations with the command, as well as members of the criminal association that has stolen weapons, can be both conflict and non-conflict.

Its successful conduct depends on the knowledge of the investigator of the regulatory framework that regulates the movement of weapons in the troops. During the interrogation it is necessary to take into account that the interrogated person has a life experience, established views. To establish psychological contact and achieve the purpose of interrogation, it is necessary to study the personality of the interrogated person, his family status, ties [18].

That is why the investigator should choose tactical methods of interrogation of victims, aimed at their neutralization. The investigator's ability to establish psychological contact with the victim is of paramount importance. The ways of its achievement in the affairs of this category have their own peculiarities. In particular, they include the following measures: preliminary study of the "victim's person", observation of her, creation of a friendly atmosphere during interrogation, finding out the causes of fear, difficulties in answering, etc. [20].

However, according to Art. 214 of CPC is the only ISA that can be conducted in urgent cases before the information is submitted to the Unified Register of Pre-trial Investigations is an overview of the place of the event. However, the results of a preliminary survey of investi-

gators and operatives indicate that in unlikely cases witnesses in criminal proceedings concerning the illicit use of firearms by criminal associations are being conducted prior to entering information into a single register of pre-trial investigations during the review of the place of the event , with the abandonment of the free timetables for the interrogation to be filled in later by the relevant date and time, which will be later than the moment when the information is submitted to the Uniform register of pre-trial investigations. In addition, such questioning is carried out not only by investigators but also by operational staff. At the same time, in the future, in order to ensure the lawfulness of its conduct, the investigator makes an appropriate order and sends it to the operational unit, after which the date of the interrogation is already filled.

This position is justified by investigators and operational agents in several circumstances: time saving; the tactical need to use the factor of surprise.

It should be noted that after receipt of information on the commission of a criminal offense to the organ, police department, immediate measures and urgent investigative (search) actions may include the detection of witnesses and eyewitnesses of the event, a survey.

Due to the wide-spread practice of attracting to the daily duty of several IOG compositions, we are proposing to introduce a separate algorithm of actions in the work of IOG, which carries out departure to the place of the event. In particular, upon arrival of IOG at the scene of the event and the establishment of all circumstances, the head of the IOG (investigator) by means of communication informs the circumstances of the criminal offense to the investigator who is in the territorial subdivision of the police for immediate registration. After receiving the URPI number, the investigator who is on the scene, independently interrogates, and in case of necessity gives a commission to conduct interrogations to the operational officer.

**Conclusion.** Thus, the main organizational and preparatory measures for interrogation include: full and detailed study of materials of criminal proceedings; study of an investigative situation that was formed at a certain stage of pre-trial investigation; determining the range of persons to be questioned; Establishing a sequence of interrogation (if several suspects); definition of the subject of interrogation; investigation of the person being interrogated (collection of operational information about the interrogated person, his place in the criminal group involved in drug trafficking, criminal offenses committed by this group); determining the time of interrogation; establishment of the place of interrogation; determining the method of calling for questioning; selection of material evidence and other materials for presentation to the interrogator; definition of participants in the interrogation; definition of technical means for recording interrogation and their preparation; Providing favorable conditions for interrogation; acquaintance with special literature or use of the help of persons with special knowledge; definition of a number of tactical methods to be used during interrogation; drafting a plan for interrogation, etc. In addition, we believe that the organizational and preparatory measures for interrogation during the departure of IOG to the place of the event appropriate to include: a) registration of materials in the URPI investigator who is in the territorial subdivision of the police; b) giving a written instruction to the operational officer to conduct the interrogation directly during the review of the place of the event.

***References***

1. Ратинов А.Р. Судебная психология для следователей: учеб. пособие. М.: Высшая школа МООП СССР, 1967. 290 с.

2. Коловоротный А.А. Уголовно-процессуальные и криминалистические аспекты расследования организации преступного сообщества (преступной организации): дис. … канд. юрид. наук: спец. 12.00.12 «Криминалистика, судебно-экспертная деятельность, оперативно-розыскная деятельность»; 12.00.09 «Уголовный процесс». К., 2015. 238 с.

3. Криминалистика: учебник / под ред. проф. А.Г. Филиппова (отв. редактор) и проф. А.Ф. Волынского. М.: Издательство “Спарк”, 1998. 543 с.

4. Вовчанська О.А. Розслідування незаконного перевезення наркотичних засобів залізничним транспортом: дис. … канд. юрид. наук: 12.00.09 / Дніпроп. держ. ун-т внутр.справ. Дніпропетровськ, 2014. 213 с.

5. Криминалистика: учебник / под ред. проф. А.Г. Филиппова и А.Ф. Волынского. М. Издательство «Спарк», 1998. 282 с.

6. Тертишник В.М. Гарантії істини та захисту прав і свобод людини в кримінальному процесі: монографія. Дніпропетровськ: Юрид. академія МВС України; Арт-Прес, 2002. 432 с.

7. Андреев И.С. Курс криминалистики / И.С. Андреев, Г.И. Грамович, Н.И. Порубов; под ред. Н.И. Порубова. Мн.: Выш. шк., 1997. 335 с.

8. Весельський В.К. Сучасні проблеми допиту (процесуальні, організаційні і тактичні аспекти): монографія. К.: НВТ «Правник» – НАВСУ, 1999. 126 с.

9. Питерцев С.К. Тактика допроса / С.К. Питерцев, А.А. Степанов. СПб.: Питер, 2001. 160с.

10. Янковой М.О. Тактичні засади допиту та розвідувального опитування: порівняльне дослідження: автореф. дис. … канд. юрид. наук: спец. 12.00.09. Одеса, 2007. 18 с.

11. Криміналістика : підручник / В. В. Пясковський, Ю. М. Чорноус, А. В. Іващенко, О. О.Алєксєєв та ін. – К. : Центр учбової літератури, 2015. – 544 с.

12. Чаплинський К. О. Тактичне забезпечення розслідування діяльності злочинних угруповань : монографія / К. О. Чаплинський. – Дніпропетровськ : Дніпроп. держ. ун-т внутр. справ; Ліра ЛТД, 2010. – 304 с.

13. Весельський В. К. Особливості провадження допиту підозрюваного (обвинуваченого) з метою недопущення тортур та інших порушень прав людини : посібник / Весельський В. К., Кузьмічов В. С., Мацишин В. С., Старушкевич А. В. – К. : Нац. акад. внутр. справ України, 2004. – 148 с.

14. Криміналістика: підручник / Берназ В.Д. та ін.; за заг. ред. д-ра юрид. наук, проф. А.Ф.Волобуєва; Харк. нац. ун-т внутр. справ. Харків: ХНУВС, 2011. 665 с.

15. Чернявський С.С. Фінансове шахрайство: методологічні засади розслідування: монографія. К.: Хай-Тек Прес, 2010. 624 с.

16. Хірсін А.В. Криміналістичне забезпечення розслідування корисливо-насильницької організованої злочинної діяльності: автореф. дис. … канд. юрид. наук за спец. 12.00.09 «Кримінальний процес і криміналістика; судова експертиза». К., 2006. 18 с.

17. Бахин В.П. Тактика использования внезапности в раскрытии преступлений ми внутренних дел: учебное пособие / Бахин В.П., Кузьмичев В.С., Лукъянчиков Е.Д. Киев: НИиРИО КВШ МВД СССР им. Ф.Э. Дзержинского, 1990. 56 с.

18. Ефименко В.В. Расследование хищений огнестрельного оружия, боеприпасов, взрывчатых веществ и взрывных устройств (по материалам следственно-прокурорской практики военной прокуратуры Дальневосточного военного округа): дис. … канд. юрид. наук: спец. 12.00.09 «Уголовный процесс, криминалистика и судебная экспертиза; оперативно-розыскная деятельность» / Ефименко Виктор Викторович. Владивосток, 2002. 192 с.

19. Капустина И.В. Первоначальный этап расследования хищений огнестрельного оружия, боеприпасов, взрывчатых веществ и взрывных устройств: дис. … канд. юрид. наук: 12.00.09 / Санкт-Петербургск. ун-т МВД России. СПб., 1999. 227 с.

20. Тарасенко О.С. Розслідування незаконного поводження з вогнепальною зброєю, що вчиняється злочинними об'єднаннями: дис. … канд. юрид. наук: 12.00.09 / НАВС. Київ, 2017. 240 с.

*Received to editorial office 05.06.2018*

**Summary**

The article outlines the organizational and tactical features of interrogation at the initial stage of the investigation into the illegal possession of firearms.

The author concludes that the main organizational and preparatory measures for conducting the interrogation include: full and detailed study of materials of criminal proceedings; study of an investigative situation that was formed at a certain stage of pre-trial investigation; determining the range of persons to be questioned; Establishing a sequence of interrogation (if several suspects); definition of the subject of interrogation; investigation of the person being interrogated (collection of operational information about the interrogated person, his place in the criminal group involved in drug trafficking, criminal offenses committed by this group); determining the time of interrogation; establishment of the place of interrogation; determining the method of calling for questioning; selection of material evidence and other materials for presentation to the interrogator; definition of participants in the interrogation; definition of technical means for recording interrogation and their preparation,providing favorable conditions for interrogation; acquaintance with special literature or use of the help of persons with special knowledge; definition of a number of tactical methods to be used during interrogation; drafting a plan for interrogation, etc.

***Keywords:*** *illegal possession of firearms, interrogation, assignment, initial stage of investigation.*

**Anatoliy Kuzmenko**
postgraduate
*(the Dnipropetrovsk state University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-17-20*

# TACTICS OF SUSPECTS INTERROGATION IN PROCEEDINGS ABOUT APARTMENT THEFTS, COMMITED BY EARLIER CONVICTED PERSONS

**Кузьменко А. ТАКТИКА ДОПИТУ ПІДОЗРЮВАНИХ У СПРАВАХ ПРО КВАРТИРНІ КРАДІЖКИ, ВЧИНЕНІ РАНІШЕ ЗАСУДЖЕНИМИ ОСОБАМИ.** Наукова стаття присвячена висвітленню деяких аспектів розслідування квартирних крадіжок, учинених раніше засудженими особами. Розглядаються особливості проведення слідчих (розшукових) дій для вилучення інформації з особистісних джерел для більш швидкого розслідування досліджуваної категорії кримінальних правопорушень.

***Ключові слова:*** *квартирні крадіжки, раніше засуджена особа, організація, тактика, слідчі (розшукові) дії, допит, одночасний допит раніше допитаних осіб.*

**Formulation of the problem.**In investigating criminal offenses, depending on the particular investigative situation, appropriate procedural actions must be carried out. Each of them has certain peculiarities of carrying out depending on the structure of the crime and certain conditions that have developed at the appropriate stage of the proceedings. At the initial stage of the investigation of apartment thefts committed by previously convicted persons, an important role is played by conducting investigatory (search) actions to extract information from personal sources. After all, it is reduced to obtaining specific orientation information on stolen property, persons who could commit offenses, etc. Therefore, the study of organizational and tactical peculiarities of the implementation of these procedural actions is very important for the entire criminal proceedings.

**Analysis of recent research and publications.** Researchers at the conceptual basis for investigating crimes were dedicated to their work by such scientists as L.I. Arkusha, K.V. Antonov, V.P. Bahin, V.D. Bernas, R.S. Belkin, A.F. Volobuev, V.A. Zhuravel, A.V. Ishchenko, O.N. Kolesnichenko, V.K. Lisichenko, I.M. Luzgin, V.G. Lukashevich, E.D. Lukyanchikov, M.V. Saltevskyi, R.L. Stepaniuk, K.O.Chaplinskyi, V.Yu. Shepitko, M.P. Yablokov and others. However, the peculiarities of criminal proceedings in cases of apartment theft committed by previously convicted persons have not been fully researched in the light of the current CPC of Ukraine and the current needs of law enforcement practice.

**The purpose** of this article is to study the peculiarities of conducting investigatory (search) actions for extracting information from personal sources during the investigation of apartment thefts committed earlier by convicted persons.

**Presentation of the main research material**. An important investigative (investigative) action in investigating apartment thefts committed by previously convicted persons is questioning. As is known, this procedural action is the most widespread and informative in criminal proceedings. It is precisely with its help that, in almost every proceeding, police officers receive the greatest amount of evidence that makes it possible to put forward versions and take further steps. Some authors define the interrogation as an investigative (wanted) action, which consists in obtaining and fixing in the established criminal-procedural form the subject of investigation of information by direct communicative contact, and the object of interrogation is the established information as any data that is relevant for the establishment truths [9, p. 151]. The questioning can be determined, according to M.O. Yankovskyi, as the procedure for the specific verbal interaction with the interrogator, regulated by the criminal procedure law, during which the investigator (prosecutor, judge), using the lawful practical methods and methods of psychological influence, receives from the interrogator and records in the protocol oral information about his known circumstances having meaning for the investigation of a crime [15, p. 190] that we support.

As a rule, when investigating apartment thefts committed by previously convicted persons, victims have been known since the beginning of proceedings. The subject of their interroga-

tion is any circumstances that are subject to establishment in the criminal proceedings. In general, the subject of interrogation forms the circumstances that are part of the subject of evidence, as well as other circumstances that can assist in the comprehensive, complete, objective conduct of criminal proceedings and the adoption of a proper procedural decision [4, p. 305].

In considering this issue, planning and preparation for interrogation can not be ignored. To them, according to V.K. Veselsky and V.S. Kuzmichov should include three main elements: organizational - ensuring rational conduct of interrogation (when and where appropriate, to hold it from the point of view of rational use of the budget of time and opportunities of the investigator - today, tomorrow, in the morning, to use technical equipment, etc.); meaningful - determination of completeness and interconnection of circumstances to be established; tactical - the establishment of appropriate means and methods for solving specific tasks interrogation. [1, p. 61].

In general, the interrogation consists of three parts: preparation for interrogation, direct interrogation and recording of the results of the interrogation. The preparatory stage of the interrogation on cases of apartment theft committed earlier by convicted persons, in principle, is based on the general rules of conducting this investigative (search) action. Therefore, not going deep into the judgments of various scholars, we give a set of organizational and tactical measures, which proposes to implement in preparation for its conduct, for example, A.F. Volobuyev. They, in our opinion, most fully cover the interrogation in the investigation of apartment thefts committed by previously convicted persons, and have the following form: thorough, complete, and comprehensive study of the materials of the criminal case; determining the order of interrogation (ie, the circles of persons to be interrogated and the sequence of their conduct); obtaining information about the interrogated person; familiarization with some special issues; invitation of persons, participation in interrogation of which is obligatory; planning interrogation; determining the time and place of the interrogation; preparation of workplace for interrogation.

In particular, studying the materials of criminal proceedings allows us to determine the subject of interrogation, formulate the question to the interrogator, establish the circle of persons subject to interrogation, etc. This allows us to identify existing gaps, differences and contradictions between the participants of the process and take timely measures to eliminate them. It is also necessary to analyze investigative (wanted) actions that were carried out at the initial stage of the investigation: site review, questioning witnesses, etc. Their research may be useful for promoting versions of the mechanism of the committed crimes and those who committed them, and other circumstances.

Important in the investigation of apartment thefts committed by previously convicted persons, has the tactics of the investigative (wanted) action. According to M.P. Yablokov, the main tactical methods of interrogation include the following: demonstration before the interrogator possible mechanism of committing a crime; demonstration of evidence with explanation of their significance; creating an idea of an exaggerated awareness of the investigator; concealing the investigator's awareness of the interrogator; the use of element of surprise [14, p. 154].

Also, for successful interrogation, it is necessary to establish a psychological contact with the interrogated person. After all, communication during interrogation is complicated by the fact that interrogation is a specific form of communication in which citizens who are in the field of pre-trial investigation and trial are in direct contact with representatives of investigative and judicial bodies, which are endowed with authority "[13, p. 134]. Therefore, it is important that the investigator has the ability to call on the interrogator or to form a trust situation among the interrogators.

At the initial and subsequent stages of the investigation, various participants in the investigation may give contradictory evidence. This is explained by both the rapid course of events during the commission of a criminal offense and the concealment of one's fault. Therefore, an important investigative (investigative) action in investigating apartment thefts committed by previously convicted persons will be the simultaneous interrogation of two previously questioned persons.

Some scholars have analyzed the existing level of knowledge and skills of investigators regarding its conducting at the moment of starting work in investigative units and analyzed the typical tactical and psychological errors during its conduct. Based on the results of the study, she determined that investigators of all age groups considered insufficient training in educational institutions, the system of vocational training and in the system of advanced training. They consider the most important sources of knowledge about "face-to-face rates" as the expe-

rience of colleagues and their own experience. This is evidenced, firstly, by the lack of investigative tactical and psychological knowledge and professional skills in relation to the most effective conduct of the fixed rate and, secondly, the need to work out the above knowledge and skills in the learning process for further, more effective, their application in professional activities [6, p. 10]. The investigative (wanted) action indicated by clarifying and eliminating contradictions in the testimony of the interrogators helps law enforcement officials to achieve justice in criminal proceedings. It is a complex verbal procedural act, since it is conducted with the participation of 2 or more previously interrogated persons in the presence of substantive contradictions in the previously provided testimony in relation to the same circumstances of the case.

Under the confrontation, determined the investigative (judicial) act, which provides for the simultaneous interrogation of previously questioned persons about the circumstances in respect of which there were significantly contradictory evidence [11, p. 25]. In turn, A.B. Soloviev characterizes it as an independent procedural action, which is carried out by means of a repeated interrogation of two persons from among witnesses, victims, suspects and defendants in the presence of each other in order to establish in their testimony significant contradictions that are relevant to establishing the truth in controversial circumstances and ultimately for the adoption of a legitimate and substantiated final decision in a criminal case [10, p. 12].

By analyzing criminal proceedings in the investigated category of offenses, we found that simultaneous interrogation of 2 or more previously interrogated persons was conducted in 58% of cases. It is not recommended to conduct simultaneous interrogation between the following categories of persons: between persons, each of which gives knowingly false testimony; if there is substantiated evidence that persons with whom a fixed rate has to be agreed to give false testimony; with the participation of a suspect who partially confesses his guilt but is inclined to change the testimony; between persons from whom the one who gives true testimony is in material, family or other dependence on another participant; when one of its participants refuses to testify in the presence of another person; between minors and adults, if there is reason to believe that an adult will adversely affect the testimony of a minor, etc. [2, p. 30].

Conducting an "on-the-spot bet" between two persons who give knowingly false testimony is possible, but according to certain rules, and in the event that these persons speak truth in some episodes, and on the other, it is a lie. The tactics of the face-to-face rate should be based on the use of contradictions between them by exacerbating the conflict situation, aimed at deepening differences between the participants. It should be emphasized that most of the investigators who participated in the questionnaire spend most of their time in order to overcome the unknowing lie, but this investigative (investigative) action in practice is not always so effective. This can be evidenced by the results of the analysis of criminal cases. We will give a description of an individual of them. Thus, the main tasks for which this procedural action was carried out were as follows: to find out the reasons for the contradictions in the testimony of the interrogated and their elimination; exposing one of the interrogators in giving false testimony; strengthening the position of conscientious interrogators who gave true testimony; additional examination and confirmation of testimony, victims, suspects.

During a direct simultaneous interview with the investigation of apartment thefts committed by previously convicted persons, both conflict-free and conflict situations may occur. To solve them, a certain set of tactical techniques can be used. M.V. Saltevskyi, depending on the direction, allocates the following groups of tactical techniques: techniques for activating the participant's memory, which is conscientiously mistaken; receptions aimed at exposing lies; receptions to overcome the refusal of the interrogator from participation in the full-time rate; receptions aimed at overcoming the undesirable influence of one participant on another [8, p. 201]. Agreeing with the possibility of using these tactical techniques, we will consider some of them, given that it is most important to use them with the participation of suspects, especially in the context of counteraction to pre-trial investigation.

One of the most expedient tactical methods during the simultaneous interrogation of the investigated category of criminal offenses should be determined by the aggravation of contradictions in the testimony of the participants of the simultaneous interrogation in less significant controversial circumstances. The question of contradictions should be put in such a way that the participants of the personal rate could not mutually recognize the course of testimony beneficial to them. This is possible if the testimony of one participant becomes fully known to another. In order to prevent this situation, the investigator in respect of each controversy raises separate questions, the answer to which is initially proposed to one, and then to another inter-

rogator. After answering a question from one of the participants in the octal bet to another, one should ask if he agrees with such an answer. When the next question, the order is changed. As soon as any of them, contrary to the given testimony, agrees with the answer of another, he will take an explanation of this, and the answer is necessarily recorded in the protocol. Using such a tactical method, one of the interrogators can not fully agree with the other: they will alternately agree or contradict each other. In such circumstances, the falsehood of their testimony becomes apparent. If the person who gave the true testimony refuses from them at the personal rate, then the investigator should not ask the two participants for the purpose of detailing and clarifying their testimony. Otherwise, the participants of the investigative (search) action, having become acquainted with its details, will later be able to put forward mutually agreed versions [5, p. 96].

**Conclusion**. To summarize, it should be noted that investigation (investigation) actions to extract information from personal sources during the investigation of apartment thefts committed by previously convicted persons include the interrogation and simultaneous interrogation of previously questioned persons. A well-chosen tactic of these investigative (search) actions provides an opportunity to effectively collect evidence that will be relevant at a subsequent stage of the investigation. In order to optimally carry out these procedural actions, it is necessary to carry out thorough preparation and apply appropriate tactical techniques.

***References***

1. Весельський В.К., Кузьмічов В.С., Мацишин В.С., Старушкевич А.В. Особливості провадження допиту підозрюваного (обвинуваченого) з метою недопущення тортур та інших порушень прав людини: посібник. Київ: Національна академія внутрішніх справ України, 2004. 148 с.

2. Котюк О.І. Мета, фактичні та процесуальні підстави одночасного допиту двох чи більше вже допитаних осіб потребують уточнення. *Вісник кримінального судочинства*. 2016. № 1. С. 26-32.

3. Криміналістика: підручник / В.Д. Берназ, В.В. Бірюков, А.Ф. Волобуєв; за заг. ред. А.Ф. Волобуєва; МВС України, Харк. нац. ун-т внутр. справ. Харків: ХНУВС, 2001. 666 с.

4. Кримінальне процесуальне право України : навчальний посібник / за ред. В.Г. Гончаренка, В.А. Колесника. Київ: Юстініан, 2014. 573 с.

5. Кузьмічов В.С, Юсупов В.В. Алібі у розкритті злочинів: навчальний посібник. К., 2007..

6. Лозова С.М. Тактико-психологічне забезпечення очної ставки: автореф. дис. ... канд. психол. наук. Харків, 2004. 20 с.

7. Переверза О.Я. Формування неправдивих показань, система тактичних прийомів їх виявлення і подолання: дис. … канд. юрид. наук. Харків, 2000.

8. Салтевський М.В. Криміналістика: підручник: у 2-х ч. Харків : Консум, 2001. Ч. 2. 528 с.

9. Следственные действия: учебник для магистров / М. В. Савельева. А. Б. Смушкин. М.: Юрайт, 2012. 273 с.

10. Соловьев А.Б. Очная ставка: лекция. М., 2006. 32 с.

11. Стахівський С.М. Слідчі дії як основні засоби збирання доказів. Київ, 2009. 68 с.

12. Чаплинська Ю.А. Організаційне забезпечення проведення допиту. *Оперативно-розшукова діяльність органів внутрішніх справ: проблеми теорії і практики:* матеріали Всеукр. наук.-практ. конф. Дніпропетровськ: Дніпропетровський державний університет внутрішніх справ, 2013. С. 221-224.

13. Удалова Л.Д. Деякі проблеми допиту інформатора в кримінальному судочинстві України. *Вісник Луганської академії внутрішніх справ*. 2003. № 1. С. 133-137.

14. Яблоков Н.П. Криминалистика в вопросах и ответах: учебное пособие. М.: Юристъ, 2000. 224 с.

15. Янковий М.О. Генезис поняття та сутність допиту. *Науковий вісник Київського національного університету внутрішніх справ*. 2007. № 5. С. 185-187.

*Received to editorial office 05.06.2018*

**Summary**

The scientific article deals with some aspects of investigation of apartment thefts made earlier by convicted persons. The peculiarities of the investigation (investigation) activities for the removal of information from the perfect source for more rapid and effective investigation of the crime are devoted too.

The investigative (search) actions to extract information from personal sources during the investigation of apartment thefts committed by previously convicted persons include the interrogation and simultaneous interrogation of previously questioned persons. A well-chosen tactic of these investigative (search) actions provides an opportunity to effectively collect evidence that will be relevant at a subsequent stage of the investigation.

***Keywords:*** *apartment theft, previously convicted person, organization, tactics, investigation (investigative) actions, interrogation, confrontation.*

**Roman Mrochko**
postgraduate
*(the Dnipropetrovsk state University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-21-25*

# CRIMINALISTIC CHARACTERISTICS OF THE WAYS OF PIMPING, COMMITED BY ORGANIZED GROUPS

**Мрочко Р. КРИМІНАЛІСТИЧНА ХАРАКТЕРИСТИКА СПОСОБІВ СУТЕНЕРСТВА, УЧИНЮВАНИХ ОРГАНІЗОВАНИМИ ГРУПАМИ.** Висвітлено сучасні способи вчинення сутенерства. Визначено, що спосіб вчинення сутенерства є центральним елементом криміналістичної характеристики злочину. Серед типових способів підготовки до сутенерства найбільш розповсюдженими є наступні: підшукування приміщень, де будуть надаватися сексуальні послуг або збиратимуться члени злочинної групи та повії; пошук осіб, які утримують місця розпусти; підшукування жінок, які будуть займатися проституцією; налагодження системи зв'язку між співучасниками; складання «графіків» роботи; підбір клієнтів. Серед типових способів приховування сутенерства та втягнення особи у зайняття проституцією, найбільш розповсюдженими є:організація фірм під виглядом зайняття легальним бізнесом (ресторанним, готельним або з надання інших послуг);заява під час затримання (особливо зі сторони сутенера), що він не знайомий із повіями, вперше їх бачить; знищення «чорнової» бухгалтерії, використаних презервативів; вплив на сумлінних учасників процесу; використання корумпованих зв'язків в органах влади й управління.

***Ключові слова:*** *криміналістична характеристика,спосіб вчинення злочину, сутенерство, проституція.*

**Formulation of the problem.** The increase in the degree of activity of criminal structures in society in relation to the creation or maintenance of places of deportation and pimping is due to a number of factors, one of which is an inadequate forensic analysis of the methods of committing these crimes. During the pre-trial investigation, investigators, using the knowledge of the forensic character of the crime, as well as the links between its elements, put forward standard investigative versions in real criminal proceedings, which allows to narrow the circle of suspects, places where it is necessary to carry out search activities, and also to combine materials of pre-trial investigations in the order of Part 1 of Art. 217 of the CPC of Ukraine, if there are sufficient grounds to consider that criminal offenses against which pre-trial investigations are carried out and for which no suspects are established, committed by one person (persons). The method of committing a crime is one of the most important elements of the forensic characteristics of pimping, since, given the current conditions and trends, it is possible to construct investigative versions, to specify the peculiarities of conducting separate investigative (search) actions. This, in its turn, allows us to further develop on this basis effective scientific and practical recommendations on the methodology for their investigation. Therefore, the chosen research topic is relevant and timely.

**Analysis of publications that initiated the solution to this problem**. The study of the way crime was committed by such well-known scientists as T. Avianyanov, V.P. Bakhin, R.S. Belkin, A.F. Volobuyev, AV Dulov, I.Sh.Gordania, G.G. Zuykov, A.V. Ishchenko, O.N. Kolesnichenko, V. S. Kuzmichov, E. D. Lukianchikov, M. I. Porubov, M. V. Saltevsky, O. G. Filippov, V. Yu. Shepitko, M. G. Shcherbakovskii, M. P. Yablokov and others. However, without degrading the values of these works, it should be noted that their work did not consider ways of committing as an element of forensic characteristics of pimping.

**The purpose** of this article is to study modern methods of committing pimps, committed by an organized group.

**Presenting main material**. The first theoretical studies of the method of committing a crime were carried out by A.I. Winberg and B.M. Chaver. They considered the way of committing a crime as a component of the subject of criminology, pointed to the possibility of using knowledge about him to find traces of crimes, the establishment of criminals and the disclosure of crimes committed by them. Of great importance was the knowledge of the typical methods of committing certain types of crimes and the development on this basis of techniques for in-

vestigating specific types of crimes. Depending on the criminal-law qualification of crimes, scholars formulated several definitions of the way to commit an intentional crime. In the main methods of committing a crime, scientists considered as "actions aimed directly at achieving the criminal result", and included in the content of this notion of action to penetrate the offender to the place of commission of the crime, techniques used by the offender, the peculiarities of the object of the attack, the place, time and tools of the crime [1]. G.M. Mudyugin shared the forensic concepts of "way of committing" and "a way of concealing a crime", defining a method of committing, as a target aimed at achieving a criminal goal, a complex of actions committed by a criminal in a certain sequence, a method of concealment - as a set of actions aimed at concealing a crime against around them, and first of all, from the investigative bodies, in order to evade responsibility for the committed act [2, p. 65-66].

According to E.D. Kuranov, the method of committing a crime is a complex of actions for the preparation, commission and concealment of a crime, selected guilty in accordance with the intended purpose and those conditions in which the criminal intent is carried out [3, p. 165-167]. Some authors say that the method of crime is the character of the person's actions, which is manifested in a certain interrelated system of operations and methods of preparation, commission and concealment of a crime [4, p. 22]. His definition was formulated by G. G. Zuykov, saying that it is a system of actions in preparing, committing and concealing a crime determined by the conditions of the external environment and the psychophysical properties of a person that may be related to the choice of the use of the appropriate tools or means, places and time [5, p. 12].

S.M. Zavialov, already in the new millennium, using the traditional approach, considers the method of committing a crime as a triad of ways of cooking, committing and concealing a crime. He notes that they are a kind of human activity, which is characterized by socio-psychological qualities, orientation, sensorimotor features of the subject [6, p. 26]. And already V.V. Tyshchenko to the content of methods of committing a criminal offense refers to a complex of acts of the offender for the preparation, commission and concealment of the crime, determined by the purpose of the criminal act, the properties of the offender and the situation (objective and subjective factors), whose results are reflected in material and intellectual traces characterizing the psychic and physical features of the offender [7, p. 18]. In turn, V.A. Zhuravel points out that the functional aspect of the behavior of the offender is chosen to characterize the method of committing a crime as a system of actions, receptions, operations aimed at achieving a certain criminal result. Knowing the typical methods of careless killings can effectively apply one of the most effective and practical schemes for investigating them, which is presented by scientists in a sequence: from traces of a crime - to a method of committing a crime; from the method of committing a crime - to the person of the offender [6, p. 28]. In the context of this, it should be emphasized that the basic means for obtaining information about the methods of committing a crime is to review the place of the event, interrogations, forensic examinations.

As we see, most scholars are considering ways to commit a crime in a combination of its components. We fully support these positions and consider the method of committing crimes related to prostitution and pimping to be fully structured, covering the preparation for its commission, the direct way of committing and ways of concealing it. In turn, try to explore these elements. According to a number of authors, typical methods of preparing for a crime related to pimping can be called: search for premises where sex services will be provided, or members of a criminal group and prostitutes will be assembled (often they can use specially created firms). It may also be searched for people who hold debauchery places; searching for women who will be prostituted; the search for accomplices and the distribution of functions between them (who transport, who protects prostitutes and the territory who attracts new prostitutes or clients); establishing a system of communication between accomplices, drawing up "schedules" of work; placing ads in the media or the Internet, making business cards; the search for links between law enforcement officials or the "criminal roof", etc. [8, p. 300].

It seems appropriate to us to classify the crime preparation activity provided by O. Balanyuk, who distinguished the following groups:

1) preparatory actions to conceal personal involvement (elaboration of a plan for the creation of a false alibi, which includes a series of actions aimed at creating in certain persons a misconception about the true location of the offender at a particular time, preliminary agreement with false witnesses, etc. - selection , the acquisition of funds intended to destroy the traces of the offender, as well as the selection of funds designed to make it difficult to use the

search-and-find dog, etc.);

2) preparatory actions for concealing the crime as a whole and masking its particular circumstances (the production or drawing up of forged documents in order to conceal criminal financial and economic operations or the true circumstances of the event, planning and selection of funds and creating conditions for commissioning events, etc.);

3) preparatory actions to create conditions for evasion from responsibility and the continuation of criminal activity (the commission of actions aimed at creating an idea of guilt in the crime of other persons, or "objective" circumstances that led to criminal consequences [9, p. 195].

So, studying the related issues, M.V. Kuratchenko notes that the methods of training include: searching for or creating a place to provide intimate services; search for individuals who will provide intimate services; creation of a certain base of persons engaged in prostitution; inclining persons to provide intimate services (money reward, blackmail, compromise, use of official dependence); placement of information about services in mass media and on the Internet; making booklets and business cards; selection of accomplices of criminal activity (holders of places of deportation, drivers, guards); coordination of activities for the provision of intimate services and scouting; creating an electronic database of regular clients who receive intimate services [10].

Given the multiplicity and adjacency of these crimes, one can explain some differences in the results obtained by K. Y. Nazarenko, who investigates the problems of investigating crimes related to the creation or maintenance of places of deportation and assault, identified the following methods of preparation: crime planning; search for a room or other place for depravity; arrangement of a room or other place for depravity; selection of persons who agree to provide intimate services for remuneration; customer search; selection of accomplices of a crime; division of roles between accomplices [11].

Concerning the direct method of committing the crime under investigation, it should be noted that, according to A.A. Nebitov, a group and organized way is characteristic of these crimes because it is extremely difficult to commit such an offense to one person, since they involve systematic and diverse actions (for example, recruitment, guarding, transportation, material support for prostitutes, etc.), which requires division of functions. Therefore, effective coercion to engage in prostitution, involvement in it and pimping is possible in terms of complicity with the division of functions and roles. However, the duration of such associations depends on the presence of corrupt relationships in government, observance of secrecy rules and disciplines that contribute to avoidance measures guilty of criminal liability [12, p. 38].

E. V. Pryakhin identifies the following typical ways of directly committing a crime connected with pimping: actions connected with securing the prostitution of another person (customer search, provision of premises, transportation, receiving money for the provision of sex services, the transfer of part of the money to a prostitute) ; involvement of a person in prostitution; forcing a person to engage in prostitution. As practice shows, there are now quite a few cases of forcing a person to engage in prostitution. The main person is involved in prostitution in various ways [8, p. 300].

K. Y. Nazarenko notes that the methods of immediate commission are: a) the creation of a place for the provision of intimate services; b) creation of conditions for effective functioning of the place for deprivation in order to obtain significant profits; c) persuading individuals to provide intimate services (blackmail, compromise, use of official dependence, monetary rewards); coordination of the provision of intimate services and scouting; acquaintance and organization of meetings for the provision of intimate services; (e) Retaining a place for prosecution and eviction [11].

The last element of the method of committing a crime is a way of concealing it. Regarding this issue P.V. Malyshkin notes that prospects for concealing socially dangerous act offender often forms the so-called "artificial" conditions for effective realization. As a result of his implementation of a set of actions to conceal the crime in the context of the crime reflected the main characteristics of the characteristics of the chosen method of crime. From the information received from the traces of which the person has deprived the city of events in the course of carrying out actions to conceal the crime, it becomes possible to determine the method of their commission, the actions of the offender, committed with this purpose, to recognize the method of concealment [13, p. 22]. In turn, Boris Rybnikov pointed out that studied category - a person's activity aimed at hiding it well-known facts and circumstances of the offense [14, p. 67].

Other authors define it as situational, recurring phenomenon, the determined number of objective and subjective factors, the most important of which is the intent and related motive and purpose [15, p. 31]. V.O. Konovalova, for his part, emphasizes that the psychological tension in concealing the crime and the presence of objective factors that create certain unforeseen obstacles, violate even carefully thought-out concealment logic and create for the perpetrator the possibility of assuming many failures, on the one hand , and obtaining important information for the investigator - on the other [16, p. 21]. In our opinion, the most concrete definition of this concept was given by M.V. Danshin, having determined that the method of concealing a crime is understood as based on the implementation of the system of objective and subjective factors of reality, the complex of actions or inaction of the person concealing the crime before, at the moment or after committing an offense [17, p. 10].

The analysis of criminal proceedings made it possible to establish that among the typical ways of concealing pimping and involving a person into prostitution, the following are the most common: organization of firms in the form of engaging in legal business (restaurant, hotel or other services); a statement during the detention (especially from the side of the pimp) that he is not familiar with the prostitutes, sees them for the first time; destruction of "rough" accounting, used condoms; influence on conscientious participants in the process; the use of corrupt connections in government and government, etc.

**Conclusions.** Summing up, we note that the way of committing pimps is the central element of the forensic characteristics of the crime. Among the most common ways to prepare for pimping, the following are the most common: looking for premises where sex services will be provided or members of a criminal group and prostitutes will be gathered; search for people who hold places of depravity; searching for women who will be prostituted; establishing a system of communication between accomplices; drawing up of "schedules" of work; selection of clients. Among the typical ways of concealing pimping and involving a person into prostitution, the most common are the following: organization of firms in the form of engaging in legal business (restaurant, hotel or other services); a statement during the detention (especially from the side of the pimp) that he is not familiar with the prostitutes, sees them for the first time; destruction of "rough" accounting, used condoms; influence on conscientious participants in the process; the use of corrupt connections in government and government, etc.

***References***

1. Ермолович В.Ф. Криминалистическая характеристика преступлений. Минск: Алмафея, 2001. 241 с.

2. Мудюгин Г.Н. Версии об объективной стороне преступления. *Планирование расследования преступлений.* М., 1957. С. 65-66.

3. Куранов Э.Д. Об основных положениях методики расследования отдельных видов преступлений. *Вопросы криминалистики.* 1962. № 6-7. С. 165–167.

4. Колесниченко А.Н., Коновалова В.Е. Криминалистическая характеристика преступлений: учеб. пособие. Харьков: Юрид. ин-т, 1985. 144 с.

5. Зуйков Г.Г. Криминологическое учение о способе совершения преступления: автореф. дисс. … д-ра юрид. наук. М., 1970. 41 с.

6. Зав'ялов С.М. Спосіб вчинення злочину: сучасні проблеми вивчення та використання у боротьбі зі злочинністю: дис. … канд. юрид. наук: 12.00.09 / НАВС. Київ, 2005. 241 с.

7. Тищенко В.В. Концептуальні основи розслідування корисливо-насильницьких злочинів: автореф. дис. … д-ра юрид. наук: 12.00.09 / Національна юридична академія України імені Ярослава Мудрого. Х., 2003. 34 с.

8. Методика розслідування окремих видів злочинів, підслідних органам внутрішніх справ: навчальний посібник / О.В. Батюк, Р.І. Благута, О.М. Гумін та ін.; за заг. ред. Є.В. Пряхіна. Львів: ЛьвДУВС, 2011. 324 с.

9. Баланюк О.В. Підготовка до злочину: поняття та криміналістична класифікація. *Актуальні проблеми держави і права.* 2006. С. 192-196.

10. Куратченко М.В. Розслідування сутенерства та втягнення особи в заняття проституцією: дис. … канд. юрид. наук: 12.00.09 / ДДУВС. Дніпро, 2017. 192 с.

11. Назаренко К.Ю. Розслідування злочинів, пов'язаних зі створенням або утриманням місць розпусти і звідництвом: дис. … канд. юрид. наук: 12.00.09 / ДДУВС. Дніпро, 2016. 218 с.

12. Нєбитов А.А. Кваліфікуючі та особливо кваліфікуючі ознаки сутенерства або втягнення особи в заняття проституцією. *Юридичний часопис Національної академії внутрішніх справ.* 2014. № 1. С. 35-43.

13. Малышкин П.В. Способ сокрытия преступления и его место в структуре способа совершения преступления. *Следователь.* 2009. № 1. С. 19-24.

14. Рыбников Б.Б. Проблема сокрытия преступлений и ее место в советской криминалисти-

ке. *Криминалистический сборник*. Рига, 1972. С. 67-70.

15. Лузгин И.М., Лавров В.П. Способ сокрытия преступления и его криминалистическое значение: лекция. М., 1980. 34 с.

16. Коновалова В.Е. Убийство: искусство расследования: монография. Харьков: Факт, 2001. 324 с.

17. Даньшин М.В. Класифікація способів приховування злочинів в криміналістиці: автореф. дис. … канд. юрид. наук. Харьков, 2000. 20 с.

*Received to editorial office 05.06.2018*

**Summary**

The author has enlightened modern ways of committing a pimping. It is determined that the method of committing a pimping is a central element of the forensic description of the crime. Among the most common ways to prepare for pimping, the following are the most common: looking for premises where sex services will be provided or members of a criminal group and prostitutes will be gathered; search for people who hold places of depravity; searching for women who will be prostituted; establishing a system of communication between accomplices; drawing up of "schedules" of work; selection of clients. Among the typical ways of concealing pimping and involving a person into prostitution, the most common are: the organization of firms in the form of engaging in legal business (restaurant, hotel or other services); a statement during the detention (especially from the side of the pimp) that he is not familiar with the prostitutes, sees them for the first time; destruction of "rough" accounting, used condoms; influence on conscientious participants in the process; use of corrupt connections in government and government.

***Keywords:*** *forensic characteristic, way of committing a crime, pimping, prostitution.*

**Dmytro Ptushkin**
postgraduate
*(the Dnipropetrovsk state University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-25-29*

## CRIMINALISTIC CHARACTERISTICS OF THE PERSON WHO INVOLVES THE CHAIR OF OBJECTS OF THE CITIZEN'S REAL ESTATE

**Птушкін Д. ОСОБА ЗЛОЧИНЦЯ ЯК ОБ'ЄКТ КРИМІНАЛІСТИЧНОГО ДОСЛІДЖЕННЯ (ЗА МАТЕРІАЛАМИ КРИМІНАЛЬНИХ ПРОВАДЖЕНЬ ПРО ШАХРАЙСТВА У СФЕРІ НЕРУХОМОГО МАЙНА ГРОМАДЯН).** Досліджено криміналістично-значущі особливості особи, що вчиняє шахрайства щодо об'єктів нерухомого майна. Розглянуто криміналістичний портрет злочинця на підставі соціально-демографічних, морально-психологічних, біологічних особливостей особи. Проводиться класифікація осіб, які вчиняють злочини щодо об'єктів нерухомого майна, на дві групи. Акцентовано, що здебільшого шахрайства, спрямовані на заволодіння нерухомим майном громадян, вчиняються у групі, із задіянням корумпованих державних службовців, ріелторів, адвокатів та осіб, які виконують управлінські функції в комерційних організаціях, нотаріусів. Відзначається поширеність участі у вчиненні даного злочину жінок, осіб із вищою освітою, обізнаних і грамотних, осіб, які є володіють прийомами спілкування, тактикою впливу на людей.

***Ключові слова:*** *шахрайство, нерухомість, житло, особа злочинця, що вчиняє шахрайство щодо об'єктів нерухомого майна громадян.*

**Problem statement and its connection with important scientific and practical tasks.** Any crime, as a socially dangerous act, can be characterized from different sides, including from the standpoint of studying the factors that influence the level of criminal behavior of the subject who acts unlawfully. The success of the investigation, in the first place, is ensured by timely detection of those involved in the crime of persons and the gathering of evidence that would prove their guilt. However, without the knowledge of law enforcement authorities about the main characteristics of persons who commit certain categories of crimes, it is not always possible to guarantee this success, since the investigation under such conditions is carried out in conditions of information deficiency.

**The analysis of recent researches and publications, in which the solution of this problemstarted**, indicates that the person of the offender is the object of attention of a number

of sciences (criminology, criminalistics, legal psychology, etc.) and studied by such scientists: M.Y. Antonian, I.O. Antonov, R. S. Belkin, P.D. Bilenchuk, M.M. Bukaev, I.O. Vozgrin, V.I. Gaenko, V.A. Zhuravel, V.O. Konovalova, O.M. Kolisnichenko, V.O. Obraztsov, M.O. Selivanov, V.V. Tishchenko, V.Y. Shepitko, A.F. Volobuev and other researchers. However, on the part of scientists, the issue of fraud committed in relation to real estate of citizens, due attention was not paid within the framework of modern Ukrainian legislation. This indicates the need to improve law enforcement activities from the point of view of the information about the identity of the scam, which determines the relevance of this article.

**The purpose of the article**. The purpose of the article is to analyze the approaches presented in the legal literature to the treatment of the perpetrator's personality and the definition of its structural elements, as well as the characteristics of persons who commit fraud against real estate objects of citizens.

**Main content**. As already noted, the person of the offender is studied in a number of sciences: criminology, criminology, criminal law, legal psychology, criminal process, etc. Meanwhile, each science allocates individual aspects and properties of the offender from the standpoint of specific methods of study. In connection with the changes taking place in our society, the dynamics of crime, including the housing market, there is a significant increase in fraudulent encroachment. At the same time, the professionalism and education of persons committing crimes in this area are constantly increasing as they adapt to new conditions. A person of a rogue is a special interest in connection with the peculiarities of the mechanism of committing this type of crime.

Establishing a person is a constant and most difficult criminalistic task that arises in the process of disclosure and investigation of crimes. This is a complex activity in which, with the use of forensic methods and means, the detection, fixation and study of informative properties and characteristics of a person are important for the disclosure and investigation of a crime. This activity involves, on the basis of collected and investigated information, the construction of the model of the wanted person and the organization of operational activities, investigative actions, conducting forensic examinations to establish a person [1, p. 29]. From this it follows that the criminalistic aspect of studying the person of the offender involves the establishment of such data about him, which are directly relevant to the choice of the direction of the investigation, the decision on the need for the conduct of investigatory (search) actions and operational-search activities and the selection of their tactics, taking into account the specificity of the investigated crime

Speaking about the constituent elements (typical features) of the perpetrators, it should be said that in various sources the question of the weighty components of the perpetrator is considered differently. Thus, Y.V. Furman proposes to distinguish the following data, describing the identity of the offender: social (social status, education, nationality, family status, profession, etc.), psychological (worldview, beliefs, knowledge, habits, skills, temperament), biological (gender, age, physical data, strength, height, weight, special attributes) [2, p. 368].

According to V.O. Obraztsova, the person of the offender is characterized by a variety of features, which are divided into: direct immutability of biological origin; socially – conditioned signs that may change. At the same time, changes may be related to the influence on the subject externally (injuries, injuries), and may also come from him (changing the appearance), and against his desire, under the influence of the social sphere and other conditions [3, p. 41].

K.O. Chaplinskyi points out that the characteristics of a person of a criminal, including members of criminal groups, may consist of a set of data on: socio-demographic, moral and psychological and criminal characteristics; regularities of connections of personality traits of the offender and his activity with other elements of the crime.

The scientist notes that the personality of the offender has an important forensic significance and allows to narrow the range of persons among which there may be criminals, put forward versions regarding the motives, goals and methods of the commission and concealment of crimes, and define the tactics of investigative actions during the investigation of crimes, especially those committed by criminal gangs. In his opinion, characterizing the subject of a crime, it is important to take into account his social, physical and mental characteristics, as well as the place in the hierarchy of the group and the role function in it [4, p. 42].

Analyzing the views of scholars, it should be noted that most of them, speaking of forensic study of the person of the offender, offer the allocation of social, demographic, moral, psychological and biological properties of these individuals [5; 6]. Of course, these characteristics determine not only the very possibility of a criminal encroachment, but also the behavior of

fraudsters during pre-trial investigation. In order to more fully describe the identity of the offender, as a structural element of the forensic character of the fraud committed against the objects of real estate of citizens, it is necessary to agree with the above-mentioned approach of scientists. At the same time, it is expedient to combine social and demographic features into one group, while moral and psychological ones into another group, thus forming three groups of signs of a person who is engaged in fraud in relation to objects of real estate of citizens: socio-demographic; moral and psychological; biological signs. At the same time, one should not ignore the criminal-legal aspects of these individuals, since it is the very existence of guilt, motive and direction of intent, etc., that determine the crime of actions of the person and promote the disclosure of the guilty person. After all, by analyzing the peculiarities of the forensic character of a fraudulent person, it is necessary to indicate a number of circumstances that motivate his behavior.

As observe V.O. Konovalova and O.M. Kolisnichenko, a complex of features of a criminal person, as an element of forensic characteristics, includes all the features that can serve to determine the effective ways and methods for the establishment, investigation and disclosure of guilty [6, p. 112]. According to V.V. Lysenko, the structure and content of the element of the offender's person depends on the type of crime and its practical orientation. For each specific type of socially dangerous acts content is determined by specific data. They are due to the nature of the crime committed and the necessary information that promotes their effective detection, disclosure and investigation [7, p. 60].

Regarding the identity of the perpetrator of fraud in relation to real estate of citizens, it should be said that fraudulent schemes in this area require criminals with special knowledge related to the regulation of relations in the given segment. The study of statistical data, analysis of the study of materials of criminal proceedings and the results of the survey of law enforcement officers who have experience in disclosing and investigating this category of crimes, show that the structure of the person of the offender, who encroaches on the legal relationship in the field of real estate, significantly differs from the forensic characteristics of persons who commit other useful crimes.

In order to make a forensic description of the person of the perpetrator of crimes in the field of real estate, in the framework of socio-demographic features, one should investigate the place of residence of a person, profession, the presence of criminal record in the past, social status, marital status, educational level, etc.; in the framework of moral and psychological – value orientations, interests, characteristics in everyday life and at work, psychological and psychological properties of a person, etc. Biological signs include sex, age, physical condition. In addition, information on the severity of the crime and its nature is important (the person acted either by the group itself, organized crime group, the period of criminal activity, the degree of participation in the group, etc.).

Regarding the socio-demographic features of a person who is committing fraud in relation to objects of real estate of citizens, one should say that the majority of people are residents of large cities (Kiev, Dnipro, Kharkiv, Odessa, etc.), 98% - citizens of Ukraine. 50% of them have an educational level above average. Only in 10% of cases convicts had incomplete secondary education, who mostly performed secondary roles within the group.

Real estate fraud is often committed by persons who work in organizations that search for housing for sale, lease (real estate companies), execute and accompany transactions related to the implementation of transactions in relation to real estate. Often criminals are the founders of real estate agencies and other companies, organizations that carry out functions for the maintenance of real estate transactions. Basically, crooks have a family and children, and often they do not hide and support some of the facts of criminal activity from their relatives. This indicates the high level of intellectual and education of individuals who had direct or indirect links to fraudulent activities in relation to real estate.

Speaking about the conviction, one should agree with N.V. Pavlova, who observes that the conviction, in the direct sense of the word, is not a sign or property of a person, but this legal concept often reflects the existence of an individual's anti-social views and thereby defines the social features of man. We can say that the commission of fraud in the area of housing, a person who has a criminal record – rather an exception [8, p. 62].

The specificity is that for the most part, real estate fraud is committed in a group. In most cases it is a question of committing several episodes. The motive for committing a crime is mainly possession of or the right to housing or material enrichment at the expense of fraudulent actions with the injured party and the realization of transactions with immovable property

of citizens in contravention of legal requirements.

The forensic investigation of a person who deals with fraud in the real estate business requires consideration of biological properties and attributes such as gender, age, physical properties, etc. So, most often these crimes are committed by individuals aged 35 to 50, which is logical, since it is at this age that most people are able to work, have sufficient life experience. Most of them are men.

The specificity of the crime of this category is the fact that in its commission minors do not participate in the majority, and if they appear in the case, they perform minor roles. In our opinion, this fact is explained by the complexity of actions aimed at taking ownership of real estate by fraudulent citizens, and the need for legal action that is necessarily carried out by legal citizens. In assessing the moral and psychological characteristics of a criminal who is committing fraud in the real estate circulation, one should pay attention to the fact that in the majority of cases such persons cynically transgress the norms of morality, they do not have sympathy with the socially unprotected strata of the population who are mostly victims.

However, according to O.V. Blagarenko, in some types of criminal schemes in the sphere of real estate circulation, for example, in the assignment of dwellings to dead or missing persons who do not have heirs, or in the theft of budgetary funds allocated for improving living conditions, there is a phenomenon such as dehumanization, that is, In committing a crime, the offender does not encounter directly with the victim, but performs deceptive acts beyond his or her attention. As a result, the effectiveness of internal restraining mechanisms is reduced [9].

As a rule, fraudsters have certain psychological stability, self-esteem and self-control, acute mind, developed imagination and fantasy, ability to interest and attract people. In order to commit a crime, they always come in contact with the alleged victim to create a favorable impression of themselves. As R. Chaldini points out, sometimes there is enough business suit for this thief, which gives a person an official appearance and allows him to enjoy the respect of others and to exert influence on them [10, p. 207].

Fraudsters can influence the consciousness of a potential victim in such a way that the latter begins to perceive the proposed instructions as their own thoughts. And such confidence allows a swindler to fulfill his criminal intentions in full. In order to make a positive impression about themselves, crooks often show a connection with influential people, show involvement in well-known firms, organizations [11, p. 44].

It should be noted that the overwhelming majority of citizens who commit fraud in the sphere of housing turnover, in general, are characterized positively or neutrally. Only 13.1% of the total number had negative characteristics. It is rarely possible to find involvement in committing such crimes of persons who abuse alcohol or drugs. They are usually accomplices to the crime and never act as organizers of such fraud. A small part of this category is made up of persons suffering from certain mental disorders. Consequently, if we consider the structure of the persons of criminals who commit fraud in the field of real estate turnover, there is a rather positive portrait of a successful enough person in a society with a positive characteristic, is family, with a higher education and relatively satisfied with the material condition.

Meanwhile, it should be emphasized that such a feature only applies to criminals who commit fraudulent conduct and abuse of trust only to achieve a criminal purpose. However, the desire to obtain material benefits and to meet their needs is often accompanied by violent acts to facilitate the process of taking possession of real estate (preparation for the illegal seizure of real estate of citizens) or in order to eliminate the owners of this property and witnesses (concealing the crime).

In connection with this, those who commit crimes against immovable property can be grouped into two groups: The first one can be attributed to persons who, in order to achieve the intent to take possession by deceit and abuse of trust in citizens property and rights on her, at the stage of preparation, carry out various kinds of violence, physical and psychological threats and other attacks on the person. The second group should include those who use only deception or abuse of trust in resorting to psychological methods of influence on a person, distortion of real information, hypocrisy, offers of obtaining certain benefits (exchange of housing, obtaining a pledge for non-existing housing, etc.) in order to achieve the ultimate goal. These individuals mostly forge documents necessary for real estate transactions, seals and stamps of organizations related to such transactions. Often, such fraudsters enter into a conspiracy with persons who either provide information about real estate objects of citizens and individuals who are their owners or facilitate the illegal registration of real estate of citizens (law enforcement agencies, employees of housing associations, condominiums, representatives of the mi-

gration service, registration services, notaries etc).

**Conclusions.** Characteristics of a person who commits crimes against objects of real property of citizens is significantly different from the characteristics of the person committing other crimes of selfishness. The characteristics of such a person should be understood as the totality of socio-demographic, moral, psychological and biological qualities of a person who was acquired by him during the course of socialization, and which constitute a public danger and facilitate the commission of fraud in relation to objects of real estate of citizens. Persons committing crimes against immovable property can be grouped into two groups: criminals who, at the stage of preparation, commit various kinds of violence in order to attain the intent to take possession by deception and abuse of trust in the real estate of citizens and its rights. , physical and mental threats and other attacks on the person; persons who use only deception or abuse of trust to reach the ultimate goal, resorting to psychological methods of influencing a person, distorting real information, hypocrisy, offering a certain benefit, etc

***References***

1. Зинин А.М. Проблемы криминалистического установления личности. *Вестник криминалистики* / отв. ред. А. Г. Филиппов. М.: Спарк, 2003. Вып. 4 (8). С. 29.

2. Фурман Я.В. Особа злочинця як елемент криміналістичної характеристики контрабанди культурних цінностей. *Актуальні проблеми держави і права*. 2013. Вип. 70. С. 364–369.

3. Криминалистика / под ред. В.А. Образцова. М.: Юрист, 1995.

4. Чаплинський К.О. Організація і тактика слідчих(розшукових) дій при розслідуванні злочинів, учинених організованими злочинними угрупованнями: монографія. Дніпропетровськ: Юридична академія МВС, 2004.

5. Ведерников Н.Т. Личность преступника как элемент криминалистической характеристики преступления. *Криминалистическая характеристика преступления*. М., 1984. С.74-76.

6. Колесниченко А.Н., Коновалова В.Е. Криминалистическая характеристика преступлений. учеб. пособие. Харьков: Юрид. ин-т., 1985.

7. Лысенко В.В. Расследование уклонений от уплаты налогов, совершенных должностными лицами предприятий, организаций, учреждений. Харьков: Консум, 1997. 60 с.

8. Павлова Н.В. Особливості розслідування шахрайства, пов'язаного із відчуженням приватного житла: дис. …канд. юрид. наук: 12.00.09 / Нац. ун-т внутр. справ. Харків, 2007. 224 с.

9. Благаренко О.В. Криминологическая характеристика личности преступника, совершившего преступления в кредитно-финансовой сфере. *Уголовно-правовая политика и проблемы противодействия современной преступности: сб. науч. тр*. Саратов: Сателлит, 2006. С.406-409.

10. Чалдини Р. Психология влияния. СПб.: Питер, 2000. 272 с.

11. Алікіна Н. Зловживання психологічними закономірностями. *Український юрист.* 2004. № 4. С. 42-45.

*Received to editorial office 05.06.2018*

**Summary**

The article deals with the study of forensic-significant features of the person who is committing fraud in relation to objects of immovable property.

Forensic portrait of the offender is considered on the basis of socio-demographic, moral and psychological, biological characteristics of the person. These characteristics determine not only the possibility of a criminal offense, but also the behavior of fraudsters during pre-trial investigation. Classification of persons who commit crimes against real estate objects can be divided into two groups: 1) criminals who commit violent acts, including murder in order to achieve the goal in the form of taking possession of the immovable property of citizens or the right to it; 2) the seizure of immovable property or the right to it is committed by a criminal without violence, but only by deception or abuse of trust.

In the main, fraud aimed at capturing immovable property of citizens, committed in a group, with the involvement of corrupt civil servants. Particular weight among those who become complicit in such crimes are realtors, lawyers and persons performing administrative functions in commercial organizations, notaries. Often, associates of fraud are medical and social workers, prosecutors and police officers. It is noted the prevalence of participation in committing this crime women, people with higher education, knowledgeable and literate, people who have methods of communication, tactics of influence on people. As a rule, fraudsters have certain psychological stability, self-esteem and self-control, acute mind, developed imagination and fantasy, ability to interest and attract people. In order to commit a crime, they always come in contact with the alleged victim to create a favorable impression of themselves.

***Keywords:*** *fraud, real estate, housing, person of the offender, who is committing fraud in relation to objects of citizens'real estate.*

**Mykola Stashchak** , Dr of Law, Prof.

**Vladyslav Shendrik**, Dr of Law, Prof.

*(the Kharkiv National University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-30-34*

# OPERATIONAL-SEARCH PREVENTION OF CRIME BY CRIMINAL POLICE UNITS: SCIENTIFIC INTERPRETATION OF CONCEPT

**Стащак М., Шендрик В. ОПЕРАТИВНО-РОЗШУКОВА ПРЕВЕНЦІЯ ЗЛОЧИННОСТІ ПІДРОЗДІЛАМИ КРИМІНАЛЬНОЇ ПОЛІЦІЇ: НАУКОВА ІНТЕРПРЕТАЦІЯ КОНЦЕПТУ.** Проаналізовано інтерпретації термінів, близьких за змістом і завданнями («профілактика», «попередження», «запобігання» та «припинення»), які протягом тривалого часу уже увійшли до термінологічного обігу науковців і практичних працівників. Констатовано, що в основному науковці у зміст профілактики закладають діяльність або систему заходів, які вживаються уповноваженими підрозділами з метою виявлення умов та причин, що підштовхують осіб на вчинення злочину, а деякі до цього додають ще й виявлення осіб, від яких можливо очікувати вчинення злочину.

***Ключові слова**: оперативно-розшукова превенція, злочинність, підрозділи кримінальної поліції, профілактика, попередження, запобігання, припинення.*

**Formulation of the problem.** One of the controversial issues in the operational-search activity(OSA) theory over a long period of time is the delineation of concepts such as prevention, prevention, prevention, suppression and prevention of crime. Until now, there is no coherent imagination regarding the correlation of these concepts, the features that distinguish them are not definitively identified. Although these criterion attributes are linked together at the same time, they are used alongside them, defining similar content and tasks of the units of the criminal police. At the same time, the research showed that one of the reasons for the lack of a unanimous opinion among scientists over the above-mentioned terms is the availability of a number of alternative positions [1, p.169]. Therefore, the purpose of the article is to analyze the existing opinions of lawyers on the content of the definition of "operational-search prevention" and the concepts derived from it, as well as the formulation of the author's vision of the interpretation of the concept "operational-search crime prevention by units of the criminal police".

**The analysis of recent researches and publications, in which the solution of this problemstarted. The purpose of the article**. In recent years, a number of works have been published that reveal some of the fundamental theoretical and applied provisions of preventive activities of law enforcement agencies. Among the domestic and foreign scientists who were engaged in the problems we are studying, we can distinguish K.V. Antonov, O.M. Bandurka, B.I. Baranenko, S.M. Gusarov, E.O. Didorenko, O.F. Dolzhenkov, V.P. Zakharov, A.M. Kyslyy, D.Yo. Nikiforchuk, Yu.Yu. Orlov, V.D. Pcholkin, M.A. Pogoretsky, I.F. Kharaberyush, O.O.Yukhno and others. At the same time, it should be noted that by this time the definition of "operational-search crime prevention by units of the criminal police" and its components remain insufficiently developed or controversial, the proposed definitions are controversial and do not find unanimous support among scholars and practitioners, especially taking into account the latest changes in the criminal procedural and operational-search laws.

In order to determine the content of the concept of "operational-search crime prevention by units of the criminal police" it is first of all to analyze the interpretation of terms close to the content and objectives ("prevention", "prevention", "prevention" and "termination"), which during for a long time already entered the terminology of the treatment of scientists and practical workers. For convenience, it is expedient to consider all the definitions of scientists related

to the interpretation of the concepts of "prevention", "prevention", "prevention" and "termination", divided into groups depending on the content that each group of scientists invests in them. The first group includes the judgment of representatives of the Soviet school OSA - E.I. Brodylovsky, V.G. Samoilov and B.P. Sgagorinsky - regarding the fact that operational-search prevention should be understood as the activities of operational units, which is aimed at individual prevention measures [2, p.110; 3, p.26; 4, p.46].

The second group form judgments of scholars of the Soviet and modern periods. So, in the dictionary of terms with OSA, sponsored by B. E. Bogdanov, I.P. Kozachenko V.A. Lukashov et al., Soviet scientists, crime prevention is considered as "the activities of state bodies and public organizations in implementing a system of measures aimed at identifying, eliminating the causes of crime and the conditions conducive to their commission" [5, p.111].

The third group includes the opinions of Ukrainian scholars (V.I. Vasilinchuk, T.V. Myronyuk and S.V. Pogrebnyak) who consider operational-search prevention as an activity of authorized divisions whose purpose is to neutralize, eliminate causes, negative phenomena and processes that generate or facilitate the commission of crimes and prevent the emergence of conditions conducive to the commission of crimes, as well as the identification of persons from whom one can expect the commission of crimes and the prophylactic effect on them [6, p.497; 7, p.6].

The fourth group is formed by research results V.P. Yevtushok, Ya.Yu. Kondratiyev, S.S. Maligin, A.G. Markushin and A.Ye.Chechetin, which include operational-search prevention in one of the forms of OSA [8, pp. 76-77; 3, p. 27; 9, p.93; 10, p.18].

**Presenting the main content**. Thus, summing up, it can be stated that mainly scientists in the content of prevention lay the activities or system of measures taken by the authorized units in order to identify the conditions and reasons that prompted individuals to commit a crime, and some add to it the identification of individuals from which one can expect to commit a crime.

Continuing the research of terminological diversity in the field of preventive activities of law enforcement agencies, we will dwell on the study of the content of the concepts of "crime prevention" and "stopping crimes." Thus, the analysis of scientific literature showed that the given terms should be considered together, since in their content the scientists laid very close content components. In the dictionary of operative-search terms, prevention and suppression of crimes are considered as forms of preventive action. Prevention is aimed at identifying those who intend or prepare a crime with the appropriate use of measures to prevent the development of intentions into illegal activities and, accordingly, preparatory actions - a crime. Activities on the cessation of crime are considered only at the stage of a crime that has begun but not yet completed [5, p.13].

S.S. Malygin and A.E. Chechetin define crime prevention as identifying those who are at the stage of forming a plot to commit a crime in order to prevent the implementation of their plan. The termination of the crime, in their opinion, is the discovery of individuals who are already trying to commit a crime [9, p.83].

O. Klyuev under the prevention of crime understands the taking of necessary measures to prevent the commission of offenses, the establishment of persons trying to commit an offense, and the adoption of certain measures against them in order to prevent the implementation of their unlawful intentions [11, p.12-13].

According to Ya.Yu. Kondratiyev, termination is a stage of prevention of a crime, which is carried out using operational capabilities to terminate already initiated wrongful acts [3, p.28].

A separate opinion about the studied concepts expresses V.V. Golina, who, in the framework of his doctoral dissertation on the topic "Special Criminological Crime Prevention (theory and practice)," concluded that crime prevention is an independent specific part of a special criminological warning consisting of a set of measures aimed at separate groups and specific persons who commit criminal intent, contemplate the commission of crimes and are positively perceived as a criminal way of life, with the aim of discrediting criminal behavior, obtaining refusal from criminal motivation and intention, or continued criminal activity. The content of the cessation of crimes, according to V.V. Golina, is a combination of activities aimed at stopping the onset of crime by developing and implementing special measures [12, p. 22-23].

Consequently, we can state that the main objectives of prevention and suppression of crime is to prevent the implementation of criminal intent, causing damage to the object of the

attack, as well as preventing the onset of socially dangerous consequences. At the same time, it should be emphasized that the prevention of a crime occurs at such a stage of crime as preparation for it (Article 14 of the Criminal Code of Ukraine), and the cessation of a crime is committed at such a stage of crime as an attempt to commit a crime (Article 15 of the Criminal Code of Ukraine ) [13]. Therefore, the question arises as to the need to rethink the position of scientists in the area of OSA about the prevention and suppression of crimes in the stages of operational and investigative prevention, since these actions, in accordance with the current Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine, should already be investigated as an unfinished crime, which has not been brought to an end for reasons that were not dependent on the will of the perpetrator, but not in any way documented within the scope of operational-search prevention during the operational investigation.

In the theory and practice of the OSA, in addition to the terms "crime prevention", "crime prevention" and "the cessation of crime", the definition of "crime prevention" is widely used, to the content of which scientists include somewhat other intrinsic features. In view of the fact that there are plenty of scientists' opinions about the above mentioned term, it is expedient to combine them into groups based on the similarity of content content. Thus, the first group of scientists (A.F. Zelinsky, A.G. Lekar, Ya.Yu.Kondratiyev, M.V. Krestinsky, A.B. Sakharov, etc.) defines the content of the operative-search alert as an activity to identify individuals , who intend to commit a crime, in order to prevent the overgrowth of these intentions in criminal acts.

The second group forms the thoughts of S. B. Alimov, Yu.M. Antonyan, S.P. Buzinov, O.M. Dzhuzha, V.K. Zvirbul, A.E. Zhalinsky, O.G. Kalman, O.M. Litvak, V.J. Negodchenkj, M.G. Sorochinsky, V.F. Ushchapovsky, O.O. Cherehnenko et al., which are the key components in the content of the crime prevention process, distinguish activities (some insist that this is a complex of measures) to identify and neutralize the causes of crime and the conditions that contribute to it.

The third group, which includes L.V. Barinov, B.E. Bogdanov, I.P. Kozachenko, V.A. Lukashov, R.N. Marchenko, E.I. Petrov et al., fully supports the opinion of scientists from the previous group and complements it as a component, such as the identification of persons from whom it is possible to expect the commission of a crime.

From the standpoint of V.V. Golinf, Yu.G. Ponomarenko and O.M. Sura, which forms the fourth group, crime prevention is one of the areas of government action against crime.

In addition to the interpretations of the concept of "crime prevention", developed at the theoretical level, there is a normative definition of this concept. Thus, in item 1.1 of the Guidelines on the activities of the bodies and units of the Ministry of Internal Affairs of Ukraine on the prevention of crime, it is noted that "crime prevention is a type of activity of the employees of the bodies and departments of internal affairs in identifying, diminishing the influence and neutralizing of the causes and conditions that contribute to their commission , taking measures for individuals whose behavior indicates a high probability of committing a crime "[14]. Such a definition of "crime prevention" is imperfect and no longer corresponds to the realities of the present.

Continuing consideration of the subject of the article, we note that, taking into account the current unsatisfactory state of combating crime, its high technical equipment, mobility, the extensive system of corruption links, secrecy, an effective system of countermeasures in order to prevent it from penetrating it from the outside and to constantly check its " continuing trends in informatization of the society and increasing the share of online communication of different age groups of the population, there is a justified necessity not only "resuscitation" of the operative-search system of the prevent its crime, but also its adaptation to new socio-political, socio-economic and normative realities of the present. To this end, further scientific development of the content of operational-search crime prevention is necessary, which will help increase its effectiveness in general.

To solve the problem, one must find out the semantics of the word "prevention". An overview of interpretative dictionaries has shown that the term "prevention", as a rule, means: 1) a set of measures that contribute to neutralizing the causes of the commission of crimes; 2) actions aimed at preventing something, preventing for some reason [15-17].

In addition, we note that in the English-speaking countries, the term "prevention" (from the Latin praeventio - warning) is used to denote preemptive criminal activity [18, p.602].

In the English translation, the word "prevent" means: 1) prevent, warn; 2) interfere with, prevent, hinder [19, p.476].

Analysis of scientific works A.I. Bogatyryova, K.A. Guseva, L.M. Davidenko, M.L. Davydenko, I.I. Ivanov, O.M. Litvak, O.M. Litvinov, O.A. Martynenko, M.O. Svirin, M.G. Sorochinsky, O.V. Timchenko, O.O. Yukhno et al., who are specialists in the field of criminal law, criminology, criminal procedure, legal psychology, etc., testifies that the word "prevention" has long been included in the scientific circulation of the above branches of law. Recently (for ten years) the term under investigation has begun to penetrate into operational-search science, which is confirmed by D.Yo. Nikiforchuk, O.S. Tarasenko, T.V. Mironyuk and V.V. Shendrik.

It should also be noted that as a result of the analysis of the national legislation, it has been established that the term "prevention" in various interpretations is gradually included in the terminological circulation of the legislator, which is confirmed by the provisions of the Laws of Ukraine "On Prevention of Corruption" (2014), "On the National Police" (2015 ) and the order of the Ministry of Internal Affairs of Ukraine, the General Prosecutor's Office of Ukraine, the Security Service of Ukraine of 08/26/2014, No. 872/88/537 "On Approval of the Instruction on the Procedure for Preventive Detention in the Area of the Anti-Terrorist Operation of Persons Involved in terrorist activity, and a special regime of pre-trial investigation in the conditions of a martial law, state of emergency or in the area of the anti-terrorist operation".

Consequently, based on the above, it is concluded that there is, firstly, one of the tendencies of modern domestic legal science and national legislation to use the term "crime prevention" and derivative terms. Secondly, the realities of the present require scholars and practitioners to further scientific and applied development, rethinking and clarifying the modern paradigm of operational-search crime prevention. Thirdly, among scientists to this day there is no single point of view regarding the hierarchy of concepts "operational-search criminality prevention", "operational-search crime prevention", "operational-search crime warning", and "operational-search stopping of crimes".

**Conclusion.**In this regard, and taking into account the results of the study of empirical material, we consider it necessary to express the following views and proposals: 1) today the formation of a new ideology and practice of operational-search crime prevention by units of the criminal police; 2) operational-search crime prevention is a general, generic concept for such terms of preventive orientation as "operational-search criminality prevention", "operational-search crime prevention", and "operative-wanted crime stopping" ; 3) Under the operational-search prevention units of the criminal police of crime should be understood organizational and tactical form of operational-search activity, which is carried out in the process of operational-intelligence forecasting and crime prevention through the use of operational-search capabilities (measures, means and forces) permitted by national legislation.

***References***

1. Стащак М.В. Розмежування категорій «попередження», «профілактика», «запобігання» та «припинення» злочинів. *Оперативно-розшукова діяльність органів внутрішніх справ: проблеми теорії та практики:* матеріали Всеукраїнської науково-практич. конф. (м. Дніпропетровськ, 27 вересня 2013 р.). Дніпропетровськ: ДДУВС, 2013. С. 169–173.

2. Самойлов В.Г. Оперативно-розыскная тактика органов внутренних дел: учебное пособие. М.: МВШ МВД СССР, 1984. 91 с.

3. Кондратьєв Я.Ю. Теоретичні, правові та оперативно-тактичні засади запобігання злочинам оперативними підрозділами кримінальної міліції: монографія Київ: НАВСУ, 2004. 444 с.

4. Смагоринский Б.П. Оперативно-розыскная тактика и организация раскрытия краж, грабежей, разбойных нападений и мошенничеств: учеб.пособие. Мн.: МВШ МВД СССР, 1986.

5. Оперативно-розыскная деятельность органов внутренних дел. Термины и определения: учеб. пособие / Б.Е. Богданов, И.П. Козаченко, В.А. Лукашов и др. К.: НИиРИО КВШ МВД СССР, 1988. 312 с.

6. Василинчук В.І. Оперативно-розшукова профілактика злочинів у бюджетній сфері: монографія. Київ: ДП «Розвиток», 2011. 520 с.

7. Погребняк С.В. Профілактична діяльність при розкритті і розслідуванні злочинів: автореф. дис. … канд. юрид. наук : 12.00.09. Одеса, 2010. 21 с.

8. Євтушок В.П. Стратегія і тактика планування основних напрямків оперативно-розшукової діяльності. *Науковий вісник НАВСУ.* 2004. № 2. Ч. 2. С. 74–84.

9. Малыгин С.С., Чечетин А.Е. Основы оперативно-розыскной деятельности: курс лекций. Екатеринбург: Изд-во УЮИ МВД России, 2001. 301 с.

10. Маркушин А.Г. Основы оперативно-розыскной деятельности ОВД: учеб.пособие. Нижний Новгород: МВШ МВД СССР, 1990. Ч. 1. 147 с.

11. Теорія і практика протидії вимаганням оперативними підрозділами органів внутрішніх

справ України: монографія / І.О. Крєпаков, М.В. Стащак, В.В. Шендрик та ін. Львів: Галицька видавнича спілка, 2012. 246 с.

12. Голіна В.В. Спеціально-кримінологічне попередження злочинів (теорія і практика): автореф. дис. … д-ра юрид. наук: 12.00.08. Харків, 1994. 44 с.

13. Кримінальний кодекс України: Закон України від 05.04.2001 № 2341–III. URL: http://zakon4.rada.gov.ua/laws/show/2341-14.

14. Про затвердження настанови про діяльність органів і підрозділів внутрішніх справ України з попередження злочинів: наказ МВС України від 25.06. 2001 № 507.

15. Тлумачний словник української мови. URL: http://eslovnyk.com/%D0%BF%D1%80%D0%BE%D1%86%D0%B5%D1%81.

16. Толковый словарь русского языка. URL: http://www.vedu.ru/expdic/93803.

17. Словник української мови: в 11 т. / за ред. І.К. Білодіда. Київ: Наукова думка, 1980. Т. 8. 905 с.

18. Шендрик В.В. Закордонний досвід превенції злочинів. *Вісник Запорізького юридичного інституту Дніпропетровського державного університету внутр. справ.* 2011. № 4. С. 601-608.

19. Новейший англо-русский (русско-английский) словарь. Харьков: Промінь, 2006. 960 с.

*Received to editorial office26.06.2018*

**Summary**

The article explores the state of scientific and applied development of the content of the concept of «operatively-investigative crime prevention by units of the criminal police». For this purpose, interpretations of terms close in content and tasks («prevention», «warning», «prevention» and «termination»), which have long been included in the terminological treatment of scientists and practitioners.

It has been established that mainly the scientists in the prevention content lay down the activity or the system of measures taken by the authorized units in order to identify the conditions and reasons that prompt people to commit a crime, and some of them also add to the identification of persons from whom it is possible to expect the commission of a crime.

It is argued that the main tasks of preventing and suppressing crimes are preventing the realization of criminal intent, causing harm to the object of encroachment, as well as preventing the onset of socially dangerous consequences. At the same time, it is noted that the prevention of crime occurs at such a stage of the crime as preparation for it (Article 14 of the Criminal Code of Ukraine), and the termination of the crime is carried out at such a stage of the crime as an attempt on a crime (Article 15 of the Criminal Code of Ukraine). The need for a rethinking of the position of scientists in the field of the RDD on including prevention and suppression of the crimes of the stages of operational search is grounded, since these actions, according to the current Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine, should already be investigated as an unfinished crime, not brought to completion for reasons not depending on the will of the guilty, but not to be documented as part of the operative-search prevention in the course of the operational-search process.

***Keywords:*** *operational-search prevention, crime, criminal police units, prevention.*

**Olexandr Tsybenko**
postgraduate
*(the Dnipropetrovsk State University of Intrernal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-34-40*

## MODERN WAYS OF ILLEGAL TAKING POSSESSION OF A CAR COMMITTED WITH OVERCOMING PROTECTION SYSTEMS

**Цибенко О. СПОСОБИ НЕЗАКОННОГО ЗАВОЛОДІННЯ ТРАНСПОРТНИМ ЗАСОБОМ, ВЧИНЕНОГО З ПОДОЛАННЯМ СИСТЕМ ЗАХИСТУ.** Досліджено особливості способів незаконного заволодіння автомобілем, учиненого з подоланням систем захисту.

В результаті аналізу наукової літератури, узагальнення правозастосовної діяльності слідчих та оперативних підрозділів МВС України, автор приходить до висновку, що незаконні заволодіння автомобілями, які вчинюються з подоланням систем захисту, характеризується повноструктурним складом з елементами підготовки й приховування злочину. Визначено особливості підготовки до учинення кримінального правопорушення. Доведено, що встановлення способу заволодіння автомобілем дозволяє слідчому вирішити низку завдань, що мають значення для провадження, зокрема: визначити слідову картину злочину; встановити особу злочинця; висунути правильні оперативно-розшукові та слідчі версії; вчасно провести необхідні розшукові заходи;

прийняти обґрунтоване рішення про вибір подальшого напряму розслідування; встановити негативні обставини злочину. Зосереджено увагу на способах приховання злочину.

***Ключові слова:*** *криміналістична характеристика злочину, незаконне заволодіння автомобілем, система захисту, спосіб вчинення злочину.*

**Formulation of the problem.** The method of committing a crime is a very important element of the forensic character of the illegal possession of vehicles. According to the CPC of Ukraine, one of the circumstances of the subject of proof in criminal proceedings of this category is the way of assuming ownership of the vehicles. Establishing a method of taking possession of vehicles will allow the investigator to solve a number of tasks of relevance to the proceeding, in particular: to determine the "trail picture" of the crime; establish the perpetrator's personality or draw up a psychological portrait of the alleged offender and take measures for its rapid detention; To nominate the correct operative-search and investigative versions; to carry out the necessary OSA in a timely manner; to make a reasoned decision to choose the further direction of the investigation; establish the negative circumstances of the crime, etc. These circumstances are clearly aimed at ensuring the comprehensive and complete pre-trial investigation. Modern automakers constantly improve and refine the function of car security systems, which provide possible ways to steal a car and can to some extent prevent them. Alongside with this, criminals are constantly improving ways of committing illegal possession of cars, developing, updating and purchasing new technical devices capable of overcoming the automobile security system, including technical locking systems and logic systems for the protection of the onboard computer, as well as alarms and systems of satellite control (supervision). In this regard, the study of modern methods of unlawful seizure of a car committed to overcoming security systems today is necessary and timely, which determines the relevance of the chosen topic.

An analysis of the latest publications that initiated the solution to this problem. The research of the question of ways to commit a crime was given to such scholars as V.P. Bahin, R.S. Belkin, O.M. Bryzkovskaya, AI Wienberg, V.O. Gapchich, I.S. Jordania, V.I. Zhulev, S.M. Zavialov, G.G. Zuykov, L.L. Kanevskyi, V.M. Kovbasa, O.M. Kolesnichenko, V.S. Kornelyuk, E.D. Kuranov, O. L. Mishutokkin, B.F. Mitsak, O.O. Moroz, G.M. Mudyugin, M.I. Panov, D.A. Patrelyuk, N.O. Popova, O. P. Rezvan, V. I. Sirotkin, S. M. Skibin, E. V. Skripa and many others. However, the analysis of these works shows that there are not sufficient theoretical developments of modern methods of committing an illegal takeover of a car made to overcome protection systems, which requires modern researchers to cover this problem, to develop scientifically substantiated proposals and recommendations for the needs of normative and law enforcement activities.

The purpose of this article is to analyze the current methods of unlawful seizure of a car committed to overcoming protection systems.

Presentation of the main research material. The method of committing a crime is one of the main elements of the forensic characterization of crimes. The study of this issue, as well as the theoretical and practical properties of the method of committing a crime, were given to such scholars as G.G. Zuykov, I.S. Jordania, M.I. Panov, V.P. Bahin, R.S. Belkin and others. Without going into the discussion about the structure of the forensic character of the crimes, one can state that all criminologists unanimously advocate a position according to which the method of committing a crime is an obligatory element of the forensic characterization of crimes. Analysis of ways of committing illegal possession of cars by committed allows to plan and implement measures for their rapid prevention of detection and termination, to arrange for the allocation of forces and means, to implement measures for the organization of pre-trial investigation. Every year the ways of committing this type of crime become more diverse. Their development and improvement are directly dependent on the actions taken by the owner of vehicles, aimed at preventing its unlawful seizure.

The first theoretical studies of the method of committing a crime were carried out by A.I. Winberg and B.M. Chaver. They considered the way of committing a crime as a component of the subject of criminology, pointed to the possibility of using knowledge about him to find traces of crimes, the establishment of criminals and the disclosure of crimes committed by them. Of great importance was the knowledge of the typical methods of committing certain types of crimes and the development on this basis of techniques for investigating specific types of crimes. Depending on the criminal-law qualification of crimes, scholars formulated several definitions of the way to commit an intentional crime.

In the main methods of committing a crime, scientists considered as "actions aimed direct-

ly at achieving the criminal result", and included in the content of this notion of action to penetrate the offender to the place of commission of the crime, techniques used by the offender, the peculiarities of the object of the attack, the place, time and tools of the crime [1, p. 37].

G.M. Mudyugin shared the criminological notions of "way of committing" and "a method of concealing a crime", defining a method of committing as a target aimed at achieving a criminal goal a complex of actions committed by a criminal in a certain sequence, a method of concealment - as a set of actions aimed at concealing acrime against around them, and first of all, from the investigative bodies, in order to evade responsibility for the committed act [2, p. 65-66]. O. M. Kolesnichenko claims that the method of committing a crime is a way of the perpetrator's actions, which is expressed in a certain sequence, the combination of separate movements, methods used by the subject. According to the scientist, one should distinguish between "the method of preparation for committing a crime, the way of committing itself, as well as concealing a crime" [3]. Disagreeing with the above statement, G. G. Zuykov notes that the acts of preparing, committing and concealing a crime form the only way to commit it, since they are aimed at achieving a single goal for them, although each individually has its own independent purpose [4, p. 32]. The scientist determines the method of committing a crime as a system of actions for the preparation, commission and concealment of crimes, deterministic conditions of the environment and psychophysical qualities of persons associated with the selective use of appropriate means and conditions of place and time [4, p. 33]. Famous scientist S.M. Zavialov argues that the method of committing a crime is not simply a sum or a set of behavioral acts, but an integral structure of behavior that is a certain system. Like any system having a certain structure, the method of committing a crime is formed from interrelated elements, acts of conduct aimed at preparing, committing and concealing a crime [5, p. 7]. Thus, most scientists, revealing the content of this concept, determines the way of committing a socially dangerous act as a system of actions for its preparation, commission and concealment [6].

Taking into account the developments of scientists in this issue, it can be said that the way of unlawful seizure of a car, including those committed to overcoming protection systems, should be considered as a system of actions for the preparation, commission and concealment of criminal acts that are united by a single intention and conditioned by the form of the commission of a crime: secret attack; open, combined with violence or threats to its application; open, not connected with violence or threats; by deception or abuse of trust.

To conclude, it should be noted that under the method of committing an illegal takeover by a car committed to overcoming protection systems should be understood as a system of actions for the preparation, commission and concealment of a crime that is conditioned by the environment, the object of the criminal encroachment and the psychophysical properties of the person, technical capabilities and the skills of criminals and others.

Forensic scientists considered separate questions about choosing a way to commit ownership of vehicles, but the study of ways to commit these crimes (under Article 289 of the Criminal Code of Ukraine) has not been given enough attention today.

Thus, B. P. Psyarov notes that the actions of criminals in preparation for an attack on TK drivers are: to develop a crime plan - 87%; defining the object of the attack - 54%; preparation of crime weapons - 47%; finding accomplices of a crime - 42%; TP preparation - 30%; Observation of object of encroachment 38%; collecting information about the object of the attack - 15%; the preparation of masking means of appearance - 12% [7, p. 47].

Summarizing the data of criminal proceedings made it possible to conclude that the current methods of unlawful seizure of a car committed to overcoming protection systems include the following actions: the choice of place and method of unlawful seizure of a car; choice of time for committing an illegal takeover by a car; preparation of a place for hiding a car; selection of object of encroachment (car); development of a capture plan; selection of accomplices and distribution of roles; collecting and monitoring the object of the criminal offense; study of systems of protection, blocking and signaling by car; the acquisition or manufacture of tools for committing a crime; preliminary arrangement with concrete persons about sale (storage) of the car; elaborating a certain line of conduct and developing measures to counteract law enforcement in case of revealing criminal intentions or actions or "hot" detention.

When organizing the ISA in order to combat such crimes, it is necessary to take into account the places of their hiding. The most commonly used criminals are: territories located at a short distance from the place occupied by a car; territories located in other regions, sometimes in neighboring settlements; garage co-ops booths leased in advance, including private (closed)

type; often the storage of direct performers does not occur due to the fact that the car is immediately sold; abandoned warehouses, buildings, territories of enterprises of institutions and organizations; own garages, yards of the private sector of residence, etc.

It should be noted that criminals, while preparing for the car cover, sometimes try to plant from others, and first of all, from investigative bodies, in order to evade responsibility for a committed act [2, p. 65-66]. O. M. Kolesnichenko claims that the method of committing a crime is a way of the perpetrator's actions, which is expressed in a certain sequence, the combination of separate movements, methods used by the subject. According to the scientist, one should distinguish between "the method of preparation for committing a crime, the way of committing itself, as well as concealing a crime" [3]. Disagreeing with the above statement, G. G. Zuykov notes that the acts of preparing, committing and concealing a crime form the only way to commit it, since they are aimed at achieving a single goal for them, although each individually has its own independent purpose [4, p. 32].

The scientist determines the method of committing a crime as a system of actions for the preparation, commission and concealment of crimes, deterministic conditions of the environment and psychophysical qualities of persons associated with the selective use of appropriate means and conditions of place and time [4, p. 33]. Famous scientist S.M. Zavialov argues that the method of committing a crime is not simply a sum or a set of behavioral acts, but an integral structure of behavior that is a certain system. Like any system having a certain structure, the method of committing a crime is formed from interrelated elements, acts of conduct aimed at preparing, committing and concealing a crime [5, p. 7]. Thus, most scientists, revealing the content of this concept, determines the way of committing a socially dangerous act as a system of actions for its preparation, commission and concealment. [6].

Taking into account the developments of scientists in this matter, we can say that the way of illegal possession of a car, including the done with the overcoming of protection systems, should be considered as a system of actions for the preparation, commission and concealment of criminal acts, which are united by a single intent and conditioned by the form of the commission of a crime: a secret encroachment; open, combined with violence or threats to its application; open, not connected with violence or threats; by deception or abuse of trust.

To conclude, it should be noted that under the method of committing an illegal takeover by a car committed to overcoming protection systems should be understood as a system of actions for the preparation, commission and concealment of a crime that is conditioned by the environment, the object of the criminal encroachment and the psychophysical properties of the person, technical capabilities and the skills of criminals and others.

Forensic scientists considered separate questions about choosing a way to commit ownership of vehicles, but the study of ways to commit these crimes (under Article 289 of the Criminal Code of Ukraine) has not been given enough attention today.

Thus, B. P. Psyarov notes that the actions of criminals in preparation for an attack on TK drivers are: to develop a crime plan - 87%; defining the object of the attack - 54%; preparation of crime weapons - 47%; finding accomplices of a crime - 42%; TP preparation - 30%; Observation of object of encroachment 38%; collecting information about the object of the attack - 15%; the preparation of masking means of appearance - 12% [7, p. 47].

Summarizing the data of criminal proceedings made it possible to conclude that the current methods of unlawful seizure of a car committed to overcoming protection systems include the following actions: the choice of place and method of unlawful seizure of a car; choice of time for committing an illegal takeover by a car; preparation of a place for hiding a car; selection of object of encroachment (car); development of a capture plan; selection of accomplices and distribution of roles; collecting and monitoring the object of the criminal offense; study of systems of protection, blocking and signaling by car; the acquisition or manufacture of tools for committing a crime; preliminary arrangement with concrete persons about sale (storage) of the car; elaborating a certain line of conduct and developing measures to counteract law enforcement in case of revealing criminal intentions or actions or "hot" detention.

When organizing the ISA in order to combat such crimes, it is necessary to take into account the places of their hiding. The most commonly used criminals are: territories located at a short distance from the place occupied by a car; territories located in other regions, sometimes in neighboring settlements; garage co-ops booths leased in advance, including private (closed) type; often the storage of direct performers does not occur due to the fact that the car is immediately sold; abandoned warehouses, buildings, territories of enterprises of institutions and organizations; own garages, yards of the private sector of residence, etc.

It should be noted that criminals, preparing for the car cover, sometimes try to seize the authentic documents, on the basis of which subsequently counterfeit power of attorney for the right to use.

The legislative approach to forming an idea of how to commit an unlawful takeover of TK is mainly based on the criterion of the gravity of a crime, namely the use of violent acts or the absence of such actions.

In this regard, D.A. Patrelyuk claims that, despite the fact that the legislator in the disposition of Part 1 of Art. 289 of the Criminal Code of Ukraine did not distinguish between methods of committing a crime, studying materials of criminal proceedings of the investigated category showed that they differ depending on the circumstances of the attack, the person victim and offender, other circumstances of the case. In this regard, the author believes that the direct commission of a crime may be carried out by: 1) secret seizure; 2) open capture, not connected with violence or threats of its application; 3) open capture, combined with violence or threats to its application (Part 2 of Article 289 of the Criminal Code of Ukraine); 4) deception or abuse of trust of the owner or user [8, p. 41].

It should be noted that such a delimitation, in our opinion, is not completely understandable, since the author proposes a distinction between two methods, such as: 1) open capture, not connected with violence or threats of its application; 2) open capture, combined with violence or threats of its use. We consider such a gradation to be too conventional, since the ownership of V through the threat of violence, in the vast majority of cases (in the case of a V driver's resistance), becomes a "stage" of active action, that is, causing physical harm.

Some authors (O. M. Bryzkovskaya, V. O. Gapchin, R. V. Kolesnikov) maintain the position that the methods of committing these crimes include: 1) secret; 2) open; 3) plotting the theft of the insured V [9; 10].

Should agree with O.L. Christov, that the staging of the abduction of the insured V is not a way of taking possession of the V, even though in the absence of the evidence base for the staging, such pre-trial investigations with qualifications under art. 289 of the Criminal Code of Ukraine [11], since responsibility for such acts is stipulated in Art. 383. Criminal Code of Ukraine "Knowingly false report on the commission of a crime".

In this regard, S.M. Skibin notes: the generalization of the practice of investigating the theft of motor vehicles and other vehicles showed that the content of the steps to verify the claims of the victims include actions aimed primarily at the establishment of an event that took place (illegal possession or its staging in order to obtain insurance). With this in mind, the following investigative versions are put forward: 1 Assignment of the vehicle. 2 Ownership of the V was not, the applicant is either mistaken, or stays offense for various reasons [12].

Summarizing the opinions of scientists about the methods of direct committing the illegal seizure of a car, we note that in our opinion, those that are committed to overcoming security systems include:

1. To overcome access (systems of protection) to the subject of the attack, which are determined by the circumstances of the crime - time, place of parking and storage conditions. Most often, the places of committing the illegal possession of cars committed to overcoming security systems are the streets, parking lots near shops (places of residence, cinemas, etc.), parking, (travel parts). In such situations, we are talking about standard security conditions, which include the presence of locks, sound alarms or anti-theft devices on the car.

Persons trying to take possession of a car, if possible, use this method, because it involves less difficulty in realizing a criminal intention. D.A. Patrelyuk notes that 23% of cases of penetration into the garage was carried out by a criminal through free access (insecurely closed doors that were tied up with wire, rope or even not secured); 10% - selection of the key from the garage; 29% - breaking the lock or bending the lower corner of the garage door; 26% - knocking out the hole in the back wall or the ceiling; 2% - copying of the brackets of the castle [8, p. 43]. Such ways of overcoming access (security systems) to the subject of the attack are inherent to "ordinary" or unskilled criminals.

However, skilled criminals use more diverse ways of penetrating a garage or other storage facility. An analysis of criminal proceedings revealed that criminals use the following methods of penetration: 1) culling of loops and parentheses of locks; 2) selection of keys to the castle; 3) picking up the garage; 4) breakage of the lock with the help of locksmiths or improvised tools; 5) expansion or extrusion of hinges, shut-off systems by pneumatic means; 6) breaking the lock or doors with the help of V; 7) bending or cutting of metal parts by welding equipment; 8) break the wall or overlay the garage; 9) overcoming the alarm system of the

room; 10) other [6].

2. Overcoming the alarm systems of the car for penetration into the interior and engine start and the unlocking of other systems under covert control vary: a) break or spin the doors of the car; b) glass breakdown; c) spinning the glass; d) selection of the key; e) penetration into the open car; e) selection of signal anti-theft system; (e) Use of standard connectors for trailers, such as the port of access to an on-board computer of the car; g) the use of technical devices that remotely read the car key code and restore it, etc.

It should be noted that automobiles, which at the time of the crime were equipped with anti-theft devices, namely: equipped with electronic devices in 21% of cases, and mechanical - 36%. Combined use of electronic and mechanical anti-aircraft tools was 3%. Other ways of protecting vehicles were 5% [11].

The code of the radio add-on criminals, as a rule, is selected (scanned) manually or with the help of a computer in the case if there is no anti-scanner in the system. To intercept the code, the radio-feeder uses codrograbers, receives the receiver and writes them to the computer, and then plays on air to remove the car from the guard.

It is deciphered, that is, recorded from the ether, disassembled in it, using the known coding rule, provide the following. If the car is equipped with an anti-theft system with a dual dynamic code, where the code change rule is strictly individual for each keychain, that is, an unknown signal to a radio transmitter is often drowned by a broadband oscillator tucked to the car. Typically, such devices are used to capture a foreign-made car for sale, disassembly, return to the owner for remuneration, for personal use (repair of their own car) or a car of domestic production or other countries for further use in the commission of other crimes.

At the same time, the use of foreign objects or the selection of keys becomes possible due to the illegal seizure of a car of domestic production or other countries, which is not very difficult due to the cost of design features of their locks. As a rule, criminals commit an unlawful takeover of such a vehicle for the purpose of their further use for committing other crimes or for the purpose of disassembly and sale by spare parts [6]. Looking at ways of concealing a crime, it should be noted that they consist of the following main stages: 1) masking the traces of a crime; 2) hiding (storing) a car; 3) re-equipment, change (interlocking) of the number of nodes and aggregates; 4) realization of the car. Car storage is most often carried out in: a)closed storage facilities (personal or rented garage, abandoned enterprises, farms, other premises or closed territories of different organizations and institutions); b) open storage (at the entrance where other cars, forest strips, separate sections of ring roads, etc.); c) other places (for example, destruction by fire, drowning in a reservoir). In some cases, the concealment of this crime occurred without the storage of V [13]. Smuggling traces of the crime "should be noted, provides: a) disassembly of V; b) change of identification numbers, parts, units and aggregates, repainting of the body; c) falsification of documents; d) destruction of evidence (records from video surveillance cameras); e) bribery (intimidation) of witnesses, etc. Implementation of a car may include the following: a) the return of the car to the owner for a fee; b) sale of the car to the customer (other criminal representatives); c) disassembly of a car for sale to spare parts or sale as a scrap. The generalization of operative-investigative practice proves that it is impossible to take possession of a car without leaving at the same or the other traces.

Consequently, any method of committing a crime is characterized by rather significant display properties. It is these reflections that contain the largest amount of information on how the crime was prepared, how the object of the attack was selected and the tools of the crime were made, what measures were taken to conceal the stolen vehicle.

**Conclusion.**As a result of the analysis of scientific literature, the generalization of law enforcement activities of investigators and operational units, we came to the conclusion that illegal possession of cars committed with overcoming protection systems is characterized by a full-structured composition with elements of preparation and concealment of a crime. Summarizing the opinions of scientists about the methods of direct committing the illegal seizure of a car, we note that in our opinion, those that are committed to overcoming security systems include: 1. Overcoming access (security systems) to the subject of the attack. 2. To overcome car alarm systems to enter the interior and start the engine and unlock other security systems.

### *References*

1. Ермолович В.Ф. Криминалистическая характеристика преступлений. Мн: Алмафея, 2001. 241 с.

2. Мудюгин Г.Н. Версии об объективной стороне преступления. *Планирование расследова-*

*ния преступлений.* М., 1957. С. 65-66.

3. Колесниченко А.Н. Содержание и значение криминалистической характеристики преступлений. *Актуальные проблемы советской криминалистики*. М., 1980. С. 81-83.

4. Зуйков Г.Г. Криминалистическое учение о способе совершения преступления: автореф. дисс. ... д-ра юрид. наук: 12.00.09. М., 1970. 34 с.

5. Зав'ялов С.М. Спосіб вчинення злочину: сучасні проблеми вивчення та використання у боротьбі зі злочинністю: автореф. дис. ... канд. юрид. наук: 12.00.09. Київ, 2005. 21 с.

6. Лютий В.В. Спосіб учинення злочину як елемент криміналістичної характеристики незаконних заволодінь транспортними засобами, вчинених організованими групами. *Науковий вісник Дніпропетровського державного університету внутрішніх справ*. 2015. № 4. С. 305-313.

7. Псарева Б.В. Расследование корыстно-насильственных преступлений в отношении водителей автотранспорта, пассажиров и перевозимых грузов: дис. … канд. юрид. наук: спец. 12.00.09, 2003. 236 с.

8. Патрелюк Д.А. Розслідування незаконних заволодінь транспортними засобами, що вчиняються неповнолітніми: дис. … канд. юрид. наук: 12.00.09. Донецьк, 2014. 250 с.

9. Брисковська О. М. Віктимологічна профілактика незаконного заволодіння автотранспортними засобами. URL: http://www.nbuv.gov.ua/old_jn/Soc_Gum/Juptp/2011_1/brusk.htm.

10. Колесников Р.В. Основные способы совершения угонов и хищений транспортных средств и меры по их предупреждению. *Вестник ТГУ.* 2011. Выпуск 7 (99), 2011. С. 239-244.

11. Христов О.Л. Протидія незаконним заволодінням транспортними засобами: криміналістичний аспект: монографія. Дніпро: Дніпроп. держ. ун-т внутр. справ, 2017. 148 с.

12. Скибин С.Н. Особенности расследования угонов и краж автомобилей или иных транспортных средств: автореф. дис. … канд. юрид. наук: 12.00.08. Ростов/н/Д, 2007. 28 с.

*Received to editorial office 05.06.2018*

**Summary**

In the article the features of ways of illegal taking over of a car made with overcoming of protection systems are investigated.

As a result of the analysis of scientific literature, the generalization of law enforcement activities of investigators and operational units of the Ministry of Internal Affairs of Ukraine, the author comes to the conclusion that illegal possession of cars committed with overcoming protection systems is characterized by a full-structured composition with elements of preparation and concealment of a crime. The peculiarities of preparation for the commission of a criminal offense are determined. It is proved that the establishment of the method of taking possession of a car allows the investigator to solve a number of problems that are important for the conduct, in particular: to determine the trace of the crime; establish the identity of the offender; To nominate the correct operative-search and investigative versions; to conduct the necessary investigative measures in a timely manner; to make a reasoned decision to choose the further direction of the investigation; establish the negative circumstances of the crime. Focused attention is paid to ways of concealing a crime.

***Keywords:*** *forensic characteristic of a crime, illegal possession of a car, system of protection, way of committing a crime.*

**Yuliya Chaplynska**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-41-45*

# SIMULTANEOUS INTERROGATION OF TWO EARLY INTERROGATED PERSONS: ORGANIZATIONAL ASPECT

**Чаплинська Ю. ОДНОЧАСНИЙ ДОПИТ ДВОХ РАНІШЕ ДОПИТАНИХ ОСІБ: ОРГАНІЗАЦІЙНИЙ АСПЕКТ.** досліджено актуальних проблемних питань організаційного забезпечення проведення одночасного допиту двох раніше допитаних осіб. Розглянуто організаційно-підготовчі заходи до проведення одночасного допиту за участю підозрюваних і обвинувачених.

Зроблено висновок, що загальна поведінка підозрюваних та обвинувачених, як правило, спрямована на зменшення їх ролі у вчиненні кримінальних проступків, приховування минулої злочинної діяльності. Вони впливають на стабільне становище потерпілих та свідків, затримку досудового слідства, перешкоджання розслідуванню, тому проведення одночасного допиту є найважливішою слідчою дією. Одночасний допит такої категорії осіб залежить від правильних та ефективних тактичних методів правоохоронних органів та їх застосування на практиці. Неправильна підготовка до одночасного допиту тісно пов'язана з ризиком можливих змін у правдивих показаннях свідка чи відмови у наданні доказів або розкритті інформації про розслідування. Неналежна затримка у здійсненні одночасного допиту може призвести до втрати ознак раптовості, що сприяє успішному досягненню мети розслідування.

***Ключові слова**: організація, організаційне забезпечення, слідчі дії, одночасний допит.*

**Formulation of theproblem.**Simultaneous interrogation of two early interrogated persons («confrontation») is the most common and effective investigative action, which gathers information about the criminal offence and the criminal activities of certain persons. This is due to the high informative features simultaneous interrogation and reliability, ease and speed of obtaining results.At the same time, the simultaneous interrogation is one of the most difficult investigatory actions. On the one hand, the complexity of the investigations is that the investigator does not possess by the time investigations exhaustive data about the personality of the offender and a certain amount of evidence that can be used during its implementation. On the other hand, suspected (accused) are not always interested in a full and comprehensive disclosure and investigation of criminal offences, which cannot but affect the truthfulness of their testimony. In addition, victims and witnesses is a negative impact from the side of the criminals, which often leads to changes in their testimony.Despite this, successful confrontation and positive results depends on the quality of the possession of the investigators knowledge of the laws of thought, logical methods and techniques, the laws of psychology and tactics developed in criminalistics.

Generalization of investigative practice has shown that a confrontation was held with the investigation of criminal offences against life, health and sexual freedom - 81 %; committed criminal groups - 80 %; against property - 78 %; in the sphere of economic activity - 51 %; against public safety, public order and morality - 49 %; in the field of performance management - 13 %. However, despite its prevalence, this investigative action has a rather low efficiency. Today, a significant percentage of staff investigative units of internal Affairs bodies (71 %) considered the simultaneous interrogation inefficient and often uses it only to confirm previous evidence of participants, that is, to hold them in place. This approach unnecessarily narrows the possible investigative actions as a way of obtaining evidence from personal sources. The situation, on the one hand, due to the particular complexity and laboriousness in preparing and conducting this investigation, and on the other, the lack of forensic knowledge and professional communicative skills of the investigator about the simultaneous interrogation. Despite this, the organizational support simultaneous interrogation previously interrogated persons today has a number of outstanding organizational and tactical problems.

**The analysis of publications which discuss the solution to this problem.**A common tactic of simultaneous interrogation previously interrogated persons covered fully enough scientists, criminologists and processually in forensic literature. In particular, a significant contri-

bution to the development of scientific bases of investigative steps made famous scientists, criminologists and scientists, in particular, M.V. Bakharev, O.M. Vasiliev, V.K. Veselsky, F. W. Glazyrin, A.V. Dulov, L.M. Carneeva, V.O.Konovalova, E.D. Lukjanchikov, M.I. Porubov, O. V. Solov'ev, S.M. Stahivskiy, O.R. Ratinov, V.M. Tertyshnyk, K.O Chaplinsky, V.Yu. Shepitko and others. The significance of the conducted research is predicated on the creation of a solid base for further research improvements tactics of the production of this investigative actions, which are widely used in law enforcement practice and is a common way of collecting actual data from personal sources.However, at present there is no integrated development with tactical support for simultaneous interrogation previously interrogated persons Not fully investigated the factors affecting the efficiency of carrying out this investigation. In the literature were not considered and were not subjected to analysis of typical tactical errors investigators that affect the effectiveness of the simultaneous interrogation.

So, **the purpose** of this article is to highlight the problem of organizational issues organizational support simultaneous interrogation previously interrogated persons taking into account the modern needs of the investigative practices.

**The main material of the study.**In criminal proceedings the simultaneous interrogation of previously interrogated persons known as an effective way of testing available and obtain new evidence. According to p. 9 art. 224 of the Criminal procedure code of Ukraine, the investigator, the Prosecutor has the right to conduct simultaneous interrogation of two or more already questioned persons to determine the causes of the discrepancies in their testimony.We can agree with E.D. Lukyanchikov that the reason for the simultaneous interrogation is the presence of significant inconsistencies in the testimony previously interrogated persons [1, p. 30].

An important place in the tactics of simultaneous interrogation take organizational and preparatory activities prior to the conference. Well-organized investigative action should be active, offensive, in the shortest amount of time, and the control action should be aimed at the solution of tactical problems.

In the scientific literature, the authors ambiguous approach to the determination of the necessary preparatory measures. Thus, according to J.V. Gavrilin, preparation for simultaneous interrogation must include: the study of previously obtained evidence; establishing the content of contradictions; the study of the person being questioned; clarify the circumstances to be installed; determining the sequence of the interrogation; the choice of time and place of the meeting; selection and systematization of evidence; the wording of the questions and the determination of their sequences [2, p. 51].M.G. Shuryhnov adds a definition of place, time and way to call on the interrogation; the creation of the necessary conditions of the interrogation; the definition of the circle of participants of investigative actions; determination means fixing investigations; plan investigations [3, p. 389].

Summarizing the views of scientists and the results of the study of criminal proceedings, as well as the materials of the survey members of the investigative and operational units, you can come to the conclusion that the most significant organizational and preparatory activities for conducting simultaneous interrogation include:

The study materials of criminal procedure allows the investigator primarily to address the question whether the simultaneous interrogation. This measure allows us to examine the person questioned, to determine the extent of their relationship and the nature of the dispute in the testimony, to determine the list of questions and their sequence, to choose the most effective techniques of investigative actions.

The decision on conducting simultaneous interrogation. Deciding and determining the time of the confrontation, it is necessary to consider the nature of evidence to be authenticated, their place in the system of other evidence, and psychological qualities of its participants and the relationships between them. The investigator should consider the materiality of the contradictions in the testimony. If discrepancies in the testimony can be eliminated by other means with less tactical risk, the simultaneous interrogation of inappropriate conduct and the investigator must abandon it. This is especially true for simultaneous interrogation between members of criminal groups and their leaders. Often lawyers are applying for investigative actions with honest its members to provide psychological impact, clarifying awareness of the investigator.When deciding the investigator should analyze and evaluate the collected information and investigating the situation at a certain stage of pre-trial investigation. It is impossible to carry out Simultaneous interrogation between two persons for «fixing» their testimony, which does not contain contradictions. No evidentiary value of such investigative action has not. There is a wrong tactic for simultaneous interrogation, in which the investigator in the presence of its

participants only read their testimony previously obtained during their interrogation. The value of investigative actions to contain it in a simultaneous interrogation of two persons, whose testimony there are contradictions.

The timing and venue of simultaneous interrogation. Investigative actions must be sudden in nature. Any delay in conducting the simultaneous interrogation can lead to decrease the possibility of obtaining positive results. Hence, the correct definition of the time of the simultaneous interrogation has an important role in its preparation. The study of criminal proceedings, which were held simultaneous interrogations, allowed to come to the conclusion that their effectiveness depends on time and suddenness. The more time passed from the moment of occurrence of the necessary investigative actions, the less was its effectiveness. Any undue delay in its implementation pulling obtain false testimony or refusal to provide them.

During the investigations, the investigator shall take measures in order of time and the venue was known as little people. In some cases it is expedient to carry out directly after the interrogation of a person, in the testimony which revealed considerable controversy before questioned will have time to meet and to agree on further readings. In other cases, on the contrary, should not rush with the simultaneous interrogation, in order to avoid premature awareness being questioned about the nature of the testimony of each other. For example, premature knowledge of the accused about the content of his testimony of an accomplice or witness, obviously, does not help the success of the investigation.

Circumstances, subject to clarification. The subject of investigative actions are circumstances that gave rise to considerable discrepancies in the testimony previously interrogated persons, the Investigator must determine the range of issues requiring clarification, and in advance to raise the issue and to determine their sequence. Especially carefully it is necessary to approach the formulation of questions. First, decide General questions, and then order them Refine and detail the circumstances to prepare clarifying and follow-up questions.

For additional questioning, if necessary, the investigator may conduct additional questioning to clarify those or other circumstances of importance for criminal proceedings. Each of the participants may be simultaneous interrogation again questioned if their readings are contradictions, gaps or inaccuracies. However, it is unacceptable to prepare participants for simultaneous interrogation, to recommend, for example, «confident keep», «to actively expose» etc.

The definition of the entities, between which will be held simultaneous interrogation, and the sequence of their interrogation. During this event, the investigator should consider the possibility of being questioned individuals influence each other in positive and negative qualities, weaknesses, mental instability, etc. it is Necessary to predict the possibility of changing evidence.

Analysis of law enforcement practice and generalization of scientific views, leads to the conclusion that it is not appropriate investigative action: between persons who give false testimony; between the partners of a criminal offence at the initial stage of the investigation. This is because criminals can use even short-term contact, select the General line of conduct; between the accused, which partly acknowledge their guilt and prone to change testimony or adversely affect other participants; between people trying to reconcile its position with respect to each other or to transmit certain information; between persons of whom the one who gives true testimony is material, related to or otherwise dependent on the other party; when one of the participants in the confrontation refuses to give testimony in the presence of another person.

In these cases, the investigator is impractical to go to a tactical risk and you need to replace some actions or others. Important tactical event in preparation for the simultaneous interrogation is the selection of its members, who will give evidence first. This is indicated by the staff of the investigative units. Thus, 79 % indicate that proper prioritization testimony contributes to the obtaining of evidence and declination unscrupulous party to give truthful testimony.

In the scientific literature rightly notes that the first provide an opportunity to speak to a person who, in the opinion of the investigator, give truthful statements that are true and damning a suspect in criminal activity; insists to give evidence in the presence of another person; the testimony of which are confirmed by other materials of the case.

After reviewing the investigative practices and the views of the scientists, it should be noted that an unscrupulous party investigative actions appropriate to examine first in such cases, when: the investigator is confident that bona fide investigative actions clearly adheres to the position and will not be exposed to negative influence; the investigator believes that the bona fide heard wrong, more fully and reasonably justify their position;indications of dishonest participant can so disturb another person questioned that he will report the result of new infor-

mation;unscrupulous party so requests, with the aim to persuade her to change testimony in their favor, and the investigator is convinced otherwise, and intends to use the situation to get truthful information;the investigator is aware of the intention of unscrupulous party to use the simultaneous interrogation to influence another person questioned, but I am sure in the insolvency of such attempts and plans to use this situation to obtain reliable readings.

Granting the right of unscrupulous party investigations to answer questions first should be carried out by the investigator in exceptional cases. A survey of investigators on this question allows us to come to the conclusion that 88 percent indicate that it is unacceptable to interrogate the first unscrupulous party; 12 % - it's a possibility, but only for tactical reasons by the investigator.

The selection of participants for the simultaneous interrogation. The main participants of investigative actions include the person who conducts investigative action, and two previously interrogated persons, in testimony of which are contradictions. Simultaneous interrogation takes place between them in any configuration, including between participants that have the same status. To prevent negative impact on bona fide member of the investigative actions, or information exchange for agreement in position before the investigative steps it is advisable to involve employees in operational units. These individuals monitor the behavior of the person questioned.

Psychological preparation of the participants simultaneous interrogation. To conduct investigations, the investigator must inform bona fide participants in the simultaneous interrogation of the possible difficulties of a psychological nature (threats, compromise) that may arise during its implementation, and provide recommendations that will prevent a negative impact.

According to P.D. Bilenchuk, V.K. Lisichenko and N.I. Klimenkothe investigator should provide psychological readiness of the participants to conduct simultaneous interrogation is particularly needed for victims and witnesses, which first attracted to the sphere of the criminal process and may not adequately react to communicate with the suspect, resulting in a goal investigative actions will not be achieved. In necessary cases, to clarify the evidence of persons who have contradictions, the investigator may additionally be questioned before conducting simultaneous interrogation [4, p. 334]. Preliminary psychological training increases endurance and stamina bona fide member of the investigative actions to prevent negative impacts.

Investigators should note that the simultaneous interrogation may have a negative effect on the good faith of its participants. During the conduct of participants with different procedural status within visual observation of each other and have the possibility of psychological influence their behavior, gestures, intonation. Witnesses, victims, observing this behavior of the accused, giving false testimony, during the implementation of the investigator's authority relative to the performance of investigative actions don't understand why the investigator "allows" such statements, a seed of doubt in his testimony, the disappointment of justice that they are connected not only with the authority of the court, but with the powers of the investigator and the Prosecutor. In this situation, they see the impunity of the accused who is telling the truth.

Definition and preparation of technical means of fixation simultaneous interrogation. The use of technology is quite effective during investigative actions involving foreigners, persons with physiological problems, because it allows to verify the correctness and completeness of the translation and correct deficiencies. For example, a survey of members of the investigative divisions allows us to conclude that when conducting investigations, the investigators do not always (9 %) use the technical possibilities. Analysis of criminal cases shows that the recording was conducted at a ratio of 1 290 cases.

The plan for simultaneous interrogation. Planning investigations should include: the wording of the questions that will be applied during interrogation; the prioritization of the interrogation; the definition of tactics of confrontation; the creation of conditions that will fully ensure the safety of its participants. However, a survey of investigators suggests that none of the respondents were of the plan investigative steps, 3 % were limited draft notes.

**Conclusion.** Summing up, it should be noted that the General behavior of suspects and accused persons, as a rule, aimed at reducing its role in the committed criminal offences, the concealment of past criminal activity. They affect sustainable position of victims and witnesses, delay pre-trial investigation, obstruct the investigation, therefore, the conduction between the simultaneous interrogation is the most important investigative action. Hence the simultaneous interrogation with such category of persons depends on the correct and effective ownership and operation rights investigators tactical methods and their application in practice. Improper

preparation for simultaneous interrogation closely associated with the risk of possible changes truthful testimony bona fide member of refusal to give evidence or disclosure of data investigation. Undue delay in implementing the simultaneous interrogation may result in the loss of the element of surprise which contributes to the successful achievement of the purpose of investigations [5, S. 275]. Tactically conducted simultaneous interrogation previously interrogated persons, even if in its course and failed to overcome the significant contradictions in the testimony, should produce unfair participant's psychological effect, to undermine its installation on a lie, to help the investigator to verify the truthfulness of the testimony of the participants, to further explore their psychological quality, develop new areas for investigation.

***References***

1. Лукьянчиков Е.Д. Особенности расследования преступлений несовершеннолетних: учебное пособие. Киев: НИ и РО КВШ МВД СССР им. Ф.Э. Дзержинского, 1990. 52 с.

2. Гаврилин Ю.В. Криминалистическая тактика и методика расследования отдельных видов преступлений в определениях и схемах: учебное пособие. М.: Книжный мир, 2004. 332 с.

3. Шурухнов Н.Г. Криминалистика: учебник. 2-е изд., исправл. и доп. М.: Эксмо, 2008. 720 с.

4. Біленчук П.Д., Лисиченко В.К., Клименко Н.І. та ін. Криміналістика: підручник / за ред. П.Д. Біленчука. 2-ге вид., випр. і доп. Київ: Атіка, 2001. 544 с.: іл.

5. Чаплинський К.О. Тактичне забезпечення проведення слідчих дій: монограф. Дніпропетровськ: Дніпроп. держ. ун-т внутр. справ; Ліра ЛТД, 2011. 496 с.

*Received to editorial office 05.06.2018*

**Summary**

This article deals with consideration of actual problem questions of tactical supply of carrying out of simultaneous interrogation of two before interrogated persons. The author has considered the organizational preparatory actions of carrying out of simultaneous interrogation of two before interrogated persons with participation of suspected and defendants.

***Keywords:*** *organisation, organisation supply, investigatory actions, simultaneous interrogation*

**Kostyantyn Chaplynskyy**
Dr of Law, Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-45-48*

## PROBLEM ISSUES OF THE EXAMINATION OF SUSPECTS

**Чаплинський К. ПРОБЛЕМНІ ПИТАННЯ ОСВІДУВАННЯ ПІДОЗРЮВАНИХ.** Досліджено актуальні проблемні питання освідування під час проведення досудового розслідування. Розглянуто наукові підходи щодо поняття та сутності освідування. Зроблено висновок, що на відміну від інших видів слідчої перевірки, експертиза порушує право на приватність та особисту свободу громадян, пов'язану з розголошенням інтимних обставин їхнього життя. Незважаючи на це, законодавець виділив експертизу у незалежні слідчі дії та визначив спеціальні правила її проведення. Проте чітке кримінально-процесуальне регулювання все ще не вирішене.

***Ключові слова:*** *освідування, тактика, тактичне забезпечення, слідчі дії.*

**Formulation of the problem**. A special place among all investigative actions, which are aimed at gathering information from the material of the representations, takes the examination. The value of this investigations is extremely high. The examination allows the investigator to directly perceive objects in order to detect traces of the crime, special features and investigate relevant to the criminal proceedings, to have an idea about the mechanism of the crime and the offender, to nominate investigative version and to guide the investigation. The timeliness and quality of carrying out such investigations as examination in many cases, success in

the investigation of crimes.When conducting pre-trial investigation examination is a common investigative action, as evidenced by the study of criminal proceedings. So, when investigating intentional grievous bodily harm assessment was conducted in 78.4% of cases [1, p. 10], when checking an alibi 2.8 % [2, p. 104]. Questioning employees of the investigative units shows that 32 % - indicate the need for improvement tactics survey, 87 % of clarification and formalization of some of itprovisions. Specified requires the improvement of the criminal procedure regulation and development of tactical security certification in accordance with modern scientific thought and the needs of the investigative practices.

**The analysis of publications which discuss the solution to this problem.** A common tactic of the examination, its procedural regulations fairly widely covered by academic criminologists and processually in forensic literature. In particular, a significant contribution to the development of scientific basis of the assessment made known scientists, criminalists and scientists, in particular, I.S. Andreev, G.I. Gramovich, V.I. Gromov, L.M. Loboiko, Ye.D. Lukjanchikov, M.M. Mikheenko, V.T. Nor, M.I. Porubov, I.L. Petrukhin, M.S. Strogovich, S.M. Stahivs'kiy, V.M. Tertyshnyk, Y.G. Torbin, N.V. Terziev, S.A. Sheifer, V.P. Chibiko and others. The importance of research and doubtless very great, because this investigative action are widely used in law enforcement practice and is a common way of gathering evidence. However, a more detailed lighting require the procedural regulation and tactical security certification with regard to the modern conditions of the present.

So, **the purpose** of this article is to highlight the problematic issues of examination, the study of the concepts and entities.

**The main material of the study**. The term «examination» in the legal literature is used for a long time. To date, however, no argument about the procedural essence of this investigation, its objectives and tactical frameworks for [3, p. 30]. In 20-ies of the last century, scientists under examination understood the work of a doctor or specialist in the field of medicine, which perform the task of the investigator in cases when specific research questions requires special knowledge [4,p. 194]. In the 90-ies of the last and beginning of the 21st century, the overwhelming majority of scientists, in particular, G.I. Gramovich, M.I. Porubov, G.M. Muhin, S.M. Stahivskiy, V.M. Tyrtyshnik O.A., Boridko, C.V. Parasochkina, G.O. Ponomarenko and others, under examination understood the inspection body for the detection of traces of the crime and special signs.

Today the authors of the concept of "assessment" is also suitable ambiguous.

So, I.S. Andreev, G.I. Gramovich and M.I. Porubov under oswan understand independent investigative activity conducted by the investigator, either by the investigator, or (on its behalf) by the physician and sent directly to the examination of a human body to detect and commit crime, special features and characteristics of functional and anatomical nature [7, p. 124]. J.V. Gavrilin believes that the examination is investigative action, which is a kind of investigative inspection consists of inspecting the body of a living person to detect it special signs and traces of the crime, injuries, identifying a state of intoxication or other qualities and traits that are of importance for the criminal case, if it does not require a forensic examination [8, p. 19].

In these definitions, the scientists point out that the examination consists of inspection of the body of a living person.

However, according to V.M. of Tertishnik, the question arises, can there be in general examinated person who has no legal standing, for example, is not questioned as a witness, or a person who because of their mental deficiencies cannot be a witness, suspect, accused [9, p. 276].

We can agree with the opinion I.L. Petruhina, which indicates that the examination of citizens who do not have in criminal case no procedural provisions is not valid [10, p. 133]. If you follow the letter of the law, the conclusion, according to V.M. Tertishnik has a right to exist [9, p. 276].

G.M. Mukhin and D.V. Ishutin-Fedotkov in determining indicate that the examination may be held against the suspect, the accused and the victim [11, p. 134].

S.A. Sheifer, Y.G. Torbin, S.M. Stahivskiy and other scientists indicate that in addition to the suspect, accused and victim examination can be conducted and in relation to the witness [12, p. 75; 13, p. 6; 3, p. 31].

In accordance with the law, the right to inviolability of the person are equally open to all citizens. If in exceptional cases, the law allows the production of examination of victims, it is unlikely that there is a need to eliminate the possibility of the examination of any other catego-

ry of persons characteristically, searched may be subjected to any person (when there are factual basis), regardless of their procedural status. [9,p. 276].

In this definition, the author points out that the examination is conducted by the investigator (the person in charge of the inquiry), and in some cases own medical examiner or doctor.

Other authors support the view of V.M. Tertishnik, however, add that the survey is carried out in the presence of witnesses of the same sex with examination face [14, p. 49;13, p. 4].

Other scientists point to the mandatory presence at the examination of witnesses, and in necessary cases and physician [15, p. 170; 16, p. 348].

In article 241 of the code of criminal procedure states: when necessary to identify or confirm the presence of the suspect, victim or witness traces of a criminal offence or take special investigator (attorney) carries out the examination, if it is not necessary to conduct a forensic medical examination.At the same time, the criminal procedure codes of the Republic of Belarus, Kazakhstan and Kyrgyzstan do not allow examination of the witness.

Based on the nature and characteristics of the examination, it should be noted such features:

- the examination is a kind of investigative inspection, the specificity of which is determined by the peculiarity of its object (the object is the body of a living person);
- examination is associated with invasion of the rights and freedoms of man, therefore, is regulated as a separate investigative action, and in respect of its production has a special procedural form;
- the survey is carried out on the basis of the decision of the Prosecutor of investigative actions;
- examination is one of the investigative actions that can be carried out with participation of a specialist (forensic medical expert or doctor);
- the investigator is not entitled to be present at the examination of a person of the opposite sex, if it relates to the exposure of persons subject to examination;
- if the examination is not permitted acts that are degrading the honour and dignity examination person, or procedures that are harmful to her health.

Therefore, in our opinion, under examination should be understood independent investigative activity conducted on the basis of the resolution of the Prosecutor and is examining the body of a living person in order to identify and commit the presence or absence of specific signs and traces of the criminal offence and other characteristics and properties of importance for criminal proceedings.

The actual basis for assessment is the availability of sufficient data to believe that the human body is a special signs or traces of a criminal offence, detection or certifying the availability of which is set to establish the truth. Legal - the decision of the Prosecutor.

**Conclusion**. Unlike other types of investigative inspection, examination violates the right to privacy and personal freedom of citizens associated with disclosure of intimate circumstances of their lives. Despite this, the legislature has allocated examination in independent investigative action and identified the special rules for its conduct. However, a clear criminal procedure regulation examination is still not fully resolved.

***References***

1. Дрозд В.Г. Організаційні і тактичні аспекти розслідування умисних тяжких тілесних ушкоджень: автореф. дис. … канд. юрид. наук: 12.00.09. Київ, 2009. 16 с.

2. Кузьмічов В.С, Юсупов В.В. Алібі у розкритті злочинів: навчальний посібник. Kb]d: КНТ, 2007. 264 с.

3. Стахівський С.М. Слідчі дії як основні засоби збирання доказів: науково-практичний посібник. Київ: Атіка, 2009. 64 с.

4. Громов В. Дознание и предварительное следствие. М., 1928. 147 с.

5. Строгович М.С. Уголовный процесс. М., 1946. 287 с.

6. Терзнев Н.В. Процессуальная природа освидетельствования. *Советское государство и право.* 1954. № 7. С. 11-13.

7. Андреев И.С, Грамович Г.И., Порубов Н.И. Криминалистика: учеб. пособие / под ред. Н.И. Порубова. Мн.: Выш. шк., 1997. 344 с.

8. Гаврилин Ю.В. Криминалистическая тактика и методика расследования отдельных видов преступлений в определениях и схемах: учебное пособие. М.: Книжный мир, 2004. 332 с.

9. Тертишник В.М. Гарантії істини та захисту прав і свобод людини в кримінальному процесі України: дис. … докт. юрид. наук: 12.00.09. Дніпропетровськ. 2010. 473 с.

10. Петрухин И.Л. Свобода личности и уголовно-процессуальное принуждение. М.: Наука, 1985. 239 с.

11. Мухин Г.Н. Криминалистика: учеб. пособие / Г.Н. Мухин, Д.В. Исютин-Федотков; М-во внутрен. дел Респ. Беларусь, Акад. МВД. Мн: Акад. МВД Респ. Беларусь, 2009. 227 с.

12. Шейфер С.А. Следственные действия. Основания, процессуальный порядок и доказательственное значение. Самара: Изд-во «Самарский университет», 2004. 227 с.

13. Торбин Ю.Г. Тактика проведения освидетельствования: методические рекомендации. М., 2001. 28 с.

14. Борідько О.А., Парасочкіна К.В., Пономаренко Г.О. Тактика слідчих оглядів: навчальний посібник. Херсон: Видавець Чуєв С.М., 2006. 72 с.

15. Белкин Р.С. Криминалистическая энциклопедия. М.: Мегатрон XXI, 2000. 2-е изд. доп. 334 с.

16. Макаренко Є.І., Тертишник В.М., Лобойко Л.М., Ліпинський В.В., Шиян А.Г. Дізнання в міліції та в митних органах: навчальний посібник. Дніпропетровськ: ПП «Ліра ЛТД», 2003. 452 с.

*Received to editorial office05.06.2018*

**Summary**

The article deals with consideration of actual problem questions of examination at pretrial investigation carrying out. The author has considered the scientific approaches to definition of concept and essence of examination.

***Keywords:*** *examination, tactics, tactical supply, investigatory actions*

**Oleksandr Chipets**
postgraduate
*(The Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-48-52*

## OPERATIONAL-SEARCH CHARACTERISTIC OF PERSON WHO CARRIES OUT THE ILLEGAL HAULING OF FIREARMNS

**Чіпець О. ОПЕРАТИВНО-РОЗШУКОВА ХАРАКТЕРИСТИКА ОСОБИ ЗЛОЧИНЦЯ, ЯКА ЗДІЙСНЮЄ НЕЗАКОННЕ ПЕРЕМІЩЕННЯ ВОГНЕПАЛЬНОЇ ЗБРОЇ.** У статті здійснено оперативно-розшуковий аналіз особи злочинця, що вчинює незаконне переміщення вогнепальної зброї. Сучасна судово-слідча практика дає можливість стверджувати, що злочинність у сфері незаконного обігу вогнепальної зброї набуває окремих, індивідуальних характеристик осіб, котрі вчинюють конкретні злочинні діяння, зокрема незаконне переміщення вогнепальної зброї. Висновком в результаті розгляду зазначеної проблематики в межах даної наукової праці є вибіркова характеристика особи злочинця, що займається незаконним переміщенням вогнепальної зброї, яка сформульована на підставі вивчення судово-слідчої практики, аналітичних матеріалів діяльності оперативних підрозділів Національної поліції України та наукових праць.

***Ключові слова:*** *вогнепальна зброя, криміналістична характеристика, незаконне переміщення, особа злочинця.*

**Formulation of the problem**. The criminogenic situation prevailing in the country today is characterized by qualitatively new forms of crimes that constitute an increased social danger. Numerous cases of illegal movement of firearms from the territory of Ukraine, the territory of the country or the territory of the state create conditions for its full use by organized groups, criminal organizations and separate criminal elements in the commission of crimes that are mainly harmful to people's lives or health. Indicators of the state of counteraction to the illegal movement of firearms by organs and units of the National Police of Ukraine are evident in the relevance of the selected subjects.

Separate analytical materials provide an opportunity to observe an aggravation of the level of criminalization of the population in this area. Thus, only in 2017, 547 firearms were withdrawn from the illegal circulation on the territory of Dnipropetrovsk region, including: 62 grenade launchers, 3 machine guns, 93 machine guns, 16 rifle carbines, 125 pistols, 12 creeps, 136 homemade firearms weapons.

The increase in the level of activity of the criminal spheres in society regarding the illic-

it trafficking of firearms is due to a number of factors, one of which is the lack of forensic analysis of those who carry it illegally. These circumstances determine the necessity and timeliness of research in this area.

**Analysis of the latest publications that initiated the solution to this problem.** The following scientists of the Ukrainian scientists engaged in the study of issues related to the problem of counteracting the illegal movement of firearms at the dissertation level: O. M. Bokiy (2010), A.V. Kofanov (2000), M. M. Maystrenko (2010), V.P. Mezhyuva (2006), J.V.Novak (2007), A.S. Novosad (2009), S.P. Paranitsa (2009), M.G. Pinchuk (2007), V. I. Rybachuk (2001), O. M. Sarnavsky (2009), T. V. Tyutyunnik (2008), V. S. Shapovalov (2015), etc. Among the scholars who studied these issues at a dissertation level in other countries, a great deal of attention was paid to such scholars as I. I. Bikeev (2000), G. O. Boiko (2003), O. F. Burlevich (2005), V.V Voinov (2001), A.V. Vthurin (1999), O.O. Dolgopolov (1999), V. V. Efimenko (2002), I. V. Kapustina (1999), R. R. Kardanov (2007), V. D. Korma (2001), V. V. Kubanok (2006), A.V. Kuznetsov (2008) ), M.V. Lukashin (2008), O. A. Mokrinsky (2004), O.O. Nikitina (2002), S. G. Pavlikov (2000), M. H. , Rustambaev (1983), V. Samorok (2004), O. F. Sokolov (2002), E. S. Tenchov (1975), E. V. Tierentyeva (2005). ), E.S. Teslenko (2011), M.P. Tyulkin (2005), E. M. Khastinov (2009), M.V. Shchegoleva (2001), etc., which in their writings They studied the problem of counteracting illicit trafficking in firearms, ammunition, explosive devices and propellers. However, there was no separate study on the illicit movement of firearms, which in turn determines the need to provide forensic analysis of this type of criminal person.

**The purpose** of this article is the author's attempt to provide forensic analysis of the identity of the offender committing the illegal movement of firearms.

**Presentation of the main research material**. General theoretical knowledge of the identity of the offender, starting with scientific research Cesare Lombroso gave the opportunity to form the classification system of this element of forensic characteristics. In particular, the noted scientist identified such categories as: congenital criminals; criminals as a result of insanity; psychopaths and other persons with mental anomalies; criminals of passion; common criminals

The author of the scientific category "Forensic Characteristics of Crimes" O.N. Kolesnichenko noted that the offender's person is a broad concept, covering a complex set of characteristics that characterize him, including his moral and spiritual world, interaction with social and individual life conditions that are certain to a degree influenced the commission of a crime [1]. P. S. Dagel understanding of this scientific-theoretical category defined it as the identity of the offender and gave the following notion of this set of socio-political, psychological and physical characteristics of the person who committed a crime that has criminal-legal significance [2, p. 15]. Continuing the study of this component of forensic characteristics through the prism of its understanding as the identity of the offender, I.M. Danshin identified the latter as a set of significant and sustained social features and socially predetermined biopsychological features of the individual, who, objectively realizing in a particular crime committed under the decisive influence of negative external circumstances environments that add to the committed act the nature of social danger, and the fault person (this individual) - the properties of social danger, in connection with as it is involved in the responsibility foreseen by the criminal law [3, p. 117-126].

Some scientific achievements make it possible to consider this element of the criminalistic characteristics of the crime in terms of the difference in understanding of concepts such as "person" and "personality". Yes, some scientists point out that these concepts do not exclude each other. However, they differ in content, differing in number of features. The notion of "personality" is wider, encompassing, besides the social essence, the role of the individual in society, the many facets of human individuality, the inner world (spiritual component). The term carries a psychological color, prompting the establishment of internal needs, motives, beliefs, installation of a particular person. It is expedient to use it in specific cases, when drawing up portraits of criminals [4, p. 11].

Other scholars focus on the fact that in developing the forensic characteristics of the offender's personality, it is rather difficult to distinguish information of a purely forensic significance, since the person is a single integral phenomenon, all sides of which are interrelated and interdependent [8, p. 76]. This explains the inter-scientific relationship of the legal sciences, since criminology draws data on the identity of the offender, mainly from criminology, criminal law, psychology, physiology, and in the opposite manner supplies his related scientific ad-

vice to related branches of knowledge, reflecting the specifics of some aspects of the person of the offender in the mechanism of committing a crime, a method for tracking.

It should be noted that in the structure of the forensic characterization of crimes, which is aimed at systematization of information relevant for a particular group of crimes obtained on the basis of the analysis of criminal cases, the data on the identity of the offender are not only forensic. Lawyers use this knowledge to solve the issues of qualification of crimes, criminologists - to solve the problems of their prevention, and criminologists - to organize the process of disclosure and investigation of crimes.

Modern authors, when investigating the identity of the offender committing certain types of crime, come mainly from age, socio-demographic, moral-psychological and other similar characteristics that characterize one or another person. In addition, V.Y. Shepitko points out that the offender has certain demographic data, some moral qualities and psychological peculiarities [6, p. 258]. At the same time, in the context of the investigated problem the person of the offender should be considered according to the following criteria: dominant instincts; conditions of socialization (especially early); temperament; intelligence; volitional qualities; motivation of a crime (including the degree of remoteness from the conditional psychological norm of the driving forces of the conflict, which found its solution in the murder); the subjective amount of effort applied to achieve a criminal result (physical, intellectual, psychological burden on overcoming psychological barriers); the degree of preparedness of the murder.

A detailed analysis of the work of the scientists (O. O. Eksarkhopulo, N. T. Vedernikov, O. N. Kolesnichenko, O. V. Luskatov, T. O. Sedov) allowed to generalize the scientific views regarding the definition of common features of the person of the offender. It is advisable to divide all information about it into an individualized one (biographical data, data on the material condition, state of health, psychological characteristics) and characterizing the person (in the social, industrial, social, political, social and everyday aspects). Based on the foregoing, we believe that the data on the person who committed the illegal movement of firearms consist of the following properties: physical; socio-demographic; moral; psychological

The study of scientific literature makes it possible to conclude that the movement of firearms is considered by scientists as a component of illicit trafficking, in particular wear, in connection with which the offender's identity was determined by scientists by distinguishing the typical features of a wide range of elements inherent in criminal elements, as evidenced by scientific sources both domestic and foreign authors. Let us mention the thoughts of some of them.

Thus, A.I. Derevyanko notes that certain types of illicit arms circulation are criminalized. These include: the illegal acquisition, transfer, sale, storage, transportation, carriage, as well as the manufacture of weapons and their main parts. According to the author, wearing and transporting weapons is carried out through the preservation and movement of his person directly to himself in the objects of clothing, in related items, or the storage and movement of vehicles with him [7, p. 147]. Considering the forensic description of the illicit trafficking of weapons, one should distinguish between the three main types of persons who conduct the investigated acts: "casual" type, "situational" and "vicious". The type of "casual" offender describes the absence of anti-social orientation of their actions, committing crimes, usually under the influence of accidentally arising and independent of him factors, for example, due to ignorance of legal norms, due to the coincidence of severe life circumstances. The type of "situational" offender is understood as an intermediate between the first and the type of "malicious" offender. The main features of this type: in the presence of certain factors (for example, proposals to manufacture, transport, etc., criminal items for reward, leave the combat post, etc.) the person committed the corresponding crime. Representatives of the type of "malicious" criminal. As a rule, there is a conscious and purposeful commission of crimes for the purpose of direct or indirect receipt of criminal proceeds in the course of the illicit trafficking of weapons, ammunition, explosives and explosive devices. Often these persons are members of organized criminal formations, the basis of their criminal activity is the said crimes [86, p. 67]. M. M. Maystrenko examining the criminological characteristics of persons committing crimes against public safety, whose objects are weapons, weapons and explosives, reveals the identity of the offender through the criterion of its social orientation, based on the ratio of negative and positive orientation. Persons committing crimes against public safety whose objects are weapons, weapons and explosives are endowed with certain characteristics that are explained by the specifics of skills, abilities, complex of interests and other essential and rather stable properties that were formed under the influence of negative elements of the social environment [4, p. 11].

The most wide-ranging elaboration of illegal actions on the circulation of firearms was proposed by V. A. Samoroka, who considered it necessary to formulate even the definition of the notion of "illicit firearms" as intentional actions of a person in the production, sale, transfer, acquisition, possession, collection, exhibition, storage , wearing, transportation, transportation, use, disposal, import of firearms into and out of the territory of the state, committed in violation of the rules of firearms and aimed at the public danger [9]. The aforementioned technology for the study of the person of the offender who commits crimes in the field of illicit trafficking of firearms is widely used in educational and methodological literature.

At the same time, the examples of the research carried out do not deprive us of the opportunity to support the views of modern scholars who state that the information regarding the typical features of a person of the offender, which constitute the content of the relevant element of forensic characteristics, is formed on the basis of studying and generalizing materials of investigative and judicial practice. Modern forensic practice makes it possible to argue that crime in the field of illicit trafficking in firearms acquires separate, individual characteristics of persons committing specific criminal acts, including the illegal movement of firearms.

**Conclusions.** As a result of the consideration of this problem within this scientific work, there is a selective description of the person of the criminal engaged in the illegal movement of firearms, which is formulated on the basis of the study of forensic practice, analytical materials of the operational units of the National Police of Ukraine and scientific works. It should be noted that the peculiarity of the commission of the illegal movement of firearms influences the formation of the motive of criminal acts in a certain category of citizens. These should include: 1) previously convicted persons for crimes related to illicit trafficking in firearms, combat supplies, explosive devices or substances; 2) persons engaged in volunteering activities (or those for whom this activity is a mask ("cover"); 3) persons living in border areas and having the opportunity to have an exclusive state border crossing; 4) persons authorized to cross the zone of ATO for personal needs; 5) persons transporting goods across the border or zone of the ATO. This category of people is divided into those who are deliberately involved in the illegal movement of firearms and those crossing the state border without knowing the contents of the cargo; 6) servicemen and members of volunteer battalions who have passed or are in service in the zone of the ATO (or those who are masked under them); 7) persons with disabilities and other persons enjoying privileges in connection with their health or age category; 8) persons working on annual or marine vessels "seafarers"; 9) minors from the age of 14 to 16 years, who are not subject to criminal liability for the commission of the said crimes, etc. Age category of persons committing the illegal movement of firearms 14-70 years. At the time of the crime, the perpetrators, as a rule, never worked or studied at all.

***References***

1. Советская криминалистика. Методика расследования отдельных видов преступлений / В.К. Лисиченко, В.И. Гончаренко, М.В. Салтевский. Kb]d: Вища школа. Головное изд-во, 1988. 340 с.

2. Дагель П.С. Учение о личности преступника в советском уголовном праве. Владивосток: Изд-во Дальневост. ун-та, 1971. 267 с.

3. Даньшин И.Н. К вопросу о понятии личности преступника. *Проблемы социалистической законности:* респ. межвед. науч. сб. М., 1980. Вып. 6. С. 117–126.

4. Майстренко М.М. Кримінологічна характеристика та попередження органами внутрішніх справ злочинів проти громадської безпеки, предметами яких є зброя, бойові припаси та вибухові речовини: автореф. дис. ... канд. юрид. наук: 12.00.08. Львів. держ. ун-т внутр. справ. Львів, 2010. 20 с.

5. Ведерников Н.Т. Личность преступника как элемент криминалистической характеристики преступления. *Криминалистическая характеристика преступлений:* сб. науч. тр. М.: Всесоюзн. ин-т по изучен. причин и разраб. мер предупреждения преступности, 1985. С. 76-79.

6. Шепитько В.Ю. Криминалистика: курс лекций. 2-е изд., перераб. и доп. Харьков: ООО «Одиссей», 2005. 368 с.

7. Деревянко А.И. Криминалистика: учеб. пособ. / А.И. Деревянко, В.И. Езикян. Юж.-Рос. гос. техн. ун-т. Новочеркасск: ЮРГТУ, 2007. 164 с.

8. Павликов С.Г. Криминалистическая характеристика и первоначальный этап расследования незаконного оборота оружия, боеприпасов, взрывчатых веществ и взрывных устройств: дис. ... канд. юрид. наук: 12.00.09. М., 2000. 195 с.

9. Саморока В.А. Особенности доказывания по уголовным делам о незаконном обороте огнестрельного оружия: дисс. ... канд. юрид. наук; спец. 12.00.09 «Уголовный процесс; криминалистика и судебная экспертиза; оперативно-розыскная деятельность»; Моск. ун-т МВД / Саморока,

Виктор Анатольевич. М., 2004. 228 с. URL: http:// www.dissercat.com/content/osobennosti-dokazyvaniya-po-ugolovnym-delam-o-nezakonnom-oborote-ognestrelnogo-oruzhiya#ixzz2pRqWUPpR.

*Received to editorial office05.06.2018*

**Summary**

The article offers forensic analysis of offender committing the illegal movement of firearms.

Modern investigative and judicial practice allows to say that the crime in the sphere of illicit trafficking in firearms becoming separate, individual characteristics of the perpetrators of specific criminal acts, in particular the illegal movement of firearms. For the perpetrators of these crimes are characterized by the following forensically important characteristics: 1) physical; 2) socio-demographic; 3) moral; and 4) psychological.

Conclusion as a result of consideration of this problem in the framework of this research work is selective characteristics of offender involved in the illegal movement of firearms, which is formulated on the basis of judicial and investigative practice, analyses the activities of the operating units of the National police of Ukraine and scientific works. Thus, it should be noted that the peculiarity of committing the illegal movement of firearms affects the formation of the motive of criminal acts among certain categories of citizens. These include: 1) previously convicted individuals for crimes related to illicit trafficking in firearms, ammunition, explosive devices or substances; 2) persons who are engaged in volunteer activities (or those for whom this activity is a disguise («cover»); 3) persons residing in the border areas and have the ability to exceptional crossing of the state border; 4) persons who are permitted to cross the zone of the ATO from the personal needs; 5) persons who transport goods across the border or in the ATO area. This category is divided into those that knowingly engaged in the illegal movement of firearms and those who cross the state border without knowing the contents of the cargo; 6) personnel and members of volunteer battalions, which have been or are serving in the ATO area (or those masquerading as them); 7) persons with disabilities and other persons receiving benefits in connection with dignity health or age category; 8) persons employed on ships or vessels «mariners»; 9) minors aged 14 to 16 years, are not subject to criminal liability for committing these crimes and Age category of the persons who commit the illegal movement of firearms 14-70 years. At the time of the crime, the criminals usually never worked or studied.

***Keywords:*** *firearms, criminalistics characterization, the illegal movement, criminal.*

## ISSUES OF THEORY, PHILOSOPHY AND HISTORY OF LAW, CONSTITUTIONAL LAW AND PUBLIC ADMINISTRATION

**Larysa Nalyvaiko**
Dr of Law, Prof.,
Deserved Lawyer of Ukraine
*(the Dnipropetrovsk State University of Internal Affairs)*

**Victor Oliinyk**
Ph.D.
*(the Dnipropetrovsk District Administrative Court)*

*DOI: 10.31733/2078-3566-2018-2-53-59*

# FOREIGN EXPERIENCE OF INTERACTION BETWEEN BODIES OF JUDICIAL AUTHORITY AND CIVIL SOCIETY INSTITUTIONS: PROBLEMS OF THEORY AND PRACTICE

**Наливайко Л., Олійник В. ЗАРУБІЖНИЙ ДОСВІД ВЗАЄМОДІЇ ОРГАНІВ СУДОВОЇ ВЛАДИ ТА ІНСТИТУТІВ ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА: ПРОБЛЕМИ ТЕОРІЇ ТА ПРАКТИКИ.**У статті проаналізовано зарубіжний досвід взаємодії органів судової влади та інститутів громадянського суспільства.Підкреслено, що необхідною умовою удосконалення діяльності органів судової влади будь-якої демократичної держави є забезпечення їх діяльності на засадах принципів відкритості, прозорості та гласності. Проблема взаємодії органів судової влади з інститутами громадянського суспільства має багатоаспектний характер. Зроблено висновок, що формування в Україні відкритого суспільства потребує модернізації державної політики відносно комунікації суду та громадськості, поєднуючи національні особливості та позитивний зарубіжний досвід.

Акцентовано, що досвід демократичних держав світу свідчить, що саме взаємодія дозволяє досягти більшої ефективності у багатьох сферах суспільного життя. Проаналізовано міжнародні договори та європейські стандарти у сфері діяльності суду. Акцентовано увагу на значенні рішень Європейського суду з прав людини у сфері забезпечення відкритої діяльності судової влади. Сформульовано пропозиції до вітчизняного законодавства з метою підвищення ефективності взаємодії суду та громадськості. Зазначено, що враховуючи досвід США, свобода обговорення повинна мати якнайширший діапазон з урахуванням обмежень щодо відкритості судового процесу в межах чинного законодавства. Враховуючи те, що журналісти не завжди обізнані із специфічними правилами висвітлення судової проблематики та браку в українських медіа журналістів належної кваліфікації та знань, які потрібні для висвітлення судової тематики доречно, було б розробити не лише Положення про взаємодію судів із засобами масової інформації та журналістами, практика реалізації яких існує в Україні, а й Правила роботи в залах судових засідань фото- і кінозйомки, теле-, відео-, звукозапису та інших електронних медіа й запропоновано їх можливу структуру.

***Ключові слова:*** *громадянське суспільство, органи судової влади, взаємодія суду та громадськості, міжнародні стандарти, Європейський суд з прав людини.*

**Formulation of the problem.** At the present stage, the priority vector of the Ukrainian state development is the improvement of democratic procedures, which envisages, in particular, the interaction of judicial authorities with civil society institutions, as well as informing the population about the activities of the courts.

Thus, the obstacles that need to be addressed are still on the way to establishing an effective dialogue, which in turn requires the study of the experience of other states, and based on the analysis and rethinking of this experience it is possible to find their own ways of improving the relationship between courts and civil society taking into account national legislation. This suggests that re-thinking of the essence and content of the judiciary in Ukraine is

only at an early stage.

**Analysis of the latest publications that initiated the solution to this problem.**In publications and scientific works, the issue of interaction between the judiciary and civil society institutions has attracted the attention of such researchers as D. Baronin, M. Vilgushynskyi, L. Vinokurova, V. Gorodovenko, R. Gryniuk, S. Denysiuk, P. Kablak, M. Kobylianskyi, A. Kolodii, I. Kostenko, V. Kravchuk, M. Latsyba, V. Maliarenko, I. Nazarov, S. Praskova, S. Prylutskyi, A. Selivanov, V. Spivak, S. Tymchenko, V. Shapoval, Yu. Shemuchenko, S. Shtogun and others. However, the study of the experience of foreign countries regarding the interaction between judicial authorities and civil society institutions has not been sufficiently reflected in publications and scientific works.

**The objective of the article.**Thus, the investigation and analysis of the basic conditions and principles of effective and efficient interaction between the judiciary and civil society institutions in foreign countries and their adaptation in Ukraine at the present stage of its development is one of the important tasks.

**Basic content.**Comprehensive social changes in the era of transition from industrial to information society are characterized, in particular, by the intensification and globalization of information communication and the growth of social significance of information in all spheres of life [1, p. 57]. Access to public information can facilitate an open and transparent discussion of all existing problems through dialogue between government and civil society [2, p. 28]. In the context of this, the issue of ensuring an adequate level of communication between the state and its citizens is extremely important [3, p. 97]. Thus, a prerequisite for improving the activities of public authorities, in particular the judiciary, is to ensure their activity on the principles of openness, transparency and publicity. However, the information secrecy of the judicial authorities violates or impedes the realization of the right of citizens to access to public information regulated by the Constitution of Ukraine, other normative legal acts and international acts ratified by the Verkhovna Rada of Ukraine.

In a state governed by the rule of law, the judiciary must be based on such principles which, in the first place, ensure its independence between the state and man, as this is, first of all, the manifestation and achievement of civil society. Therefore, the study of foreign experience in the interaction of civil society institutes with the judiciary, in particular where the court is not an integral part of the state apparatus and administration, but is an independent and impartial mediator between civil society and the state, is a topical issue in the context of the development of a rule-of-law state [4, p. 241-249].

In accordance with Part 2 of Article 5, Part 1 of Article 38 and Part 4 of Article 124 of the Constitution of Ukraine, the people that constitute the content of the category «civil society» have the right to participate in the implementation of state power, in particular the judicial authorities, in any way with the exception of those expressly prohibited by law. However, the understanding of the role of judicial authorities in democratic countries is different and depends, for example, on their socio-economic conditions of development.

To provide access to court information modern European countries use documents developed by the United Nations, the Council of Europe and others which are based on the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights in its affairs.

It should be noted that in the implementation of the aforementioned international legal acts the decisions of the European Court of Human Rights (hereinafter – the Court) take one of the central places. Thus, for example, the concept of openness and publicity of judicial proceedings is given an expanded description in the judgment of the Court of Human Rights of December 08, 1983 in the case of Pretto and others v. Italy [5, p. 215] the public nature of the proceedings referred to in point 1 of Article 6 protects the plaintiffs from the secrecy of the administration of justice beyond the public control; it serves as one of the ways to lend credibility to both higher and lower courts. By making the administration of justice transparent, it contributes to the achievement of the objectives of point 1 of Article 6, namely the fairness of a trial, the guarantee of which is one of the fundamental principles of any democratic society. In another judgment (Ekbatani v. Sweden of May 26, 1988 [6, p. 123]), the Court expressed even more clarity ... as far as publicity is concerned, all materials of the case must be accessible to the general public.

At the same time, the Court expresses a position stating that the factual circumstances of the case should be considered only in the presence of the parties to the case and other interested parties. At the same time, from the standpoint of the Court the discussion of the court issues of

law is also possible in the absence of the parties to the case, in particular Engel (Engel) and others v. The Netherlands – a judgment of 08 June 1976, Lingens v. Austria – a judgment of July 08, 1986, Bowman v. the United Kingdom – a judgment of February 19, 1998, etc.

From the standpoint of the interaction of courts with the public and mass media, the US experience is interesting because of the legal system of the USA, which consists of 50 separate state legal systems and the federal law system, and is based on precedent. Since the middle of the 20th century the access of television cameras to the courtroom has been limited, largely in response to a significant resonance over the murder trial of Sam Sheppard. In this case, the opinion of the Supreme Court of America reduced to the fact that the main disadvantage of the case was the failure of the judge, who was in the process, to keep the situation in the courtroom under proper control. The judge did not consider carefully the possibility of taking other measures to reduce the volume of media materials, which provoked bias, and to protect the jury from external influences. Moreover, he completely neglected the warnings of the defense counsel and, in fact, allowed the media to lead the process. The judge should have prohibited the officials from making confidential statements in the press as well. The Supreme Court of the United States came to the conclusion that the trial of the accused was not objective, and pointed out the various means by which the judge could have restricted the resonance. In the end, the US Supreme Court ruled that the judge had not fulfilled his duty to protect the defendant from the resonance that the whole community was concerned about, which naturally provoked bias, and had not been able to keep the destructive forces in the courtroom [7, p. 165].

In 1990, the Conference of Judges approved the report of the special committee on broadcasting in the courtroom, which contained a recommendation for a pilot program, in which electronic media would be allowed to cover the progress of civil litigation processes in six district and two appellate courts. The conference also criticized the prohibition contained in the Code of Conduct and adopted a broadcasting policy as set out in the Judicial Policies and Procedures Directives which state: «A judge may grant permission for radio broadcasting, television broadcasting, recording and photographing in the courtroom court and adjoining premises during investment, naturalization and other ceremonial procedures. A judge may grant permission for such actions in the courtroom or adjoining rooms during other court sessions or between such meetings only in the following cases: for the submission of evidence, for fixing the course of the trial, for security purposes, for other purposes of judicial administration, and in accordance with the pilot programs approved by the Conference of Judges of the United States of America» [8; 490, p. 31].

In 1994, the Conference of Judges did not support the recommendations of the committee on expanding the practice of covering the course of civil hearings with the use of filming. Subsequently, the Conference of Judges strongly encouraged District Courts to issue an order reflecting the decision of the Conference on the Prohibition of Photographing and Illumination on Radio and Television of Hearings in US District Courts. In this regard, in order to settle the issue in the district courts they issued a permanent order, instructions and directives on taking photographs, recording the broadcasting of hearings in the courtroom [9]. Thus, one of the areas of interconnection between the judiciary and civil society institutions is to ensure openness of justice, but in practice restrictions on the openness of the judicial process are justified and must be within the limits of the current legislation.

The duty of publishing declarations of judges on property, income, expenses and financial obligations is a means of social control over the integrity of the judiciary, and therefore one of the mechanisms of its legitimation. But, apart from the primary mechanism for such disclosure (publication of the declarations of all judges on the Internet), it is necessary to consider declaration not only of incomes but also of expenses. It is this practice that is used in the United States, Germany and many other countries and is more effective in terms of the purpose of its introduction. Such proposals will not in any way violate the judge's right to privacy because, on the one hand, a person in judicial power must understand the need for self-restraint of certain of his rights, which is conditional on the publicity of his office, and on the other hand, as S. Pashyn correctly pointed out, the judge should consider himself not part of the national elite, which seeks to ensure a high standard of living, but as one who bears the burden of public service of a highly-qualified citizen representative, a protector of their interest to live under the protection of legal safeguards [10, p. 58].

The development of the information society makes actual the electronic version of justice, which contains, firstly, the automation of judicial procedures, and, secondly, the simplification of informing interested persons through the Internet, mass media, and others like that.

The European Program «Justice Program» and «Right, Equality and Citizenship Program 2014-2020» [11] can be considered as an example of the practical implementation of the regional rules of justice. The general objective of the e-court has been to create a genuinely European area of justice based on mutual trust, as well as to facilitate judicial cooperation in civil and criminal cases, assistance in seminars for judges, prosecutors and other lawyers. According to Article 6 of the Rights, Equality and Citizenship Program the further development and funding of the e-Justice portal is supported. In fact, the introduction of the e-court has become a significant achievement in the development of e-justice [12, p. 223].

At the level of the draft Strategy for European e-Justice 2014-2018, the implementation of the main objectives of e-justice has been detailed: the European e-Justice portal, interaction, legislative aspects, the European legal semantic network, interoperability of registries, networks, cooperation between users of the relevant portals in the system of European e-justice, translation, rights and obligations in the field of e-justice, personnel upgrading, financing, external relations, Multiannual action plan on e-Justice 2014-2018 [13].

The Estonian electronic file system integrates police databases (MIS), prosecutors (ProxIS), courts (KIS), prison services (VangIS) that interact with each other. The established base has a strong force in the following categories: electronic certificate, electronic signature and e-justice services. The formation of the Estonian model of electronic court is similar to the Ukrainian realities. In particular, in 2002-2005 within KOLA court decisions started to be published on the Internet (statistics were also provided). In return, in the years 2006-2013/2014, within the framework of KIS (compatibility – X-ROAD), implementation of the main functions of the document management system was ensured. Henceforth, Estonia continued to develop an electronic court system. Since 2008, payment orders have been processed electronically. In 2013/2014 the system KIS2 (compatibility – E-FILE) – the modern system of document circulation for courts – began. At the same time, the Supreme Court has had a separate system with the first and second instances until 2014 [14, p. 67].

The unique aspect of functioning of the Estonian model of the electronic justice system was the use of an electronic ID-card – an integrated tool when designing electronic services. Thus, there works a web-based public e-File information system that allows parties and their representatives to participate in civil, administrative, criminal proceedings and the process for the consideration and resolution of electronic misconduct cases [14, p. 67-68]. Entering this portal, an Estonian can see all documents delivered to him in any court proceeding. The Public e-File user can determine the e-mail they want to use to receive messages. Each Estonian has an email address @ eesti.ee. The message contains a link to a document and a note (to access the portal, you must log in using the national e-mail message of the person). Processing of payment orders is an entirely electronic implementation; the only channel that can be used to file a case or communicate with a court is Public e-File. Public e-File is also used for other applications, but there are alternative ways available (correspondence, etc.).

Consequently, taking into account foreign experience, it would be appropriate to develop not only the Regulations on the interaction of courts with the media and journalists, but also the rules for work of photography and film, television, video, audio and other electronic media in the courtrooms.

In 2010, a Polish-based Forensic Research Foundation was set up in the Republic of Poland, which initiated a specially-developed methodology for assessing the activity of a judge by ordinary citizens during a trial [15]. A questionnaire consisting of 22 questions was developed and fitted on a sheet of A4 format. Ordinary citizens without legal education were able to provide an answer for most questions. For example, «Was the hearing scheduled? If not, what was the reason for this and how was it reported? Indicate the scheduled and actual start of the meeting. If the meeting started later, please indicate what caused it. Who was late? Did the person apologise for the delinquency of the case?» and so on. The questionnaires were conducted by volunteers, the results of questionnaires became the driving force, to a greater extent, not for the analysis of judicial activity, but for the improvement of the latter.

In Kazakhstan, there is an experience of litigation monitoring. Thus, monitoring was conducted in the following forms: the general, when observers attended any court sessions, and the full one in which observers chose one criminal case from the newly appointed and traced it from the first session to the sentence. Within the framework of full monitoring, observers attended meetings from 53 criminal cases, whereas 332 cases were covered by general monitoring. In total, observers attended trial sessions under the leadership of 122 judges [16].

The monitoring allowed to reveal a number of problems in the implementation of crimi-

nal justice in the courts of Kazakhstan. For example, compliance with the rules of adherence to judicial ethics was not always followed; there were recorded cases of illegal restriction of access to observers directly by judges or court personnel; access to observers at open court sessions was sometimes limited; some court sessions were held in places not suited for conducting court trials. Quite often there was a lack of a schedule for dealing with cases, which became a significant barrier for observers. Half of court sessions took place with a delay of more than 15 minutes, which is unacceptable, since the lawyer is, first of all, a representative of the society's elite, a model for an example. And it is no coincidence that a logical question arises: do I want to match this «model»? The answer is obvious ... Somewhere the judge did not explain the defendant's right not to testify against himself; in almost half of the cases the right to an interpreter was violated. The monitoring also revealed other violations of international standards of fair criminal justice [17].

The monitoring of litigation in Kazakhstan is interesting for Ukraine, considering that for its conduct a qualitative questionnaire was developed that can be adapted to the criminal proceedings of Ukraine. Also, in Kazakh monitoring there are special observer meetings at a certain stage of the implementation of the monitoring program, where each observer shares his own experience of monitoring open court sessions. The results of such discussions were amended and supplemented. Kazakh monitoring reports give the reader the opportunity to find out the essence of the problem discovered, even in the absence of special legal education, which is the emergence of an active civic position.

A similar monitoring of court sessions was held in Kyrgyzstan, which mainly concerned cases relating to the protection of electoral rights of citizens and other participants in the electoral process [18].

Summing up the aforementioned, it can be concluded that the problem of cooperation between judicial authorities and civil society institutions has a multifaceted nature. The interaction of these entities on the basis of partnership is necessary for the development of Ukraine as a democratic, social and legal state. The experience of democratic states of the world shows that it is the interaction that allows achieving greater efficiency in many spheres of public life. The formation of an open society in Ukraine requires the modernization of state policy regarding the communication of the court and the public, combining national features and positive foreign experience.

**Conclusions.** As a result of the conducted research, positive experience of foreign countries in the context of optimizing the effectiveness of interaction between judicial authorities and civil society institutions is analysed, namely:

1. The bodies of the judiciary transmitting the abstract public benefit of laws into the area of specific private interests are close to the people. Publicity of the process is perceived, firstly, as officiality, and secondly, as the ability of the court to equally defend the rights and freedoms of man and citizen – but not solely of the powerful – which must be carefully clarified, weighed and taken into account. Thus, this is the social openness of the judiciary to civil society institutions.

2. In view of the informatization of public and state development in Ukraine, there is a need for a social modernization of the administration of justice. Introduction of information technologies in courts is a way to transparency in the activities of courts, one of the elements of ensuring access to justice, etc. It should be noted that a special law that would regulate exclusively the issue of informatization of the judicial system in Ukraine today does not exist, but separate legal norms are contained, for example, in the Law of Ukraine «On the Judiciary and the Status of Judges» (Part 2, Part 3, Article 11; Part 2 of Article 72, Part 1 of Article 73, point 2 of Part 2 of Article 76, Part 3 of Article 97, Part 4 of Article 100, Part 5 of Article 100, Part 5 of Article 103, point 8 of Article 105, point 8 of Part 1 of/ Article 149), the Law of Ukraine «On the Basic Principles of the Development of the Information Society in Ukraine for 2007-2015» (point 1 of Section I, points 1, 5, 7, 9 of Section III, point 1 of Section IV), etc.

3. Relations between the judiciary and the media require the creation of an effective system of interaction, which in turn can be recognized as one of the priority directions of democratization of modern Ukraine. An analysis of the experience of foreign countries in the sphere of cooperation between judicial authorities and civil society institutions suggests that the development and improvement of relations with the media is important, first of all, for the judicial system itself, as the public receives a large amount of information precisely through the media. Given the US experience, freedom of discussion should have the widest range, taking into account restrictions on the openness of the court process within the framework of the cur-

rent legislation. Taking into account that journalists are not always aware of the specific rules of the litigation coverage and that the Ukrainian media lack journalists who would have the proper qualifications and knowledge necessary to cover judicial issues, it would be appropriate to develop not only the Provisions on the interaction between the courts and the media and journalists the practice of which exists in Ukraine, but also the Rules of work of photography and film, television, video, audio and other electronic media in the courtrooms that can be structured as such way: 1. General provisions; 2. The rights and duties of journalists; 3. The rights and duties of a judge-speaker, a spokesperson or other person who carries out the functions of interaction ensuring media relations; 4. Access to court premises; 5. Access to court sessions; 6. Photographic and video shooting in the courtroom; 7. Other issues of fixing information, holding photo-video outside court and in court corridors; 8. Photographing and video recording outside the court session.

***References***

1. Дзьобань О.П., Жданенко С.Б. Право на інформацію: філософсько-правовий аспект проблеми. *Вісник Національної юридичної академії України імені Ярослава Мудрого. Сер.: Філософія, філософія права, політологія, соціологія.* 2013. № 4. С. 56-64.

2. Наливайко Л.Р., Вітвіцький С.С. Право на доступ до публічної інформації в контексті контролю громадян за діяльністю держави. *Право і суспільство.* 2014. № 5. С. 28-33.

3. Смокович М. Доступ до публічної інформації: окремі аспекти теорії та судової практики. *Право України.* 2014. № 3. С. 97-109.

4. Прилуцький С.В., Гриценко І.С. Судова влада і громадянське суспільство: концепт взаємодії. *Вісник кримінального судочинства.* 2015. № 1. С. 241-249.

5. Справа «Претто та інші проти Італії» (Case of Pretto and Others v. Italy): рішення від 08.12.1983. *Практика Європейського Суду з прав людини. Рішення. Коментарі.* 2005. № 1. С. 215-230.

6. Ефективність рішень Європейського суду з прав людини, або справи, розглянуті з 1959 по 1998 рік: (Effects of Judgments or Cases 1959-1998*). Практика Європейського Суду з прав людини. Рішення. Коментарі.* 1999. № 4. 123-176.

7. Каблак П.І. Взаємовідносини судової влади та громадськості (правові і організаційні аспекти): дис. ... канд. юрид. наук. Львів, 2015. 211 с.

8. Романюк О. Відкритість судових процесів: українська практика і міжнародні стандарти. URL: http://osvita.mediasapiens.ua/media_law/world_journalists/vidkritist_sudovikh_protsesiv_ukrainska_praktika_i_mizhnarodni_standarti/.

9. Шаповал А., Ганга В. Міжнародний досвід висвітлення кримінального та цивільного судочинства. *Віче.* 2011. № 8. С. 30-32.

10. Пашин С.А. Состязательный уголовный процесс: монография. М: Р. Валент, 2006. 188 с.

11. Regulation (EU) № 1382/2013 of the European Parliament and of the Council of 17.12.2013 establishing a Justice Programme for the period 2014 to 2020. URL: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1382/

12. Ізарова І. Розвиток електронного правосуддя в цивільних справах у європейських країнах. *Юридичний вісник.* 2014. № 6. С. 222-227.

13. Draft Strategy on European e-Justice 2014-2018 of 21.12.2013. URL: http://eur-lex.europa.eu/LexUriSery/LexUriSery.do?uri=OJ:C:2013:376:0007:0011: EN:PDF/

14. Барікова А.А. Електронна держава: нова ефективність урядування: монографія. Київ: Юрінком Інтер. 2016. 224 с.

15. Court Monitoring Methodology. URL: http://courtwatch.pl/wp-content/uploads/Court_Monitoring_ Methodology.pdf/.

16. Отчет по результатам работы наблюдательной Миссии по соблюдению прав человека в Республике Казахстан 23-30 апреля 2012 г. События 16 декабря 2011 года в городе Жанаозен и их последствия. URL: http://www.khpg.oug/files/docs/1343032528.pdf/.

17. Запара С., Гасай М. Національні передумови та зарубіжний досвід проведення незалежного моніторингу судового процесу. *Науковий вісник Ужгородського національного університету. Сер.: Право.* 2016. Вип. 36 (2). С. 174-178.

18. Мониторинг судебных разбирательств по делам о защите избирательных прав граждан и иных участников избирательного процесса. Бишкек: Трансперенси Интернешнл-Кыргызстан, 2005. URL: http://www.transparency.kg/files/courtroommonitoringproject.pdf/.

*Received to editorial office 01.06.2018*

**Summary**

The article analyses the foreign experience of interaction between judicial authorities and civil society institutions. It is emphasised that the necessary condition for improving the activity of the judicial authorities of any democratic state is to ensure their activity based on principles of openness, transparency

and publicity. The international treaties and European standards in the field of court activity are analysed. The emphasis is placed on the significance of the decisions of the European Court of Human Rights in the field of ensuring the open activity of the judiciary. Proposals to domestic legislation are formulated in order to increase the effectiveness of interaction between the court and the public.

***Keywords:*** *civil society, judicial authorities, court and public interaction, international standards, European Court of Human Rights.*

**Larysa Nalyvaiko**
Dr of Law, Prof.,
Deserved Lawyer of Ukraine

**Olga Chepik-Tregubenko**
Ph.D.

*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-59-63*

## ENSURING THE ELECTORAL RIGHTS OF INTERNALLY DISPLACED PERSONS AT LOCAL ELECTIONS: PROBLEMS OF THEORY AND PRACTICE

**Наливайко Л., Чепік-Трегубенко О. ЗАБЕЗПЕЧЕННЯ ВИБОРЧИХ ПРАВ ВНУТРІШНЬО ПЕРЕМІЩЕНИХ ОСІБ НА МІСЦЕВИХ ВИБОРАХ: ПРОБЛЕМИ ТЕОРІЇ ТА ПРАКТИКИ**. У статті розглянуто проблематику реалізації виборчих прав внутрішньо переміщених осіб в Україні на місцевих виборах. Також акцентовано увагу на гарантуванні виборчого права на місцевих виборах інших мобільних груп громадян. Наголошено, що рівність громадян у всіх сферах суспільної діяльності, зокрема і рівність виборчих прав, гарантується як на національному, так і на міжнародному рівнях. Проте, сьогодні в Україні склалася ситуація, коли частина громадян не може реалізувати одне із своїх основних прав – близько 4% громадян позбавлено права на вибори на місцевому рівні, що не відповідає сучасним міжнародним демократичним стандартам. Неузгодженість вітчизняного законодавства та відсутність належного механізму реалізації виборчого права на місцевих виборах виступає нині як дискримінація громадян України, що стали вимушеними переселенцями з Донбасу та Криму, є трудовими мігрантами всередині держави, взагалі не мають реєстрації місця проживання та ін.

Зроблено висновок, що прийняття парламентом України законопроекту № 6240 про внесення змін до деяких законів України (щодо виборчих прав внутрішньо переміщених осіб та інших мобільних всередині країни громадян) з відповідними змінами та доповненнями сприятиме дотриманню конституційних виборчих прав внутрішньо переміщених осіб та інших мобільних груп громадян. Зволікання парламенту із внесенням відповідних змін до чинних нормативно-правових актів стримує процес демократизації. З урахуванням цього, на сучасному етапі практично єдиним шляхом вирішення розглядуваної проблеми є внесення відповідних змін парламентом України до законодавства, й зволікання Верховною Радою стає свідченням про невідповідність міжнародним стандартам у цій сфері та сприяє обмеженню прав громадян.

***Ключові слова:*** *виборче право, внутрішньо переміщені особи, переселенці, мобільні групи, правова держава, міжнародні стандарти.*

**Formulation of the problem.**Over a four-year period, a large number of citizens (according to the official data of the Ministry of Social Policy as of May 2018 – 1 502 019 people) left their places of permanent residence due to events in the Donbas and Crimea and received the status of internally displaced persons. Unfortunately, some of these people continue to live in difficult social and economic conditions on other territories of Ukraine. This is usually due to the inability to get a job with proper wages and working conditions, lack of own housing and the inability of the state to provide relocated housing and a number of other reasons.

However, along with these issues, the issue of violation of the political rights of internally displaced persons, namely, the electoral rights at the local level, is equally important. It is about election of deputies of local councils and village, settlement and city mayors. Since the right of choice is one of the fundamental rights of citizens, the consideration of this issue has not only theoretical, but also, first of all, paramount practical importance for ensuring the electoral rights of internally displaced persons in Ukraine.

**Analysis of the latest publications that initiated the solution to this problem.**Issues of guaranteeing and realizing the electoral rights of citizens were studied by such scholars as V. Bukach, T. Zavorotchenko, V. Lemak, V. Marchenko, O. Martsliak, A. Oliinyk, N. Onischenko, O. Petryshyn, V. Pogorilko, P. Rabinovich, O. Todyka, V. Shapoval, Yu. Shemshuchenko and others. Problems of electoral rights of internally displaced persons in Ukraine were considered in scientific, monitoring and other works by D. Kovryzhenko, Y. Lenger, K. Pavshuk, N. Pashkova, S. Savelii and others.

**Objective**.Due to the fact that today this problem has not received proper scientific support, although it has a fundamental applied value, it is expedient to carry out a theoretical and legal review of the implementation of the electoral rights of internally displaced persons in Ukraine at local elections.

**Basic content**.One of the most important signs of a democratic state is the presence of a certain list of human rights in a citizen, among which, in addition to personal rights – life and protection, freedom and personal integrity, non-interference in private life – political rights are the victory of human rights activists since the 20$^{th}$ century. [1, p. 4]. Equality of citizens in all spheres of social activity, in particular the equality of electoral rights, is guaranteed at the national level – the Constitution and other normative legal acts of Ukraine, as well as at the international level – the Universal Declaration of Human Rights of 1948, the Convention for the Protection of Human Rights and the Fundamental Freedoms of 1950, the International Covenant on Civil and Political Rights of 1968, etc.

In the aspect of the issue under consideration, it should be noted that international standards in the area of ensuring the rights and freedoms of internally displaced persons directly prohibit discrimination or other forms of restriction of the rights and freedoms of internally displaced persons [2, p. 48]. At the same time, today in our state there is a situation when some Ukrainian citizens can not realise one of their basic rights – about 4% of Ukrainian citizens are deprived of the right to vote at the local level.

The National Monitoring System Report on the Situation of Internally Displaced Persons, released in April 2017, noted that only 6% of internally displaced persons indicated that they voted in local elections in the territory of displacement in 2015. The main reason why forced migrants were not able to vote in local elections in 2015 was the lack of local registration [1, p. 4]. The indicated problem, on the one hand, is strongly confirmed by the inability to determine the terms of the end of the military conflict in the Donbas and the de-occupation of the Crimea, on the other hand, according to sociological surveys, most of the settlers are no longer going to return to their places of registration, even after Ukraine returns their legal territories.

For example, in Transcarpathia, more than 3,600 internally displaced persons are registered, and the total is about 5,000 people. Of these, 80% do not want to return to their regions and are potential residents of the united territorial communities. But they remain outside the electoral process of the local communities in which they have been living for more than three years [3].

According to the current legislation of Ukraine, IDPs can exercise their right to vote during local elections, but for this purpose, the place of registration must be changed, which will entail the loss of these persons' status as an internally displaced person.

A sociological survey (1700 internally displaced persons interviewed in Ukraine) gave an opportunity to find out that 75% of IDPs do not want to lose their status for election rights [4]. Thus, the state forces its citizens to choose between their fundamental rights: the right to choose and the right to social protection, which does not meet current international democratic standards.

In accordance with the United Nations Principles on Internal Displacement, IDPs, whether they are in camps for internally displaced persons or outside of such camps, should not be subjected to discrimination as a result of their movement in the exercise of the right to freedom of thought and conscience, expressions and beliefs, the right to conduct business, the right to work, the right to freedom of association, to participate in the management of local affairs,

the right to vote and the right to participate in management of governmental and public affairs, etc. [5]. If to turn to the analysis of the national legislation, then according to Article 8 of the Law of Ukraine «On Ensuring Rights and Freedoms of Internally Displaced Persons» of March 27, 2015: internally displaced person exercises his right to vote at the elections of the President of Ukraine, people's deputies of Ukraine, local elections and referendums by changing the place of voting without changing the election address according to Part 3 of Article 7 of the Law of Ukraine «On the State Register of Voters» [6].

However, in practice there was an absolutely opposite situation, since according to the provisions of the Law of Ukraine «On Local Elections», which was adopted on July 14, 2015, the right of internally displaced persons to take part in elections is not provided, because the right to vote in the elections of deputies of rural, village, city council, elections of village, settlement, city mayor have citizens of Ukraine belonging to the respective territorial community and living within the constituency [7]. In the above example, one can observe, first of all, the inconsistency of domestic legislation, which indicates the superficial attitude of the authorities to their duties. As a result, this leads to a violation of the rights of citizens and provokes disputes between the authorities and the public.

In this context, it should be noted that States which, at certain stages of their development, faced with the need to ensure the right to vote in elections for internally displaced persons, resolved the issue and brought their own legislation in line with the principles of Guidance, providing IDPs with the possibility of participation in public life at the national and local levels [2, p. 50]. Such states include Georgia, Moldova, and others. However, in Ukraine, taking into account the activity of scientists, public activists, and international organizations, there have still been no proper changes in this direction, with the exception of the submitted draft laws for consideration by the Parliament of Ukraine. Among them: 2501-a of August 12, 2015, on amendments to the Law of Ukraine «On Local Elections» (concerning the ensuring the right to vote for internally displaced persons), 2501a-1 of August 21, 2015, on amendments to certain legislative acts concerning ensuring the electoral rights of internally displaced persons, 2501a-2 of August 26, 2015, on amendments to some laws of Ukraine on ensuring electoral rights of internally displaced persons. All listed bills are sent at revision for one or another reason.

Currently working in the profile committee of the Verkhovna Rada of Ukraine there are two bills:

1) Draft Law No. 4471 dated April 19, 2016, on amendments to certain laws of Ukraine on ensuring the electoral rights of internally displaced persons [8];

2) Draft Law No. 6240 dated March 27, 2017, on amendments to certain laws of Ukraine (concerning the electoral rights of internally displaced persons and other mobile citizens within the country) [9].

As for the first draft, the Main Research and Expert Department expressed a number of critical remarks, although positive norms were noted [10]. The general conclusion was that according to the results of the consideration in the first reading, it is advisable to return the bill to the revision.

One of the key shortcomings of this draft law is that internally displaced persons are allowed to change their voting address shortly before the day of voting, which may increase the risk of abuse during registration of voters, the difficulty of exercising the right to vote in individual cases involving IDPs, and also increases the likelihood of multiple voting [2, p. 52-53].

In its turn, Draft Law No. 6240 meets the most up-to-date European standards and will promote proper protection not only of the electoral rights of internally displaced persons, but also of other mobile citizens within the country. So, the urgency of ensuring the electoral rights of internally displaced persons has raised the issue of ensuring the electoral rights of labour migrants within the country, people without registration due to lack of housing and those who have been living in one community for many years but registered in another, and so on. Therefore, it is positive that the bill will provide the opportunity to exercise the right to vote in local elections to a much wider range of voters.

The most important thing in Draft Law No. 6240 is that the place of voting, the election address, is changing. It is proposed to provide that, upon a motivated voter's request, the registry authority may determine another electoral address of the voter than the one according to which the voter's place of residence is registered in accordance with the Law of Ukraine «On Freedom of Movement and Free Choice of Place of Residence in Ukraine». The authors of the bill determine the list of documents confirming the actual residence of the voter at the address indicated in the application: 1) a rental agreement for a residence at the address that the voter

requests to identify him at a new election address; 2) a document issued by a state authority or a local self-government body, which certifies the voter making an entrepreneurial activity at the address of the home that the voter requests to determine at the new election address; 3) a document confirming the right to own a home at the address the voter requests to identify with his new election address; 4) a certificate of registration of the internally displaced person; 5) a document certifying that the voter carries out the caring of a person whose place of residence is registered in accordance with the Law of Ukraine «On Freedom of Movement and Free Choice of Residence in Ukraine» at the address that the voter requests to determine at a new election address; 6) a document certifying the voter's stay in marriage or in a family relationship with a person whose place of residence is registered in accordance with the Law of Ukraine «On Freedom of Movement and Free Choice of Residence in Ukraine» at the address, which the voter asks to identify him at a new election address.

The Main Research and Expert Department supported the proposed approach in the Draft Law on the possibility of determining the voters' electoral address by their actual place of residence, as this will facilitate the exercise of the electoral rights of a large part of citizens. Given that the administration of the state register of voters is carried out on a permanent basis by separate structural subdivisions of the state apparatus, organizational obstacles to the implementation of the tasks specified in the project are also not seen [11]. According to the results of consideration in the first reading, Draft Law No. 6240, according to the specialists of the Main Department, may be adopted in the first reading on the basis of the comments made.

It should be noted that, like any other document, the project 6240 also has some disadvantages. Thus, according to experts, if the project is aimed at improving the conditions for citizens to vote in the elections for their actual place of residence (although it conflicts with the special legislation on registration of place of residence, including the military), then the practical side of the project seems less convincing. It is not clear how the identity of such citizens should be confirmed during the voting procedure, because simple coincidence of the surname, name and patronymic, perhaps, will not be enough. Accordingly, the voter will have to file the documents on the basis of which he was registered at the appropriate address. However, it is unknown whether this will be enough [12]. The provisions of the draft law require other revisions. Thus, it would be advisable to extend the term for voters' access to the Registry bodies during the electoral process, without limiting it to the fifth day since the beginning of the election process [11]. Therefore, part 3 of Article 20 of the Law of Ukraine «On the State Register of Voters» in accordance with the Draft Law No. 6240 is proposed as follows: an application for changing the electoral address may be submitted by the voter to the registry authority whose authority extends to the territory to which the election address is assigned, which will change the current election address of the voter, not later than on the fifth day from the day of the beginning of the election process or the referendum process, held in the territory within which the voter requests to determine his election address.

**Conclusion.** Thus, summarising the situation regarding the above-mentioned issues, it is appropriate to emphasise that the inconsistency of domestic legislation and the lack of an adequate mechanism for the exercise of electoral law in local elections today serves as discrimination against Ukrainian citizens who became forced migrants from the Donbas and Crimea as labour migrants within the state, in general do not have a residence registration, etc. Ensuring the electoral rights of these individuals is crucial for solving a wider range of tasks: the legitimacy of the electoral process in Ukraine. In addition, voting for internally displaced persons is one of the key elements of their integration into the local community. Adoption of the Draft Law 6240 by the Verkhovna Rada of Ukraine on amendments to certain laws of Ukraine (regarding the electoral rights of internally displaced persons and other mobile citizens within the country), with appropriate changes and additions, will contribute to the observance of the constitutional rights of the electorate of internally displaced persons and other mobile groups. Delaying the parliament with the appropriate changes to the current normative legal acts constrains the process of democratization. The next local elections in Ukraine will take place in 2020, but the process of decentralization and association of territorial communities in different regions of the country calls for local elections and in other terms: in 2017, 201 elections were held in the united territorial community, located in all districts where more than 116 thousand internally displaced persons of Ukraine were not able to vote (according to the estimation of the Public holding «Impact Group»). In addition, in Ukraine there are now millions of labour migrants and about 800 thousand Ukrainian citizens who do not have registration at all. With this in mind, at present, virtually the only solution to the problem under consideration is to

make appropriate changes to the legislation of Ukraine by the Parliament, and the delay by the Verkhovna Rada is evidence of non-compliance with international standards in this field and contributes to the restriction of the rights of citizens.

***References***

1. Закірова С. Вибірковість виборчого законодавства в Україні: хто і чому залишається невидимками. *Громадська думка про правотворення.* 2017. № 18 (143) листопад. С. 4.

2. Ковриженко Д. С., Пашкова Н. В., Савелій С. С. Виборчі права внутрішньо переміщених осіб: проблеми та шляхи законодавчого врегулювання. *Вісник Центральної виборчої комісії.* 2017. № 1 (35). С. 48-53.

3. Виборчу реформу та особливості проведення перших виборів в ОТГ обговорили в Ужгороді. URL: http://zakarpattya.net.ua/News/179221-Vyborchu-reformu-ta-osoblyvosti-provedennia-pershykh-vyboriv-v-OTH-obhovoryly-v-Uzhhorodi--FOTO.

4. Ракеш Шарма: 75% ВПО в Україні не бажають втратити свій статус заради виборчих прав. URL: http://www.ukrlife.tv/video/suspilstvo/rakesh-sharma-75-vpo-v-ukrayini-ne-bazhaiut-vtratiti-svii-status-zaradi-viborchih-prav.

5. Керівні принципи Організації Об'єднаних Націй щодо внутрішнього переміщення. URL: http://www.unhcr.org/protection/idps/43ce1cff2/guidingprinciples-internal-displacement.html.

6. Про Державний реєстр виборців: Закон України від 22 лютого 2007 р. *Відомості Верховної Ради України.* 2007. № 20. Ст. 282.

7. Про місцеві вибори: Закон України від 14 липня 2015 р. *Відомості Верховної Ради України.* 2015. № 37-38. Ст. 366.

8. Проект Закону про внесення змін до деяких законів України щодо забезпечення виборчих прав внутрішньо переміщених осіб № 4471 від 19 квітня 2016 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58791.

9. Проект Закону про внесення змін до деяких законів України (щодо виборчих прав внутрішньо переміщених осіб та інших мобільних всередині країни громадян) № 6240 від 27 березня 2017 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61425.

10. Висновок на проект Закону України «Про внесення змін до деяких законів України щодо забезпечення виборчих прав внутрішньо переміщених осіб» № 4471 від 19 квітня 2016 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=587914.

11. Висновок на проект Закону України «Про внесення змін до деяких законів України» (щодо виборчих прав внутрішньо переміщених осіб та інших мобільних всередині країни громадян) (реєстр. № 6240 від 27 березня 2017 р.). URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61425.

12. Експрес-огляд законотворчої діяльності Верховної Ради України. Бюлетень № 118. Законопроекти, зареєстровані в парламенті за період 27.03.2017 – 31.03.2017. URL: http://khpg.org/%20en/index.php?id=1494874473.

*Received to editorial office 01.06.2018*

**Summary**

The article deals with the problems of implementing the electoral rights of internally displaced persons in Ukraine at local elections. The emphasis is also placed on guaranteeing the right to vote in local elections of other mobile groups. It is stressed that equality of citizens in all spheres of social activity, in particular equality of electoral rights, is guaranteed both on the national and international levels. However, the inconsistency of domestic legislation is now discriminating against those citizens of Ukraine who have become forced migrants from the Donbas and Crimea, who are labour migrants within the state, or who do not have registration at all, and so on. It is concluded that the adoption by the Parliament of Ukraine of Draft Law 6240 with the corresponding changes and additions will contribute to the observance of the constitutional right to vote of internally displaced persons and other mobile groups.

***Keywords:*** *electoral law, internally displaced persons, settlers, mobile groups, rule of law, international standards.*

**Olena Marchenko**
Dr of Philos. S.
*(the Dnipripetrovsk State University of Internal Affairs)*

# INTERNATIONAL PRACTICES OF CONCEPTUALIZATION OF THE PHENOMEN OF CORRUPTION

*DOI: 10.31733/2078-3566-2018-2-64-67*

**Марченко О. МІЖНАРОДНА ПРАКТИКА КОНЦЕПТУАЛІЗАЦІЇ ФЕНОМЕНА КОРУПЦІЇ.** Ефективна протидія корупції є однією з найактуальніших проблем сучасності. Водночас недостатнє наукове обґрунтування понятійного апарату досліджень в означеному напрямі та відсутність коректного інструментарію вимірювання об'ємів розповсюдження корупційних діянь призводить до нівелювання державних програм протидії корупції і антикорупційної політики в цілому. У статті досліджено ступінь категоріальної визначеності поняття «корупція» на основі досвіду концептуалізації феномену корупції у міжнародних програмних документах та наукових працях сучасних зарубіжних дослідників. Цінною підтримкою для вирішення складних завдань боротьби із корупцією в українських реаліях є досвід інших країн і та теоретична й методологічна база, яка вже напрацьована європейськими дослідниками.

Автором здійснено спробу виявити глибинні причини недостатньої дієвості антикорупційних програм, що мають теоретико-методологічний і національно обумовлений характер. Досліджується проблема боротьби із корупцією в її глобальному, загальносоціальному вимірі і водночас на прикладі українського досвіду доводиться необхідність розробки обґрунтованої методології дослідження рівня корупції з урахуванням національної специфіки.

***Ключові слова:*** *корупція, протидія корупції, міжнародно-правовий акт, криміналізація корупційних діянь.*

**Formulation of the problem.** Effective counteraction to corruption is not impossible without systemic research of the essential signs and without manifestations of corruption as a negative social phenomenon, and as a result, definition of the concept of "corruption". When Ukraine proclaimed its independence, this concept has become widespread in domestic legal literature, speeches by politicians and leaders of the state.

At the same time, the exact notion of this phenomenon is not invent until now, despite the large number of attempts.

Appeal to the conceptual foundations of international program documents on combating corruption, as well as the conceptual apparatus of foreign research on this issue, will, firstly, reveal the main tendencies in substantiating the essence and meaningful content of "corruption" in criminology at the international level; and secondly, analyze the prospects of categorical certainty of this concept in the national science.

**Analysis of recent research and publications.** M.I. Melnik ("Criminological and criminal-legal problems of counteraction to corruption", 2002) [1], S.S. Cherniavsky "Theoretical and practical bases of the technique of investigation of financial fraud", 2010) [2], V.M. Lischenko ("Evidence in the pre-trial stages of the criminal process in cases of bribery", 2011) [3], Bousol O.Yu. (Countering Corruption Crime in Ukraine in the Context of a Modern Anti-Corruption Strategy, 2015) [4]and others.

In addition, scientific works of L.I. Arkusha, A.V. Haiduk, O.M. Bandurka, O.O. Dulskii, O.G. Kalman, M.I. Kamlika, I.M. Kozyakova, E.V. Nevmerzhitsky, O.Ya. Prokhorenko, A.I, Redka, V.V.Sokurenko, M.I. Havronyuk, as well as foreign scholars B. Volzhenkina, O. Gredeland, A. Zhiganova, M. Kostennikova, R. Klitgard, V. Miler are devoted to the issue of counteraction to corruption.

At the same time, due attention is not paid to the study of approaches to the definition of "corruption" in international legal acts regulating anti-corruption activities in the European legal space. Nowadays' trends in the study of corruption by foreign scholars require more thorough study as well.

**The purpose of the study:** to establish the degree of categorical certainty of the concept of "corruption" based on the experience of conceptualizing the phenomenon of corruption in

international program documents and scientific works of modern foreign researchers.

**Basic material of research.** One of the first international documents in which the definition of the concept of corruption was given was the Code of Conduct for Law Enforcement Officials, adopted by the Resolution of the General Assembly of the United Nations of December 17, 1979. In this document, the notion of corruption is used in the sense of bribery: "Although the notion of corruption should be determined in accordance with national law, it should be understood that it covers commiting or not taking certain action in the performance of duties or in connection with the performance of these duties as a result of getting gifts that are required or accepted, promises or incentives, or their illegitimate receipt every time when such action or inactivity takes place "(Article 7, paragraph "b").

This document is of a recommendatory nature, and the content of the concept of corruption is reduced to bribery in the narrow sense: "The expression" act of corruption "should be understood as reflecting an attempt to bribe" (Article 7, paragraph "c").

Subsequently, the main areas of the fight against corruption were outlined in Resolution No. 7 "Corruption in Public Administration", adopted by the United Nations Congressional Committee on the Prevention of Crime and the Treatment of Offenders, held from August 27 to September 7, 1990. The recommendations set out in this document are of fundamental importance for each State to assess the adequacy of its criminal law and criminal-procedure legislation in order to respond to all types of corruption and ensure that appropriate sanctions are applied. Despite the fact that neither the concept of corruption nor the list of acts recommended for criminalization is not presented in this document, there has been a tendency to define a single set of measures and actions to combat corruption.

An analysis of the experience of conceptualizing the phenomenon of corruption, presented in the scientific works of contemporary foreign researchers, is important to establish categorical certainty of the notion of "corruption". In the scientific article, Liz Campbell, a researcher from the UK, "Current Legal Problems" (2016), provides a thorough analysis of existing approaches to understanding corruption in modern criminology. The author focuses on the definition of corruption by the National Agency for Combating Crime (NCA) of Great Britain, which coordinates the activities of law enforcement agencies in the fight against organized crime.

In the latest National Strategic Assessment, the NCA defines corruption as "the ability of an individual or group to distort the process or function of an organization to achieve a criminal purpose." Such an interpretation of corruption seems broad and general. Draws attention to several important semantic accents, which became the subject of criticism from the author of the article. The focus on "ability" raises the question: how to determine who is capable of such actions, how much such potential is subject to fixation and measurement, under which conditions ability must already be perceived as an attempt of action or action?

Another focus is on the subject of corruption: there is no indication of a public office in the definition, that is, any person or group may be the subject of corruption. The priority for the drafters of a document is a criminal act [5, c.117].

In the last «National strategic estimation» NCA determines a corruption how to distort «ability of individual or groups process or function of organization for achievement of criminal purpose».

Such interpretation of corruption is wide and general. A few important accents which are an object for criticism from the side of author of the article come into a notice. Concentrating of attention on «ability» causes a question: how to define, who is apt at such actions, as far as such potential ability is subject fixing and measuring, what terms ability already must be perceived at as an attempt of action or action?

Other accent touches the subject of corruption: in determination there is not pointing on a public place, that any person or group can be the subject of corruption actions. Is there priority for compilers a document - criminal act [5, c.118].

In determination of NCA we can look after actualization of corruption as such criminal acts which harm a production process and remove key principles of functioning of organization. The author of the article marks correctness of such accent, in fact, on her opinion's, a corruption can be considered criminal and come into the notice of organs of criminal justice only then, when touches a process or functions, carried out organization, but not personal relations.

Drew conclusion an author, that determination of corruption, presented NCA in his state-of-the-art review, can become a starting point in conceptualization of concept, however is not complete.

Going near measuring of corruption is added criticism in the article, in particular methodology of Transparency International, the study of public idea is fixed in basis of which.

An author asks about that, as far as objective, impartial and grounded from point of knowledge of ordinary citizen with the real state of affairs and anticorruption activity of the proper organs of power in that or other professional industry presented in Indexes of measuring of corruption results.

Other researcher, D.-A. Leyn, in the article «Corruption in the article: a new analysis» (Open Journal of Political Science, 2017) is probed by a concept «corruption» on the basis of analysis of the existent going near interpretation of this concept unit both in academic editions, like Oxford Thesaurus and to the accepted methodology of well-known international projects, that determinations of index of corrupted have for an object (Transparency International).

A researcher establishes, that sense of concept «corruption», judging on certificate literature, a «graft» is, however much a synonyms which answers this concept is utterly wide: «crime», «offence», «dishonesty», «falsification», «unscrupulousness», «deception», «swindle», «bribery», «contractual crime» [6, p.158]. Such significance draws «washing out» of concept of corruption and in results it is not understood.

Determination of corruption, which is in by basis of Corruption Perceptions Index (CPI) - To the index perception of corruption, no less wide: «a corruption is cumshawing for the sake of own benefit. Can be skilled variously (large, insignificant, political and others like that), depending on the amount of the lost money and to the sector which it takes place in».

At the same time the corruption acts of civil servants are subject in such indexes research, while a corruption in a private sector remains out of eyeshot societies. In the sector of market, the author of the article marks, with his multinational enterprises and financial institutes, there is a great number of types of rewards, which are in a «grey area» between legality and lawlessness.

«Indemnifications», «commissions», acceptable in activity of powerful corporations and enterprises, often is the hidden corruption with the purpose of receipt a proprietor or other persons of illegal benefit. Consequently, vagueness of concept «corruption», the wide spectrum of his values is drawn by selectivity in a fight against this phenomenon and creates terms for lobbying of interests of powerful corporations in the different sectors of economy [6, p. 161-162].

In scientific research of collective of authors under the title of «Corruption Typology: A Review of Literature» (Chinese Business Review, 2017) it is presented four to typology of corruption acts, most widespread in majority European countries. One of them includes a bribery, cumshawing, «favouratism» (assigning is for positions on the basis of the personal likings, but not professional qualities).

From one this typology the ramified of maintenance of concept «corruption» and wide circle of criminal acts which are interpreted as a corruption becomes obvious. Such determination of corruption is resulted in the article: «it is manipulation with the purpose of to extract the personal benefit due to other (state, organization, citizens), it is actions or inactivity, breach of trust, as a result of which both legal and ethics, obligations are violated for the sake of the personal, political, social or economic benefit» [7, p. 103].

Authors mark that a corruption is the universal for the whole world phenomenon. At the same time interpretation of this phenomenon is different in countries and even within the framework of the legal system of one country which results in appearance of plenty of classifications of corruption actions, and it considerably complicates a fight against a corruption both on international and on national, levels.

**Conclusion.** On the basis of the analysis of international program documents and modern scientific researches devoted to the actual issues of counteraction to corruption, the problematic aspects in the implementation of the formula “definition – measurement – counteraction to corruption” are grounded, which are hindering the state anti-corruption policy in many countries of the world, and in particular in Ukraine.

Domestic and foreign research workers specify on absence of compatible concept of corruption and on his arbitrary interpretation as on failing.

Although in a great deal exactly flexibility of quarantinable formulations allows states-participants to execute the accepted international obligations in relation to criminalization of corruption acts (and not only those, that directly transferred in conventions but also other, conditioned the specific of the national legal system), there is a requirement in the unique universal determination of corruption, in particular at the level of European Union.

Such determination will allow to set the unique general principles, methods, measures of

fight and co-operations of the states, more effective to co-operate on questions delivery of criminals and from the whole package of other questions. At the level of national legislation maintenance of concept «corruption» must open up through the list of acts, which will represent the specific of the legal system of every separate state.

***References***

1. Мельник М. І. Кримінологічні та кримінально-правові проблеми протидії корупції: автореф. дис. … д-ра юрид. наук: 12.00.08 / Нац. акад. внутр. справ. Київ, 2002. 40 с.
2. Чернявський С. С. Теоретичні та практичні основи методики розслідування фінансового шахрайства: автореф. дис. ... д-ра юрид. наук: 12.00.09 / Київ. нац. ун-т внутр. справ. Київ, 2010. 34 с.
3. Ліщенко В.М. Доказування на досудових стадіях кримінально го процесу у справах про одержання хабара: автореф. дис. ... канд. юрид. наук: 12.00.09 / Нац. акад. внутр. справ. Київ, 2011. 22 с.
4. Бусол О.Ю. Протидія корупційній злочинності в Україні у контексті сучасної антикорупційної стратегії: автореф. дис. ... д-ра юрид. наук: 12.00.08 / Ін-т держави і права ім. В.М. Корецького НАН України. Київ, 2015. 39 с.
5. Campbell L. Corruption by Organized Crime'− A Matter of Definition? *Current Legal Problems.* 2016. Vol. 69. No. 1. P. 115–141.
6. Lane Jan-Erik. Corruption: A New Analysis. *Open Journal of Political Science.* 2017. No. 7. P. 157-169.
7. Naziru Suleiman, Zaleha Othman. Corruption Typology: A Review of Literature. *Chinese Business Review.* 2017, Feb. Vol. 16. No. 2, P. 102-108.

*Received to editorial office 20.09.2018*

**Summary**

The degree of categorical certainty of the notion of corruption was researched on the basis of the experience of conceptualization of the phenomenon of corruption in international program documents and scientific works of modern foreign researchers.

***Keywords**: corruption, counteracting corruption, international legal act, corrupt acts criminalization.*

**Eleonora Skyba**
Dr of Philos. S.
*(The Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-67-73*

## CONCEPT OF LEGAL CONSCIOUSNESS IN PHILOSOPHY OF LAW OF BOGDAN KISTYAKIVSKY

**Скиба Е. КОНЦЕПТ ПРАВОСВІДОМОСТІ У ФІЛОСОФІЇ ПРАВА Б. КІСТЯКІВСКОГО.** Охарактеризовано основні характеристики категорій право, правосвідомість. Проаналізовано характеристики ідеї Б. Кістяківського про «живе право». Доведено, що правові категорії і ціннісні орієнтації є структурними елементами правосвідомості учасників суспільних відносин.

Визначено, що у ученні Кістяківського право – це система раціональних принципів. Вони включають базові апріорні категорії свідомості, якими керуються суб'єкти суспільних відносин в повсякденної реальності. Уточнено, що Б. Кістяківський розглядає правосвідомість як сукупність раціональних висновків і душевних переживань особистості, які викликають добровільне прийняття нею зобов'язань.

***Ключові слова:** правосвідомість, природне право, апріорні категорії правосвідомості, живе право, позитивізм.*

**Formulation of the problem.** The development of Ukrainian statehood is characterized by significant changes in the consciousness of the individual and society. At this time, special

attention should be paid to the philosophical comprehension of the reasons for the existence of various types of right thinking. It is philosophy that reflects the problems of social interests formation, the goals of individual development, and analyses the legal principles. The problem of legal justice is very important in today's Ukraine. The study of the problem of legal consciousness allows you to analyze the possibility of raising the level of legal awareness, which will increase the social role of law. An appeal to the works of Bohdan Kistyakivsky is important for understanding the sources of formation, development of the legal consciousness of society. Bohdan Kistiakivsky, Ukrainian philosopher of law and sociologist of Neo-Kantian orientation, was one **of** the organizers of the Academy of Sciences of Ukraine and is famous as one of the prominent scientists on the problems of legal consciousness.

To solve a lot of social and legal problems in today's Ukraine it is necessary to study the in-depth content-psychological mechanisms of social interaction, to analyze causal relationships, motivational means of forming the legal consciousness as an individual and collective one.

**Analysis of recent research and publications.** Different aspects of the problem of legal consciousness were considered in the scientific works of foreign and domestic authors. T. Korshun studied the problems of legal consciousness and natural sources of legal consciousness of B. Kistykivsky, M. Alchuk studied the whole idea of "living Law" and concept of legal consciousness of B. Kistykivsky, V. Datcenko analyzed the problems of social philosophy of B. Kistykivsky, and pointed her attention with the issues of methodology and sociology of Law of B. Kistykivsky, M. Velmer gives of lot of very important ideas on the problem of human rights and democracy formation.

**The purpose of the article.** The purpose of the article is to analyze the metaphysical grounds of legal consciousness in the philosophy of law B. Kistyakivsky. It is necessary to identify the essential characteristics of Kistyakivsky's legal consciousness in order to understand the problems of legal crises. It is important to determine the peculiarities of law in the philosophical and legal concepts of B. Kistyakivsky and to analyze the problem of legal freedom of the individual.

**Presentation of the main material.** At the beginning of the XX century, the new trends in the philosophy of law are arisen and spread of. Philosophers who analyze the general principles of law are increasingly focusing on the concept of legal consciousness as one of the main indicators of the implementation of the idea of law in society. Representatives of various scientific schools determine that the basis of the concept of legal consciousness is grounded on different values. One of such lawyers is Bogdan Kistiakovsky (1868 - 1920), whose works became especially interesting and important in connection with state-building processes in independent Ukraine. He studied at the University of Berlin at the Faculty of Philosophy, listened to seminars at the University of Paris and at the University of Strasbourg and in 1898 he defended his doctoral dissertation "Society and Individuality" in Strasbourg. In February 1917 he defended a dissertation at the Kharkiv University for a degree in Doctor of Public Law. In the last years of his life he was preparing a work entitled "The Law and Science of the Law. Methodological Introduction to the Philosophy of Law", which he called his main book and it was supposed to sum up the scientific discussions of the beginning of the XX century in the sphere of law. It is believed that the only manuscript of the book was destroyed by a fire in the Yaroslavl printing press of 1918, so only a small fragment of the book came to light.

Kistyakivsky studies the main principles of law regulation and concludes that the categories of necessity, obligation, and justice are the main principles of the law regulation, and justice. Studying the problem of universal values, he as a philosopher, and a lawyer, concludes that the concept of human rights is the embodiment of universal values and is the basis for the development of justice in society.

In the doctrine of B. Kistyakivsky the concept of law is a system of rational principles, which built on categories of consciousness and which determine the social relations of subjects in the real legal life. The scientist defines legal consciousness as a cumulative result of the work of categories of consciousness, such as rational conclusions and emotional experiences of the person while taking on legal obligations. Proceeding from understanding of the category of law as rational principles, he distinguishes the following categories of legal consciousness: necessity, obligation, and justice. These categories of consciousness are used by scientist as basic and fundamental for both the individual's legal consciousness and for his system of "living" law.

Freedom is analyzed as a key legal value and a basis of legal consciousness. The purpose of granting freedom in the understanding of Kistyakivsky is to create conditions for the harmonious development of personality. A scientist's approach to determining the priority of a

person or a state is very important for the present-day Ukraine. For Kistyakivsky, the necessity of constructing the legal order in society is connected with the recognition of the priority of the interests of the individual. A mutual understanding of society, personality, and state is very valuable for contemporary pluralism as a social principle. Kistyakivsky believes that any social progress should be carried out in order to achieve individual freedom. Social progress, in his understanding, is the achievement of a higher degree of freedom for each individual. Only such a state of development of society, stresses the scientist, guarantees public justice.

The analysis of B. Kistyakovsky's the ideas, proves that the scientist concentrates his attention on the issues of natural and positive law. The choice between positive and natural law is very important for the formation of philosophical and ideological position for each representative of the philosophy of law. As it was analyzed, in the early period B. Kistyakivsky put all his attention with the methodology of legal positivism. It is evidenced by his involving to sociology, psychology. But law, in his understanding, is not limited to the orders of the authorities or laws of the state. Law is implemented and exists in the real legal application of an individual in real life; in the understanding of laws by each of the members of the society; law is carried out in public relations between subjects. As we can see, for Kistyaksvsky, natural law is the only criterion for verifying the truth of the existing legal orders, rules, and laws.

Kistyakivsky emphasizes the special significance of legal consciousness and notes that it participates in the creation and implementation of law, fills legal norms and general legal principles with human content. Through the legal consciousness, each person represents his own worldview and the level of spiritual culture. The category of legal consciousness reveals an understanding of freedom and a desire for justice.

The whole system of philosophical and legal views of the prominent Ukrainian scientist is determined by the appointment of the right of that sense of justice. According to Kistyakivsky, the law as legal regulator is necessary for the formation of common social values. Legal regulation provides an opportunity to ensure a relatively peaceful existence of a person in society. The main task of the law and order is to ensure the freedom of the individual, creating conditions for non-interference of the state in the life of each person. Such a system creates conditions for non-interference in the life of a person; this allows everyone to form their personality in accordance with their own ideas about the essence of human life.

Adoption of the idea of natural law means the need to address the practical aspects of legal materials and the general problems of person as a subject of law.

The scientist stresses that natural - legal thinking is defined as the ability of the individual to evaluate the current law, and to develop strategies for changing legislation and law and legal rules.

Kistyakivsky introduced the term "living law" into circulation of legal terminology in order to emphasize the opposition of a truly existing law and law documented in the "dead" formal documents. "Living law" is a phenomenological law in its nature. The "living law" exists only in the minds of individuals and differs in the details of the perception of different persons.

Thus, "living law" has a real impact on the legal situation in the country. A legal norm issued by the state should be perceived by the legal consciousness of the country's population. State laws should become an integral part of the legal consciousness of a significant part of the population of the country; in this case they will affect the formation of legal relations in society. Legal norms, acting in the form of categories of independence, necessity, justice are formed and realized in each particular life legal situation, form the person's legal consciousness.

While thinking of the state, B. Kistyakivsky identifies it with the cultural mankind that lives in a cultural union. For a scientist, a cultural man and a state are two concepts, which complement each other: the state is unthinkable without a cultural man, as well as a cultural person can not be understood without a state.

B. Kistyakivsky sets higher requirements for a law-governed state than for other types of state entities. He writes that the rule of law is the highest form of state existence that mankind has made as a real fact. Modern scholars also argue that the rule of law in general is very similar to the constitutional and differs only in certain moments of its perfection.

B. Kistyakivsky does not determine the constitution as one of the most important signs of a law-governed or justice state. The thinker models the justice state on the principles, some of which are well-known and used in world practice. Some of these principles are not yet used by modern justice state. Especially, we should note the ideas of legal culture, social justice, democracy, which are of great importance for the revival and development of Ukrainian political and legal thought.

Characterizing the justice and legal state, B. Kistyakivsky pointed to such an important feature of it as the limited nature and subjugation of power and its impersonal nature.

Firstly, in his opinion, the primary deterrent factor of power is not the laws that restrict power, but it is the inalienable, inviolable, rights of the individual. These rights are not granted by the state, but are natural and must be regulated.

Secondly, B. Kistyakivsky wrote that a legal state is not only a state that limits itself to standards established by its own will and fulfills these norms. In the modern legal state not individuals govern, but general rules or legal norms govern So, the state must turn into a legal phenomenon, where every act of the government apparatus, court and other official body is determined and ruled by the relevant law, which coincide with the constitutional principle.

In general, B. Kistiakivsky paid special attention to the legislative, as the representative body of the state. He believed that the Parliament should carry out the management of state affairs through the people when involving them into state govern. Therefore, he considered Parliament as the most important branch among the three branches of power.

B. Kistyakivsky believed that citizens should execute their right to manage state affairs, depending on their own legal culture, and sense of responsibility. They should do it through political parties, public organizations. Therefore, in a rule of law, there should be a large variety of non-state structures. Particularly, the work of parties should be directed at socially pushed elements that could, with their help, influence the state life.

In a law-governed, legal state, the law must be entirely subordinated to the people. B.Kistyakivsky grants citizens all political rights of the personality, which are written down in the Constitution of Ukraine in 1996.

B. Kistyakivsky wrote that no restrictions on electoral law can be inadmissible. He maintained progressive views on the inadmissibility of any qualifications, unjustified restrictions on the right to elect and to be elected.

Kistyakivsky called for an increase level of legal consciousness among the people, the conviction in people's greater respect for the law and human rights. To achieve this aim it is necessary strive to the strengthening the sense of responsibility, recognition of the importance of state and national interests, strengthening social and social awareness, and most importantly thing, we should activate national solidarity.

B. Kistyakivsky, speaking about the state, identifies the state as the cultural mankind that lives in a cultural union. For a scientist, a cultural man and a state are two concepts, which complement each other: the state is unthinkable without a cultural man, as well as a cultural person cannot be thought without a state.

Especially we should note the ideas of legal culture, social justice, democracy, which are of great importance for the revival and development of Ukrainian political and legal thought.

Characterizing the rule of law, B. Kistyakivsky pointed to such an important feature as the limited nature of law and subjugation of power and its impersonal nature. Thinking of the question what B. Kistyakivsky meant by using such concepts we can see the following.

In his opinion, the primary factor of limiting power is not the laws that restrict power, but the inalienable, inviolable, rights of the individual. These rights are not granted by the state, but are natural and regulated obligatory.

The legal means to achieve the above-mentioned ideas the scientist believed to be the following:

- the inviolability of the person (the duty of the state to the person);
- realization of the people's right to the public's representation;
- solidarity of the authorities and solidarity of the nation: the guarantee of this solidarity is the universal vote right executed through equal, direct and secret voting;
- participation of the people in the process of lawmaking and govern.

B. Kistyakivsky wrote that it is necessary every person strives and only then the person will be ready to dare. So, the person will be free. The purpose of social development is not that the members of society wait for charity from the side of society, but that no members will expect or look for charity. In a legal state the responsibility for the proper functioning of the law depends on the people themselves.

The people must participate in the creation and organization of state institutions. People should be interested in state affairs, because, according to B. Kistyakivsky the organization of the legal state depends on the will of the people. Without an active attitude to the legal order and public interests that comes from the consciousness of the people the rule of law is unthinkable.

Consequently, the rule of law arises under the condition of a high level of legal awareness and the presence of people with a developed sense of political responsibility. In his work "For the Protection of Law" B. Kistyakivsky analyzes the legal consciousness of society at the beginning of the twentieth century and concludes that the biggest disadvantage of legal norms is that they express only the external form of law and do not express the legal beliefs of the people, and therefore do not stimulate people to respect and to comply with the law. Therefore, he believed, the crisis of jurisprudence is caused by the crisis of the legal consciousness of society.

Scientific works are devoted to the theory of law and sociology. He wrote on political topics and defended the rule of law and democratic principles, defended the finality of the constitution, criticized the "poverty of legal consciousness".

An integral part of B. Kistiakivsky's theory of law is his concept of a law-governed state. The state is a legal organization of the people, which fully owns its own power, and not dependent on power. All cultural human beings lived and live in state units, where man and state are two concepts that complement each other. So, the cultural person cannot be understood without the state. Kistyakivsky was negatively concerned with the notions of the state as a merciless despot. State must not be organization that has the aim to suppress the economically weak and poor. He saw the real task of the state in realizing the solidarity interests of people.

Kistyakivsky demanded to clearly distinguish the notion of "sovereignty", or the rule of the people and "autocracy of the people", warned that their identification could return autocracy of the people, whose despotism is more terrible than the despotism of one person. Ideas of unlimited people's power contrasted with the principle of popular sovereignty: the connection of state power in a legal society with the people, its participation in the organization of state power through elections on the basis of universal equal suffrage, the establishment of state institutions through the people's representation. Only with the support of the people and in support of the state power in the rule of law remains power, keeps its own and independent value, creating a certain unity with the people. The unity of power with the people always remains the main goal and the basic aspirations of all the rule of law.

Kistyakivsky called for raising the level of legal awareness among the people, his conviction in his greater respect for the law, his and other rights, strengthening the sense of responsibility, recognition of the importance of national and national interests, strengthening social and social responsibility.

Kistyakivsky emphasizes the special significance of legal consciousness and notes that it participates in the creation and implementation of law, fills legal norms and general legal principles with human content. Through the legal consciousness, each person represents his own worldview and the level of spiritual culture. The category of legal consciousness reveals an understanding of freedom and a desire for justice.

The whole system of philosophical and legal views of the prominent Ukrainian scientist is determined by the appointment of the right of that sense of justice. According to Kistyakivsky, the law as legal regulator is necessary for the formation of common social values. Legal regulation provides an opportunity to ensure a relatively peaceful existence of a person in society. The main task of the law and order is to ensure the freedom of the individual, creating conditions for non-interference of the state in the life of each person. Such a system creates conditions for non-interference in the life of a person; this allows everyone to form their personality in accordance with their own ideas about the essence of human life.

Adoption of the idea of natural law means the need to address the practical aspects of legal materials and the general problems of person as a subject of law.

The scientist stresses that natural - legal thinking is defined as the ability of the individual to evaluate the current law, and to develop strategies for changing legislation and law and legal rules.

Kistyakivsky introduced the term "living law" into circulation of legal terminology in order to emphasize the opposition of a truly existing law and law documented in the "dead" formal documents. "Living law" is a phenomenological law in its nature. The "living law" exists only in the minds of individuals and differs in the details of the perception of different persons.

Thus, "living law" has a real impact on the legal situation in the country. A legal norm issued by the state should be perceived by the legal consciousness of the country's population. State laws should become an integral part of the legal consciousness of a significant part of the population of the country; in this case they will affect the formation of legal relations in society. Legal norms, acting in the form of categories of independence, necessity, justice are formed and realized in each particular life legal situation, form the person's legal consciousness.

While thinking of the state, B.Kistyakivsky identifies it with the cultural mankind that lives in a cultural union. For a scientist, a cultural man and a state are two concepts, which complement each other: the state is unthinkable without a cultural man, as well as a cultural person can not be understood without a state.

B. Kistyakivsky sets higher requirements for a law-governed state than for other types of state entities. He writes that the rule of law is the highest form of state existence that mankind has made as a real fact. Modern scholars also argue that the rule of law in general is very similar to the constitutional and differs only in certain moments of its perfection.

B. Kistyakivsky does not determine the constitution as one of the most important signs of a law-governed or justice state. The thinker models the justice state on the principles, some of which are well-known and used in world practice. Some of these principles are not yet used by modern justice state. Especially, we should note the ideas of legal culture, social justice, democracy, which are of great importance for the revival and development of Ukrainian political and legal thought.

Characterizing the justice and legal state, B.Kistyakivsky pointed to such an important feature of it as the limited nature and subjugation of power and its impersonal nature.

Firstly, in his opinion, the primary deterrent factor of power is not the laws that restrict power, but it is the inalienable, inviolable, rights of the individual. These rights are not granted by the state, but are natural and must be regulated.

Secondly, B.Kistyakivsky wrote that a legal state is not only a state that limits itself to standards established by its own will and fulfills these norms. In the modern legal state not individuals govern, but general rules or legal norms govern So, the state must turn into a legal phenomenon, where every act of the government apparatus, court and other official body is determined and ruled by the relevant law, which coincide with the constitutional principle.

In general, B. Kistiakivsky paid special attention to the legislative, as the representative body of the state. He believed that the Parliament should carry out the management of state affairs through the people when involving them into state govern. Therefore, he considered Parliament as the most important branch among the three branches of power.

B.Kistyakivsky believed that citizens should execute their right to manage state affairs, depending on their own legal culture, and sense of responsibility. They should do it through political parties, public organizations. Therefore, in a rule of law, there should be a large variety of non-state structures. Particularly, the work of parties should be directed at socially pushed elements that could, with their help, influence the state life.

In a law-governed, legal state, the law must be entirely subordinated to the people. B.Kistyakivsky grants citizens all political rights of the personality, which are written down in the Constitution of Ukraine in 1996.

B.Kistyakivsky wrote that no restrictions on electoral law can be inadmissible. He maintained progressive views on the inadmissibility of any qualifications, unjustified restrictions on the right to elect and to be elected.

He points that the state must not oppress a person. As Kistyakivsky stresses, a person must have the right to legal protection from the state. But the scientist did not support the idea of the passive behavior of a person in relations with state bodies. He opposed paternalism in the relations between the individual and the state. B.Kistyakivsky wrote that it is necessary every person tries to achieve his public recognition; as the next step, the person must overcome his fears to be involved in public life; and only then he will be free. The purpose of social development is not that members of society obtain charity from the society, but that nobody expected or waited for charity but was the responsible for legal state functioning.

**Conclusion.** Ukrainian society is not yet ready to be a civil society due to the low legal culture, lack of awareness of citizens with their own rights and inability to defend them. The discrepancy between the level of the legal culture of citizens and the existing regulatory framework can undermine all the efforts of legislators to bring our state closer to legal state. B. Kistyakovsky's ideas about the rule of law have acquired not only scientific but also practical value and are an important stimulus for Ukraine's advancement to its constitutional ideal.

The process of formation of the rule of law is difficult, because, first of all, in order to achieve the goal, political and legal reforms in Ukraine are needed. Consequently, one can not but mention the close connection between the formation of the rule of law, the social interests of the people and culture (including the legal) of society as a whole.

***References***

1. Алчук М. Філософія права Б. Кістякківського. Львів: Вид-во ЛНУ ім. Івана Франка, 2010. 300 с.
2. Даценко В. Соціальна філософія Б. Кістяківського. *Гуманітарний журнал.* 2009. № 2. С. 99-105.
3. Кістяківський Б. Методологія та соціологія права. Вибрані твори. Київ: Абрис, 1996. С. 97-274.
4. Kistykivsky B. Society and Individual. *Cocis.* 1996. № 2. P. 9-274.
5. Коршун Т. Природні джерела правосвідомості І. Ільїна та Б. Кістяківського. *Філософія. Культура. Життя.* 2012. Вип. 37. С. 85-99.
6. Велмер М. Права людини і демократія. Київ: Ніка-Центр, 2008. 212 с.

*Received to editorial office 01.06.2018*

**Summary**

Characterized by the main characteristics of categories of law, legal consciousness. The characteristics of Kistyakovsky's idea of "living law" are analyzed. It is proved that legal categories and value orientations are structural elements of the legal consciousness of participants in social relations.

It is determined that in the teachings of Kistyakovskii law is a system of rational principles. including the basic a priori categories of consciousness, which guided the subjects of social relations in everyday reality. It is clarified that Kistiakovskiy regards the sense of justice as a set of rational conclusions and emotional experiences of the individual causing its voluntary acceptance of its obligations.

***Keywords:*** *legal consciousness, natural law, a priori categories of justice, living law, positivism.*

**Yuriy Viznytsya**
Ph.D., As. Prof.
*(the Kryvyy Rih Faculty of the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-73-77*

## CRIMINAL AS AN ELEMENT IN HYBRID WAR

**Візниця Ю. ЗЛОЧИННА ДІЯЛЬНІСТЬ ЯК СКЛАДОВА ГІБРИДНОЇ ВІЙНИ.** Аналізується кримінальна діяльність як складова сучасної гібридної війни. Окрему увагу приділено ролі злочинності в збройному протистоянні на Сході України, завданням, що стоять перед правоохоронними органами в цьому процесі.

Метою дослідження є визначення місця і ролі кримінальної діяльності в гібридній війні, зокрема на прикладі російсько-українського збройного протистояння на Сході України.

На полі бою в сучасному збройному конфлікті поряд з регулярними військами з'являється безліч нових дійових осіб – іррегулярні формування повстанців і бойовиків, кримінальні банди, міжнародні терористичні мережі, приватні військо-промислові компанії та легіони іноземних найманців, підрозділи спецслужб різних країн світу, а також військові контингенти міжнародних організацій. На Заході новий тип війни отримав назву «гібридної війни». **.** Метою цього дослідження є визначення місця і ролі кримінальної діяльності в гібридній війні, зокрема на прикладі російсько-українського збройного п Гібридну війну у загальному вигляді розуміють як воєнні дії, що здійснюють шляхом поєднання мілітарних, квазімілітарних, дипломатичних, інформаційних, економічних та інших засобів з метою досягнення стратегічних політичних цілей. Специфіка такого поєднання полягає в тому, що кожний із військових і невійськових способів ведення гібридного конфлікту застосовується у воєнних цілях та використовується як зброя. Перетворення на зброю (weaponization) відбуваються і в медійній сфері. Розмитість і невизначеність природи сучасних конфліктів відбивається у множинності термінологічних назв для широкого спектра явищ: гібридна війна, конфлікти у «сірій зоні», або «сірі війни» (graywars), необмежені конфлікти (unrestrictedconflicts) та ін., що мають на меті відрізнити сучасні війни від традиційних, або конвенційних, видів збройних конфліктів. Застосування додаткових термінологічних «наліпок» для нинішніх конфліктів, їхнє нав'язливе повторювання поза поглибленою рефлексією над сутністю справи змушує деяких експертів сумніватися, чи варто взагалі говорити про появу нових форм ведення війн. Дехто з військових теоретиків категорично відмовляє гібридним війнам у сутнісній специфіці, інші наполягають на тому, що така специфіка

існує. Розгляд відмінностей у розумінні нових, "змішаних", форм ведення бойових дій дозволяє поставити питання про наявність у сучасних під- ходах до гібридної війни принципово різних стратегічних перспектив, залежно від позиції сторін у конфлікті та їхніх цілей, а також про вплив позиції учасника конфлікту на формування стратегій протидії гібридним загрозам і гібридному нападу.

У статті робиться висновок, що ситуація як у районі проведення АТО, так і в інших регіонах країни поки що залишається складною і вимагає дедалі більших зусиль від українських спеціальних служб та правоохоронних органів щодо упередження загроз, викриття справжніх намірів противника, своєчасного виявлення та припинення розвідувальної, диверсійної, терористичної та іншої протиправної діяльності проти нашоїдержави.

***Ключові слова:*** *злочинна діяльність, гібридна війна, непрямі дії.*

**Formulation of the problem:** Criminal activity as a social phenomenon has amultidimensional nature. According to many modern researchers, criminalactivities can be seen as part of a hybrid war along with otherscomponents of direct and indirect action against a potential enemy.

**Analysis of publications that start to solve this problem.** On the battlefield in a modern armed conflict along with regulartroops there are many new actors - irregular formationinsurgents and militants, criminal gangs, international terrorist networks,private military-industrial companies and legions of foreign mercenaries,units of special services from different countries of the world, as well as military contingentsinternational organizations. In the West, a new type of war has been called "hybrid war ".

Conceptual basis of this war during the XXI century is enlighten in American military theorists R. Glen, J. Gordon,D. Kilcullen, J. McQueen, J. Mattis, J. Matsumura, W. Nemet, E. Simpson,R. Wilkie, N. Freier, F. Hoffman, Norwegian Specialist G. Carlsen,the Netherlands – Frankvan Kappen et al. Although some foreign scholars (K. Lowe, P.Mansour, W. Murray, N. Yamaguchi, and others) believe that the concept for the theory of military art does not give anything new, as one or another hybrid threats and forms of hostilities already existed in military affairs [1, p.114].

**The purpose** of our study is to determine the place and role of the criminalactivity in the hybrid war, in particular on the example of Russian-UkrainianArmed Conflict in the East of Ukraine.

**Presenting main material.** In the preface to his book "StrategyIndirect Action "(1954) an outstanding British military historian and theoristBasil H. Lidell-Hart wrote: "When I researched the experience of manymilitary companies and for the first time realized the superiority of indirect action over the direct,I just managed to more fully disclose the essence of the strategy. However, with morein-depth study, I began to understand that the method of indirect action had much morethe application that he is the law of life in all areas, philosophical truth.It serves as the key to solving any problem that is decisivethe factor of which is a person when opposing interests can lead toconflict. In all such cases, direct pressure causes sustained resistance,thus increasing the difficulty of changing views. Change viewsis achieved more easily and quickly by invisible penetration of a new idea ora means of controversy, in which the instinctive opposition of an opponent overcomes bypassing by. The method of indirect actions is the same basic mode of action in the industrypolitics, as well as in the relationship between man and woman. Success in trading will bebigger, if it is possible to bargain, than when there is no such an opportunity.

As in the war, the goal is to loosen the resistance beforetrying to overcome it ". [2, p.4].

A combination (or "hybrid") of direct armed, military action withindirect means of achieving military-political goals is not such a modern innovation. It is known since ancient times, since the times of Sun-Tzu and Thucydides. But the transformation of the idea of a "hybrid war" from an exquisite historical oneanecdote or the theoretical construction of the cruel reality we found on ourseyes and broke into our everyday life together with the beginning of Russian aggression inCrimea and the East of Ukraine.

The hybrid war in general terms is understood as a military action thatcarried out by a combination of militaristic, quasi-militaristic, diplomatic,informational, economic and other means to achieve strategic goalspolitical goals. The specificity of such a combination is that each ofmilitary and non-military methods of conducting a hybrid conflictused for military purposes and used as weapons. Convert toweapons (weaponization) occur in the media sphere. British researcherthe information component of Russian aggression P. Pomerantsev uses the

termweaponizationof media, that is the use of media as weapons. [3, p.22] Similarly, onour opinion, all non-military weapons are used as non-weapons means of conducting a hybrid war.

The blurriness and uncertainty of the nature of modern conflicts is reflected inplurality of terminological names for a wide range of phenomena: hybrid warfare,conflicts in the gray zone, or gray wars, unrestricted conflicts etc., aimed at distinguishing modern wars from traditional, or conventional, types of armed conflicts. Additional terminological "clips" for current conflicts, theirs an intrusive repetition of a deep reflection over the essence of the affair forcing some experts to doubt whether it is worth talking about the appearance at all new forms of warfare? Some of the military theoreticians categorically refuses hybrid wars in their essential specifics, others insist onthat such a specificity exists. Unacceptable for many experts there is abusethe term "hybrid war", they consider it an ordinary war that is reinforcedmodern advanced technologies and combined with conscious usevulnerable places of security structures of the modern worldTactics of hybrid war with the combination of heterogeneous military and non-militarymeans and by itself is not new. Innovation, as the Russian-Ukrainian aggression is the purposeful use of modern features security environment for conducting hybrid military operations in the territories of countries with undefined, buffer, space - between states with democratic andauthoritarian regimes. Buffer countries were even in the bipolar worldsource of increased danger. And in a globalized world and hybridthe wars of the existence of such buffer entities have increased significantly, which,together with the ruined system of reliable international guarantees, puts underquestion any idea of using the latest division of the world between the great powers as an instrument for international stabilization.

In the conditions of this war it becomes impossible to distinguish the right from the guilty, the enemies fromallies, ordinary civilians from militants and suicide bombers.

Hidden or open external military intervention, carried out by gangsfighters of neighboring countries with the support of high-tech intelligence andThe impression made by some developed countries of the world gives such an armed manthe conflict is even more complicated and ambiguous. With contentmilitary action in the war of this type is not the physical destruction of the armed forcesan enemy, and demoralization and the imposition of their will on the population of the state.

On the battlefield in a modern armed conflict along with regulartroops there are many new actors - irregular formationinsurgents and militants, criminal gangs, international terrorist networks,private military-industrial companies and legions of foreign mercenaries,units of special services from different countries of the world, as well as military contingent'sinternational organizations. In the West, a new type of war has been called "hybridwar ". Conceptual basis of this war during the XXI century first of all, engaged in American military theorists R. Glen, J. Gordon,D. Kilcullen, J. McQueen, J. Mattis, J. Matsumura, W. Nemet, E. Simpson,R. Wilkie, N. Freier, F. Hoffman, Norwegian Specialist G. Carlsen,the Netherlands - Frank van Kappen et al. Although some foreign scholars (K. Lowe, P.Mansour, W. Murray, N. Yamaguchi, and others) believe that nothing newthe concept for the theory of military art does not give, as one or another hybridthreats and forms of hostilities already existed in military affairs [3, p.114]. Byin the words of Lieutenant Colonel of the US Marine Corps U.Nemeta, hybridthe war is a "modern kind of guerrilla warfare" that "unites moderntechnologies and modern methods of mobilization ". N. Freire of the Center for Strategic and Strategic StudiesInternational Studies (USA) identified four threats to the hybrid war: 1) traditional; 2) non-standard; 3) terrorism and 4) subversive when usedtechnology to counter the benefits of military force. D. Kilkallen, author of the bookThe "TheAccidentalGuerilla" claims that the hybrid war -it is better to identify contemporary conflicts, but emphasizes that it isa combination of partisan and civil wars, as well as rebellion andterrorism"A hybrid war is a blend of classical warfare withusing irregular armed formations. The state that leads the hybridwar, concludes a conspiracy with non-state actors - militants, groupsthe local population, organizations with which the formal connection is completelydenied. These performers can do such things as the state itself to docan not, because any state is obliged to adhere to Geneva andThe Hague Conventions on the laws of the land war, agreements with otherscountries. All dirty work can be transferred to the shoulders of non-stateformations, "explains the retired Major-General Frank van Kappen, former security advisor to the UN and NATO. That is how Russia acted in the Crimea, the same - on the Donbass.

Member of the Center for Strategic Studies at the UniversityNational Defense (USA) F. Hoffmann characterizes the hybrid war as a"A complete arsenal of various types of hostilities, including conventional capabilities,irregular tactics and formation; terrorist acts (including

senselessviolence and coercion) and a criminal mess "[4]. Hybrid War can beconducted both by the state and by various non-state actors. According toHoffman, the hybrid war combines five elements: 1. Modality againststructures: Does the definition have a focus on methods of combatthe enemy or its structure (combinations of states, non-state actors, foreign militants)? 2. Simultaneousity: Do forces use at the same timeFour different conflict modes or demonstrate the ability to useall four during the campaign? 3. Mergence: Should forces combine differentdivisions (regular and irregular) in the arena of fighting or mixing differentConflict regimes? How much coordination should be introduced and at what levelwar? 4. Complexity: Should the actor mix all four modes, orthree of them enough to make the war hybrid? 5. Crime: Whether the deliberate choice of a regime of conflict is a crime, or thisjust a source of income or support for gangsters?In our opinion, in the context of what we have already mentioned about the "hybrid"war, it is important that, firstly, it combines conventional and non-conventionalfighting and the corresponding participants in this war (along with the armed forcesactive actors are terrorists, mercenaries, partisans, militia,banditry, special forces of other states, etc.); and secondly, the beginning"Hybrid" war is associated with the use of non-conventional methods of conductcombat operations by illegal armed formations; Thirdly, overthe whole "hybrid" war is very important for the struggle for reason andsouls of people, that is, information struggle, where the main actorsnot civilians but also civilians: television, the Internet, other meansmass communication.

As noted above, the components of the hybrid warfare also belongcriminal activity, the consequences of which are a means of powerful influence onpublic opinion. Failure of the state to stop the criminal messgenerates distrust both to law enforcement bodies and to the state as a whole, destroys social optimism, weakens the ability of society to be exhaustingconfrontation with a strong and dangerous enemy.

Modern crime in Ukraine is characterized by a high level, unfavorable dynamics and structure. So, for 11 months in 2016 it wasregistered 584.8 this. crimes, while for the same period of 2015 -515.4 thousand (excluding the temporarily occupied territories). It is the highestindex since 1997. Average annual absolute growthcrime in 2013-2016 is 32.4 thousand, the average growth rate -1,021, average growth rate - 2,1 %. [5]. Despite the negative tendency, nevertheless taking into account the effect of such powerful factors as deepthe economic crisis, and the factors associated with the war, the statistics are no "explosion"crime does not reflect. In 2013, the disclosure of three of each was recordedfour crimes committed. In 2016, the number of crimes revealed isa quarter of the fixed. It is difficult to notice the interdependence betweenthe effectiveness of law enforcement and indicators of crime.

At the same time, the "resonant" crimes, the criminal chronicle became more frequent-crowded with dramatic plots, the public is confident thatreturn "bad 90s".

In 2016, no organizer or participant was convictedorganized group (OG) or criminal group (CG). As you know, in 2015 it wasthe units of the Ministry of Internal Affairs for the fight against organized crime were liquidated.

In 2010, the activities of 40 OG and CGs with transnational connections were exposed, 2014-28, 2015-4, 2016-4. Not disclosed 92% of them. The situation as in the area ofantiterrorist operation, as well as in other regions of the country, remains complexand requires more and more efforts from the Ukrainian special services andlaw enforcement agencies for the prevention of threats, the disclosure of genuineintentions of the enemy, timely detection and termination of the intelligence,sabotage, terrorist and other criminal activities against our state.

One of the characteristic features that, in our opinion, makes it possible to understandthe specifics of the mood of the media environment in relation to the criminal statussociety and law enforcement activities. In 2016, it increased by 60%the number of crimes related to the prevention of professional activityjournalists.

**Conclusions.** Consideration of differences in the understanding of new, "mixed" forms.

The conduct of hostilities makes it possible to raise the question of the availability of modern sub-moves to the hybrid war of fundamentally different strategic perspectives, depending from the position of the parties to the conflict and their goals, as well as the influence of the position of participant in the conflict on the formation of strategies to combat hybrid threats andhybrid attack.

Situation both in the area of antiterrorist operation, and in other regions of the country so far remains complicated and requires more and more effort from the Ukrainian special services and law enforcement agencies to prevent threats, Revealing the true intentions of the enemy, timely detection andthe cessation of intelligence, sabotage, terrorist and other pro-the

original activity against our state.

Of course, we are far from thinking for every crime, evenresonant, necessarily "the hand of Moscow". However, in a hybrid environmentwar, the fight against crime, given its destructive socialconsequences, plays an important role in protecting national interests.

***References***

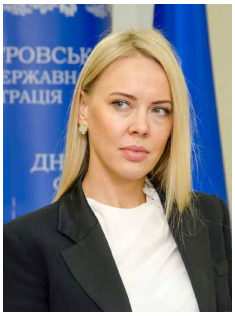
1. Требін М.П. «Гібридна» війна як нова українська реальність. *Український соціум*. 2014. № 7. С. 113-121.
2. Лиддел-Гарт Б.Х. Стратегия непрямых действий. М. 1957. 540 с.
3. Померанцев П. Нічого правдивого і все можливе. Львів: Видавництво Українського Католицького Університету, 2015. 362 с.
4. Хоффман Ф. Гибридная война и ее вызовы. URL: https.// public/wikireading.ru / 1236235.
5. Бесчастний В. Кримінологічний аналіз стану злочинності в Україні. *Підприємництво, господарство і право.* 2017. № 1. С. 207-213.

*Received to editorial office 01.06.2018*

**Summary**

The article analyzes criminal activity as a component of modern lifehybrid war. Particular attention is paid to the role of armed crime in the confrontation in the East of Ukraine, the challenges aheadlaw enforcement agencies in this process.

***Keywords:*** *criminal activity, hybrid war, indirect tacticsaction.*



**Iryna Gritsay**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-77-81*

## PRINCIPLE OF GENDER EQUALITY IN THE ARMED FORCES OF UKRAINE: PROBLEMS AND PROSPECTS

**Грицай І. ЗАСАДИ ГЕНДЕРНОЇ РІВНОСТІ У ЗБРОЙНИХ СИЛАХ УКРАЇНИ: ПРОБЛЕМИ ТА ПЕРСПЕКТИВИ.** Розкрито сутність гендерної політики у Збройних Силах України, проаналізовавно нормативно-правову основу гендерної рівності у Збройних Силах України.

Наголошено, що протягом останніх десятиліть в українському суспільстві відбуваються суттєві зміни в осмисленні та легітимації гендерних відносин. Демократичне суспільство повинно надавати жінкам і чоловікам рівні можливості брати участь в усіх сферах життя, у тому числі, і в Збройних Силах України, миротворчому процесі. Нині жіноцтво представлене на всіх напрямах встановлення миру та забезпечення врегулювання конфлікту, а саме: у політичному, волонтерському та власне військовому напрямах.

Підкреслено, що правові засади державної політики, спрямованої на досягнення гендерної рівності Збройних Силах України, можуть бути умовно поділені на такі основні складові: конституційно-правові акти, які визначають загальні засади державної політики, спрямованої на утвердження гендерної рівності у суспільстві; міжнародно-правові стандарти гендерної рівності, які закріплені в міжнародних актах, прийнятих на глобальному та регіональному рівнях; спеціальні акти військового законодавства, які безпосередньо регулюють реалізацію гендерної політики у Збройних Силах України.

Акцентовано, що Україна взяла низку міжнародних зобов'язань, які повинна виконувати, у тому числі, стосовно забезпечення рівних прав та можливостей жінок і чоловіків. Відсутність рівних прав щодо вступу на військову службу з'являється вже на етапі вибору освіти. Конституція та низка законів теоретично гарантують рівний доступ чоловіків та жінок до вищих навчальних уста-

нов, що готують офіцерський склад Збройних Сил України, але практика дуже відрізняється від теорії, оскільки на законодавчому рівні передбачено набір до військових освітніх закладів лише юнаків. Тобто ці підзаконні акти суперечать Конституції та іншим законам України та гендерної політиці держави.

Гендерна політика у Збройних Силах України є складовою загальної гендерної політики держави. Одним із основних напрямів впровадження гендерного аспекту у Збройні Сили України є удосконалення законодавства з питань забезпечення рівних прав жінок і чоловіків щодо участі в державному управлінні у сфері воєнної безпеки, забезпечення рівних можливостей на етапі вибору освіти у військових освітніх закладах, під час проходження служби, так і під час перебування у військовому запасі та поєднання професійних і сімейних обов'язків в процесі проходження військової служби.

***Ключові слова:*** *рівні права та можливості, гендерна рівність у Збройних силах України, військовослужбовці, гендерна політика держави.*

**Formulation of the problem.** Over the past decades, significant changes have occurred in the Ukrainian society in understanding and legitimizing gender relations. The institute of the Army is no exception, as during the period of social problems and military conflicts it is important to integrate professionally and take into account the interests of those categories of citizens who are involved in the resolution of conflicts and the establishment of peace in the country. Democratic society should provide women and men with equal opportunities to participate in all areas of life, including the Armed Forces of Ukraine, the peacekeeping process. Today, women are represented in all areas of peace and conflict resolution, namely in the political, volunteering and military directions.

**Analysis of recent research and publications.** Any reform measures in the state, including those in the national troops, which are now especially relevant for our country, should at least take into account the latest scientific achievements and research proposals that are rational for a particular stage of development. The most famous foreign experts in the field of the study of the process of women's integration into the army are the following: M. Binkin, A. Davin, R. Egnell, C. Enloe, E. Jackson, D. Mitchell, A. Mulrain, V. Nielsen, D. Parker, M. Rustad and others. Ukrainian researchers and scholars are also looking for solutions to the problem of gender equality in the military sphere. But despite the attention of specialists to this topic, it is still very debatable and under-researched at the present time. Authors such as L. Batrakova, N. Vavilova, Z. Vashurina, S. Vykhor, V. Voshchevska, N. Dubchak, G. Grytsenko, O. Diachenko, A. Kvit, Yu. Kalagin, N. Klimenko, V. Krotykov, V. Kutsenko, V. Maliuga, T. Martseniuk, I. Modnikova, O. Oliinyk, E. Ponuzhdaev, S. Rykov, Yu. Savchenko, O. Seniavska, O. Smirnov, R. Tkachuk, V. Topalskyi, O. Shestopalova and others paid attention to some areas of women's service in the army, the gender equality of women and men in the armed forces. The lack of gender balance in the domestic army requires close attention from academics. The large-scale involvement of women in military service is characteristic of a number of countries of the world, which determines the study of foreign practices in this field and requires further thorough socio-political analysis in the context of political discourse.

**The purpose of the article** is to analyse the legal and regulatory framework of gender equality and justice in the Armed Forces of Ukraine, to highlight the problems of ensuring equality at the stage of entering military educational institutions, while on active duty and inactive duty.

**Presenting main material.** The idea and value of gender equality is realised, first of all, at the state level. The state gender policy is aimed at ensuring equal rights and opportunities for men and women. The legal principles of state policy aimed at achieving gender equality and justice in the Armed Forces of Ukraine can be conditionally divided into the following main components: constitutional and legal acts that define the general principles of state policy aimed at strengthening gender equality in society; international legal standards of gender equality, which are enshrined in international acts adopted at the global and regional levels; special acts of military legislation, which directly regulate the realisation of gender policy in the Armed Forces of Ukraine [1, p. 26].

In line with the Millennium Development Goals, which were set at the UN Millennium Summit in September 2000 and must be reached by 2015, Ukraine has also identified "gender equality" among its six goals [2]. Another important commitment of Ukraine concerns the ratification of the most famous international instrument on women's rights – the United Nations Convention on the Elimination of All Forms of Discrimination against Women [3]. The National Review of the Implementation of the Beijing Declaration and Platform for Action

on Women also notes that despite the accession to international agreements and the adoption of national legislation on equal rights and opportunities for women and men, there is a lack of political will to implement gender reforms, a low level of women's representation in the public and political life, and the resilience of stereotypes about the distribution of roles of men and women in society and family (which are spread through education and the media) [1, p.7].

The importance of attracting attention to the issue of gender-based violence is confirmed by special documents of international organizations: UN Security Council Resolution 1325 "Women, Peace, Security" (2000) [4] and Recommendation No. 30 to the UN Convention on the Elimination of All Forms of Discrimination against Women. The resolution was the first document in which it was recognised that during armed conflicts women needed special protection. At the same time, the resolution called for women to be promoted as special representatives, diplomats, negotiators to attend the official peace talks and represent the interests and needs of women during such negotiations.

On February 24, 2016, the Cabinet of Ministers of Ukraine approved the National Action Plan for implementing the UN Security Council Resolution 1325 "Women, Peace and Security" for the period until 2020 [5]. The National Action Plan seeks to ensure a stable peace and conflict resolution, taking into account the gender perspective, creating conditions for expanding women's participation in peacekeeping processes, preventing and overcoming gender-based violence, improving the protection system of women who have been affected by conflicts (identification, establishment of a system of assistance, rehabilitation , informing) [6].

The representation of women in the field of defence of Ukraine is gradually increasing, which corresponds to global trends. Thus, in March 2014, with the commencement of the annexation of the Crimea by Russia, 16,554 women served in the Armed Forces of Ukraine, which was about 10% of the total, including 1,750 officers (5%) and 14,999 contracted military men (33%). [7]. The press service of the Ministry of Defence of Ukraine reports that at the beginning of March 2018 more than 25,000 women serve in the Armed Forces of Ukraine, of which more than 3,000 are officers. 10,000 women serve in positions that determine the combat capability of the Armed Forces of Ukraine. More than 6,000 women are participants of ATO, and 2,000 women are now carrying out combat tasks in the conflict zone in the east of the country [8].

However, despite the increasing interest of women in military affairs and the positive statistics on the increase in the number of women in the Armed Forces of Ukraine, national legislation on security and defence refers to representatives of different sexes in different ways.

Until 2016, women were given an opportunity to hold, so to speak, "peaceful" positions in the army. The extension of the rights of female military personnel to military positions took place with the adoption of orders from the Ministry of Defence of Ukraine [9, 10]. As a result of these changes, the list of combat positions for contracted female military personnel has been significantly expanded. Earlier, female soldiers could serve mainly as medical specialists, communicators, clerks, accountants, cooks, but now this list has been increased to more than 100 combat military specialties. Obviously, the limitation of female military rights is minimized, but full compliance with the principle of gender equality in this regard has not yet been achieved, as some posts in the Armed Forces of Ukraine are still inaccessible to women, especially in special units and high-level landing troops.

Unequal rights and opportunities between men and women in the Armed Forces of Ukraine exist not only during active duty, performance of service duties and transfer, but also after the termination of service while in military reserve. Bill No. 6109, which was adopted in the first reading on December 5, 2017, is called to update archaic laws [11]. This law establishes the principle that women conduct military service on an equal basis with men, which includes equal access to positions and military ranks and an equal amount of responsibility while performing military service duties. Secondly, men and women will have equal opportunities to enter into a contract for military service. Henceforth, the criterion of selection for military service will be exclusively professionalism, not sex. It also eliminates restrictions on the appointment of women for tours of duty and travel, and abolishes restrictions on the service of women in the military stock, which opens up broad prospects for women – taking into account the achievements of military service when enrolling in the appropriate category and type of reserve, new military ranks in reserve, potentially higher pension.

Admittedly, the draft law does not eliminate all the problems of gender equality in the Ukrainian Army, as social issues related to childcare leave for men, the issue of gender impartiality in bringing to administrative and criminal responsibility, gender education and others remain unresolved.

The lack of equal rights to enter military service appears at the stage of the choice of education. In accordance with the resolution of the Cabinet of Ministers of Ukraine No. 717 of April 28, 1999 "On the Regulations on the Lyceum with Increased Military-Physical Training" [12] and the Order of the Ministry of Education of Ukraine, the Ministry of Defence of Ukraine and the State Committee for the Protection of the State Border of Ukraine No. 266/222/363 of July 26, 1999 [13] in lyceums with intensive army physical training to receive general education and army physical training for further admission to higher educational institutions of the Ministry of Defence of Ukraine, the Administration of the State Border Guard Service, National Guard, Ministry of Internal Affairs of Ukraine can only boys. For girls, this right is not foreseen at all.

P.2 of the Decree of the Ministry of Defence of Ukraine No. 719/1289 of December 14, 2015 states that "female persons may be involved in military training in military specialties for the replacement of military positions in accordance with the List approved by the order of the Minister of Defence of Ukraine No. 412 / dsk (as amended) of June 20, 2012, registered with the Ministry of Justice of Ukraine on July 16, 2012 under No. 1191/21503" [14].

In item 1 of the Regulation on the military lyceum it is specified: "Military lyceum is a general educational institution of the III degree with a military professional orientation of training and pre-professional training, which involves conducting in-depth pre-accreditation and intensive physical training and education of young people in readiness for military service" [15].

The Constitution and a series of laws theoretically guarantee equal access of men and women to higher education institutions trained by the officers of the Armed Forces of Ukraine, but the practice is very different from the theory, since at the legislative level only young men are enrolled in military educational institutions. That is, these subordinate acts directly contradict the Constitution and other laws of Ukraine and impede the more modern and more capable formation of the Ukrainian Army. Equalizing these inequalities is possible by amending these by-laws, namely, supplementing the orders and provisions with the words on admission to military educational institutions of women on a par with men. Consequently, the existence of a gender restriction on the right of female military personnel to occupy certain military positions is manifested not only during the service, but also restricts the right of women to military education in the relevant specialties. Any education for all categories of military personnel should include training on topics such as an integrated approach to gender equality issues, responding to gender issues, gender implications of conflicts, etc. All the military should be familiar with the concept of "gender", aware of the importance of this problem, and the positive impact of gender equality on the combat capability of the armed forces.

Today, the armed forces of many countries recognise the importance of integrating gender issues into training, preparation and execution of tasks. According to international standards, the personnel of the armed forces must undergo training in the field of human rights, gender equality and diversity in accordance with their command duties, as well as training on gender issues before and after deployment in the area of hostilities in accordance with the specifics of the area. In this regard, the armed forces need to develop their capacity to integrate gender aspects into control mechanisms. This is done through special training on gender issues, as well as by incorporating these issues into all education and training programs. The main area that needs to be given special attention is the programs for developing management skills of sergeants, officers and senior command [16]. The program of such training may include the following issues: national and international gender equality legislation applicable to the armed forces; armed forces policy and directives relating to gender equality; gender issues in the service (including rules and policies that take into account family circumstances of the military, as well as the problem of sexual harassment); collection and analysis of data grouped by gender of the subject, and other gender data on personnel and military operations. While training military personnel on gender issues one needs to identify the required qualifications, as well as to monitor the achievements and adherence to the required training standards. Such training can be supported by government bodies responsible for gender equality issues. Armed forces can also use the knowledge and experience of civil society organizations, national human rights institutions or international organizations. It is extremely important that the military leaders seek to develop their own skills in applying a gender-based approach to all aspects of command of the armed forces.

**Conclusions.** Gender policy in the Armed Forces of Ukraine is an integral part of the general gender policy of the state. One of the main directions of the implementation of the gender perspective in the Armed Forces of Ukraine is to improve the legislation on ensuring equal rights of women and men in participating in the state management in the field of military

security, ensuring equal opportunities during active duty, transfer, performance of official duties, while staying in a military reserve and combining professional and family responsibilities in the process of military service. Thus, it is obvious that the legislative system has serious gaps that equally affect the interests of both female and male military personnel. Also important is the development of scientific research on the gender aspect of national security policy and the development of cultural and educational work with the military and population in order to form gender culture of the individual.

***References***

1. «Невидимий батальйон»: участь жінок у військових діях в АТО: соціол. дослідж. Укр. жіноч. фонд; авт. тексту: Г. Гриценко, А. Квіт, Т. Марценюк; за заг. ред. Тамари Марценюк. Київ: СТ-ДРУК, 2016. С. 89.

2. Цілі розвитку Тисячоліття ООН: Україна 2015. Ціль № 6 «Забезпечення ґендерної рівності». URL: http://www.ukraine2015.org.ua/tsil6.

3. Конвенція Організації Об'єднаних Націй про ліквідацію всіх форм дискримінації щодо жінок. *ООН, Конвенція, Міжнародний документ від 18.12.1979.* URL: http://zakon4.rada.gov.ua/laws/show/995_207.

4. Резолюція Ради Безпеки ООН 1325 «Жінки, мир, безпека» прийнята Радою Безпеки на її 4213-м засіданні 31 жовтня 2000 р. URL: http://zakon4.rada.gov.ua/laws/show/995_669.

5. Про затвердження Національного плану дій з виконання резолюції Ради Безпеки ООН 1325 «Жінки, мир, безпека» на період до 2020 року: розпорядження Кабінету Міністрів України від 24.02.2016 № 113-р. URL: http://zakon3.rada.gov.ua/laws/show/113-2016-%D1%80.

6. Суслова І. Жінка під час збройного конфлікту: від жертви до миротворця. URL: https://nv.ua/ukr/opinion/suslova/zhinka-pid-chas-zbrojnogo-konfliktu-vid-zhertvi-do-mirotvortsja-124795.html

7. Ткачук Р. Від амазонок давнини до жінок-воїнів сьогодення. *Військо України*. 2014. № 2. С. 12-19.

8. В ВСУ гендерный принцип соблюден, утверждают в Минобороны. URL: http://interfax.com.ua/news/general/489922.html.

9. Про затвердження змін до тимчасових переліків військово-облікових спеціальностей і штатних посад рядового, сержантського і старшинського складу та військовослужбовців-жінок і тарифних переліків посад вищезазначених військовослужбовців: наказ Міністерства оборони України від 03.06.16 р № 292. URL: http://zakon2.rada.gov.ua/laws/show/z0880-16.

10. Про затвердження Змін до тимчасових переліків військово-облікових спеціальностей і штатних посад рядового, сержантського і старшинського складу та військовослужбовців-жінок і тарифних переліків посад вищезазначених військовослужбовців: наказ Міністерства оборони України від 20.10.17 р № 541. URL: http://zakon5.rada.gov.ua/laws/show/z1384-17.

11. Про внесення змін до деяких законів України щодо забезпечення рівних прав і можливостей жінок і чоловіків під час проходження військової служби у Збройних Силах України та інших військових формуваннях: Проект Закону України від 21.02.2017 р. № 6109. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61190.

12. Про Положення про ліцей з посиленою військово-фізичною підготовкою: постанова Кабінету Міністрів України від 28.04.1999 №717. URL: http://zakon3.rada.gov.ua/laws/show/717-99-%D0%BF.

13. Про затвердження Правил приймання до ліцеїв посиленою військово-фізичною підготовкою та схеми закріплення ліцеїв за військовими формуваннями України: наказ Міністерства освіти України, Міністерства оборони України та Державного комітету і справах охорони державного кордону України від 26.07.1999 № 266/222/363. URL: http://zakon3.rada.gov.ua/laws/show/z0566-99.

14. Інструкції про організацію військової підготовки громадян України за програмою підготовки офіцерів запасу: наказ Міністерства оборони України від 14.12.15 р. № 719/1289. URL: http://zakon5.rada.gov.ua/laws/show/z1678-15.

15. Положення про військовий ліцей: постанова Кабінету Міністрів України від 17.07.03 р. № 1087. URL: http://zakon3.rada.gov.ua/laws/show/1087-2003-%D0%BF.

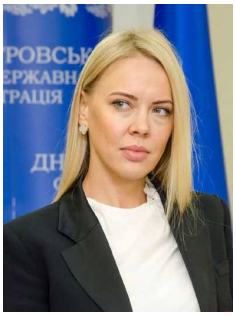
16. Бастик Меган. Интеграция гендерных аспектов во внутренний контроль в вооруженных силах. Женева: ДКВС, ОБСЕ, БДИПЧ ОБСЕ, 2014.

*Received to editorial office 01.06.2018*

**Summary**

The scientific article is devoted to the disclosure of the essence of gender policy in the Armed Forces of Ukraine, the analysis of the legal basis of gender equality in the Armed Forces of Ukraine, with the definition of problematic norms of legislation that impose restrictions on women's rights.

***Keywords:*** *equal rights and opportunities, gender equality in the Armed Forces of Ukraine, the military, gender policy of the state.*



**Iryna Gritsay**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

**Liubov Gordiienko**
specialist's degree in international law,
*(the Taras Shevchenko National University of Kyiv)*
master's degree in law
*(the Yaroslav the Wise National Law University)*

*DOI: 10.31733/2078-3566-2018-2-82-86*

# INTERNATIONAL MECHANISM FOR ENSURING RIGHTS OF INTERNALLY DISPLACED PERSONS AND ITS IMPLEMENTATION BY UKRAINE AT THE REGIONAL LEVEL

**Грицай І., Гордієнко Л. МІЖНАРОДНИЙ МЕХАНІЗМ ЗАБЕЗПЕЧЕННЯ ПРАВ ВНУТРІШНЬО ПЕРЕМІЩЕНИХ ОСІБ ТА ЙОГО ЗАПРОВАДЖЕННЯ В УКРАЇНІ НА РЕГІОНАЛЬНОМУ РІВНІ.** Розглянуто міжнародний механізм забезпечення прав внутрішньо переміщених осіб. Визначено нинішній стан виконання міжнародного механізму забезпечення прав внутрішньо переміщених осіб Україною на регіональному рівні. Надано пропозиції щодо підтвердження дій органів державної та місцевої влади щодо здійснення міжнародного механізму забезпечення прав внутрішньо переміщених осіб.

Міжнародний механізм забезпечення прав внутрішньо переміщених осіб розглядається як сукупність заходів у просторі та часі міжнародними органами, які, відповідно до норм міжнародних договорів з прав людини, забезпечують права внутрішньо переміщених осіб шляхом спеціальних засобів, методів та процедур. Форми реалізації міжнародного механізму забезпечення прав внутрішньо переміщених осіб на регіональному рівні визначаються як: 1) нормативна форма; 2) інституційна форма та 3) процесуальна форма. Нормативною формою здійснення міжнародного механізму забезпечення прав внутрішньо переміщених осіб на регіональному рівні є забезпечення державними та місцевими органами влади національного законодавства про захист прав внутрішньо переміщених осіб. Інституційна форма реалізації міжнародного механізму забезпечення прав внутрішньо переміщених осіб Україною на регіональному рівні передбачає встановлення державою та місцевою владою відповідних умов для діяльності універсальних та регіональних міжнародних дійових осіб. Процедурна форма передбачає використання відповідних інструментів, методів та процедур, зокрема судових, для ефективного забезпечення прав осіб, які переміщуються всередині країни.

Розглянуто проблемні аспекти реалізації процесуальної форми реалізації міжнародного механізму забезпечення прав внутрішньо переміщених осіб Україною на регіональному рівні органами державної влади та місцевого самоврядування. Визначено конкретні напрями регіональної діяльності у сфері забезпечення прав внутрішньо переміщених осіб, а також пропонується створення регіональної платформи для більш ефективного та цілеспрямованого застосування міжнародних стандартів у сфері захисту прав внутрішньо переміщених осіб.

***Ключові слова**: внутрішньо переміщені особи, міжнародний механізм забезпечення прав внутрішньо переміщених осіб, міжнародне публічне право, міжнародний захист прав людини, органи державної влади та місцевого самоврядування.*

**Formulation of the problem.**At the beginning of XXI century tension of international relations more frequently results in outbreak of violence, military intervention and massive violations of international humanitarian law. Manifestation of the "New World Order", under which particular states, contrary to the principles of international law, give effect to their own interests in despicable way, incites an intense growth of internal migration in the modern world. Today the forced internal displacement is assuming considerable dimensions, as evidenced by the UN statistical data, showing that the total number of internally displaced persons (hereinafter – IDPs) in the world has reached 40 million as at December 31st, 2017 [1]. Described tendencies objectively impose the necessity of examination of the international mecha-

nism for ensuring rights of IDPs, development of the most appropriate means of efficient protection of such persons by the states, facing the issue of forced internal migration.

Since the beginning of the year 2014 this perspective is relevant to Ukraine as well. Emergence of forced displacement within the borders of our country has specific causes owing to violation of jus cogens by the Russian Federation – annexation of Crimea and outbreak of hostilities on the territory of Donetsk and Luhansk oblasts. As at February 5th, 2018, according to the Ministry of Social Policy of Ukraine, only the number of registered IDPs in Ukraine amounts to over 1,49 million persons [2]. According to the estimates of the Office of the United Nations High Commissioner for Refugees, in 2018 over 1,8 million persons were forced to leave places of permanent residence and seek refuge in other regions due to the annexation of Crimea and military actions in the East of Ukraine [3]. Ensuring rights of IDPs by Ukraine remains one of the crucial issues among others in the field of human rights. This is due to the lack of experience of protection of persons, who were forced to leave places of permanent residence owing to the military conflict, as well as sluggishness of state and local government bodies regarding the fulfillment of obligations on integration of Ukrainian citizens with IDP status.

**Analysis of pubications.** It should be noted that international mechanism of human rights protection, as a stand-alone object of study, often attracts attention of foreign and Ukrainian scientists, yet they are primarily focused on the legal status of refugees and asylum seekers. Within the framework of international law, the following foreign researchers focused on the issues of internal displacement: C. Beau, N. Van Hear, F. Deng, P. Jennings, S. Castles, R. Cohen, V. Kälin, E. Mooney, B. Stark, R. Wilkinson, J. Hathaway and others.

In national scientific research selected aspects of protection of rights of IDPs in different fields were examined by I. Bezzoub, S. Brytchenko, M. Bouromensky, V. Hrynchak, I. Hyzhy, O. Zadorozhny, M. Kobets, M. Kovtoun, K. Krakhmalova, I. Kozynets, O. Malynovska, V. Nadraha, V. Potapov, A. Solodko, H. Tymchyk, S. Chekhovych, S. Fedorchouk, O. Fesenko and others. Nevertheless, there have been very few studies concentrated on international mechanism for ensuring rights of IDPs in Ukraine, moreover, the issue of its implementation at the regional level has never been considered before. Such situation justifies relevance and timeliness of chosen topic.

The main **objective** of this article is to describe the definition and the structure of the international mechanism for ensuring rights of IDPs, as well as to determine the current condition and the issues on the way of its implementation in Ukraine at the regional level. In order to achieve this objective it's essential to define and carry out the following ***tasks***: a) determine the meaning of the definition "international mechanism for ensuring rights of IDPs" and its structure; b) provide an overview of the current condition of implementation of international mechanism for ensuring rights of IDPs in Ukraine at the regional level and draw up recommendations on improvement of activities of state and local government bodies in this area of work.

**Presentation of the main material**. The issue of ensuring rights of IDPs in Ukraine is just a part of the worldwide problem of forced internal migration. The cause of proliferation of internal migration in a state is often a result of military conflicts and inter-ethnic strife. The necessity of providing assistance to the persons who were forced to spontaneously change the place of residence for objective reasons became particularly acute in the 1970s owing to the civil wars, flaring up in the territory of Angola, Vietnam, Cambodia, Sudan [4, c. 26]. According to the Global Report of the Internal Displacement Monitoring Centre of the Norwegian Refugee Council, as at the end of the year 2017, the majority of IDPs, who left there place of residence due to the military conflict, come from Syria (2,9 million), Democratic Republic of Congo (2,2 million), Iraq (1,4 million), South Sudan (857 thousand), Ethiopia (725 thousand) [5].

Following the increase of cases of involuntary migration, the global community was gradually realizing the necessity of developing joint approach to protection of right of persons, displaced within the territory of their own countries, and providing international assistance to the states in this field. What is at stake today is a certain international mechanism for ensuring rights of IDPs, but it should be noted that the theoretical concept of "mechanism" has a lot of interpretations which may be found in specialized sources. *The international mechanism ensuring rights of IDPs* should be considered as a set of activities of international bodies in space which, according to the provisions of international treaties in the field of human rights, ensure rights of IDPs by means of specific tools, methods and procedures. Different sources provide plenty of perspectives on the structure of the mechanism, including the mechanism of human rights protection, yet the most intelligible is the interpretation of the structure of the mechanism

for ensuring rights of IDPs is the one set forth by the Ukrainian authors [6, c. 158], considering it as the interaction of three components: 1) norms of international law, regulating relations involving IDPs; 2) legal entities – international institutions, implementing the substance of international law and 3) specific tools, allowing to ensure effective protection of rights of IDPs in space and time.

The international mechanism for ensuring rights is, first and foremost, a result of international relations, which is why it's related to the application of the norms of international law, concentrated in *universal* and *special* treaties, regulating the issues of ensuring IDPs rights. Universal treaties, establishing general principles of ensuring IDPs rights, are the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the European Convention on Human Rights, 1950. *Special* international treaties, regulating relations involving IDPs, are the UN Convention Relating to the Status of Refugees, 1951, and the Protocol, 1967, concerning the status of refugees, as well as *the Guiding Principles on Internal Displacement*, elaborated and adopted by the UN General Assembly and the UN Commission on Human Rights in 1998.

The legal entities of the international mechanism for ensuring rights of IDPs have universal and regional scope of activities. Universal legal entities of the mechanism for ensuring IDPs rights are the United Nations and its agencies: ECOSOC, Human Rights Council, International Organization for Migration, specialized committees, dealing with rights of particular categories and others. International judicial authorities should also be distinguished as, for example, the UN International Court of Justice and the European Court of Human Rights. The international body, directly dealing with IDPs issues, is *the UN Refugee Agency*. The UNHCR's mandate was expanded by the UN General Assembly in 1972 to include IDPs component. The International Red Cross used to work in the field of assistance to IDPs and acted as a guarantor of the Geneva Conventions. The international community didn't dare to interfere due to traditional perception of the national sovereignty and the principle that governments have a sole authority to address issues of their own citizens. Nevertheless, the scale of the problem in the end of the last century could not but draw attention of the UN. Joint efforts of member states, for their part, were motivated by an aspiration to withhold the stream of refugees. The UN High Commissioner for Refugees is, thus, the main international institution, fully engaged in issues of ensuring IDPs rights in the world. Since 2014 the UNHCR and its missions in Ukraine have been proactively providing assistance to the citizens affected by the conflict in the East of our country. The UNHCR agency for IDPs in Kyiv cooperate with Ukrainian partner organizations as "CrimeaSOS" (since 2014), "10$^{th}$ of April" (since 2016) and "Right to Protection" (R2P) in the field of protection of rights of IDPs in Central and Western Europe. In 2018 its activities are going to include: protection and work with communities of displaced persons and local communities in 19 regions in Central and Western Ukraine; legal and individual assistance; advocacy at different state levels and cooperation with other relevant organizations in the field of protection of IDPs rights [7].

Regional legal entities of international mechanism of ensuring IDPs rights are concentrated, for a number of reasons, in European system of human rights protection. These include the Council of Europe, the OSCE and other organizations. The fundamental requirements on respect and protection of IDPs rights are set out in the Recommendation (2006)6 of the Committee of Ministers of the Council of Europe to member states on internally displaced persons. The Recommendation of the Committee of Ministers determine 13 substantive principles concerning protection of IDPs rights [8, c. 12]. Certain provisions, for example, on enjoyment of property and possessions, as well as taking one of "sustainable decisions" are detailed in the following two crucial documents of the Council of Europe on internal displacement, namely the Recommendation 1877 (2009) of June 24$^{th}$, 2009 "Europe's forgotten people: protecting the human rights of long-term displaced persons" and the Resolution 1708 (2010) of January 28$^{th}$, 2010, "Solving property issues of refugees and internally displaced persons".

The *specific tools*, allowing to efficiently ensure rights of IDPs in space and time are constantly being improved. For example, the international practice has known a so-called "cluster approach" to ensuring IDPs rights as a range of coherent actions, carried out by particular international organizations. In 2011 the UNHCR initiated a major review of the Global Protection Cluster, in 2012 a new program statement and strategy on ensuring comprehensive approach to protection were introduced. Instead of being limited by the humanitarian aid, it has to cover all aspects of displacement and remain operational until all needs and problems of displacement are solved [9, c. 20].

The process of improvement of the international mechanism for ensuring IDPs rights is constantly on the agenda of the UN. Taking into account the actualization of this subject matter in Ukraine, appears an objective necessity of establishing appropriate prerequisites for actions of the components of the international mechanism for protection of IDPs affected by the conflict in Eastern Ukraine. It particularly concerns the regions, where state and local authorities are obliged to fulfill the commitments of Ukraine in this sphere. But, firstly, it would be appropriate to develop the modalities of implementation of the international mechanism for ensuring rights of IDPs at the regional level which correspond with the structure of such mechanism.

The modalities of implementation of international mechanism for ensuring IDPs rights in Ukraine at the regional level are: 1) the normative form; 2) institutional form and 3) procedural form. The normative form modalities of implementation of international mechanism for ensuring IDPs rights in Ukraine at the regional level is about compliance of the state and local authorities with the national legislation on protection of IDPs rights and international standards in this field, which may be applied directly in case of their ratification by the Verkhovna Rada of Ukraine. Institutional form of implementation of international mechanism of ensuring IDPs rights at the regional level implies establishment by the state and local authorities of the appropriate conditions for activities of universal and regional international legal entities, engaged in this perspective. And, finally, procedural form intends to bring into play relevant tools, methods and procedures, including judicial ones, in order to ensure IDPs rights effectively at the regional level in Ukraine. The first and the second form are more or less applied by the local authorities, however, the implementation of procedural form gives rise to complaints.

The regional level of implementation of comprehensive international tools, methods and procedures, aimed at ensuring IDPs rights in Ukraine, involves effective work of governmental authorities, local self-government bodies and non-governmental human rights organizations on protection of civil, political, social rights and freedoms of IDPs in coordination with international organizations. It should be recognized that Ukraine, through the regional level, has already carried out and keeps implementing relevant activities on protection of IDPs rights, yet a lot of issues remain unsolved. A significant part of competencies on implementation of particular activities within the regional programs of implementation of components of international mechanism for ensuring IDPs rights belong to the local self-government bodies, including establishment of comprehensive system of civil protection of citizens, affected by the military conflict, raising awareness of population on the rules of secure approaches to military actions and terrorist threats, shaping zero tolerance to any gender-based violence or discrimination, etc.

It should be noted that in the context of decentralization reform in Ukraine, the role of the local self-government bodies in implementation of international mechanism for ensuring IDPs rights is going to be reinforced. The local executive authorities and the local self-government bodies have to focus joint efforts on development of efficient and accessible system ensuring IDPs rights, as well as women and girls, affected by the conflict, including access to temporary accommodation, medical, social, psychological and legal services, etc. Regional level of implementation of international tools, methods and procedures on ensuring rights of IDPs involves effective work of regions, taking into account their particularities: geography, culture, ethnic difference and others. It concerns implementation of urgent activities according to the following scopes of work at the regional level:

– in the legal and regulatory framework: elaboration of relevant programs on implementation of international mechanism for ensuring IDPs rights (for example, a large-scale campaign on realization of the adopted National Plan on Implementation of the UN Security Council Resolution № 1325 (2000) up to 2020, in the framework of which the local authorities elaborate and carry our regional action plans);

– in the educational framework: carrying out educational activities on ensuring rights of IDPs in Ukraine with necessary recommendations for the rule-making entities (governmental authorities and local self-government bodies) on improvement of organizational and legal conditions of implementation of international standards in this area;

– in the informational framework: expanding the channels of communication concerning the needs of IDPs, including involvement of national and local media;

– in the framework of regional governance: enforcing the methods of state and public control of fulfillment of national and local programs, suggesting the ways of socialization of IDPs in certain regions of the country, protection of their particular rights and freedoms, providing primary legal assistance.

**Conclusion.** Thus, the international mechanism for ensuring rights of internally dis-

placed persons is regarded as an order of activity in space and time of international bodies that, in accordance with the norms of international human rights treaties, ensure rights of internally displaced persons through special tools, methods and procedures. The international mechanism for ensuring rights of IDPs at the regional level is implemented through normative, institutional and procedural forms. The process of implementation of the international mechanism for ensuring rights of internally displaced persons in Ukraine has not only the lack of efficiency of its separated components, but also a certain disengagement of activities of state and local authorities, divergence of views on implementation of national and regional programs of assistance to IDPs. Taking into account such a situation, a *regional platform* ensuring more efficient and targeted implementation of international standards of IDPs protection should be established in Ukraine. An initiative should be regarded in the context of the decentralization reform. The process of dialogue at the common regional platform will provide an opportunity of conducting effective analysis of particular aspects of implementation of the international mechanism for ensuring rights of internally displaced persons in Ukraine, allow to identify the best modalities and methods for activities of the executive authorities and the self-government bodies in this area. Moreover, establishment of such platform will raise awareness and understanding of practical implementation of international standards in the field of protection of IDPs rights at the regional level, extending institutional instruments of direct participation of representatives of territorial communities in this direction.

***References***

1. Global Report of the Internal Displacement Monitoring Centre of the Norwegian Refugee Council, 2018. URL: http://www.internal-displacement.org/global-report/grid2018/.

2. Report of the Ministry of Social Policy of Ukraine concerning the number of registered IDPs. URL: https://www.msp.gov.ua/news/14748.html.

3. Situation in Ukraine. Newsletter (March, 1-31 2018). URL: http://unhcr.org.ua/attachments/article/1299/2018%2003%20UNHCR%20UKRAINE%20Operational%20Update%20FINAL%20UA.pdf.

4. Pavlova L. V. Extra-Mandate Activity of the UNHCR: Promoting the Displaced Persons Protection. *Belarus journal of international law and international relations*. 2000. № 5. Pages 26-31. URL: http://elib.bsu.by/bitstream/123456789/30092/1/2000_5_JILIR_pavlova_r.pdf.

5. Internally displaced persons. URL: https://uk.wikipedia.org/wiki/Внутрішньо_переміщені_особи#cite_note-.

6. Kaliouschchenko I. M. International legal standards to ensure rights of internally displaced persons and their implementation in Ukraine. *Electronic scientific law journal.* 2016. № 2. С. 157-160. URL: http://lsej.org.ua/index.php/ostannij-vipusk.

7. Situation in Ukraine. Field offices (April, 2018). URL: http://unhcr.org.ua/attachments/article/244/2018%2004%20UNHCR%20Ukraine%20FU%20Kyiv%20Update%20FINAL%20UA.pdf.

8. Compilation of laws and regulations on ensuring rights of internally displaced persons in Ukraine / Compiled by: Ph.D., professor L.R. Nalyvayko, Ph.D., associate professor K.V. Stepanenko. Dnipro, Dnipro State University of Internal Affairs, 2017. 452 pages.

9. The State of the World's Refugees: In Search of Solidarity, 2012. 32 p. URL: http://www.unhcr.org/4fc5ceca9.html.

*Received to editorial office 14.07.2018*

**Summary**

The article examines the international mechanism for ensuring rights of internally displaced persons. The current state of implementation of the international mechanism for ensuring rights of internally displaced persons by Ukraine at the regional level is determined. Proposals are being put forward to improve the actions of state and local authorities in the field regarding the implementation of an international mechanism for ensuring rights of internally displaced persons.

***Keywords:*** *internally displaced persons, international mechanism for ensuring rights of internally displaced persons, international public law, international protection of human rights, state and local government bodies.*

**Olena Dzhafarova**
Dr of Law, Prof.
*(the Kharkiv National University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-87-91*

# RESEARCH OF THE MODERN STATUS OF THEORETICAL AND NORMATIVE CLOSURE OF THE CONCEPT OF PUBLIC-SERVICE ACTIVITY

**Джафарова О. ДОСЛІДЖЕННЯ СУЧАСНОГО СТАНУ ТЕОРЕТИКО-НОРМАТИВНОГО ЗАКРІПЛЕННЯ ПОНЯТТЯ ПУБЛІЧНО-СЕРВІСНОЇ ДІЯЛЬНОСТІ**. Автором приділено увагу з'ясуванню категоріального апарату, яким оперує діюче законодавство щодо вдосконалення нормативного закріплення такої категорії як «публічно-сервісна діяльність».Доведено, що публічно-сервісну діяльність доцільно розглядати через призму категорії «сервісна держава», з цією метою було проаналізовано різні підходи щодо виділення принципів формування моделей сервісної держави. Обґрунтовується, що викладені принципи моделі сервісної концепції держави є підґрунтям для глибокої наукової дискусії, оскільки їх запровадження потребує сформованого європейського громадянського суспільства. В статті аргументується підхід, що «публічно-сервісна діяльність» виходить за межі категорії «надання адміністративних послуг», визначення якої надано в Законі України «Про адміністративні послуги», та розкриває соціальне призначення держави її вторинну роль в порівнянні із правами та свободами людини. Надано авторське визначення публічно-сервісної діяльності в широкому та вузькому розумінні.

***Ключові слова:*** *публічно-сервісна діяльність, державна політика, адміністративні послуги, органи публічної адміністрації.*

**Formulation of the problem.**The adoption of the Ukraine-2020 Sustainable Development Strategy, which consolidated the four key vectors of our country's development, is an important prerequisite for the introduction of European standards of life in the state, the emergence of Ukraine's leading positions in the world, ensuring a qualitatively new level of rights, freedoms and legitimate interests of physical and legal entities. One of these vectors is the «vector of security», which envisages a range of actions of legal and organizational character, which are usually reflected in the need for a particular reform. Mentioned vector of development of our country involves nine separate, but related to one and the same objective of reform. It is interesting that the proposed and carried out gradually reform of the law enforcement system, which provides for adjustment tasks and functions of law enforcement, changing attitudes of law enforcement people to fulfill their duties towards its realization as for public services paid by country primarily to ensure the safety of each person, his/her personal and property rights, public and state interests.

In general, supporting these changes in the ideology of the work of all law enforcement bodies, we consider it appropriate to refer to the scientific literature on the definition of these categories in order to formulate its own categorical apparatus, which is necessary for the practice of law enforcement [1, p. 45-51].

**Analysis of recent research and publications.**The importance of this problem was drawn to the attention of leading specialists in the field of administrative and other branches of law: V.B. Averyanov, O.M. Bandurka, O.I. Bezpalova, D.S. Denisyuk, R.A. Kalyuzhnyy, S.V. Kivalov, V.K. Kolpakov, A.T. Komzyuk, D.M. Lastovych, R.V. Myronyuk, O.M. Muzychuk, A.O. Selivanov, O.F. Skakun, V.V. Sokurenko, M.M. Tishchenko, S.O. Shatrava and others.At the same time, by many scholars and practitioners a lot of questions regarding the definition of a categorical apparatus by which operates the current legislation, areresearched fragmentarily and need comprehensive work, and the development of a conceptual approach to improving the regulatory consolidation of such a category as «public-service activity».

**Presenting main material.**Having examined the modern legal literature, in the presence of a clear notion of «public-service activity», we can conclude that there are currently no systematic developments regarding the content and significance of this category. Let us turn to the terminological definition of these categories. Yes, public, that is, intended for a wide visit, use; public, derived from the Latin «publicus», that is, public, state; popular, national [3].Service – maintenance of the population, maintenance of his domestic needs, derived from the English «service» – service, employment, work, public service, servicing, provision of services [3]. Recently, the adjective «service» is used when defining the meaning of «service state». M.V. Dzeveliuk notes that in the foreign literature the idea of service reorientation of the state has long been discussed in connection with several problems.Firstly, the state must be competitive in terms of providing these services, and therefore the system of public administration should be guided by the latest management technologies. Secondly, the state should refuse to monopolize those functions that can be implemented more effectively by private structures. Thirdly, the provision of services should be a priority form of the implementation of most state functions [4, p. 61]. The service idea of the development of public administration is based on the classical economic scheme «service provider – consumer», where the stability and legitimacy of public institutions are connected with the effectiveness of identifying, modeling and implementing individual and group interests and needs [5, p. 3; 6]. O. Gryshnova has another point of view, which observes that the conception of the service state can only be realized in those countries where the executive power, prior to the introduction of modern information technologies into its activities, was structurally and ideologically «serviceable», that is, limited in rights and duties [7].In the opinion of P.S. Klimushin and D.V. Spasibov service approach to the change as a paradigm of managerial thinking and management technologies is at the stage of conceptual and legal comprehension, theoretical and categorically-conceptual formation. The first thing that arises during the analysis of certain doctrines, strategies, programs of service modernization – is the conceptual and legal fuzziness, the blurriness of the used terms, concepts, etc. [6, p. 7]. O.V. Karpenko in general proposes the introduction into the scientific circle of the definition of «service-oriented state policy», which provides for a focused course of actions of the authorities and a set of tools (mechanisms, tools, levers, methods), which they practically implement to create, ensure the functioning and development of a service state [8, p. 12]. But mentioned definition does not give a concrete answer to the content of the service state.

In order to formulate our own approach to the problem, let's analyze the today existing thoughts that are contained on the pages of scientific publications.

If to study this concept in a more legal plane, then academician V.B. Averyanov noted that public-service activity is activities of the relevant state and non-state bodies in order to ensure, during its relations with the population, by concrete physical and legal persons the conditions, for which the latter are capable of effectively implementing and protecting their rights, freedoms and legitimate interests [9]. At the same time V.B. Averyanov notes that the public-service direction of the functioning of executive bodies was formed due to activity related to: 1) the consideration and solution of various individual appeals of private (physical and legal) individuals regarding the implementation of their subjective rights and interests protected by law; 2) provision of administrative (management) services to specific individuals in the form of permit-licensing, registration and other similar actions;3) the adoption of individual binding decisions on individuals in relation to the fulfillment of their various responsibilities provided by law, as well as the resolution of so-called «public» cases (for example, on resettlement of people during the construction of roads, bridges, energy networks, land allocation for national needs, etc.); 4) the implementation of an out-of-court consideration of administrative legal disputes in the procedure for administrative review of complaints of individuals; 5) applying to citizens the measures of administrative coercion, in the first place measures of administrative responsibility [10, p. 243-244].

O.V. Karpenko considers the service activity of the state government and local self-government bodies as a priority direction of the development of public administration in Ukraine, the essence of which is the provision of management services to citizens who are their recipients – the customers of the state (beneficiaries), and public servants and officials of bodies of local self-government – providers (executors), implementing these services on behalf of the state [8, p. 11]. In the context of this definition, we note that local self-government bodies are not subjects of state administration, they have a different nature – self-governing.

In turn, V.R. Bila notes that the public-service activity is to provide administrative (managerial) services. It is in this way that the administrative-legal science determines the ac-

tivity of public administration bodies in meeting certain needs of the individual, which is carried out upon his/her request, that is, the realization of the subjective rights of subjects not possessing powers of authority [11]. The same position is observed by I.Fedotova, who provides definition of public-service activity in the field of customs business as activity of the bodies of incomes and fees for the provision of administrative services in the customs field, which is carried out on the application of individuals and legal entities and is aimed at acquiring, changing or terminating rights or duties in the field of customs [12, p. 51].

According to our personal conviction, the identification of public-service activity only with the provision of administrative services is very narrow today.

It is an interesting position of B. Petyovka that is based on academic achievements of V.B. Averyanov who pointed to the need for emphasis on the definition of «public-service law», along with the usual definition of «administrative law» in certain public purpose and nature of administrative law. The definition of «public-service law» emphasizes the critical focus of this industry to serve the needs of the most complete software implementation and protection of adequate individuals rights, freedoms and lawful interests in their dealings with public authorities (government and self-management) [13, p. 99]. The analysis of this position shows that scientists are inclined to a broader interpretation of this category. In support of this position, we will give the opinion of B.M. Gooke, who notes that the introduction into the legal circle of such a concept as «public-service activity» has long been the cause of discussion in scientific circles, since it is based on the constitutional position of the social orientation of the state and is content of the activity of the state, its duty to ensure the rights and freedoms of man [14, p. 119]. We do not support the position that the service concept of the state is realized in the technology of e-government and e-democracy as inextricably linked institutions [6, p. 8], because the emphasis is put on the technical means of achieving the rights of individuals, and not on the role of the state in its implementation.

At the same time, V.D. Shcherban, notes that, having established the institution of public-service activity, the state represented by the executive authorities ensured establishing direct contact with the population [15, p. 14]. This position is interesting, but we believe that the latter is narrowed at the expense of the subjects, namely, the executive authorities. Because this category of «public-service activity» makes it possible to unite all actors involved in the implementation of state functions and move away from the monopoly of power and to emphasize the priority role of a person and his/her rights in the activity of the latter.At the same time, the researcher formulates his own position on understanding the concept of «public-service activity of executive bodies», which suggests to understand the activities of state bodies of executive power, which is the provision of public services of different size, nature and significance to individuals or legal persons, with the aim ensuring the realization of the rights, freedoms and legitimate interests established for them, as well as for the purpose of supplementing or extending their legal personality in connection with the provision of a certain public service [15, p. 10]. We see the approach of V.D. Shcherban somedebatable, that the content of the latter includes public services of different size, nature and significance for individuals or legal persons. The question is that the researcher does not indicate in this case that the latter are implemented within the competence of one or another executive body and accordingly can not go beyond the latter.

Also, the opinion needs attention that public-service activity, despite the interpretation of its content by many scholars as a permissive activity, is still characterized by an imperative nature, since most public services are aimed at the implementation of rights not specified by the administrative and other branches of legislation, namely the realization a duty that may be obtaining a passport, a mandatory exercise of a certain activity after obtaining a license, permit or other legal document, etc. [15, p. 22]. Expressing his own position on this matter, we would like to emphasize that V.D. Shcherban is mistaken in the fact that the latter is aimed at fulfilling the duty, since according to the Constitution of Ukraine, today a citizen has only two responsibilities: to protect the state (for men) and pay taxes and file an appropriate tax return. Everything else is a person's right, the realization of which involves the implementation of a certain «obligation», which is an independent legal remedy for the settlement of legal relations, has a secondary and original character, etc.In our opinion, it is a public-service activity that is not characterized by imperativeness, in this it is its peculiarity and the need to rethink the role of the latter.

In connection with this, we believe that in determining this category it should focus on the analysis of categories of more general manner, such as the state, the rights and freedoms of citizens and the mechanism of its providing, as the latter relationship is central to jurisprudence

and for understanding the above category [1]. It is interesting, in our opinion, is the definition of the state as the highest form of social organization that provides protection and coordination of individual, group and general public interests through the law in a particular area. [16]. The authors of the book «Private Life and Police. Conceptual approaches. The theory and practice»understand the state as an instrument that provides the best conditions for the development of the individual, society and the state itself, and the generalized solution to the problem of national security at the reached level of development of its theory is based on three basic elements: interests – threats – protection [ 17, p. 27]. Security is a condition for the existence of a state, society or person that allows them to preserve accumulated values [17, p. 33].According to Article 3 of the Constitution of Ukraine, person, his/her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value [18]. At the same time, the state undertakes to provide the latter with certain legal instruments and state institutions. On the basis of the foregoing, it should be concluded that the basis of the organization and functioning of the modern Ukrainian state is a social contract, which provides that the state is formed by the expression of the will of free and independent persons, and undertakes to contribute in every way to the realization of human rights, and in cases of violation of it to defend the last. At the same time, the other side of the social contract also has certain obligations among which are: payment of taxes, observance of the established rules of conduct, the duty to protect the integrity of the state, etc. It should be noted that the priority and opportunities for individuals to exercise their rights, including in relation to public administration, are given.It is in this approach that the modern view of the state as an institution that provides certain services to individuals who, so to speak, «order» them, is revealed. The range of these «services» directly derives from the public functions of the state, which are content, the basis for the identification and consolidation of the specific rights and obligations of the subjects of the relevant relations [1].In support of this position, we will give a view of V.Y. Misyura, who emphasizes that the concept of a socially oriented service policy of the state should be based on the following four dimensions – the principles of a modern democratic state: 1) the state-guarantor (that is, the system of institutions providing quality public services); 2) the state-partner (institutionally provides favorable conditions for public activity and encourages citizens to independent solving problems according to the current legislation, political system and economic conditions); 3) the state-supervisory authority (on the basis of established rules of the public and, above all, economic activity); 4) the state-executor of services for the society (first of all, the task of security and the state's ability to do something for society at a lower cost) [19].In this case, M.V. Dzevelyuk notes that it seems that it can distinguish the following key characteristics of the service state: 1) the service state tends to the minimum state, but is not identical to it. In a service state, most of the functions are implemented «on request», that is, the service state is passive. However, at the same time, these functions that require constant public participation of the state – law enforcement, migration, border protection, etc. – can combine traditional active forms of implementation of functions with the provision of appropriate services to society; 2) the service state operates on a competitive basis.Demonopolization of functions leads to the emergence of alternative providers of services, which previously had the exclusive status of state functions. At present, developedcivil societiesare gradually institutionalizing the state; 3) the service state should first of all provide services that society as a whole or separate social groups can not receive independently from other institutions. First and foremost, the state provides services to vulnerable groups of population in order to compensate for the inequality of access to services; 4) the service state is a «modest» state in the sense that its operation should be subject subordinated to rational market logic.The service state should take into account all significant economic circumstances when rendering services in order to fit into the general structure of public expenditures: no service may be provided at the expense of other services; 5) in terms of the subject content, the service state is a state of highly specialized specialists, and not necessarily managers. As part of the service functional model of management, this goes astray, while the efficiency and speed of decision-making and achievement result in the foreground;6) the functioning of the service state occurs in a situational mode, which allows for faster adaptation of the decision-making algorithm to a particular case. Hence the departure from global comprehensive strategies and action plans, which is today becoming increasingly visible in public administration [4, p. 65-66]. Expressing our own thoughts on this subject, we note that the principles outlined in the model of the service concept of the state are the basis for a profound scientific discussion, since its implementation requires a prevailing European civil society.

**Conclusions.** Based on the foregoing, it can conclude that «public-service activity» goes beyond the category of «rendering administrative services», the definition of which is provided in the Law of Ukraine «On administrative services», and reveals the social purpose of the state of its secondary role in comparison with person's rights and freedoms.

***References***

1. Джафарова О.В. Щодо розуміння категорії «публічно-сервісна діяльність» Національної поліції. *Безпека дорожнього руху: правові та організаційні аспекти:* матер. Міжнар. наук.-практ. конф. (м. Кривий Ріг, 22 листоп. 2016 р.). Кривий Ріг: Донецьк. юрид. ін-т МВС України, 2016. С. 55-58.

2. Про Національну поліцію: Закон України від 02.07.2015 № 580-VIII URL: http://zakon.rada.gov.ua/go/580-19.

3. Академічний тлумачний словник (1970-1980). URL: http://sum.in.ua/.

4. Дзевелюк М.В. Сервісна держава як функціональна модель сучасної держави. *Актуальні проблеми держави і права.* 2017. Вип. 78. Р. 60-67.

5. Коженко Ю.В. Поняття «сильної» та «сервісної» держави у контексті модернізації державного управління: загальне та відмінне. *Фундаментальні дослідження.* 2012. №. 3. С. 744-748.

6. Климушин П.С., Спасібов Д.В. Поняття сервісно-орієнтованої держави у контексті модернізації публічного управління. *Теорія та практика публічного управління.* 2017. №. 2(57). URL: http://www.kbuapa.kharkov.ua/e-book/tpdu/2017-2/doc/1/03.pdf.

7. Грышнова Э.Э. Политическая система Российской Федерации: теория и практика формирования, тенденции развития: Автореф. дис. д-ра полит. наук: 23.00.02. М., 2010. 46 с.

8. Карпенко О.В. Механізм формування та впровадження сервісно-орієнтованої державної політики в Україні: Дис. … д-ра наук. з держ. упр-я: 25.00.02. Київ, 2016. 466 с.

9. Авер'янов В.Б. Вибрані наукові праці / за ред. Ю.С. Шемшученка, О.Ф. Андрійко. Київ: Ін-т держави і права ім. В.М. Корецького НАН України, 2011. 448 с.

10. Публічне управління: Європейські стандарти, досвід та адміністративне право / В.Б. Авер'янов, В.А. Дерец, А.М. Школик та ін.; за ред. В.Б. Авер'янова. Київ: Юстініан, 2007. 288 с.

11. Біла В.Р. Особливості адміністративно-договірних відносин за участю органів Державної податкової служби. URL: http://radnuk.info/pidrychnuku/admin-pravo/493-stetsenko/21399-2012-06-19-22-07- 49.html.

12. Федотова І. Актуальні питання правового забезпечення публічно-сервісної діяльності Міністерства доходів і зборів України у митній галузі. *Публічне право.* 2014. №. 1 (13). С. 47-53.

13. Петьовка В. Деякі проблеми визначення поняття «адміністративна послуга» та шляхи їх вирішення. *Публічне право*. 2013. №. 2 (10). С. 99-104.

14. Гук Б.М. Адміністративні послуги органів публічної влади України: поняття, зміст. *Право і суспільство.* 2011. №. 3. С. 117-121.

15. Щербань В.Д. Адміністративно-правові засади публічно-сервісної діяльності органів виконавчої влади України: Дис. … д-ра юрид. наук: 12.00.07. Київ, 2017. 210 с.

16. Андрусяк Т.Г. Теорія держави і права: Навч. посібник. Львів: Фундація "Право для України", 1997. 198 с.

17. Приватне життя і поліція. Концептуальні підходи. Теорія і практика / відп. ред Ю.І. Римаренко. Київ: КНТ, 2006. 740 с.

18. Конституція України від 28 червня 1996 р. URL: http://zakon1.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

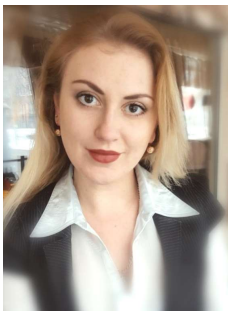
19. Місюра В.Ю. Сервісна суть державної політики як основа модернізації публічного управління. *Публічне управління: удосконалення та розвиток.* 2015. № 12. URL: http://www.dy.nayka.com.ua/?op=1&z=933.

*Received to editorial office 31.08.2018*

**Summary**

The article outlines the principles of the model of the service concept of the state, which are the basis for a deep scientific discussion, because its implementation requires a prevailing European civil society. It was emphasized that «public-service activity» goes beyond the category of «providing administrative services» and reveals the social purpose of the state, its secondary role in comparison with human rights and freedoms.

***Keywords:*** *public-service activity, state policy, administrative services, public administration bodies.*



**Kateryna Dolhoruchenko**
lecturer
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-92-94*

# ESSENCE OF ANALYTICAL INTELLIGENCE AS A KIND OF ACTIVITY OF THE SPECIAL DEPARTMENT OF "VINETA" OF THE REICH MINISTRY OF EDUCATION AND PROPAGANDA

**Долгорученко К. СУТНІСТЬ АНАЛІТИЧНОЇ РОЗВІДКИ ЯК ВИДУ ДІЯЛЬНОСТІ СПЕЦВІДДІЛУ «ВІНЕТА» МІНІСТЕРСТВА ПРОСВІТИ І ПРОПАГАНДИ РАЙХУ.** Розкрито сутність аналітичної розвідувальної діяльності спецвідділу «Вінета» Міністерства просвіти і пропаганди Райху у період нацистської окупації радянських територій. Визначено загальні та специфічні риси, принципи та цілі реалізації даного виду діяльності, в цілому, нацистськими розвідувальними спецслужбами, зокрема спецвідділом «Вінета». Акцентується увага на висвітленні змісту нормативної основи діяльності аналітичного підрозділу спецвідділу «Вінета».

***Ключові слова**: нацистський окупаційний режим, аналітична розвідка, пропагандистська діяльність, спецвідділ «Вінета».*

**Formulation of the problem**. Today, in an acute military and informational confrontation between the Russian Federation and Ukraine, hostile propaganda is aimed at deepening the processes of demoralization and disintegration of Ukrainians, to discredit the political authorities in our country. Therefore, there is an urgent need for a qualitative restructuring of the special bodies that carry out intelligence activities for the quality provision of the functioning of the national information space.

It is legitimate to raise the issue of innovative improvement of methods and means of activity of intelligence-analytical structures as an important condition for the effectiveness of counter-propaganda. It should be noted that, for both Ukraine and for many post-Soviet states, the urgency of this problem is still linked to the need to ensure information sovereignty as the main condition for integration into the world's informational space.

Therefore, analytical intelligence as a type of activity is interpreted by scientists as the lawful activity of specially designated entities, which is based on the complex use of special methods and means of analysis in the study of massifs of information in order to acquire new knowledge of strategic, tactical and predictive nature [1, p.114]. It was during the Second World War that analytical intelligence became one of the priority activities of specially authorized structures within the framework of advocacy warfare, in particular between totalitarian states, the Third Reich and the USSR.

Accordingly, in order to carry out a systematic monitoring of the moral and psychological and socio-political situation of the Soviet people under the conditions of the Nazi occupation, in June 1941 a special department of the Vineta was formed within the structure of the Reich Ministry of Education and Propaganda. On the basis of the implementation of the Fuhrer's directive "On the organization of propaganda during the offensive on the USSR" of June 20, 1941, during the entire period of the Nazi occupation of the territories of the USSR, the personnel of the analytical unit "Vineta" was continuously conducted analytical intelligence activities.

Hence, the essence of analytical intelligence as a kind of activity of the special department of "Vineta" of the Reich Ministry of Education and Propaganda, we understand as a secret activity of this structure, which was regulated by the current Nazi legislation, which is aimed at identifying strategically important information, designing or forecasting development trends social events, phenomena and processes in the conditions of the established Nazi occupation regime in the Soviet territories. The essence of the activity was the imposition, distortion, concealment and distortion of information in order to psychologically curtail the local population in the conditions of occupation.

**Analysis of publications that initiated the solution to this problem**. The special sub-

ject of historical and legal intelligence became the problems of organizing and realizing the intelligence activities of the Special Forces of the Third Reich. In particular, foreign researchers, such as J. Bramshtett, J. Hageman, Yu. Orlov, S. Chuyev, and domestic scientists - V.Varenko, M.Mykhaylyuk, O.Salata, etc. worked on this problem. However, there are practically no fundamentals of research in the field of analytical intelligence activities of the special department of "Vineta" of the Reich Ministry of Education and propaganda till now.

**The purpose** of the article is to reveal the essence of the concept of analytical intelligence as a kind of activity of the special department "Vinet" of the Reich Ministry of Education and propaganda.

**Presenting main material**. In accordance with the provisions of the directive of Führer's deputy R. Hess "On the cooperation of all departmental structures of Reich on issues of education and propaganda" of May 13, 1935, the state analytical intelligence activities were carried out by the structures of the following German special services [7, p.141]. Namely the military intelligence and counterintelligence service (abbeer), foreign intelligence of the General Directorate of Imperial Security (RSHA), the foreign department of the National Socialist Party, the special service of the Ministry of Foreign Affairs. During the period of the Soviet-German war, this activity was implemented through the advocacy of the SS and the Abbey, as well as the special bodies of the Imperial Ministry of Public Education and the Propaganda and Occupation Bodies of the Ministry of the Eastern Occupied Territories. However, only in the structure of the Ministry of Propaganda J. Goebbels, from the spring of 1943, the analytical unit "Vineta", which carried out special informational and analytical activities in the eastern occupied territories, was constantly functioning.

Analytical intelligence as a kind of advocacy activity of the special business of Vineta was due to the ideological concept of national socialism, as well as the strategic goal, practical goals and objectives of the implementation of an advocacy campaign in the occupied Soviet territories. The strategic goal of analytical intelligence as a component of the propaganda activities of the special department of Vineta was defined by the following normative documents of the Nazi system of law: the Fuhrer's Directions "On Propaganda for the Period of War" of September 1, 1939, and "On the Organization of Propaganda in the Period of the Onslaught on the USSR" of June 20, 1941 Year [9, p. 220]. And also the directive of the head of the General Staff of J. Keitel "On the goals and intentions of propaganda during the operation of Barbarossa of June 6, 1941, and the circular of district administrators J. Goebbels"On the employees'powers of the of the main department of propaganda "dated December 4, 1942, etc. [9, p. 228].

Based on the main provisions of these normative acts, the strategic goal of the analytical intelligence activity of the special department of "Vineta" of the Ministry of Education and Publicity of Reich was to construct a national-socialist ideological space to ensure the functioning of the Nazi regime in the occupied territories of the Soviet Union.

The system of specific goals and tasks of the special department "Vineta" identified the following normative documents: the order of the Fuhrer "On the tasks of the district health ministry" of September 4, 1934; Directive No. 21 of the Barbarossa Plan of the General Staff "On the use of propaganda during the" lightning "military campaign against the USSR" of October 7, 1940; Direction of district administrators J. Goebbels "On conducting radio propaganda in the conditions of war" of June 15, 1941; special order of the general referent of the Eastern Department "About the formation of" Vineti "of June 20, 1941; the order of the general referent of the Eastern Department "On the appointment of Dr. H. Kurtz, director of the special department" Vineta "of June 21, 1941; The directive of district administrators J. Goebbels "On the observance of secrecy during propaganda" of August 21, 1941, etc. [8, p. 12-24].

Accordingly, the main goals of analytical intelligence activities of the special department of "Venta" were:

- collection and analysis of information for its further use in the propaganda war against the population of the USSR;
- system monitoring of directions, methods and forms of advocacy of Soviet special structures;
- Identification of potential and real threats in the area of information space in the territories occupied by the Nazis.

Proceeding from the stated goals, by the order of the general adviser Dr. E. Taubert "On the formation of the active propaganda unit of the Eastern Division" of November 10, 1941 [10, p.11] and the circular of the District Administrator J. Goebbels "On the powers of the em-

ployees of the main propaganda department" December 4, 1942 [10, p.24], a number of tasks were set out before the special department, namely:

- collection and verification of targeted information;
- content analysis of open sources of enemy information;
- provision of analytically consolidated information to the highest authority of Reich, in particular, on the conditions for the implementation of the propaganda campaign in the Soviet occupied territories and its results;
- coordination of the promptly important information required by the units of the Ministry of Education and Reich for propaganda in the occupied territories;
- operational counteraction of the activities of the Soviet special organs of propaganda.

**Conclusions.** In the conditions of the Soviet-Nazi war, information and analytical intelligence became the main type of activity of the special bodies of the Reich Ministry of Education and propaganda. The essence of analytical and reconnaissance activities carried out by the ministry's special department of Vineta was to deliberately identify the real and potential threats in the realm of the implementation of imperial Nazi propaganda in the occupied Soviet territories and to provide systematic monitoring of the morally-psychological state of the Soviet population under occupation.

***References***

1. Бусол О. Аналітична розвідка в Україні як самостійний напрям діяльності державних органів і недержавних підприємств. *Науковий вісник Київського національного університету внутрішніх справ*. 2010. Вип. 2. С. 114-120.
2. Буряк А. Аналитическая разведка. Москва. 2007. 187 с.
3. Варенко В. Інформаційно-аналітична діяльність: навч. посібник. Київ, 2013. 416 с.
4. DoobL. W. Propaganda its psychology and technique. New York, 1935. 424 p.
5. Лук'янчиков Є. Методологічні засади інформаційного забезпечення розслідування злочинів: монографія. Київ, 2005. 360 с.
6. Овчинский С. Оперативно-розыскная информация. Москва, 2000. 367 с.
7. Чуев С. Спецслужбы Третьего Рейха. Москва, 2003. 384 с.
8. Institut für Zeitgeschichte, München (IfZ) KurzH. «Vineta» / Entnommen im vorliegenden Zustand aus Wlassow-Material von Jürgen Thorwald // Institut für Zeitgeschichte. Bestand. ZS-0412. S. 24.
9. Akten zur deutschen auswortigen Politik 1918-1945. Aus dem Archiv des Deutschen Auswortigen Amtes. Serie D (1937-1945). Baden-Baden. 1961, Bd. 12,2, S. 689.
10. Bundesarchiv (BA). – Koblenz. R55/21462. Dokumente. Berichte. Dr. Taubert. 34 s.

*Received to editorial office 01.06.2018*

**Summary**

The article reveals the essence of the analytical reconnaissance activity of the special department of the Vinete of the Ministry of Education and Reich propaganda during the period of the Nazi occupation of Soviet territories. The general and specific features, principles and goals of the realization of this type of activity, in general, are being determined by the Nazi intelligence services and, in particular, by the Special Officer Vineta. Attention is paid to the coverage of the content of the normative basis of the analytical unit of the special department "Vineta".

***Keywords**: Nazi occupation regime, analytical intelligence, propaganda activity, special department "Vineta".*

**Vasyl Ilkov**
Dr of Law, As. Prof.
*(the Dnipropetrovsk Regional Administrative Court)*

*DOI: 10.31733/2078-3566-2018-2-95-97*

# JUDICIAL PRACTICE AS A SOURCE OF LAW IN THE ADMINISTRATIVE COURT PROCEEDINGS

**Ількoв В. СУДОВА ПРАКТИКА ЯК ДЖЕРЕЛО ПРАВА В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ.** The states of scientific research of the problem of sources of law in administrative legal proceedings are researched in this article. National Courts should interpret the law of Ukraine during the proceedings. In the vast majority of scientific works, judicial practice and judicial precedent sources of law, in their formal legal sense, are not recognized. Elements of the present interpretation formulated in the reasoning of the court judgments and decisions in which the Court explained that the rule of law and for any reason should be applied when considering specific disputes. The relevant court interpretation summarized higher judicial authorities and launches a source of law, as a decision of the Supreme Court. The features of the judicial precedent in administrative proceedings are the rulings of the Supreme Court, which contain conclusions on the application of the rules of law.

***Keywords:*** *source of law in administrative proceedings, judicial decision, a decision of the Supreme Court, judicial practice, judicial precedent.*

**Formulation of the problem**.The state of scientific research of the problem of sources of law in administrative legal proceedings is researched for not a long time. The theoretical approaches to understanding the concept of "source of law in administrative legal proceedings", "system of sources of law in administrative legal proceedings" has their scientific reflection and their own definitions of these concepts.

**Objective**. A particular attention is paid to clarifying the role and peculiarities of application as a source of jurisprudence law, describes the Constitution of Ukraine as a source of law, features of international treaties as sources of law, clarifies the role and features of application of the law and subordinate normative-legal acts as sources of law when considering certain types of public legal disputes. The properties of court rulings of the ECHR and the Constitutional Court of Ukraine as sources of law are revealed.

**Basic content**.The legal nature of cases of administrative jurisdiction and their influence on the application of sources of law in administrative legal proceedings are revealed. The foreign experience of using the sources of law in the administrative justice of other countries is generalized and the possibilities of its implementation in the domestic legislation are determined.

It is established that the modern domestic theory of sources of law in administrative legal proceedings is in the state of formation, while not fully available a single vision of their nature and system. The acquisitions, developed by the domestic legal science, firstly, laid down exclusively normative, essentially dogmatic approach to understanding the essence of the sources of law; and secondly, became the basis for the modern understanding of many domestic scientists of branch sciences content sources of law, their hierarchical structure, based precisely on these positions. After all, in the vast majority of scientific works, judicial practice and judicial precedent sources of law, in their formal legal sense, are not recognized.

The emphasis is placed on the fact that the problems of legal proceedings are often, among other things, determined by the inadequate quality of the theoretical basis. This conclusion is fully related to the sources of law in administrative proceedings, since the problems of their application by administrative courts are caused, including lack of sufficiently deep and meaningful studies of their nature, properties and hierarchical construction.

The author formulates the definition of the concept of "source of law in administrative proceedings", which refers to the legal acts and acts of the judicial authorities in which, in which the rules that regulate the organization and implementation of justice in administrative

cases, when considering administrative courts of public law disputes and disclosed their properties.

It is substantiated that the Constitution of Ukraine is the central place in the system of sources of law in administrative legal proceedings; international treaties; laws of Ukraine; subordinate legal acts, as well as court decisions of the Constitutional Court of Ukraine and the ECHR.

The emphasis is placed on the fact that when constructing a system of sources of law, judicial practice of administrative courts and precedents of the Supreme Court should be taken into account. It is concluded that the jurisprudence contained in judicial acts - the Supreme Court decisions, which provides an interpretation of the rules of law and concludes that they are being used, is the source of law in administrative proceedings. The features of the judicial precedent in administrative proceedings are the rulings of the Supreme Court, which contain conclusions on the application of the rules of law.

Attention is drawn to the fact that in the countries of the European Community, the highest court of law plays an important role in ensuring the unity of judicial practice. In countries such as Germany, France, Netherlands, Hungary, Poland, the unity of judicial practice is provided in the form of a pre-trial inquiry, a case law, a typical case. The conclusion is drawn on the expediency of borrowing relevant foreign experience in domestic legislation regarding the strengthening of the role of the Supreme Court in ensuring the unity of judicial practice by giving it the authority to consider disputes over competence, to take exemplary court decisions in disputes arising on similar grounds in relations governed by the same rules of law and in which plaintiffs claim similar requirements.

It is substantiated that the Constitution of Ukraine, as a source of law in administrative proceedings, is characterized by the fact that its norms are rules of direct action, which should be applied by courts in the event of gaps in the law or in conflict with the norms of the Constitution of Ukraine of the provisions contained in the administrative-procedural law.

The attention is focused on the problems encountered by administrative courts when deciding on the application as a source of law laws that contain conflict of laws rules. When resolving conflicts, one of the substantive legal rules should use the rule of priority of the norm with the most favorable for the person's interpretation. It is a question of the rule of law enshrined in the Constitution of Ukraine, on the legal values, which are the basis of the entire legal system of Ukraine (Articles 3, 8, 57, 129 of the Constitution of Ukraine) [1].

According to the first paragraph of Article 2 of the Code of Administrative Judgment of Ukraine, the task of administrative justice is to protect the rights, freedom and interests of individuals, the rights and interests of legal people in public law relations from violations of public authorities, local governments, their officials and officers and other subjects exercising their duties on the basis of legislation, including delegated powers by the fair, impartial and timely consideration of administrative cases [2].

In accordance with paragraph 2 of Article 17 of the Code, jurisdiction of administrative courts extends to public disputes, including disputes of individuals with public authority to appeal its decisions (legal acts or acts of individual actions), actions or inaction [2].

Mandatory signs of a public law dispute between the court parties are certain legal subordination of one person to another and mandatory method of regulating these relations, one of the participants in such relationships must carry out power management functions.

Court parties and features of legal disputes, legal position of the subjects, the method of legal regulation and the nature of the dominant interest in the relationship are in the basis separation of administrative jurisdiction from the Civil and Commercial [4, p. 122]

It is concluded that the judicial precedent and judicial practice are unequal concepts. The judicial precedent should be distinguished from judicial practice, since the latter, unlike the judicial precedent, as a single act of the court, is a set of decisions of courts on a particular legal issue. Attention is drawn to the fact that not all judicial decisions and judicial acts can be sources of law in administrative proceedings, but only those which: 1) contain legal norms that have special features of normativity; 2) are obligatory for the courts and subjects of the authority to apply the relevant normative-legal act; 3) contain provisions on the application of the rules of law.

It is substantiated that judicial practice in administrative legal proceedings is objectified in the decisions of the Supreme Court, which contain conclusions on the application of the rules of law; generalizations of judicial practice (references on the results of studying and generalization of judicial practice, approved by the Supreme Court of Ukraine); court summaries

and statistics (case reviews, case studies, case studies); court decisions.

An attention is drawn to the fact that not all forms of court activity are sources of law in administrative proceedings, but only those that contain legal conclusions about the application of the rules of law. The author refers to these acts of the Supreme Court rulings, which contain conclusions on the application of the rules of law; Decisions the Supreme Court.

**Conclusion.** Based on the analysis of the norms of the CAP of Ukraine, the Law of Ukraine "On the Judiciary and the Status of Courts" dated 02.06.2016 and the draft of the new CAC of Ukraine, the features of the decisions of the Supreme Court and the peculiarities of their application as sources of law in administrative legal proceedings are singled out. The attention is paid to the problematic issues of strengthening the role of the Supreme Court in ensuring the unity of judicial practice, namely those relating to the peculiarities of proceedings in a typical and exemplary case.

It is noted that with the adoption of the Law of Ukraine "On the Judiciary and Status of Judges" of 02.06.2016, the decisions of the Supreme Court of Ukraine are effectively excluded from the provisions of the law. Therefore, courts can and should use their provisions as sources of law [3].

The legal nature of the decisions of the Supreme Court, which allows them to be recognized as sources of law, are examined, as they contain conclusions about the correct interpretation and application of the rules of law by the courts. Failure to take into account the legal position of the Supreme Court and conclusions based on the generalization of judicial practice may lead to the annulment of a court ruling that did not take into account these positions.

***References***

1. Конституція України. URL: http://zakon2.rada.gov.ua/laws/show/254к/96-вр.

2. Кодекс адміністративного судочинства України від 06.07.2005 № 2747-IV. URL: http://zakon2.rada.gov.ua/laws/show/2747-15.

3. Про судоустрій і статус суддів: Закон України від 02.06.2016 № 1402-VIII. URL: http://zakon2.rada.gov.ua/laws/show/1402-19.

4. Смокович М.І. Визначення юрисдикції та розмежування судових юрисдикцій: монографія. Київ: Юрінком Інтер, 2012. 304 р.

*Received to editorial office 04.06.2018*

**Summary**

The states of scientific research of the problem of sources of law in administrative legal proceedings are researched in this article. National Courts should interpret the law of Ukraine during the proceedings. In the vast majority of scientific works, judicial practice and judicial precedent sources of law, in their formal legal sense, are not recognized. Elements of the present interpretation formulated in the reasoning of the court judgments and decisions in which the Court explained that the rule of law and for any reason should be applied when considering specific disputes. The relevant court interpretation summarized higher judicial authorities and launches a source of law, as a decision of the Supreme Court. The features of the judicial precedent in administrative proceedings are the rulings of the Supreme Court, which contain conclusions on the application of the rules of law

***Keywords:*** *source of law in administrative proceedings, judicial decision, a decision of the Supreme Court, judicial practice, judicial precedent.*

**Karen Ismaylov,** Ph.D.
*(the Odessa State University of Internal Affairs)*

# CONCEPT OF INFORMATIONAL SOCIETY IN JURISDICTION

*DOI: 10.31733/2078-3566-2018-2-98-100*

**Ісмайлов К. СТАН РОЗУМІННЯ КОНЦЕПЦІЇ ІНФОРМАЦІЙНОГО СУСПІЛЬТСВА.** Здійснено аналіз розвитку та стану правового забезпечення розвитку інформаційного суспільства в Україні, зазначені проблеми формування інформаційного суспільства в Україні та запропонованні шляхи їх вирішення.

***Ключові слова:*** *інформаційне суспільство, інформаційний простір, інформаційна спільнота, інформаційні ресурси.*

From the second half of the twentieth century for the leading countries of the world the time has come for the post-industrial or information society, where the main products of production are not things and energy, but information and knowledge that serve not only as a means of understanding, but also the most expensive commodity, the most common system of services and a special form of ownership. The problem of creating a global information space has emerged in the world. In Ukraine, this process began only at the beginning of the twenty-first century. Immediately there was a need to build a people-centered, open to all people, and aimed at developing an information society in which everyone could create and accumulate information and knowledge, have free access, use and share [5]. Indeed, Ukraine, having gained independence, became part of the European democratic states. And one of the main constitutional rights of citizens is the right freely to collect, store, use and disseminate information [3, art. 34]. This right laid the foundation for the development and establishment of an information society in Ukraine. However, the normative and legal basis of this process, without a definite categorical apparatus, does not contribute to the appropriate legal training of citizens of the state prior to entering the state of the informational development of civil society, as an integral part of modern civil society.

**The urgency of the topic of this work** is due to the transition of modern Ukrainian society from industrial to informational, in which the activities of people are realized on the basis of the use of services provided through information technology, through the exercise of the right to information that is possible only in the context of significant information and legal education work in this area.

**The state of scientific development.** The authors of the publication "Information Society" made a significant contribution to the interpretation of the main theoretical and practical issues of the information society, the stages of its development in Ukraine. The Way of Ukraine ". It attempted to answer the question on which way Ukraine could go and identified this way. The author of the analytical report "Information Society in Ukraine: Global Challenges and National Opportunities" is a comprehensive analysis of the theoretical and practical issues of the information society in Ukraine. Doctor of Philosophy Dubov D.V., Doctor of Philosophy O.M., Ph.D., Hnatyuk S.L. Among the well-known Ukrainian scholars in the field of law, which are considering the legal basis of the information society in Ukraine, should also be distinguished by T.A. Bereza, V.D. Gapotya, I.V. Hetman, V.P. Kolisnika, V.G. Pylypchuka, A.A. Pismenytsky and other researchers.

**The purpose of the article** is to analyze the current state of legal provision of the development of the information society in Ukraine in the context of conceptual understanding of this concept in jurisprudence.

**The object of research** of this publication is the information society in Ukraine in the legal categorical aspect.

**Research methods.**The methodological basis of the research was the general methods of scientific knowledge, as well as those used in legal science: methods of analysis and synthesis, formal-logical, comparative law, etc.

To reflect better the state of the information society in Ukraine, the notion of "information society" needs to be defined. Unfortunately, in the jurisprudence there is no clear definition of this concept, but the characteristics of its main features, which are presented in doctrinal definitions, the opinions of most researchers are similar.

Bereza T.A. said: "Information society is really digital and global, it is characterized by life-long learning, network intelligence, silicon technology. Also:

• Information is a society in which all possibilities of modern civilization are used for the benefit of a concrete person, in which it maximally reveals and fully realizes itself;

• Information is a society aimed at introducing, exchanging and generating new ideas and knowledge of the main national capital, the basis for the stable development of the state;

• Information is a society in which a high level of technological development is organically combined with the principles of humanity, humanism, openness and responsibility of all its members [1, p. 285-286].

Ukraine, a developing country, is in a state of civilizational uncertainty. For her, the information society is rather a slogan of developed countries than real practice. Therefore, the process of transition of Ukraine to the information society should be closely linked with the development of the world information community.

At the present stage, a number of legal acts regulating the development of the information society in Ukraine were adopted: the law "On Information", the law "On the Basic Principles of the Information Society Development in Ukraine for 2007-2015", the resolution of the Cabinet of Ministers of Ukraine "On the Establishment of Interbranch Council on the development of the information society", the resolution of the Cabinet of Ministers of Ukraine "On Approval of the Strategy for the Development of the Information Society in Ukraine", the order of the Ministry of Education and Science of Ukraine "On Approval of the Methodology for indicators for the development of the information society", etc. But they are controversial, uncoordinated, and therefore ineffective. Today, there are many gaps in information law, which is a significant barrier to the development of the information society.

By the resolution of the Cabinet of Ministers of January 14, 2009, the "Regulation on the Inter-branch Council on the Information Society Development" was approved, which is a permanent consultative and advisory body under the Cabinet of Ministers of Ukraine. Its main tasks are the preparation and submission to the Cabinet of Ministers of Ukraine of proposals on the implementation of the state policy on the development of the information society and Ukraine's integration into the global information space [7].

There is also a resolution of the Cabinet of Ministers "On Approval of the Provision on the State Agency for Electronic Government of Ukraine". It states that the State Agency for E-Governance of Ukraine is a central executive body whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine and which implements state policy in the spheres of informatization, e-governance, the formation and use of national electronic information resources, the development of the information society [4].

In Ukraine there is intensive informatization of most spheres of human life and activity. This process is characterized by the following indicators:

- the instant and global nature of information exchange;
- the distances and state boundaries for the flow of information flows are erased;
- the possibilities of collecting, processing, storing, transmitting information, access to it are growing;
- there is a transition to new forms of employment, in particular, new labor resources are formed due to the increase in the number of employed in the information / intellectual-oriented types of works [2, p. 5];
- the number of sites on the Internet is growing rapidly;
- development of telecommunication systems and means;
- national communications network is expanding.

In the law of Ukraine "On the Basic Principles of the Information Society Development in Ukraine for 2007-2015", the expected results from the tasks, goals and areas stipulated by this law are indicated. Today they are disappointing, because the minority is scheduled to be implemented:

- the level of information security of man, society and state has increased;

- degree of development of information and telecommunication infrastructure, in particular Ukrainian segment of the Internet;

- the share of science-intensive products, the quality and accessibility of education, science, culture and health services increased due to the implementation of ICT;

- the human capacity to gain access to national and world information electronic resources has expanded;

- new jobs were created, conditions for work and life improved;

- the introduction of the legal and regulatory framework of the information society was deepened [5].

Based on the statement "Strategy of the development of the information society in Ukraine", it is appropriate to point out that the current state of the development of the information society is facing a certain resistance, which is due to:

- lack of an effective mechanism for the implementation of the tasks of the development of the information society;

- the ineffectiveness of the Inter-branch Council on the development of the Information Society;

- the economic crisis, which led to a reduction in the amount of financing of works in the framework of the National Program of Informatization, etc. [6].

Thus, in order to increase the effectiveness of the development of the information society, today we can offer the following ways to overcome the negative trends mentioned above:

• systematization of normative legal acts, codification - creation of the Information Code of Ukraine. Compliance of the information legislation system with the norms of international law on the development of the information society;

• creation of new acts and bodies that would ensure the full implementation of citizens' right to information;

• education of the population of the basic foundations of the culture of information and mastering the skills of realization of the right to information. This knowledge and skills are necessary for the fullness, reality of the embodiment of the idea of an information society.

• raising the level of computer and information literacy of the population;

• creating conditions for greater transparency (informational openness) of power (legislative, economic, technical).

***References***

1. Береза Т.А. Поняття інформаційного суспільства, принципи його побудови та складові компоненти // Інформаційне суспільство. Шлях України. Київ: Бібліотека інформаційного суспільства, 2004. 309 с.

2. Інформаційне суспільство в Україні: глобальні виклики та національні можливості. Київ: НІСД, 2010. 29 с.

3. Конституція України: Закон від 28.06.1996 № 254к/96-ВР. *Відомості Верховної Ради України.* 1996. № 30. Ст. 141.

4. Про затвердження Положення про Державне агенство з питань електронного урядування України: постанова Кабінету Міністрів України від 1 жовтня 2014 р. № 492. В редакції Постанови КМ № 887 від 16.11.2016. URL: http://zakon3.rada.gov.ua/laws/show/492-2014-%D0%BF/05.04.2018./12.55.

5. Про Основні засади розвитку інформаційного суспільства в Україні на 2007-2015 роки: Закон України від 9 січня 2007 року N 537-V. *Відомості Верховної Ради України*. 2007. N 12. Ст. 102.

6. Про схвалення Стратегії розвитку інформаційного суспільства в Україні: розпорядження Кабінету Міністрів України від 15 травня 2013 р. № 386-р. URL: http://zakon1.rada.gov.ua/laws/show/386-2013-%D1%80/20.10.2017./20.00.

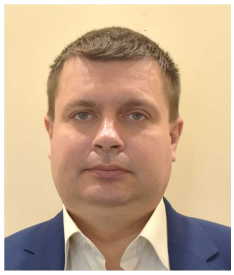
7. Про утворення Міжгалузевої ради з питань розвитку електронного урядування. Постанова Кабінету Міністрів України від 14 січня 2009 р. № 4. URL: http://zakon4.rada.gov.ua/laws/show/4-2009-%D0%BF/20.10.2017/8.30.

*Received to editorial office 31.05.2018*

**Summary**

In this article an analysis of the development and status of the legal provision of information society development in Ukraine is implemented, the problems of information society formation in Ukraine are designated and the solutions are offered.

***Keywords:*** *information society, information environment, information community, information resources.*



**Oleksandr Komissarov**
Dr of Law, Prof.
*(National Academy of the Security Service of Ukraine)*

# CITIZENS'RIGHTS TO PEACEFUL MEETING: PROBLEMS OF TERMINOLOGICAL UNCERTAINTY

*DOI: 10.31733/2078-3566-2018-2-101-104*

**Комісаров О. ПРАВА ГРОМАДЯН НА МИРНІ ЗІБРАННЯ: ПРОБЛЕМИ ТЕРМІНОЛОГІЧНОЇ НЕВИЗНАЧЕНОСТІ.** Розглянуто основні проблеми термінологічної невизначеності права громадян збиратися мирно. Здійснено аналіз основних категорій, які стосуються реалізації права громадян збиратися мирно. Здійснено співвідношення понять «мирне зібрання», «масовий захід», «публічний захід». Визначено дії, які не можуть вважатися публічними та виділено зібрання й заходи, які не слід вважати публічними .

***Ключові слова:*** *права громадян, свобода мирних зібрань, мирне зібрання, масовий захід, публічне місце, публічний порядок, публічна безпека.*

**Formulation of the problem**. Since the asset 39 of the Constitution of Ukraine came into force and the official determination of the first part of this asset in decision of the Constitutional Court of Ukraine №4/2004 from 19.04.2001 has been continued a discussion about the content of citizens to gather peaceful and about its forms and ways of such meetings. The events of 2014-2018 made active the component of security of the mentioned problem from discussion of legal regulation of forms and ways to realizate the citizens' rights for peaceful meetings to a problem of suitability of such a meeting cause of threats to national and public security and probability of terror acts and group breaches of public order. The refreshing of discussion demands the revising of basic terminology and working out of proposals to improve an effective law which regulates the holding up of peaceful meetings and public arrangements.

**The analysis of publications which consist the solution of the problem.**The problems of realizations of citizens' rights for peaceful meetings without weapons, and to hold up meetings, rallies, marches and demonstrations, and restrictions for realization of this right in the interests of national security and public order are the traditional objects of scientific researches of domestic law experts. "The peaceful meetings as an object of research was in works of M. Denisova (2010) in frames of consideration of problematic questions of legal ensuring to realizate the constitutional right for peaceful meetings in Ukraine, A. Shevchenko (2010) during the research of constitutional right for peaceful meetings, O. Klymenko (2015) in frames of consideration of a problem of legal ensuring of constitutional right to hold peaceful meetings in Ukraine, E. Cobruseva (2015) during the research of administrative-law ensuring of rights and freedoms of person and citizen for peaceful meetings, O. Shkarnega (2016) in frames of researches relatively to realization of right for peaceful meeting, O. Tronko (2016) in research about administrative-law principles of realization of human right for peaceful meetings. "Public arrangements"- works of V. Polishchuk (1999) in consideration of administrative-law regulation and practice of holding of peaceful meetings, Y. Lemishko (2009) in frames of research of constitutional-law basis of participation of Ukrainian citizens in public and mass arrangements, M. Voznyk (2010) during the consideration of a problem of securing the meetings by units of Interior Ministry, V. Pokaychuk (2011) in studying the peculiarities of leading the special operations by units of public order of Interior during the holding of sports events, R. Katsuba (2012) in consideration a problem of prevention of public order breaches during the holding of sports events, V. Berezana (2014) the administrative-law ensuring of public order protection and public security during holding the mass arrangements, V. Zarosylo (2017) the administrative-law ensuring of holding the mass arrangements in Ukraine, A. Dolynnyi (2017) in studying of the administrative-law ensuring by the national police of Ukraine the public se-

curity and order during holding the mass arrangements.

The other terms and categories in scientific researches were not deeply considered but in law-practice and normative-law acts which regulate public relations in places of peaceful meetings are used such terms " the mass being of people", " the mass confluence of people" etc.

**The aim of the article.**On the ground of analysis of effective law and practice of its realization to determine the main problems of terminological uncertainty as regards the realization of human rights for peaceful meetings.

**Basic content.**The Constitution of Ukraine guarantees the realization by citizens on their rights to gather peaceful, without weapons and hold meetings, marches and demonstrations. But the authors of the Main law didn't mention the realization of such right by any of law category or juridical construction. Thereafter in the text of the Main law isn't used neither concept "mass arrangement", no "peaceful meeting".

The attaching in art. 39 in the Constitution of Ukraine of the possibility to meet peaceful without weapons and to hold meetings, marches and demonstrations may be considered one of the constitutional guarantees of citizen's right on free conception of the world, and also religious liberty, liberty of mind and word, on free expression on one's look and conviction, the use and spreading on one's choice the information mouthly, written or in another way, rights on self-development etc. By this means the state fastens by declaring for its citizens the freedom to meet peaceful and rights to hold mass arrangement in its Constitution a hierarchy of information- communicative possibilities of individual development. By common position of OSCE and Venice commission such meetings are arrangements that have on target the message of a certain information to one or another person (persons).

It is necessary to agree with position of R. Melnik, regarding the existence of a board right on social – communication which is important for a person, citizen, because through it are realized the needs of human and citizen in communicating with other persons; Thanks to it self realization of a person takes place and citizen in society and in state. [1, p. 59]

From the perspective of personality development such a need should be strengthened by the collective activity aspect which guarantees participation of the citizen in social, religious, political, economic-processes, etc.

Formed be above mentioned positions the content of interpretation "peaceful meeting" becomes incomprehensible. First of all in phrase is considered a category "meeting"in its relationship with a category "arrangement" as fixed in law to avoid by some individuals an intellectual and social isolation (solitude) and fixed in law the possibility to take part in formation of a common position to solve problems. According to a general model the right to meet as to organize and to hold an arrangements belongs as to one individual as to any group of individuals independently their degree of relationship, subordination, registration the form of such association or availability of organization-law form etc.. Besides that it should be verified the prohibition of any discrimination of "meeting" and its participants on such features asr ace, the color of skin, sex, language, religion, politic or another views, national or social origin, state, place of birth or any other status. The discrimination on any of these features restricts the right to peaceful meetings and must be considered as the breach of international law in branch of human rights [2, p. 14]

Recording this model should be added that international law recognizes only general principle of the right to assemble peaceful, does not recognize the detail of its content or the formation of a categorical basis for its implementation, while in the national legislation of most countries of the world not only"confirms" the existence of such a right or freedom, but also "tries" to maximally clarify the content of its basic components and to regulate the procedure for its implementation.

In art 39 of the Constitution of Ukraine as an additional sign of the"peaceful"the absence of weapons determined which should be manifested of its public demonstration by the participants of such a meeting and/or their expression in any way with the intention of its application.

In turn the national legislation contains refinement and a detailed of specific procedures regarding to provide the right of freedom of peaceful assembly in the relevant by laws, including local governments.

Thus, in Ukraine, in accordance with item 1 of section XV"Transitional Provisions" of the Constitution of Ukraine, is valid in part that does not contradict of the Constitution of Ukraine, the procedure for the organization and holding of meetings, rallies, street marches and demonstration, approved by the Presidium of the Supreme Soviet of the USSR of 28.07.1988 N 9306. [3]

It should be considered that effective order does not cover the organization and holding any meetings that had characteristics of publicity and regulates the organization and conduct

meetings, hikingtrips, demonstrations that permission to restrict such concept "peaceful meeting" determine the legal status of his participants such participants peaceful meetingin every case. The action of the specified order in part of the requirements for the order of organization and holding peaceful meeting, timely notice of the executive authorities ororgans of local government, documents which should be included to the application about conducting of peaceful meeting should be proceed taking into account the legal position, which Constitutional Court of Ukraine expressed in its decision since 19 April 2001 year N 4 p (the case of early notification of peaceful gatherings) [4] and in part of the requirements for an early notification of the worship, religious rites ,ceremonies taking into account the legal position which Constitutional Court of Ukraine expressed in his decision since 08.09.2016 year N 6 rp (the case of an early notification of public worship, religious ceremonies, ceremonies and processions) [5].

So group of people which want to avoid intellectual or social isolation or participate in the formation of a common position, have to realize their own opportunity, due to staying at the same time in a certain place, the characteristics of which allow to express the formed position. Analysis of constitutions of European countries allowed to identify two types of placescollection "out of door"andcollection in another places (non-public) places (building) [1, 33]. Every appropriate collection answer a signs of "public" and chosen place of collection should be determined as "public place". The term of "public place" can determined as open area for free access, building or structure or their part useable for your characteristics for residence the group of peoples and their expression of formed position. In practice of European Court of Human Rights to category "public place" to refer public streets and squares [6].

An important aspect is formation of the realism of law to freedom of peaceful assembly is common goal of every person such join to collection and her ways of achieve with aim and appointmentofthecollectionIn case such common goal is possible the formation of unitary position of the people group's with simultaneous refusal from her demonstration outside.Thatiswaysuchactioncannotbeconsideredpublic. Also should not be considered public: general meeting of villager (villagers), city fors olving issues of local value according to the Law of Ukraine "On self-government in Ukraine"; convocation (conferences) of residents that conduct according to the Law of Ukraine «On self-organization bodies of population»; meetings of labor collectives, meetings of statutory bodies of management of legal entities, association of citizens, meeting of voters with candidates for deputies with elected deputies, Presidential candidates of Ukraine, meeting of initiative group for organizing a referendum, collection that held for recreation purposes, and public holiday, concerts, if they are not component of the peaceful assembly; wedding processions,funeral, if they are not component of the peaceful assembly, religious rites and ceremonies in case, stipulated by the Law of Ukraine"About freedom of conscience and religious organizations".

During such events possible is gain features «publicity» in result appropriate activity such its holding in "public place" that gives it to basic presumption to benefit freedom assembly [1, 21], status of"thought public activity" but don't give rights of participants relevant assembly or meeting, to encroach on rights and freedom, honor and dignity another people as in that is why including that are from they in within"visibilityand audibility"or watch overswing "activity"in every which way on sufficient distances. The main characteristic of "activity" with the organizer or initiator (agent) such activity, becomes his character, as in p.1 art. 39 of the Constitution of Ukraine, marked over help term"peaceful", and in p.2 art. 39 of Ukrainian Constitution not peaceful behavior of the participants in the meetingis defined as a threat to national security, public order, population's health.

Developing such assumption should draw attention on position of the Organization for Security and Co-operation in Europe, aswasexpressedinleadershipwithhuman rights and provision the rule of law at times public assemblyIn accordance said leadership quality for freedom peaceful assembly guaranteed if meeting is peace. Meeting is peace if his organizers claimed about their peace intent, and behavior of members is non-violent. [2, p. 17] Illegal but peace meeting what holding in situation when organizer or another persons had not carry out of requirements laws(recording order organization or notification in time – supplemented us) enjoy such most protection, as another peace meetings. [2,p. 7]

**Conclusions.** Summarizing the bove, it should be noted that terminological uncertainty is one of the key problems on the way to introduction in Ukraine of a single mechanism for the realization of the right of citizens to gather peacefully in order to solve any problems of the life, to formulate and express a common position with regard to them while adhering to the level of security to the low and order. The systematic nature of this problem is indicated by the

content of article 39 of the Ukraine Constitution which defines the procedural and security components of the mechanism for implementing this right.

In modern conditions“peaceful assembly” is one of broadest concept that covers the entire set of public events ,organized and conducted in public places peacefully, without weapons in the form of meetings, rallies, demonstrations, pickets, expressions of personal, civil or political position, from any questions.

The type of a peaceful is public (mass) activity, characterized by a large number of participants: as in most cases have been normatively definedorganization of actions; availability of goal or specific goal; presence of public venues, regulation of the activity.

The term “mass events” in legislative and other regulatory acts of Ukraine is used only in connection with the law enforcement activities of the bodies of the National Police of Ukraine and other state bodies. It is widely used as departmental regulation as in service documents of the Ministry of Internal Affairs.

In case of declaration by the organizers (authorized participants) of a public activity of the exclusively peaceful nature of this measure and of non violet, albeit active conduct of its participants, such an event may be determined as peaceful.

The obligation of Police officers are providing the security and rule of law during public and another activities such as not considered but held peaceful that way it is part of the state guarantees to its citizens ,enshrined in art. 39 of the Constitution of Ukraine.

The proper state of security and rule of law can be achieved only through the interaction organs of the National Police of Ukraine with the units of the interregional territorial organs of the National Police of Ukraine in particular the patrol police, units of the National Guard of Ukraine for the protection of public order.

The territorial body of the National Police of Ukraine did not interfere in the organization of such event, but carry out organizational and regulatory activities regardingprovide the protection of public safety and order during its conduct, depending on its purpose and scale and other unites are involved in ensuring security and order in carrying out such measures acting on his instructions.

***References***

1. Мельник Р.С. Право на свободу мирних зібрань: теорія і практика. Київ, 2015. 168 с.
2. Права людини і забезпечення правопорядку під час публічних зібрань. Керівництво. Homework. Варшава, 2017. 154 с.
3. Порядок організації і проведення зборів, мітингів, вуличних походів і демонстрацій, що був затверджений Указом Президії Верховної Ради СРСР від 28.07.1988 N 9306. URL: http://zakon3.rada.gov.ua/laws/show/v9306400-88.
4. Рішення Конституційного Суду України у справі за конституційним поданням Міністерства внутрішніх справ України щодо офіційного тлумачення положення частини першої статті 39 Конституції України про завчасне сповіщення органів виконавчої влади чи органів місцевого самоврядування про проведення зборів, мітингів, походів і демонстрацій (справа щодо завчасного сповіщення про мирні зібрання). URL: http://zakon3.rada.gov.ua/laws/show/v004p710-01.
5. Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) положень частини п’ятої статті 21 Закону України "Про свободу совісті та релігійні організації" (справа про завчасне сповіщення про проведення публічних богослужінь, релігійних обрядів, церемоній та процесій). URL: http://zakon3.rada.gov.ua/laws/show/v006p710-16.
6. Urteil v. 09-07-2003, RJD 2003-III, 231 (255 [№ 56]) – Djavit An. Urteil v. 31-03-2005 (№ 266) – Adali.

*Received to editorial office 22.06.2018*

**Summary**

The main problems of terminological uncertainty of the right of citizens to gather peacefully are considered. The analysis of the main categories concerning the realization of the right of citizens to gather peacefully is carried out. The correlation between concepts "peaceful assembly", "mass event", "public event" is carried out. Identified actions that can not be considered public and highlight the collection and activities that should not be considered public.

***Keywords**: citizen's rights, freedom of peaceful gatherings, peaceful assembly, mass event, public place, public order, public safety.*

**Anna Korshun**
postgraduate
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-105-108*

# INTERNALLY DISPLACED PERSONS' RIGHT TO HOUSING IN UKRAINE: PROBLEMS OF ENSURING REALIZATION

**Коршун Г. ПРАВО ВНУТРІШНЬО ПЕРЕМІЩЕНИХ ОСІБ НА ЖИТЛО В УКРАЇНІ: ПРОБЛЕМИ ЗАБЕЗПЕЧЕННЯ РЕАЛІЗАЦІЇ.** На основі проблем внутрішнього конфлікту, який був викликаний військовою окупацією територій України, особи, які переїхали з окупованих територій так і не отримали житло, що було гарантовано їм Конституцією України. На жаль, більшість ВПО, що змушені були переїхати з окупованих територій мають труднощі з доступом до гідного житла, яке повинна надати держава. У цій статті досліджено проблеми реалізації права на житло внутрішньо переміщеними особами в Україні. Тематична актуалізація пов'язана з тим, що саме від реалізації права на житло залежить нормальне функціонування демократичної держави. Реалізація права на житло серед ВПО є особливо важливим, оскільки житло є необхідним для кожної людини. Необхідно, щоб законодавство змогло реалізувати права на житло, за допомогою якого внутрішньо переміщені особи можуть отримати соціальне житло. Зарубіжна практика свідчить, що реалізація права на житло для внутрішньо переміщених осіб може відрізнятися. Проаналізовано зміст існуючих законопроектів, які покликані забезпечити ефективну реалізацію права на житло внутрішньо переміщених осіб. Досліджено зарубіжний досвід в цій сфері. Сформульовано авторські пропозиції щодо вирішення проблеми.

***Ключові слова:*** *внутрішньо переміщені особи, переселенці, житло, правова держава, міжнародні стандарти.*

**Problem statement.** The need for realization of the right to housing is conditioned by the fact that the terrorist events on the territory of Eastern Ukraine caused the forced migration of the population and the emergence of a special category of internally displaced persons. As of February 5, 2018, according to the data of the structural units of the social protection of the population of the oblast and Kyiv city state administrations, 1 493 057 internally displaced persons were registered. Since internally displaced persons are the most vulnerable in the population, the issue of realization of the right to housing is relevant.

Ukrainian public opinion is increasingly aware of the scale of the socio-political catastrophe that manifests itself in the violent migration of the population in the East of Ukraine and the Crimea. In forced migration there is a human drama of countless consequences. People from the East of Ukraine and the Crimea are forcibly leaving their history and their land. Displaced persons have to be in uncertainty in which they do not know when they return.

**Status of the research:** At the present stage, many domestic scientists pay attention to the problems of internally displaced persons, namely: N. Andrusyshyn, T. Gnatiuk, N. Gusak, I. Danylova, V. Diachenko, M. Kobets, K. Krakhmalova, V. Mikhailovskyi , O. Ryndzak, U. Sadova, T. Semygina, S. Trukhan, D. Tsvigun, and others.

**The purpose and tasks of the article** are to outline the current problems of legislation on the realization of the right to housing and to research possible ways to solve them.

**Description of the main material.** This article analyses the problems the of realization of the internally displaced persons (IDPs – further) right to housing. In addition examples of foreign countries' practice in solving the issue of realization of the right to housing and the suggested trends in the formation of national policy in this area are considered.

In Ukraine, internal displacement of people has economic, social and political reasons. The reason that caused the greatest number of internal migration in Ukraine was the violence committed by armed groups against the civilian population, caused by the interests of mass occupation of the country's territories, and also because the militants did not share the political positions of the population, which forced people to leave the occupied territories.

Housing is one of the main material conditions of human life. The need for a person in the home arises from the moment of his birth, is maintained throughout his life and ceases after death. Hence, meeting the needs of people in housing is an important social task.

Realization of the IDPs right to housing is especially important as housing is neces-

sary for every person.

The Constitution of Ukraine states: «Citizens in need of social protection shall be provided with housing by the state and local self-government bodies free of charge or at an affordable cost to them in accordance with the law [1]». Consequently, we can conclude that satisfying the housing needs of Ukrainian citizens is an important social task of the state. Based on the problems of the internal conflict those who have moved from the occupied territories have received the status of internally displaced persons and one of the most important problems facing these citizens has become the problem of realization of the right to housing, guaranteed by Article 47 of the Constitution of Ukraine. Unfortunately, the majority of IDPs forced to leave the occupied territories have difficulties with access to decent housing, which should be provided by the state.

Among the large number of rights that are violated daily against the internally displaced persons, the right to housing is important since other types of rights requiring equal restitution, such as the right to health and education, have the same importance as housing for a person, because this is one of the most important needs where IDPs should have exclusive rights and guarantees, precisely because of their vulnerability.

We must start with the recognition that the decision should not just be the construction of new homes, but also a multitude of alternatives that range from special mortgage credit to renting.

However, it is clear that the full realization of the right to housing for the entire displaced population can not occur in the short-term or even in the medium term. Therefore, it is necessary to develop various alternatives to address the unreliable housing situation of displaced persons by analysing the various forms of safe ownership that can be provided, always with the prospect of turning them into long-term solutions with sustainable ability.

The first attempt to correct the realization of the internally displaced persons right to housing was the Resolution of the Cabinet of Ministers of Ukraine «On approval of the integrated state program for support, social adaptation and reintegration of Ukrainian citizens who moved from the temporarily occupied territory of Ukraine and areas of anti-terrorist operation to other regions of Ukraine for the period up to 2017».

The purpose of the Program was to solve the main problems of internally displaced persons and reduce the level of social tension among them and in society; promotion of integration and social adaptation of such persons at the new place of residence; assistance in ensuring the creation of proper conditions for life, rights and implementation of the potential; provision of social, medical, psychological and material support; creation of prerequisites for compensation for property (material) and moral damage caused to them; creation of favorable conditions for voluntary return to places of previous residence (subject to full actual cessation of hostilities in areas where the state authorities temporarily do not exercise their powers) [2].

The next step was the presentation of the new «Strategy of the IDP integration and implementation of long-term solutions to internal displacement for the period till 2020» from the Ministry for Temporary Occupied Territories and Internally Displaced Persons.

Submitted by the Ministry for Temporary Occupied Territories and Internally Displaced Persons within the Forum, «Strategy of the IDP integration and implementation of long-term solutions to internal displacement for the period till 2020» should replace «The integrated state program for support, social adaptation and reintegration of Ukrainian citizens who moved from the temporarily occupied territory of Ukraine and areas of anti-terrorist operation to other regions of Ukraine for the period up to 2017» approved by the government in 2015 [3].

The aim of the Strategy is social and economic integration of internally displaced persons and implementation of long-term solutions to the realization and protection of their rights, freedoms and legitimate interests, increasing their self-sufficiency and independence, taking into account the interests of host territorial communities, establishing effective interaction of internally displaced persons with host territorial communities, state authorities and local self-government bodies on the basis of partnership, the result of which is the achievement of social unity [4].

On January 17, 2018, the government issued Resolution No. 20 «On amendments to the procedures» approved by the Resolution of the Cabinet of Ministers of Ukraine on March 31, 2004 No. 422, in which internally displaced persons are classified in the category of citizens entitled to receive premises from the housing stock for a temporary residence, as well as determine the necessary for this list of documents [5].

Prior to the publication of this Resolution, the problem of realization of the right to housing was not regulated at all, given that according to the legislation of Ukraine, IDP is not included in the list of categories of citizens who have the right to social housing. In some cases,

when the local council was able to allocate social housing for IDPs, the provisions of the laws «On local self-government in Ukraine» and «On social fund housing» were applied.

The Norwegian Refugee Council has carried out an analysis of three projects in the cities of Donetsk oblast, namely, in Bakhmut, Kramatorsk and Slaviansk for provision of social housing for internally displaced persons in the Donetsk region. Based on the example of projects in these cities, we see that the process of providing housing was too complicated for local councils, due to the lack of rights to social housing in the IDP, but in some cases the right to housing was provided by references to Articles 9 and 11 of the Law of Ukraine «On ensuring rights and freedoms of internally displaced persons»and Article 26 of the Law of Ukraine «On local self-government», which provides for the exclusive competence of local councils on the alienation, transfer of use and other utilization of communal property, these projects were passed to IDPs [6].

The foreign experience of the post-Soviet countries allows us to analyse the general conditions for the provision of housing to solve housing issues in this category of persons in order to make appropriate recommendations for Ukraine on the way of policy formation in this area. So, let us look at the example of Azerbaijan and Georgia, which Ukraine can take into account.

The internal displacement of people in Azerbaijan began after the conflict with Armenia through the territory of Nagorno-Karabakh. The conflict began during the Soviet era in 1988, when nationalist aspirations appeared in Nagorno-Karabakh, and the Soviet government agreed to pass on the territory to Armenia. In Azerbaijan, there is a program for improving living standards and creating jobs for refugees and IDPs. Thanks to this program, 82 temporary settlements were constructed in Azerbaijan with schools and medical centers for 40,000 families, that is, for 180,000 internally displaced persons. The positive aspect of this program is that the IDPs were able to realise their right to housing for a long-term free of charge. However, the negative point was that the quality of housing in these temporary settlements was not satisfactory, therefore, in a short time the buildings needed repairs.

To date, Georgia has about 259,247 IDPs, which is about 6% of the population of Georgia. The procedure for providing housing for internally displaced persons was carried out in the following ways:

1) IDPs could privatise housing in which they live for a long time;

2) transfer of IDPs to restored and newly built houses, or the provision of one-time compensation of 10,000 dollars USA;

3) purchase of housing in rural areas for IDPs;

4) redemption of private property and transfer of ownership to IDPs;

It is noteworthy that the Georgian authorities transferred housing to the private property of the IDPs in order to secure their long-term resettlement and created opportunities for free disposal of property (purchase, sale, lease, etc.).

The negative point was that, as well as in Azerbaijan, most of the buildings were constructed with defects, and this entailed the need for repairs of the newly built dwelling. Another problem was that the IDPs were not involved in previous consultations and did not participate in the distribution of housing. There have also been cases where the IDPs took a lump sum payment and since the confirmation of their applications, they still could not get their money for a long time.

Proceeding from the necessity of developing proposals in the context of the problem of realization of the internally displaced persons right to housing, we propose analytical development of appropriate actions for the realization of the IDPs right to housing.

On the basis of the problems of the internal conflict, which was caused by the military occupation of the territories of Ukraine, those who moved from the occupied territories did not receive housing, which was guaranteed by the Constitution of Ukraine. Unfortunately, most of the IDPswho were forced to leave the occupied territories have difficulty in accessing decent housing, which should be provided by the state.

Therefore, a number of suggestions are presented below as recommendations for state policy which can be taken into account to help overcome the weak performance of the state in regulating the realization of the internally displaced persons right to housing.

**Conclusions.** The tentative approach aimed at resolving the right to housing should be aimed at the development and harmonization of state policy, which under the leadership of the state will allow quantitative and qualitative overcoming the current situation.

It is also necessary to recognise that today's housing policy was mainly focused on creating a new home, and although other alternatives have been proposed, they are either not

encouraged or implemented to a lesser degree. Among the decisions that should be considered as alternatives to the internally displaced persons, the following proposals that can be applied are listed:

1) purchase of new housing;

2) purchase of used housing;

3) state program of housing assistance on the site belonging to the internally displaced persons;

4) improvement of the current housing (there are cases where the internally displaced persons lease or buy a long-term home in a state of emergency, in the case of which the state may help to rebuild housing with the condition of residence for a certain term);

5) adaptation of abandoned buildings that can be structurally transformed into residential buildings;

6) reconstruction of urban old housing stock;

7) design of rural settlements;

8) one-time compensation from the state;

9) special loan conditions, mortgages for IDPs.

By synthesising the results of the analysis, one can conclude that the realization of the right to housing for internally displaced persons in Ukraine is of special importance today, since the realization of the IDPs rights is a legal guarantee of the inviolability of the rights and freedoms established by the Constitution. At the current stage, the urgent issues are the introduction of amendments to domestic legislation, which must comply with international standards and ensure the effective realization of the right to housing for internally displaced persons. Ways of effective development of realization of the right to housing are a promising direction for further research.

***References***

1. Конституція України від 28 червня 1996 року. *Відомості Верховної Ради України*. 1996. № 30. Ст. 141 (зі змінами внесеними Законом України «Про внесення змін до Конституції України (щодо правосуддя)» від 02 червня 2016 року. *Відомості Верховної Ради України*. 2016. № 28. Ст. 532).

2. Про затвердження Комплексної державної програми щодо підтримки, соціальної адаптації та реінтеграції громадян України, які переселилися з тимчасово окупованої території України та районів проведення антитерористичної операції в інші регіони України, на період до 2017 року: постанова Кабінету Міністрів України від 16 грудня 2015 р. *Урядовий кур'єр*. 2015. № 244.

3. За ініціативи МТОТ з державного бюджету вперше виділено кошти на забезпечення тимчасовим житлом ВПО. URL: http://mtot.gov.ua/za-initsiatyvy-mtot-z-derzhavnogo-byudzhetu-vpershe-vydileno-koshty-na-zabezpechennya-tymchasovym-zhytlom-vpo-v-chernysh/.

4. Про схвалення Стратегії інтеграції внутрішньо переміщених осіб та впровадження довгострокових рішень щодо внутрішнього переміщення на період до 2020 року: розпорядження Кабінету Міністрів України від 15 листопада 2017 р. *Урядовий кур'єр*. 2017. № 240.

5. Про внесення змін до порядків, затверджених постановою Кабінету Міністрів України від 31 березня 2004 р.: постанова Кабінету Міністрів України від 17 січня 2018 р. *Урядовий кур'єр*. 2018. № 15.

6. Соціальне житло для внутрішньо переміщених та осіб, що постраждали від конфлікту: порівняльний аналіз проектів у Бахмуті, Слов'янську та Краматорську. URL: https://www.nrc.no/globalassets/pdf/briefing-notes/ukraine/case-study-social-housing-for-idps_ukr.pdf.

*Received to editorial office 05.08.2018*

**Summary**

On the basis of the problems of internal conflict, which was caused by the military occupation of the territories of Ukraine, those who moved from the occupied territories did not receive housing, which was guaranteed by the Constitution of Ukraine. Unfortunately, the majority of IDPs who were forced to leave the occupied territories have difficulties with access to decent housing, which should be provided by the state. This article explores the problems of the realization of the internally displaced persons right to housing in Ukraine. The content of the existing bills which are intended to ensure the effective realization of the right of internally displaced persons to housing is analysed. The foreign experience in this field is studied. The author's suggestions for solving the problem are formulated.

***Keywords:*** *internally displaced persons, settlers, housing, rule of law, international standards.*

**Alina Oreshkova**
lecturer
(*the Dnipropetrovsk State University of Internal Affairs*)

*DOI: 10.31733/2078-3566-2018-2-109-114*

# THEORETICAL AND LEGAL CHARACTERISTICS OF THE APPROACHES TO THE DEFINITION OF THE CONCEPTOF INTERNALLY DISPLACED PERSON

**Орєшкова А. ТЕОРЕТИКО-ПРАВОВА ХАРАКТЕРИСТИКА ПІДХОДІВ ДО ВИЗНАЧЕННЯ ПОНЯТТЯ ВНУТРІШНЬО ПЕРЕМІЩЕНОЇ ОСОБИ**. У статті розглядається зміст поняттявнутрішньо переміщених осіб у контексті сучасних реалій українського суспільства. Проаналізовано наукові підходи до визначення поняття "внутрішньо переміщена особа" та надано авторське визначення цього поняття.

***Ключові слова**: внутрішньо переміщені особи, біженці, військовий конфлікт, окупація.*

**Formulation of the problem.** In today's conditions, our country continues to see an increase in local and interstate military conflicts which combined with emergency situations (natural or man-made) force people to leave their place of permanent residence. During the independence, as a result of armed aggression in the East of Ukraine and in the Autonomous Republic of Crimea, our state faced the problem of internal displacement of its citizens for the first time. In the scientific literature there are several synonymous concepts that apply to such a category of persons: "internal refugee", "internally displaced resident", "forced migrant", "internal migrant", "forced settler", etc. In official legal acts of Ukraine, they are defined as "внутрішньо переміщена особа", which corresponds most closely to the English word "internally displaced persons" (hereinafter referred to as the IDP). That definition is enshrined in the UN Guiding Principles on Internal Displacement.

**Analysis of publications in which the explanation of this problem began.** The concept of internally displaced person is known in the legislation of a few countries, given that it is necessary to clearly identify who should be assigned to the IDP in order to find out their legal status and develop mechanisms for the protection of their rights. Separate issues concerning the legal status of internally displaced persons in Ukraine are devoted to scientific works of such scholars as E. Gerasymenko, R. Goldman, F. Deng, B. Pirotskyi, M. Malyha, V. Mykytenko, E. Mykytenko, I. Kozynets, K. Krakhmalova, M. Kobets, L. Shestak, M. Sirant, N. Tyshchenko and others. However, it should be noted that until now, there have been no comprehensive studies of questions concerning the generalization of the historical experience of delineating the definition of internally displaced person.

**The purpose of the article** is the author's attempt to offer a definition of this general theoretical category on the basis of methodological analysis, taking into account the defined interpretations of the concept of internally displaced person.

**Presenting main material.** As of March 27, 2017, according to the data of the departments of social protection of the population of the oblast and Kyiv city state administrations, 1 601 806 immigrants or 1 288 399 families from the Donbas and the Crimea were taken into account [1]. The displacement of persons in Ukraine from the occupation zone took place spontaneously, involuntarily, and therefore in its essence more consistent with the concept of refugee, but according to the principles of the Office of the United Nations High Commissioner for Refugees (UNHCR), the difference between an internally displaced person and a refugee is the absence of the fact of crossing the state border in order to leave the zone of armed conflict. In turn, the mechanisms created for refugees did not take into account those who were forced to move within their country. Those persons who, for various reasons, could not or did not want to leave their country, did not fall under international legal protection. The international level of this problem was also hampered by the traditional notion of state sovereignty. The governments of the countries retained the exclusive right to resolve issues related to the situation of their citizens [2, p. 258]. The existing need for a detailed and thorough study of the phenomenon of internal displacement and its delimitation from adjacent terms is confirmed by

the diversity of terminology.

In international law, the only universally accepted term used for such a category of persons is internally displaced persons (IDPs). This concept is part of a wider term which is commonly used in international law, that is, displaced persons who are victims of a phenomenon such as forced migration. The introduction of this term into scientific circulation is attributed by E.J. Jaffe to the famous Russian-American demographer Eu. Kulischer [3, p. 187], which he used for the first time in his work, "The Displacement of the Population in Europe" (1943), concerning persons who were forced to change their pre-war residence as a result of the Second World War. Today, the UN Human Rights Council divides the displaced persons into two subgroups: refugees and asylum seekers, as well as IDPs.

For the first time in Ukraine, the mass phenomenon of internally displaced persons arose in connection with the accident at the Chernobyl Nuclear Power Station. Thus, a large area went to the exclusion zone as a result of radioactive contamination and about 200 thousand people were forced to change their place of residence. However, the situation of this category of persons at the legislative level was regulated only in 1991, namely the adoption of the Law of Ukraine "On the status and social protection of citizens who suffered due to the Chernobyl catastrophe" [4]. There was also adopted the Decree of the Council of Ministers of the RSFSR "On additional measures to strengthen health care and improve the situation of the population residing in the contaminated territories as a result of the Chernobyl accident" of December 14, 1989 [5] and Decree of the Cabinet of Ministers of Ukraine "On the procedure for resettlement and individual cases of resettlement of citizens from the contaminated territories as a result of the Chernobyl accident" of December 16, 1992 [6]. However, the whole range of problems encountered by this category of persons was not possible to be resolved by these normative acts. Despite the fact that in Ukraine's history there have been precedents for mass displacement of people due to the Chernobyl accident, our country still lacks experience related to the effective interaction between the state represented by bodies of state power and local self-government, civil society organizations, international organizations, volunteers for the development and implementation of complex state programs.

The concept of displaced person began to be widely used during the Second World War, resulting in about 10 million people being drawn to forced labor or expelled from countries of primary residence based on racial, religious or political considerations [7].

In 1972, the UN General Assembly expanded the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR), which covered refugees and asylum seekers, that is, people forced to seek a country of residence and seek international protection to persons displaced within their own countries. When investigating the issue of internal displacement, it was established that current international legal norms could not fully regulate the legal status of internally displaced persons, they were fragmented, had gaps and were found in a large number of legal acts. In this context, on the instructions of the General Assembly of the United Nations and the Commission on Human Rights, Guiding Principles on Internal Displacement were developed and adopted in 1998. Paragraph 2 specifies that internally displaced persons should be considered as persons or groups who were compelled or forced to flee or to leave their homes or place of permanent residence, in particular as a result of or in order to avoid the consequences of an armed conflict, persistent manifestations of violence, violation of human rights, natural or man-made disasters, and who have not crossed the internationally specified state borders [8]. The peculiarity of the definition of the concept is the lack of a clear list of reasons for the displacement of the population.

As V. Klein notes, in defining this concept in the Guiding Principles on Internal Displacement two main features can be distinguished: the violent or involuntary nature of the movement and the fact that such movement remains within the state. The act does not apply to those who voluntarily relocate to another place for the sole purpose of improving their financial position [9].

For our country, Guiding Principles on Internal Displacement is a guide for lawmakers in the context in which they should be studied and taken into account in national legislation because, firstly, the document contains conclusions of world political thought in the context of the problems of the category of persons under investigation, and secondly, the norms of international legal documents on the protection of human rights are part of national legislation.

However, despite all the positive international legislation, the domestic law of the state itself, within which the migration processes take place, plays a major role in the protection of the internally displaced persons. Only the application of domestic law relating to human rights and internal displaced persons is an effective means of ensuring the rights and freedoms of the

latter. Besides, it is advisable to pay attention to the normative legal acts of foreign countries. For example, the Azerbaijani government in 1999 adopted the Law "On status of refugees and forcibly displaced (persons displaced within the country) persons" and affirmed that a forcibly displaced person was a person forced to leave their permanent residence as a result of military aggression, a natural and man-made disaster on the territory of the Republic of Azerbaijan, and move to another place (Article 1) [10].

In the Law of Georgia "On internally displaced persons – prosecuted from the occupied territories of Georgia", adopted on March 1, 2014, in accordance with Article 6, internally displaced persons should be understood as citizens of Georgia or stateless persons who were forced to leave their place of residence owing to the occupation of the territory by a foreign state, aggression, military conflict, mass violence and / or mass violation of human rights (the law does not apply to natural disasters and man-made disasters) [11].

The study of the legislation of the African Union is important. Thus, at a special summit in Kampala on November 22, 2009, the Convention on the Protection of Internally Displaced Persons in Africa was adopted. The above-mentioned Convention came into force in 2012, but reflects the norms formulated in 1998 in the Guiding Principles on Internal Displacement and protects internally displaced persons in accordance with the norms of international law.

Standards of Article 1 of The Kampala Convention states that "internally displaced persons" are individuals or groups who have been forced to flee their homes or places of traditional residence or to leave them, in particular, as a result of armed conflict, mass violence, human rights violations, natural or anthropogenic disasters or to avoid such effects, and who have not crossed the internationally recognized border of the state. Besides, this article of the Convention defines the concept of "displacement within the country", which should mean compelled or forced displacement, evacuation or relocation of persons or groups of persons within the internationally recognized borders of the state [12].

In Croatia, instead of the concept of internally displaced person, they use a concept close in content, namely, "exile". Point 1 of Article 2 of the Croatian Law "On the Status of Expellees and Refugees", 1993, gives the definition of "exile" as a person who escaped from one territory of the Republic of Croatia to another territory of the Republic of Croatia [13]. Besides, the aforementioned law up to 1999 divided the IDPs into two categories, namely, "exiled" persons and actually "displaced" persons. This division was carried out according to the criterion of the date of the forced displacement of certain persons [14, p. 6-7]. However, this division of the IDPs distinguished them also on the basis of ethnic origin. "Exiled" persons are mostly ethnic Croats of all age groups displaced outside the Danube area of Croatia. As of February 2000, the number of such persons was 47,000. "Displaced" persons are ethnic Serbs, mainly the elderly and socially disadvantaged groups displaced to the Danube area of Croatia. As of February 2000 their number was 3,000 people [15, p. 39]. In our opinion, the division of the IDP into several categories is discrimination, albeit concealed on grounds of ethnic origin.

In November 1999, the Croatian Government introduced changes to the legislation that was in force at that time, which formally eliminated discrimination in favour of one category of IDPs, that is, "exiled" persons (mostly Croats), at the expense of other displaced persons, mostly Serbs. However, in practice, the discriminatory effects of the law remained: individuals ("the exiled") retained the appropriate status and benefits that they received in accordance with the original law [16, p. 84].

The theoretical and sociological aspect of the definition of the category of internally displaced persons has been studied by a number of scholars. In particular, G. Goodwin-Hill defines IDPs as persons who are forced to flee suddenly from their homes in large quantities as a result of armed conflict, internal hostility, systematic violations of human rights or natural disasters and stay in the territory of their own country [17, p. 314-315]. Identifying the concept of internally displaced person and settler, the author thus emphasises that in fact, the IDP is a person who falls under the definition of compelled settlers, but having left their place of permanent residence, they stay in their own country as citizens of the country.

M. Nikolajchuk observes that "internally displaced persons are a specific target group for the implementation of migration policy, which is characterized by heterogeneous characteristics, determined by special needs, personal characteristics and influences of the environment" [18, p. 109].

Officially, the category of internally displaced person is enshrined in Ukrainian legislation with the adoption of the Law "On ensuring the rights and freedoms of internally displaced persons" of 20 October 2014, the adoption of the aforementioned normative legal act was preceded by 4 bills that were registered in the Verkhovna Rada of Ukraine of the Seventh Convocation, namely, bills: of June 3, 2014, No. 4998 "On ensuring the rights and freedoms of citi-

zens living in or moving from an area of temporary anti-terrorist operation" [19]; of June 19, 2014 No. 4998-1 "On the legal status of persons who are forced to leave their place of residence due to the temporary occupation of the Autonomous Republic of Crimea and the city of Sevastopol and the circumstances related to the conduct of an anti-terrorist operation on the territory of Ukraine: Proposals" [20]; of August 13, 2014, No. 4490-a "On internally displaced persons" [21] and of October 28, 2014, 4490a-1 "On ensuring the rights and freedoms of internally displaced persons" [22], which subsequently came into force.

According to Point 1 of Article 1 of the above-mentioned law, an internally displaced person is a citizen of Ukraine, a foreigner or a stateless person who is legally in Ukraine and has the right to permanent residence in Ukraine, who was forced to flee or leave his place of residence as a result or in order to avoid negative consequences armed conflict, temporary occupation, widespread manifestations of violence, human rights violations and natural or man-made emergencies [23]. An individual acquires the right to be registered as an internally displaced person after he / she begins to meet certain criteria.

The quotation in the Law of Ukraine "On ensuring the rights and freedoms of internally displaced persons" includes the basic features:

– *being a citizen of Ukraine*. In addition, since December 24, 2015, with the entry into force of the Law of Ukraine "On amendments to some laws of Ukraine on strengthening the guarantees of the observance of the rights and freedoms of internally displaced persons" No. 921-VIII, the right to obtain this status is also fixed by foreigners and individuals stateless [24].

– *permanent residence in the territory that has suffered from the factors listed in the definition.* The concept of place of residence has a private law and public law understanding. The first is based on the provisions of Part 1 of Article 29 of the Civil Code of Ukraine [25], according to which the place of residence of an individual is housing in which they reside permanently or temporarily, and Article 379, which provides that the residential property of an individual is a residential house, apartment, other living space, intended and suitable for permanent or temporary residence. The second is based on Article 3 of the Law of Ukraine "On freedom of movement and free choice of place of residence in Ukraine" [26]: place of residence is housing located on in the administrative territorial unit in which the person lives, as well as specialized social institutions, institutions of social services and social protection, military units.

In accordance with Part 2 of Article 4 of the Law of Ukraine "On ensuring the rights and freedoms of internally displaced persons", the ground for the registration of internally displaced persons is residence on the territory where the circumstances specified in Article 1 of this Law arose, at the time of their occurrence [23].

Law of Ukraine "On freedom of movement and free choice of place of residence in Ukraine" in Paragraph 2 of Article 2 states that registration of a place of residence or place of temporary residence of a person or its absence can not be a condition for the exercise of the rights and freedoms envisaged by the Constitution, laws or international treaties of Ukraine, or the reason for their restriction [26]. Registration is the submission of information to the Uniform State Population Register and to the passport document on the place of residence or place of temporary residence of the person with the address of the home. Consequently, when deciding on the issue of permanent and actual residence or non-residence of a person in a certain place, the mark in the passport of registration has no significance. This opinion is confirmed by the position of the Supreme Court of Ukraine in such cases as proceedings: No. 6-1046sv08 dated March 19, 2008, No. 6-15013sv07 dated December 10, 2008, No. 6-27745vs08 dated March 11, 2009, No. 6- 7165sv09 dated November 03, 2010 [27, p. 183-185].

– *fleeing the place of previous residence.* According to Part 2 of Article 1 of the Law of Ukraine "On ensuring the rights and freedoms of internally displaced persons", the address of place of residence of a person at the moment of occurrence of the circumstances specified in Part 1 of this Article is recognized as the address of the abandoned place of residence of the person [23].

– *leaving the place of residence as a result of the use of violence (the use of unlawful influence on a person due to which a person is completely deprived of the opportunity to control his actions) or forcing (the circumstances that pressed the person to leave his previous place of residence).* Under pressure, according to V. Nadraga, one should understand the absence of positive motivation for moving, as well as changing living conditions, in which it becomes impossible for normal life or there is a real threat to security in the absence of a prospect of normalization of the situation [28, p. 137]. This feature is not absolute, in particular, as in the case of refugees, sometimes it is not possible to return to the affected area, even in the absence

of registration on it. For example, Part 5 of Article 4 of the Law of Ukraine "On ensuring the rights and freedoms of internally displaced persons" established that students who had acquired a certain educational qualification level and had a residence registration in dormitories, after being discharged, are entitled to receive a certificate on the registration of an internally displaced person in case, if they do not want to return to their previous place of residence due to the circumstances specified in Article 1 of this Law [23].

– *the purpose of leaving the previous place of residence* –to avoid the negative consequences of armed conflict, temporary occupation, widespread manifestations of violence, massive violations of human rights and natural or man-made emergencies, or the potential opportunity (risk) of their occurrence. The list of grounds is exceptional.

In our opinion, the introduction of a closed list of such grounds and failure to take into account other threats to the population may further create the need to amend this Law and its related subordinate legal acts.

This legislative provision does not include subjective elements (for example, fear of becoming a victim), but is limited by objective constituents, conditions prevailing in a certain territory. That is, the danger of further stay at the place of previous residence is considered in the general context of the situation, and its assessment does not require the presence of personal negative experience or loss.

**Conclusions.** Based on the methodological analysis, taking into account the definite interpretations of the concept of internally displaced person, we can formulate the author's definition of internally displaced person as a citizen of Ukraine or a citizen of another state / stateless person who is entitled to permanent residence in Ukraine and forced to flee or leave his own home or a place of permanent residence without crossing the internationally specified frontiers if there are such grounds as:

fear of becoming a victim of persecution or lack of opportunity to fully enjoy the guaranteed protection by the current legislation of Ukraine or international treaties, the consent of which is binding on the Verkhovna Rada of Ukraine in the place of its permanent residence;

a threat to his life / members of family, security or freedom;

feeling for himself / members of family the consequences of violence in situations of armed conflict or systematic violation of human rights; external aggression; foreign occupation; Civil War; armed clashes on ethnic, religious, linguistic or other grounds that violate public order in a place of permanent residence;

emergencies of natural or man-made nature.

Thus, a person acquires the right to be registered as an internally displaced person after he / she begins to comply with certain characteristics, in particular:

– being a citizen of Ukraine;

– if being a citizen of another state or a stateless person, he / she must have a legal right to permanent residence in Ukraine;

– the emergence of the need to flee or leave his home or place of permanent residence on the grounds which may concern both the person and family members, in particular:

The possibility of becoming a victim of persecution or the inability to fully enjoy the protection of Ukraine's guaranteed by current legislation or international treaties, the consent of which is binding on the Verkhovna Rada of Ukraine; the threat to life, safety or freedom; a sense of the consequences of violence in situations of armed conflict or a systematic violation of human rights; external aggression; foreign occupation; Civil War; armed clashes on ethnic, religious, linguistic or other grounds that violate public order; emergencies of natural or man-made nature;

– the purpose of leaving home or place of permanent residence – to avoid a threat to his life or members of family;

– leaving his home or place of permanent residence without crossing the internationally specified frontiers.

***References***

1. Офіційний веб-портал Міністерства соціальної політики. URL: http://www.msp.gov.ua/news/12801.html.

2. Козинець І. Міжнародні стандарти захисту та допомоги внутрішньо переміщеним особам. *Молодий вчений*. 2014. № 12 (15). С. 258-261.

3. Jaffe A.J. Noteson the Population Theory of Eugene M. Kulischer. *The Milbank Memorial Fund Quarterly*. 1962. Vol. 40. № 2. P. 187-206.

4. Про статус і соціальний захист громадян, які постраждали внаслідок Чорнобильської катастрофи: Закон України від 28.02.1991 р. № 796-XII. *Відомості Верховної Ради Української РСР*. 1991. № 16. Ст. 200.

5. Про додаткові заходи щодо посилення охорони здоров'я та поліпшення матеріального становища населення, яке проживає на території, що зазнала радіоактивного забруднення в результаті аварії на Чорнобильській АЕС: постанова Ради Міністрів Української РСР від 14.12.1989 р. № 315. URL: http://zakon0.rada.gov.ua/laws/show/315-89-п.

6. Про Порядок відселення та самостійного переселення громадян з територій, що зазнали радіоактивного забруднення внаслідок аварії на Чорнобильській АЕС: постанова Кабінету Міністрів України від 16.12.1992 р. № 706. URL: http://zakon5.rada.gov.ua/laws/show/706-92-п.

7. Малиха М.І. До проблеми сутності поняття «внутрішньо переміщені особи»: державна політика та регіональна практика. *Грані*. 2015. № 8. С. 7.

8. Керівні принципи ООН з питань переміщених осіб в середині країни від 22 липня 1998 р. URL: http://www.un.org/ru/documents/decl_conv/conventions/internal_displacement_principles.shtml.

9. Келин В. Руководящие принципы по вопросу о перемещении лиц внутри страны: Комментарий / пер. з англ. М. Петросян; Правозащит. центр «Мемориал». Москва, 2004. 111 с.

10. О лицах, вынужденно перемещенных с оккупированных территории Грузии, – вынужденных переселенцах: Закон Грузии от 6.02.2014 р. URL: https://matsne.gov.ge/index.-php?option=com_ldmssearch&view= docView&id=2244506&lang=ru/. About persons displaced from the occupied territories of Georgia – Internally Displaced Persons: The Law of Georgia 6.02.2014 [E-resource]. – Mode of access: https://matsne.gov.ge/index.php?option= com_ldmssearch&view=-docView&id=2244506&lang=ru/.[in Georgian].

11. Про внутрішніх переміщених осіб та тих, що зазнають переслідувань, з окупованих територій Грузії: Закон Грузії від 01.03.2014 р. URL: http://mra.gov.ge/res/docs/2014041013582144976.pdf.

12. Кампальська Конвенція (Конвенція Африканського союзу про захист осіб, переміщених всередині країни, і надання їм допомоги в Африці). URL: www.refworld.org.ru/pdfid/54e454094.pdf.

13. Law on the Status of Expellees and Refugees 1993 / Croatian Parliament. URL: http://legislationline.org/documents/action/popup/id/5999.

14. Republic of Croatia. Extraordinary Presidential Elections 24 January & 7 February 2000: Final Report. URL: http:www.osce.org/odihr/elections/croatia/15670?download=true.

15. Croatia: Housing rights and employment still preventing durable solutions / Internal Displacement Monitoring Centre. URL: http:www.internal-displacement.org/assets/library/Europe/Croatia-September-2009.pdf.

16. Croatia: Housing rights and employment still preventing durable solutions / Internal Displacement Monitoring Centre. URL: http:www.internal-displacement.org/assets/library/Europe/Croatia-September-2009.pdf., с. 39.

17. Гудвін-Гілл Г.С. Статус біженця в міжнародному праві. Москва, 1997. 648 с.

18. Nikolajchuk M. The constituent elements of the mechanism of regulation of migration processes of the rural population. *Rehional'na ekonomika*. 2005. Vol. 3, No. 37. P. 105-112.

19. Про забезпечення прав і свобод громадян внутрішньо переміщених осіб: Проект Закону від 03.06.2014 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=4998&skl=8.

20. Про правовий статус осіб, які вимушені залишити місця проживання внаслідок тимчасової окупації Автономної Республіки Крим та міста Севастополя та обставин, пов'язаних з проведенням антитерористичної операції на території України: Пропозиції Президента до Закону від 19.06.2014 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51397.

21. Про внутрішньо переміщених осіб: Проект Закону 13.08.2014 р. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/JG3GQ68A.html.

22. Про забезпечення прав і свобод внутрішньо переміщених осіб: Проект Закону від 28.08.2014 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52046.

23. Про забезпечення прав і свобод внутрішньо переміщених осіб: Закон України від 20.10.2014 р. № 1706-VII. URL: http://zakon4.rada. gov.ua/laws/show/1706-18.

24. Про внесення змін до деяких законів України щодо посилення гарантій дотримання прав і свобод внутрішньо переміщених осіб: Закон України від 24 грудня 2015 р. № 921-VIII. URL: http://zakon3.rada.gov.ua/laws/show/921-19/print.

25. Цивільний кодекс України від 16.01.2003 р. № 435-IV. URL: http://zakon3.rada.gov.ua/laws/show/435-15/print.

26. Про свободу пересування та вільний вибір місця проживання в Україні: Закон України від 01.12.2003 р. № 1382-IV. URL: http://zakon2.rada.gov.ua/laws/show/1382-15/print.

27. Хомяк П. Чи підтверджує відмітка у паспорті про реєстрацію місцяпроживання факт постійного проживання? *Науково-практичний журнал «Мала енциклопедія нотаріуса».* 2015. № 5 (83). С. 182-190.

28. Надрага В.І. Проблеми вимушеної внутрішньої міграції населення в контексті концепції «суспільства ризику». *Укр. соціум*. 2015. № 1. С. 134-141.

*Received to editorial office 30.07.2018*

**Summary**

The article examines the content of internally displaced persons in the context of modern religions of Ukrainian society. The scientific approaches to the definition of the concept of "internally displaced person" are analyzed and the author's definition of this concept is presented.

***Keywords**: internally displaced persons, refugee, military conflict, occupation.*

**Mykola Sambor**
Ph.D.
*(the Pryluky Police Department of the Main Department of the National Police in Chernigiv oblast)*

*DOI: 10.31733/2078-3566-2018-2-115-121*

# ADMINISTRATIVE DISCRETION IN ADMINISTRATIVE-DELICT LAW

**Самбор М. АДМІНІСТРАТИВНИЙ РОЗСУД В АДМІНІСТРАТИВНО-ДЕЛІКТНОМУ ПРАВІ.** У статті розглядається теоретичне поняття «розсуду» у праві. Аналізуються доктринальні підходи до розуміння «розсуду», «адміністративного розсуду», а також наявні узагальнення судової практики, що дозволяють з'ясувати зміст розсуду. З урахуванням наукової доктрини виділяються ознаки адміністративного розсуду у адміністративно-деліктному праві, а також досліджуються межі адміністративного розсуду під час застосування адміністративної відповідальності із урахуванням посилань на можливість такого розсуду, що міститься у законодавстві.

Запропоновано авторське визнання адміністративного розсуду у адміністративно-деліктному праві. Визначено ключові ознаки адміністративного розсуду у адміністративно-деліктному праві.

На думку автора, дослідження адміністративного розсуду в адміністративно-деліктному праві сприятиме якості законодавства, його визначеності та зрозумілості, а також дотримання заборон, встановлених у нормах вказаного законодавства, а також дозволить створити чітко окреслену сферу застосування адміністративного розсуду, що гарантуватиме дотримання прав, свобод та інтересів людини і громадянина, інтересів суспільства і держави від протиправних посягань, стабільності суспільних відносин.

***Ключові слова:*** *розсуд, адміністративний розсуд, адміністративно-деліктне право.*

**Formulation of the problem.** Legal regulation of social relations is based on the basic methods related to imperative and dispositive methods of influencing the behavior of the participants in the relationship. Typically, for the sphere of public-legal relations, in particular for the subjects of power relations - officials of the executive branch, inherent in the strict regulation of their behavior. This issue is defined in the constitutional rules of direct action, in particular, in Part 2 of Art. 6 of the Constitution of Ukraine, which states that the executive authorities exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine, as well as Art. 19 of the Constitution of Ukraine, according to which the legal order in Ukraine is based on the principles according to which no one can be compelled to do what is not stipulated by law. State authorities, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided by the Constitution and laws of Ukraine.

But despite such regulations, the law always leaves scope for alternative actions, independently determine which norm to apply in certain circumstances, in one way or another, reveals a certain discretion that is not absolutely definite. Taking into account the constitutional prescriptions, methods of legal regulation of social relations on which the legal order is based in the state, we consider that the discretion of the subjects of power authorities should be directly provided for in the law as one of the ways of exercising powers. Administrative discretion in the Ukrainian legal system and the legal system has not received proper coverage and in-depth research, which does not have the best effect on the quality of implementation of powers by officials of executive authorities.

**Recent publications revealing the problem**. The research of the issues of discretion in the application of the rules of law and administrative discretion was defined for the purpose of scientific searches Berezin O.O., Rezanov S.A., Solovey Yu.P., Slyusareva T.G., Khavronyuk M.I., and others. However, to date, the issue of administrative discretion has a number of uncertainties, discussion issues, as well as unexplored gaps, the filling of which will significantly affect the quality of the application of the law, in particular administrative and tort standards, aimed at regulating public relations associated with the use of administrative liability and public coercion, and also enrich the theory of administrative and tort law.

The lack of common views on discretion among the theorists and practicing lawyers affects the place of administrative discretion in the area of administrative-delict law, the rules of which govern the application of administrative coercion, as well as measures restricting human and civil rights and freedoms. I am convinced that any means that allow subjects of power to deviate from the norms of positive law by restricting individuals in the exercise of their rights, freedoms and interests or, moreover, depriving individuals of all or individually guaranteed rights guaranteed by the Constitution and the world community, freedoms and interests must be thoroughly investigated, their use is absolutely defined.

**The purpose of the article**. Taking into account all the above aims of this article, it is an analysis of scientific opinions on administrative discretion and its place in the field of administrative and tort law and legislation of Ukraine.

**Basic content**. The essence of the regulatory influence of law on social relations is determined by the possibility of normatively constructing models of the necessary and possible behavior of the subjects of these relations. In practice, this is reflected in the provision of certain subjects of public relations certain rights and in the assignment of other legal obligations and the establishment of certain prohibitions [12, p. 32]. However, the system of legislation today does not guarantee all-encompassing regulation or the creation of formal mechanisms for the imitation of participants in public relations. The aforesaid applies to the sphere of legal regulation of social relations, where the parties are the subjects of the authority, which are entitled to apply measures of administrative responsibility. In addition, the actual social relations are different from abstract, fixed in the norms of positive law, socially useful forms of behavior that act as universal regulators. It is obvious that such a state of affairs, the ratio of actual social relations and the impossibility of timely prompt response of the right to change in public life called for the life of an alternative behavior within the limits of the rules of positive law, giving the subjects of public relations a certain discretion in choosing behavior, exercising rights, performance of duties. Undoubtedly, this also reveals the fundamental component of law - freedom.

On the one hand, the unrestricted freedom to choose a solution will inevitably lead to gross violations of the rule of law, adversely affecting the formation of the rule of law. On the other hand, the excessive restriction of discretion (or its complete exclusion) in some cases may deprive the subject of enforcement of the opportunity to take into account the individual peculiarities of the case, which negatively affects the validity of the decision. The main thing is that using legal instruments to determine the required degree, the amount of discretion of the subject of law enforcement [10, p. 4]. The key idea of discretion, including administrative discretion, is to define its boundary, in such a way as to prevent the transformation of freedom from arbitrariness, ensuring the coexistence of freedom, equality and justice as the fundamental principles of combining the interests of different members of social relations.

In our opinion, in order to understand administrative discretion, one should plunge into understanding the very right as the foundation for all other categories and legal concepts.

Actually for the legitimate approach, law is understood as a product of the state, including discretion. At the same time, Nersesyants VS noted that for the legal type of legal understanding under the law is meant somewhat objective, not dependent on the will, discretion and arbitrariness of the law of the governing authority [3, p. 28]. Consequently, the right should be deprived of state discretion, the discretion of state officials, since such a discretion distorts the idea of law, since it allows manipulating the law in its own interests. Although, on the other hand, such a sign of positive law, as a general obligation, is a product of the state's discretion.

Obligibility of the law - it is only a consequence of arbitrary discretion of the state, the mandatory of his orders, instructions [3, p. 72]. Legisty reduces the right to the law and interprets the power of coercion as the essence of law and its distinctive rice. According to this logic, it turns out that with the help of coercion, official power may not right in its discretion and arbitrariness to turn into a law [3, p. 86]. The legislator should not and does not have the right to regulate everything at its own discretion, in violation of the requirements of supranational law ("the idea of law") [3, p. 459-460].

Discretion, based on interest, acts as the engine of the formation of law in its positivist sense. Happiness acquires a fundamentally important sound, which distinguishes it from arbitrariness, when it becomes a consequence of the combination of the interests of freedom, equality and justice.

No less important influence of discretion is felt during its implementation. Particularly acute is the question of discretion when applying the rules of law by authorized entities by the

state, in particular, officials of executive bodies. Extremely relevant discretion appears in the context of the application of coercive measures, legal liability, including administrative liability.

In the theory of law there is a point of view that discretion distorts legal requirements. Alekseev SS he wrote, however, that it is the individual-legal activity (judicial and administrative discretion) that allows the judicial and other authorities of the state to overthrow the democratic legal establishment, to eliminate their relatively progressive content, to correct laws [4, p. 85-86].

Applying this approach in the sense of discretion to the sphere of administrative and tort law, we have the opportunity to note that the discretion in administrative tort law should be as determined as possible in the norms of positive law, that is, in the legislation on administrative offenses. In favor of this statement convincingly we are constitutional norms of direct action, contained in Art. 6 of the Constitution of Ukraine, which states that the executive and judicial authorities exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine, as well as in art. 19 of the Constitution of Ukraine, which indicates that bodies of state power and bodies of local self-government, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided by the Constitution and laws of Ukraine. In this way, the Basic Law of Ukraine lays down restrictions for administrative discretion in administrative and tort law.

It is important to understand the administrative discretion in the administrative-delict law to find out the available scientific doctrines of understanding the discretion, administrative discretion.

O.M. Zherebtsov and Ye.O. Chaban indicate that administrative law as a type of law enforcement discretion is a free choice of the authorized body of state or municipal government in the person of its official who is a state or municipal official capable of future lawful behavior, the actual basis of which are objective factors of the surrounding reality, based on the discretionary specificity of the activities of these bodies and the method of legal regulation of public-legal relations and implemented within the framework of legal regulation of public law [1, p. 53-54]. Discretion is interpreted as a free choice by the authorized entity of lawful conduct. The said perception of administrative discretion should be based on the existence in the norms of the positive law of alternative behavior of executive authorities and their officials.

T.G. Slyusareva writes that administrative discretion is defined as defined by normative-legal acts the freedom to choose the variant of behavior of an authorized subject (official) on the basis of his thinking activity, taking into account the realization of his public interest with a view to the adoption of an optimal managerial decision, to act or to abstain from its committing (inaction) for expedient realization of own powers [11, p. 7]. The key author determines the nature of discretion - mental activity, and the root cause - public interest, means of achievement - action or inaction, and also points to the ultimate goal - the exercise of authority. Taken together, we consider that one of the key elements for discretion is the scope of its implementation, those boundaries that outline the scale of the embodiment of discretion. However, in the case of officials of executive bodies, the legislator should determine as precisely as possible their sphere of conduct, and not an alternative and freedom to choose such behavior. In conditions of free choice of conduct, the presence of power and the right to coercion, the subject becomes arbitrarily in the pursuit of his interest. Under such conditions, the legal order will turn into an injustice, when all democratic principles are destroyed, and the rights, freedoms and interests of man and citizen are spoiled.

At administrative discretion it is necessary to understand the assessment of the actual circumstances, the grounds (criteria) which are not enshrined in the legal norms is sufficiently complete or specific, and which is carried out by the body (official) during the selection, within the limits permitted by the regulatory acts, the optimal solution for the solution of a specific administrative issue [8, p. 8; 9, p. 97]. Rezanov S.A. and Nightingale Yu.P. They are inclined to believe that administrative discretion covers the limits of assessment of factual circumstances that do not have a clear attachment to the rules of positive law.

Although there are other views on the understanding of administrative discretion. Similar definitions in essence are not much different from those outlined above, whose authors are inclined to focus on other elements of administrative discretion, in particular the internal state of the subject of administrative discretion.

For example, administrative discretion is the power of the public administration actors to carry out analytical, intellectual, creative activities within the limits and in the manner established by law, by evaluating the actual circumstances of the case for the purpose of lawful ob-

servance, observing the principles of the rule of law, justice, prudence, efficiency, and subsequently the choice of the optimal solution in a particular administrative case [6, p. 138-139].

We are convinced that understanding and realization of administrative discretion by officials of executive authorities and local self-government is an understanding of the limits of legal regulation, that is, an understanding of the optimal completeness of the legal mediation of social relations due to the necessity of state influence on the spheres of public life, which can not be regulated except for help right Defining here are the interests of society and the state, rights and freedoms of man and citizen, political, economic, social and other factors. Undoubtedly, the limits of legal regulation to a certain extent are conditional and can not be determined absolutely. But the fundamental principles here are, on the one hand, the optimal completeness of legal regulation of the most important for society, state, man and citizen of relations, and on the other - the prevention of legal regulation of public life. [13, p. 611]. It follows that discretion in general and administrative discretion in particular are an important constituent element of ensuring a high-quality and efficient legal regulation in the country. Unfortunately, this issue has not been given proper attention not only in the theory of administrative and tort law, but also in legislation. Although it is precisely in the presence of administrative and judicial discretion in administrative-delict law that the norm contained in art. 252 of the Code of Ukraine on Administrative Offenses (hereinafter - CUAO), which states that an authority (official) assesses evidence based on their internal convictions, based on a comprehensive, complete and objective study of all circumstances of the case in their totality, guided by law and legal awareness [14].

In connection with the existence of such a theoretical and normative gap in the sense of administrative discretion in administrative tort law, we will turn to related areas of law and legislation, in particular, in the criminal and criminal-procedural branch.

M.I. Khavronuk notes that the necessity of maximum limitation of judicial discretion by law follows, in particular, from the provisions of Art. 24 of the Constitution, according to which "citizens have equal constitutional rights and freedoms and are equal before the law". This provision should be understood as meaning that the rights and freedoms provided for by the Constitution of Ukraine are equally applicable to all citizens and have the same content and scope for them, and that the law can not impose on one more obligation than on the other, to demand from one which is not required from another. Unlimited jurisdiction can lead to the fact that one person in violation of Art. 58 of the Constitution of Ukraine will be responsible for acts that at the time of its commission are not recognized k.pr. (criminal offense - MS noted us), and the other one - no, in some cases one and the same damage will be recognized as significant or difficult directly on the basis of the law, and in others it will be in violation of Art. 62 of the Constitution of Ukraine only to be assumed. This also applies to valuation concepts that characterize the socially dangerous consequences of k.pr. and to determine which CC operates, in particular, the terms "death", "death", "grave consequences", "especially grave consequences", "harm", "damage" [2, p. 92]. Within the framework of criminal and criminal procedural law, discretion in the overwhelming majority is associated with the entity that has the power to examine the criminal proceedings in substance and to determine whether or not a guilty person has committed a criminal offense.

On this basis, the Supreme Court of Ukraine paid special attention to this issue by investigating the issue of judicial review in its ruling of February 1, 2018 in the case No. 634/609/15-k.

The concept of judicial discretion in court proceedings encompasses the powers of the court (rights and obligations) granted to him by the state, to choose between alternatives, each of which is legal, and the intellectual and voluntary power of the court to resolve disputed legal cases in the cases determined by law issues, based on the purposes and principles of law, general principles of legal proceedings, particular circumstances of the case, data on the identity of the guilty, justice and sufficiency of the chosen punishment, etc. The grounds for judicial discretion in imposing punishment are: criminal, relatively-defined (where the limits of punishment are established) and alternative (where there are several types of punishment) sanctions; the principles of law; empowering norms, which use the words "may", "right", in relation to the powers of the court; legal terms and concepts that are multi-valued or not normative, such as "guilty person", "sincere repentance", etc.; Valuable concepts, the content of which is determined not by law or regulation, but by the law-consciousness of the subject of law enforcement, for example, when taking into account mitigating and aggravating circumstances (Articles 66, 67 of the Criminal Code), the definition of "other circumstances of the case", the possibility of correction of the convicted person without service punishment that matters for the

application of art. 75 of CC etc; Individualization of punishment is a specification of the type and size of the measure of state coercion, which a court assigns to a person who committed a crime, depending on the peculiarities of this crime and its subject. The discretionary powers of the court are recognized by the European Court of Human Rights (in particular, the case of Dovzhenko v. Ukraine), which in its decisions refers only to the need to determine the legality, scope, methods and limits of the application of freedom of assessment by judicial authorities, based on the compliance of such powers with the court principle the rule of law. This is ensured, in particular, by the appropriate justification of the chosen decision in the court proceedings, etc. [7]. Relying on the provisions of Part 5, 6 of Art. 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" [15], the conclusions on the application of the rules of law, set forth in the decisions of the Supreme Court, are mandatory for all subjects of power, which apply in their activities a normative legal act containing the relevant the norm of law. The conclusions on the application of the rules of law, set forth in the decisions of the Supreme Court, are taken into account by other courts in the application of such rules of law. From here we arrive at the conclusion that this understanding of discretion is possible only when applying the criminal law, and the said conclusion is not obligatory for the understanding of administrative discretion when applying the norms of the CUAO.

Administrative and tort law is inextricably linked with such a form of realization of law as an application, since only the latter allows one entity (under these conditions, to the subjects of authority - to the executive and local self-government bodies and their officials) to apply norms to relations , in which subjects of authority are not or were not direct participants. But in the course of its implementation an important role is played by the administrative discretion of the subjects of power authorities.

Berezin O.O. notes that the discretion of enforcement is carried out on the basis and within the framework of the law of the activities of authorized law entities, which provides for the choice of the most optimal solution in the legal case [10, p. 7].

The administrative discretion of authorized officials of executive power bodies in administrative and tort law should be established and implemented in strict conformity with the Constitution and laws of Ukraine, in particular CUAO.

In our opinion, it is important that even the drafting of an administrative offense protocol is a right, and not a duty of officials, which can not entail any liability for officials in the absence of a protocol on an administrative offense. Administrative discretion is inextricably linked with the procedural rules of administrative and tort law, since the latter determine the powers and behavior of officials, although the latter is the result of the application of the rules of material administrative and tort law. An example of such discretion can be the qualification of an act as an administrative offense in a situation where the legislator used valuing concepts to designate an objective part of an administrative offense. Evidence of this is the norm contained in Art. 173 CUAO, which states that petty hooliganism is an obscene language in public places, and abusive clinging to citizens and other similar actions that violate the public order and peace of citizens, but which "other similar actions that violate public order and the peace of the citizens "and belongs to the administrative discretion of officials of executive power, who have the authority to identify, document and terminate administrative offenses, which, at their discretion, determine the objective side of the administration the offense for which liability is provided for in Art. 173 CUAO, thus taking over the powers of the legislative body, since only the laws of Ukraine define acts that are administrative offenses (Article 22, part 1, Article 92 of the Constitution of Ukraine [16]). From this it can be concluded that the administrative discretion related to the formulation of the administrative offense directly contradicts the Constitution of Ukraine, and therefore can not be applied, despite the fact that the rules of CUAO such discretion is permissible. Returning to the limits of the application of administrative discretion, legal regulation, based on the general principles of law and law, in particular, such fundamental principles as the rule of law, observance of the rights, freedoms and interests of man and citizen, as well as methods of legal regulation, we note that attribution to the sphere administrative discretion in defining acts that are administrative offenses contradicts the principles of a law-governed state and in the future gives an unreasonably wide field for the realization of state measures. mousse officials against citizens or persons who are in the state.

A profound and comprehensive study of the circumstances of the case, the adoption of the results of such a study act of administrative and tort law depends partly on the administrative discretion of the subject of the application of the rules of administrative and tort law, as indicated by the norms of Art. 252 CUAO, and norms 280 CUAO, and the norms of art. 15

CUAO and st.st. 17-22 CUAO, art. 33-36 CUAO. and the actual sanctions of the norms of a special part of the CUAO, in particular those that are alternative, or set the upper and lower limits of administrative penalties.

No wonder Abdullayev MI notes that relatively specific sanctions provide for the choice of penalties within a single sanction at the discretion of the law enforcement agency, depending on the particular circumstances. Alternative sanctions provide the opportunity to choose one of the measures of punishment provided by this legal norm. [5, p. 197-198]. In this aspect, administrative discretion is extremely important, but the latter must be based on the high moral, national consciousness of the legal consciousness of the person who applies it, which guarantees the correct application of the law, a penalty that will be comparable to the offense committed and also capable of performing the tasks which are facing administrative-delict law.

**Conclusion.** To summarize the study, we note that administrative discretion in administrative-delict law is the intellectual and voluntary activity of officials of executive authorities or local self-government (or their authorized persons), based on the norms of positive law, is carried out on the basis, within the limits of authority and in the way provided by the Constitution and laws of Ukraine is connected with the assessment of evidence, comprehensive, complete and objective study of all the circumstances of the case in their totality in their internal contention tion, guided by their own sense of justice, aimed at strengthening the rule of law, human rights, freedoms and interests of man and citizen and is associated with the adoption of an individual act of law. The key features of administrative discretion in the administrative-delict law are: 1) the subject of implementation – an authorized official of the executive body or local self-government; 2) intellectual-volitional activity; 3) activity based on the norms of the Constitution and laws of Ukraine; 4) activity which is the product of the legal consciousness of the subject of administrative discretion, which is realized exclusively within the limits and in the manner specified by the Constitution and laws of Ukraine; 5) scope of administrative discretion: assessment of evidence, comprehensive, complete and objective study of the circumstances of the case; 6) goal - the establishment of the rule of law, observance of rights, freedoms and interests of man and citizen, stability of social relations; 7) adoption of an individual act of law enforcement; 8) application or non-application of administrative liability, depending on the circumstances of the case; 9) ensuring the enforcement of an administrative penalty in case of administrative liability.

We believe that the study of administrative discretion in administrative-delict law will promote the quality of legislation, its certainty and comprehensiveness, as well as compliance with the prohibitions established in the norms of the said legislation, and will allow the creation of a clearly defined sphere of application of administrative discretion that guarantees the observance of rights, freedoms and interests. rights and citizens, the interests of society and the state from illegal encroachments, stability of social relations.

**References**

1. Жеребцов А.Н., Чабан Е.А. Административное усмотрение, административный произвол и административное (чиновничье) обыкновение: теоретические и практические вопросы соотношения. *Административное право и процесс.* 2014. № 4. С. 53-58.

2. Дудоров О.О., Хавронюк М.І. Кримінальне право: навч. посібник / за заг. ред. М.І. Хавронюка. Київ: Ваіте, 2014. 944 с.

3. Нерсесянц В. С. Общая теория права и государства: учебник для юрид. вузов и факультетов. Москва: НОРМА—ИНФРА • М, 1999. 552 с.

4. Алексеев С. С. Общая теория права: в 2-х томах. Т. I. Москва: Юрид. лит. 1981. 361 с.

5. Абдулаев М.И. Теория государства и права: учебник для высших учебных заведений. Москва: Финансовый контроль, 2004. 410 с.

6. Семеній О. Ознаки адміністративного розсуду в діяльності суб'єктів публічної адміністрації. *Адміністративне право і процес*. 2017. № 6. С. 136-139.

7. Постанова Верховного Суду України від 1 лютого 2018 року у справі № 634/609/15-к, провадження № 51-658 км 17. URL: http://www.reyestr.court.gov.ua/Review/72009792 (дата звернення: 05.05.2018).

8. Соловей Ю.П. Усмотрение в административной деятельности советской милиции: автореф. дисс... канд. юрид. наук: 12.00.04 / Академия управления МВД СССР. Москва, 1982. 23 с.

9. Рєзанов С.А. Адміністративний розсуд: нормативна основа та її удосконалення. *Право і безпека.* 2005. № 4-5. С. 96-99.

10. Березин А.А. Пределы правоприменительного усмотрения: автореф. дисс... канд. юрид. наук: 12.00.01. Нижний Новгород, 2007. 26 с.

11. Слюсарева Т.Г. Административное усмотрение в деятельности государственных служащих: автореф. дисс... канд. юрид. наук: 12.00.04. Москва, 2013. 26 с.

12. Мельник О.М. Метод правового регулювання як засіб підвищення ефективності правового регулювання суспільних відносин. *Часопис Київського університету права*. 2008. № 3. С. 32-38.

13. Бобровник С.В., Богініч О.Л. Межі правового регулювання // Юридична енциклопедія: в 6 т. / Шемшученко Ю.С. (голова редкол.), Бурчак Ф.Г., Зяблюк М.П. та ін. Київ: Укр. енцикл., 1998. Т. 3: К-М. 2001. С. 611.

14. Кодекс України про адміністративні правопорушення від 7 грудня 1984 року (статті 1–212-[20]). URL: http://zakon5.rada.gov.ua/laws/show/80731-10/print1524162891578316; (статті 213–330) http://zakon5.rada.gov.ua/laws/show/80732-10/print1524416658814481. (дата звернення: 05.05.2018).

15. Про судоустрій і статус суддів: Закон України від 2 червня 2016 року. URL: http://zakon2.rada.gov.ua/laws/show/1402-19/print1509542343625494. (дата звернення: 04.06.2018).

16. Конституція України від 28 червня 1996 року. URL: http://zakon3.rada.gov.ua/laws/show/254к /96-вр/print1443619337497914. (дата звернення: 05.05.2018).

*Received to editorial office 05.06.2018*

**Summary**

The article deals with the theoretical concept of "discretion" in the law. The doctrinal approaches to the understanding of "discretion", "administrative discretion", as well as generalizations of judicial practice, allowing to find out the content of discretion, are analyzed. Taking into account the scientific doctrine, signs of administrative discretion in administrative and tort law are distinguished, as well as the limits of administrative discretion when applying administrative liability, taking into account references to the possibility of such discretion contained in the legislation.

***Keywords**: discretion, administrative discretion, administrative-delict law.*

**Andriy Samotuga**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-121-125*

## SOCIAL CONTRACT AND PROBLEMS OF ITS LEGAL EMBODIMENT IN UKRAINE

**Самотуга А. СУСПІЛЬНИЙ ДОГОВІР ТА ПРОБЛЕМИ ЙОГО ПРАВОВОГО ВТІЛЕННЯ В УКРАЇНІ.** Незважаючи на більш як 25-річне існування незалежної Української держави та більш як 20 років з моменту прийняття її Конституції, наразі Україна все ще перебуває в процесі формування політичної нації. На підставі авторських узагальнень констатовано, що чинна Конституція України, з одного боку, є не суспільним, а політико-правовим договором, що має здебільшого ознаки компромісу владних еліт і центрів влади – Президента і Парламенту. З іншого боку, український історико-політичний досвід на зламі тисячоліть увиразнює деякі фундаментальні аспекти самого феномена суспільного договору. В сучасних соціально-політичних дослідженнях суспільний договір зазвичай розглядається скоріше не як конкретна історична подія, закріплена низкою доступних для дослідження документів, а як позначення деяких рис довготривалого історичного процесу, в результаті якого виникли сучасні ліберально-демократичні суспільства, до якого прагне і Україна

Суспільний договір є чинним лише за умови, коли його визнає принаймні більшість членів суспільства. Інакше він, залишаючись леґальною підставою існування суспільства, втрачає власну леґітимність. Для нормального існування суспільного організму леґітимним має бути не лише зміст суспільного договору, а також спосіб його укладання.

***Ключові слова**: суспільний договір, конституція, розробка, укладання.*

**Formulation of the problem.** Recent amendments to the Constitution of Ukraine have activated public debates and scientific searches around the problems that have constantly arisen since the adoption of this constituent act of the state. Between such established legal features of the Constitution as "the basic law of the state", "higher legal force", "direct effect of norms", "increased stability", "a special procedure for the adoption and amendment", in recent years, specialists are increasingly added such a sign as a "social contract".

Today, there are no appeasement that the country needs new clear rules of the game, and therefore a new social contract, a new Constitution and, in general, a reset of the state based on a new quality of relations between citizens and the authorities. Especially after the Revolution of dignity, at a time when the country is fighting for its independence, after attempts to launch serious structural reforms, the cause of which failures are often the burden of the past, which is like a ballast, impeding progress on the move. And yet the 1996 Constitution as a product of a compromise between the elites, the old post-communist and the new national-democratic, no longer responds to the request of time and society, even despite its corrections, and thus can not ensure the successful development of the state. It is necessary to rewrite it, but it is better to create it from scratch, launching a new constitutional process, convening, as proposed by some activists, a constitutional assembly with the participation of the best minds of society. Indeed, precisely because of the lack of its own rules of the game and the forced balance in the imposed paradigm, all efforts of the community end with a crash ... [4].

Moreover, the conclusions of recent author's publications indicate that the current state of Ukrainian society, its actual inactivity in the process of drafting and adopting the Constitution of Ukraine, as well as the introduction of changes to it, does not provide grounds to consider the current Basic Law of the state as a social contract, and especially the development, adoption , making changes and implementing the provisions of the Constitution of Ukraine allows us to characterize it as a political-legal agreement, based on a compromise between political elites and power centers - the President and the Verkhovna Rada of Ukraine [2].

**Analysis of publications that initiated the solution to this problem.** The question of the legal characterization of the social contract became the subject of studies of Ukrainian experts - theoreticians of law and constitutionalists. In general, they are worthy of attention to works of M.I. Kozyubra, A.R. Krusyan, M.P. Orzikh, V.F. Pogorilko, P.M. Rabinovich, Yu.M. Todyka, O.F. Frytsky and others. A special emphasis on the role of social contract as a component of the constitutional process is made in the publications and considerations of M.I. Stavniychuk, V.M. Shapoval and V.I. Shishkin [5-6]. However, they lack a coherent retrospective review of factors that would determine the legitimacy of a social contract both as an act and as a process.

**The purpose** of the article is to determine the problems of legal embodiment of a social contract in Ukraine.

**Basic content.** Ukraine is currently in the process of forming a political nation. The 25-year experience of independence has made it possible and necessary to comprehend this process.

In turn, the concept of a social contract is the key to such an understanding. On the one hand, without realizing the fundamental features of a social contract that raises our socio-political existence, we can not hope for the final formation of a full-fledged political nation and a true state of an independent state. On the other hand, the Ukrainian historical and political experience at the turn of the millennium reveals some fundamental aspects of the very phenomenon of a social contract. In modern socio-political studies, the social contract was usually considered not as a specific historical event, fixed by a number of documents available for research, but as the designation of some features of a long-lasting historical process, which resulted in the emergence of modern liberal-democratic societies [1].

Public agreement, remaining in the modern humanitarian concept, got all the specific features of the literary metaphor. Therefore, any attempt to capture the historical event of concluding a public agreement does not seem to be a scientific statement, but rather as an act of creative fantasy. In the end, the document embodying the social contract of the members of a political nation can be considered a constitution of the respective state. However, it is clear that the very act of adopting a constitution does not completely exhaust the complex process of concluding a public agreement. In addition, a public agreement is valid only if it recognizes at least the majority of members of society. Otherwise, while remaining a legitimate reason for the existence of a society, it loses its legitimacy. Moreover, for the healthy existence of a social

organism, not only the content of the social contract, but also the method of its conclusion, should be legitimate [3].

In the history of European political thought, we will see at least three fundamental concepts of a social contract. The first one belongs to the British philosopher Thomas Hobbes, who states: "We say that the state is founded, if a plurality of people come to an agreement and concludes an agreement with each one that, for the sake of peace between them and protection from others, everyone will recognize all his actions and considerations a person or a gathering of people, whom the majority gives the right to represent all (that is, to be their representative), regardless of whether he voted for or against them. "

As we see, for Hobbes's understanding of a social contract, it is characterized by the fact that it is made by the members of society with each other, and not with the authorities. Therefore, it follows from this that the authorities are not a party to a public agreement and, as a result, do not bear any responsibility to individual members of society. Such an understanding of the public agreement raises political conservatism. However, even for this concept, which denies the responsibility of the authorities to individual members of society, the responsibility of the authorities is valid for the whole society as a whole. Therefore, people have the right to uprising only in the case when the government threatens the life and welfare of not single citizens or groups, but to the whole social organism.

It should be noted that even according to this concept of a public agreement, the people of Ukraine had the right not only to peaceful opposition, but also to an armed uprising against Yanukovych and his flock in 2013. After all, by refusing to sign an association with the European Union, Yanukovych violated the existing public agreement that touched the interests of the entire society. The paradox of this event is that the rights and interests of those people who did not support the idea of association were more closely respected, but under the current social contract for a long time they had to build their own lives, plan their own careers, education and the future of their own children, taking into account this vector of development of the country. Thus, they legitimized this agreement, although they did not support it since the beginning of its conclusion, and Yanukovych personally delegated it, ignoring the long-term plans and expectations of all Ukrainian citizens [7].

The interim results of the Revolution of Dignity have been the subject of a number of legislative changes regarding the assessment of the historical past of Ukraine, the formation of new principles of the relationship between government and society. Thus, along with the repeal of the decision of the Constitutional Court of Ukraine of September 30, 2010, which marked the return to the parliamentary-presidential republic, laws on purification of power (lustration), condemnation of the communist and national-socialist regimes and the prohibition of the promotion of their symbolism (decomunization), as well as updating anti-corruption legislation and legislation on the organization and activities of the judicial branch of government. All these can be considered as new basis of social contract of modern Ukraine. Legislative innovations have led to numerous changes in the institutional component of the state mechanism as a response to social demands. For example, the creation of the National Anti-Corruption Bureau, the National Agency for the Prevention of Corruption, the Ministry of Information Policy, the Institute of National Memory, etc.

The second concept of a social contract belongs to John Locke, who formulates its basic principles in the following way: "Since people by nature are all free, equal and independent, then no one can be removed from this state and subjugate political power to another without his consent. The only way to abandon its natural freedom and to impose the bonds of civil society is to reach out to other people to join the community ... When a certain number of people have agreed to form a single community or system of governance in this way, they are becoming united through it. They form a single political body in which the majority has the right to act and decide on the rest." Locke almost reproduces Hobbes's wording. However, there are important differences between them. First, Hobbes considers the so-called "natural state", preceding the conclusion of a social contract, as a purely negative status as a state of "war of all against all".

Therefore, the social contract for him is primarily a safeguard of this crushing war, and it is concluded "for the sake of peace and protection from others." Lock, in turn, fixes first of all the positive characteristics of the natural state, stating that "people by nature are all free, equal and independent".

One can dare to argue that for Hobbes only a social contract predetermines the humanity of people who are in the natural state are predatory animals that destroy each other. As is well

known, Hobbes for the description of the natural state borrows the statement of the Roman playwright Plautus "homo homini lupus est" ("man to man is wolf"), although in Plautus's platitude, this statement is smoldering and has a slightly different and less radical meaning. In the "Asses" he writes: "Man is a wolf, if he does not know him." For Locke, instead, a public agreement realizes the fundamental characteristics of people, harmonizing them, harmonizing among themselves such natural features of man as freedom, equality and independence. This difference stems from a friend. According to Hobbes, the members of the public agreement, by negotiating with each other, renounce their own arbitrariness, and transfer all the rights of management of the society to a government that is not a party to a social contract, and therefore, it is not accountable to those who conclude it, but instead must always restrain their natural hostility to each other in order to enable the survival of a social organism. It follows from Locke's concept of a social contract that it is made not by fierce enemies in order to protect themselves from each other, giving the authorities an unlimited right to use violence for the sake of preserving peace, and free, equal and independent citizens with a responsible authority in their power to take care of observance of conditions for the realization of their freedom, equality and independence. Political liberalism relies precisely on this concept of social contract [8-9].

The change in the public attitudes of active citizens of Ukraine during and immediately after the first Maydan in 2004 can be interpreted as a transition from Locke's to Hobbes's understanding of a public agreement. The protest was caused by falsification of elections by the authorities. If you look at this in the eyes of Hobbes, then this does not justify mass protests, because according to his concept of a social contract, the authorities are not the party that concludes it, and she can not break it. Resistance to the authorities is legitimate only when the government becomes an enemy to the whole society, not when it has rigged elections, even though the majority of citizens have neglected the opinion. Instead, with the Locke's position, falsification of elections is a violation of a public agreement by the authorities, which not only justifies, but also requires active opposition from citizens. Immediately after the victory of the first Maydan and the election of Yushchenko as the president of Ukraine, the vast majority of former protesters were in a ghost stand in anticipation of the decision of the newly elected president and his team, if not all, of most social and political problems. Those who objected to the falsification of the election led Locke to understand the public agreement as an agreement between citizens and the authorities, began to look at the new government from the standpoint of the Hobbesian concept of a social contract, according to which the authorities are not as a party, as the subject of an agreement that its citizens conclude between by itself. The liberal demand from the authorities to be an honest participant in the deal turned into a conservative expectation of becoming a savior of the nation. This expectation is pleasing to those who are in power. However, the task turns out to be impracticable, and yesterday's winner turns into a loser. A vivid illustration of this was the miserable result of Yushchenko's presidential election in 2010.

The third version of the concept of a social deal is found by Jean-Jacques Rousseau. According to him, "... each of us transforms his person and all his power into a common property which is under the supreme command of universal will, and we recognize each member of the body as an integral part of the whole." At first glance, such an understanding of a public agreement best suited individual citizens and should lead to the success of society as a whole. However, it is this concept that contains the embryos of totalitarianism, when the will of individual real individuals dissolves in the supposed commonality of a nation or state, which enables either an individual or an individual party to usurp power on behalf of the whole of society. The most striking examples of such usurpation in the twentieth century were German Nazism and Russian Bolshevism.

The experience of this usurpation in the form of Soviet totalitarianism has survived several generations of modern Ukrainian citizens [10].

**Conclusion**. So we have the following social contract scheme: the civilization of the elite, the cultural contracts of elite groups with social groups, the elite pact (elite conspiracy), the system of trust between the elite and society, the public decision, why a society should be together, a constitution, international legitimacy (the ruling class , society, their constitution).

All these elements are actually what commonly referred to as a social contract.

And only some of these elements of a social contract fall into the Constitution in the form of values. For example, in the French Constitution, there are common values - "freedom, equality, fraternity", in the USA it is "freedom, property, aspiration for happiness". In Russia it

would be necessary to write - "justice, empire, greatness". This is not only a difference in the historical origin of these guidelines, but also the difference in the set of mental factors of different peoples.

If you ask what values should be in the Preamble of the Constitution of Ukraine, then you can point out completely different – independence, democracy, victory.

***References***

1. Бурлуцький С.В. Стратегія формування суспільного договору в умовах посилення соціальної стратифікації. *Часопис економічних реформ.* 2015. № 1. С. 89-95.

2. Самотуга А.В. Конституція України як суспільний договір: нотатки до наукової дискусії крізь призму її розробки, прийняття та внесення до неї змін. *Науковий вісник Дніпропетровського державного університету внутрішніх справ.* 2017. № 2. С. 59-68.

3. Городницький А. Фактори становлення суспільного договору (social contract) у західній континентальній філософії. *Університетська кафедра*. 2017. № 6. С. 151-160.

4. Малко Р. Священний Грааль. URL: http://tyzhden.ua/Politics/195556.

5. Ставнійчук М. Дві України. Поле бою — Конституція. *Дзеркало тижня*. 2016. 24 червня. URL: // https://dt.ua/article/print/internal/dvi-ukrayini-pole-boyu-konstituciya.

6. Шаповал В. Конституція України: життя "складного підлітка". Там само. URL: ttps://dt.ua/article/print/internal/konstituciya-ukrayini-zhittya-skladnogo-pidlitka.

7. Кебуладзе Вахтанг. Яка в нас суспільна угода? URL: http://tyzhden.ua/Columns/50/214791.

8. Дацюк Сергій. Суспільний договір як виклик. URL: https://blogs.pravda.com.ua/authors/datsuk/5ac34d8d8bb55/.

9. Дацюк Сергій. Чи є підстави для нового суспільного договору? URL: https://blogs.pravda.com.ua/authors/datsuk/5b3b56a933131/.

10. Радчук Олександр. Суспільний договір як альтернатива перманентних змін до Конституції. URL: https://blogs.korrespondent.net/blog/users/3238746-suspilnyi-dohovir-yak-alternatyva-permanentnykh-zmin-do-konstytutsii.

*Received to editorial office 12.07.2018*

**Summary**

In contemporary socio-political studies, a social contract is usually viewed not as a concrete historical event, fixed by a number of documents available for research, but as the designation of some features of a long-standing historical process, which resulted in the emergence of modern liberal-democratic societies, to which Ukraine aspires

A social contract is valid only if it recognizes at least the majority of members of society. Otherwise, while remaining a legitimate reason for the existence of a society, he loses his legitimacy. For the normal existence of a social organism, not only the content of the social contract, but also the method of its conclusion, should be legitimate.

***Keywords****: social contract, constitution, drafting, adopting.*

# ISSUES OF PRIVATE LEGAL REGULATION OF SOCIAL RELATIONS

**Lyudmyla Andriyevska**
lecturer

**Maryna Polishchuk**
Ph.D.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-126-129*

## RECENT PROBLEMS OF LIABILITY FOR DAMAGES IN LABOR LAW

**Андрієвська Л., Поліщук М. СУЧАСНІ ПРОБЛЕМИ МАТЕРІАЛЬНОЇ ВІДПОВІДАЛЬНОСТІ В ТРУДОВОМУ ПРАВІ.** У статті проаналізовано особливості матеріальної відповідальності сторін трудових правовідносин. Розглянуто проблеми з данного питання, що містяться в національному законодавстві та наведено ряд пропозицій щодо його реформування.

Зроблено висновок, що відповідальність за шкоду має найважливіше значення у трудовому законодавстві. Зрештою, виконуючи свої функціональні обов'язки, жодна сторона не застрахована від настання трудового правопорушення, що, в свою чергу, є основою відповідальності за шкоду. Добре, коли як працівник, так і роботодавець широко обізнані з цього питання і здатні захищати свої права та законні інтереси. Однак для того, щоб вони могли це усвідомити, ця тема повинна бути повністю висвітлена на законодавчому рівні, який, на жаль, сьогодні відсутній.

Таким чином, національне законодавство про відповідальність за шкоду, пов'язану з трудовими відносинами сторін, зокрема, з його підстав, детальних прав та обов'язків сторін у вирішенні конкретної проблеми та в ряді інших обставин, потребує реформування шляхом усунення теоретичних суперечностей, прогалини, а також деталізацію правових норм, що регулюють це питання в нормативно-правових актах. Насамперед це допоможе прискорити процедуру доведення вини, а, по-друге, дозволить запобігти зловживанням влади та захистити праві і законні інтереси сторін трудових правовідносин. Тому це допоможе вирішити ряд проблем, які щоденно виникають у юридичній практиці.

***Ключові слова:*** *відповідальність, матеріальна відповідальність, матеріальна відповідальність працівника, матеріальна відповідальність роботодавця.*

**Introduction.** Currently the labour law, even though it is based on constitutional provisions on human and civil rights and freedoms, requires reforms and comprehensive analysis for improving the legislative framework and law enforcement practice. In particular, it applies to liability for damages of labour relationship parties.

In recent years this problem has been investigated by V. S. Venediktov, I. V. Zub, D. O. Karpenko, V. I. Prokopenko, V. G. Rotan, M. P. Stadnik, L. I. Surovska and others. Liability for damages issues have been widely covered in the accounting literature in the Soviet period, significant attention was paid to a definition and procedures of compensation for financial damages. The above issues were a part of scientific interests of N. G. Belov, F. F. Butynets, L. M. Kramarovsky, S. I. Gerych, V. K. Radostovets, A. A.Shpig and others. Works of the above-mentioned authors constitutes a sound scientific basis for research on a

definition of liability for damages and accounting reflection of its consequences [3, p. 150].

But despite the considerable value of the scientific heritage of these specialists, the national legal science still misses a comprehensive research that would form a holistic view on the legal nature of employees' contractual liability in the market economy environment, its grounds, conditions and application. The relevance of this topic is also due to the fact that inequality of employment relationship parties causes significant differences in the legal regulation of the employer's liability for damages to an employee and the employee's one to an employer. These differences apply to determining a compensation amount, procedures and limits, the nature of legal acts regulating the relevant issues [5, p. 3].

**Problem statement.** The research on liability for damages of employment relationship partiesis aimed atanalysing the modern problemsof raising the awareness of employment relationship parties of their rights and legitimate interests, possibilities for their protection, as well as preventing the abuse of powers of one party due to the ignorance of the other.

**Research outcome.** For a better understanding what exactly is in scope of a liability for damages, it is worth stating what a liability is. So, under the labour law a liability is a separate type of legal responsibility which consists in an employee's obligation to be liable for a committed labour law violation and to incur appropriate sanctions. The basis for such a liability is a labour law violation, which is a guilty unlawful act of failing to perform or breaching employment duties by an employee [6, p. 411].

In this case two types of liability are applied in the labour law – disciplinary liability and liability for damages.

A liability for damages shall be understood as a liability of an employment contract party, namely of an employee or of an employer, to compensate the other party for a damage caused by a guilty unlawful failure to perform or improper performance of employment duties in accordance with the procedure and in the amount established by law [6, p. 410].

In turn, V.I. Shcherbina defines a liability for damages in the labour law of Ukraine as a liability of one of the employment relationship parties to compensate for a financial damage caused to the other party due to improper performance of their employment duties [6, p. 411].

An employee and an employer (an owner of an enterprise, an institution, an organization, an authorised body or individual) with whom an employee is in the employment relationship are subjects of liability for damages in the labour law in all cases [2].

An employee's liability for damages is their liability to compensate a direct actual damage caused to the employer's property by an employee's unlawful guilty violation of their employment responsibilities in the amount and procedure established by law [6, p. 411].

It should be noted that an employee's liability for damages under the labour law has three goals.

The first (primary) goal is to protect employer's property from damage, loss, theft and guarantee the compensation for damage caused by an employee. Thus, this employee's liability is restorative, because its primary goal is to restore employer's damaged property. Therefore, holding an employee liable for damages does not exclude application of disciplinary actions to them, because simultaneously with causing a property damage (property labour violation) a guilty employee commits a labour disciplinary offense (disciplinary offense) (part 3, article 130 of the Labour Code of Ukraine) [2, art. 130].

The second goal is to assure a guarantee to an employee when holding him liable for damages, to protect an employee's salary from unnecessary, illegal and unreasonable charges. This goal of the institution of liability for damages is guaranteed. The third goal is to instil in an employee asolicitous, diligent and lean attitude with no intent to cause damage to the employer's property, which is given so that an employee can perform their employment functions [6, p. 411].

Regarding employer's liability for damages, it should be noted that according to the legal doctrine the employer's liability for damages is defined as an employer's responsibility to compensate for a damage caused to an employee as a result of non-performance or improper performance of their employment duties in accordance with the procedure and in the amount established by law [1].

According to Article 153 of the Labour Code of Ukraine, the employer's liability for damages is based on an employer's responsibility to create conditions necessary for normal work;to ensure healthy and safe working conditions and to introduce modern safety means, as well as sanitary and hygienic conditions that prevent work-place injuries and occupational diseases of employees [2, art. 153].

Articles 117, 235, 236 of the Labour Code of Ukraine state that an employer is obliged to compensate an employee for damages caused by a delay in settlement upon dismissal, an unlawful dismissal, an employee's transfer to another job, an incorrect wording of a dismissal reason in an employment record book, a delay in delivering an employment record book due to the fault of an owner or a body authorised by an owner, a delay in executing a reinstatement decision.Art. 237of the Labour Codeof Ukraine stipulates that an official who is guilty of an unlawful dismissal or transfer of an employee shall be held liable for damages.Art.237-1of the Labour Codeof Ukraine establishes a responsibility of an owner or an authorised body to compensate an employee for moral damage [2].

Based on the above, financial damage compensated for by an employer to an employee can consist of property and non-property parts.

Modern theoretical scientists based on the analysis of current laws and judicial practice note that the financial damage caused to an employee during the performance of his employment duties includes: 1) damage caused to an employee as a result of violation of the right to work: by an unjustified refusal to employ; by violation of recruitment rules when recruiting an employee, which caused his or her subsequent dismissal for this reason; by an illegal transfer, removal or dismissal of an employee; by violation of obligations of an owner or an authorised body to issue documents on employee's job and salary (incase of improper filling, processing and delaying the issuance of the employment record book, employment and salary documents); 2) damage caused to employee's property; 3) moral damage[1].

Currently there is a gap in the labour legislation: while the second and third above-mentioned types of damage are imperfectly regulated by the labour laws, the employer's liability for illegal refusal to employ is still missing in the Labour Code of Ukraine [1].

The draft of the Labour Code of Ukraine as of April 22, 2013 developed by the working group of the Ministry of Social Policy of Ukraine determines the grounds and terms of employer's liability in sufficient detail. Namely, Chapter II of this draft provides for the following cases of the employer's liability: 1) the employer's liability for damage caused to employee's property (art. 415); 2) the employer's liability for damage caused by non-fulfilment of employer's obligations to provide the employee with material benefits and services (art. 416); 3) the employer's liability for damage in other cases established by this Code, law or an employment contract (art. 417); 4) the employer's liability for caused moral damage (Art. 418) [4].

However, despite the detailed regulation of the employer's liability for damage by the above-mentioned draft of the Labour Code of Ukraine, its Chapter II requires further elaboration.

With regard to international standards and adoption of best practices on this issue, it should be noted that the analysis of conventions, multilateral and bilateral agreements between countries allowed to conclude that, firstly, according to the international contractual regulation of liability for damages of employment contract parties, the parties are generally liable for damage under the national laws of the employment country in which an employer is located. Secondly, the legal regulation of financial damage caused to an employee by health damage in multilateral and bilateral agreements has its own peculiarities, which consist in a different compensation scope and procedure. Thirdly, employees who work in the territory of another country based a contract of work and labour concluded between economic entities of both countries are liable for damages under the laws of a sending country [7, p. 10].

The above-mentioned peculiarities of liability for damages of employment relationship parties under the national laws give grounds to state that such a type of liability is a special legal institution which is inherent only to the labour law and different from all other institutions of liability for damages of other law branches. The peculiarities are triggered by the specifics of employment relationship and the need for social protection of an employee [6, p. 413].

Taking the present into account, practically all normative acts related to the institution of employee's responsibility for damages are oriented to the economic model where employers are mainly state enterprises and organisations. And even partial changes in the labour legislation lead to a number of contradictions, which in turn create uncertainties and doubts among employers and agencies responsible for consideration of labour disputes. It becomes obvious that nowadays there is an urgent issue of improving the current legislation, in particular in terms of liability for damages of employment relationship parties.

This legislation should be reformed certainly with a consideration of an increase in the level of employees' legal guarantees, namely legal standards on liability for damages should protect employees' salaries from excessive and illegal charges [6, p. 413].

Additionally, once the current legislation on employee's liability for damages and application practices are analysed, first of all obligations of employment relationship parties to preserve property of an enterprise, an entity, an organisations should be specified.

Moreover, it is necessary to clarify in a legislative way the basis and terms of liability for damages, its types and amounts (limits), possibilities and limits of reducing the damage size, the object of compensation in relation to modern business conditions of enterprises, institutions, organisations [6, p. 413].

**Conclusions.** Liability for damages is of key importance in the labour law. After all, when performing their functional duties, no party is insured against the occurrence of a labour offense, which, in turn, is the basis for liability for damages. It is great when both an employee and an employer have proper awareness on this issue and are able to protect their rights and legitimate interests. However, for them to be able realise it, this topic should be perfectly illuminated at the legislative level, which unfortunately is missing today.

Thus, the national laws on liability for damages of employment relationship parties, in particular, on its grounds, detailed rights and obligations of theparties in solving a particular problen and on a number of other circumstances, needs to be reformed by eliminating theoretical contradictions and gaps, as well as detailing the legal regulations governing this issue in regulatory legal acts.After all, it will help, first of all, speed up the procedure for holding a guilty party, secondly, it will make it possible to prevent an abuse of authorities and protection of employment relationship parties' rights and legitimate interests.

Therefore, it will help solve a number of problems that are faced on a daily basis in the legal practice.

**References**

1. Dyachenko Yu. S. Employer's Liability for Damages in Legal Relationship. URL: http://www.rusnauka.com/13_NBG_2015/Pravo/4_191249.doc.htm

2. The Code of Labor Laws of Ukraine as of December 10, 1971. No. 322-VIII. *Journal of Verkhovna Rada of Ukraine*. 1971. No. 50. Art. 375.

3. Lega A. V. Economic and legal aspects of liability for damages of accountants. *Bulletin of the ZhDTU.* № 3 (53). 2010. P. 150-151.

4. Draft Labor Code of Ukraine as of April 22, 2013 № 2902. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=46746&pf35401=259514

5. Felenko Yu. A. Contractual liability for damages in the labor law // Abstract from thesis for a Candidate Degree in Law Sciences. X., 2016. P. 1-21.

6. Khaynus O.I. The concept of employees' liability for damages in the labor law. *Journal of Kiev University of Law*. 2011. Issue 4. P. 410-414.

7. Khutorian N.M. Theoretical problems of liability for damages of employment relationship parties // Abstract from thesis for a Doctor Degree in Law Sciences. X., 2003. P. 1-26.

*Received to editorial office 07.06.2018*

**Summary**

The article analyses peculiarities of liability for damages of employment relationship parties, as well as considers national law issues in this regard and suggests a number of reforms.

***Keywords:*** *liability, liabilityfor damages, liabilityfor damages of an employee, liability for damages of an employer.*

**Stanislava Myronyuk**
Ph.D.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-130-133*

# THE RIGHT TO BE A DONOR IN UKRAINE: LEGAL REGULATION AND PROBLEMS OF IMPLEMENTATION PRACTICE

**Миронюк С. ПРАВО НА ДОНОРСТВО В УКРАЇНІ: ПРАВОВЕ РЕГУЛЮВАННЯ ТА ПРОБЛЕМИ ПРАВОЗАСТОСОВЧОЇ ПРАКТИКИ.** З прийняттям Закону України «Про застосування трансплантації анатомічних матеріалів людині» 17 травня 2018 року було запроваджено алгоритм дій щодостворенняєдиної державної інформаційної системи трансплантації, яка буде складатись з таких реєстрів:1) реєстр волевиявлення особи про надання згоди або незгоди на посмертне донорство або призначення нею повноважного представника; 2) реєстр волевиявлення особи, яка надала у встановленому цим Законом порядку згоду на вилучення анатомічних матеріалів для трансплантації та/або виготовлення біоімплантатів з тіла померлої особи, яку вона представляє; 3) реєстр анатомічних матеріалів людини, призначених для трансплантації та/або виготовлення біоімплантатів; 4) реєстр живих донорів; 5) реєстр живих донорів гемопоетичних стовбурових клітин; 6) реєстр реципієнтів; 7) реєстр осіб з трансплантованим анатомічним матеріалом; 8) реєстр закладів охорони здоров'я, що надають медичну допомогу із застосуванням трансплантації та/або здійснюють діяльність, пов'язану з трансплантацією, та інших суб'єктів господарювання, що здійснюють діяльність, пов'язану з трансплантацією; 9) реєстр трансплант-координаторів. На сьогоднівже законодавчо врегулювано питання констатації смерті головного мозку. На наш погляд зроблено великий крок, якийдозволить робити операції по пересадці органів, використовуючи трупні органи, але в цьому питанні також існує багато суперечливих положень, і є недосконалим. Тому на нашу думку, законодавче положення щодо заборони прижиттєвої пожертви задля порятунку близьких родичів, особам, які відбувають покарання в містах позбавлення волі потребує перегляду, адже говорячи про заборону бути донором особи, що відбуває покарання в місцях позбавлення волі, ми говоримо про заборону особі-реципієнту на можливість стати здоровою людиною або навіть жити.

***Ключові слова***: *трансплантація, донор, живий донор, трупний орган, реципієнт, близькі родичі, медичне право.*

**Relevance of the topic of the article.** Back in 1933, Ukrainian surgeon YuriyVoronyi conducted the first in the world, a successful renal transplant operation from the deceased in Kherson. But despite this fact, according to the level of development of the sphere of transplantation in general, and the indicator of post-mortem donation in particular, as statistics of the Ministry of Health of Ukraine (hereinafter – the Ministry of Health) shows, our state is the last among the countries of Europe, in Ukraine operations concerning organ transplants from dead persons are 100 times less than in neighboring Poland.Today in Ukraine due to imperfection of legislation, economic, social and ethical problems, transplantation has no opportunities for development. To great regret, thousands of sick people are forced to spend huge amounts of money on operations abroad, investing both their own funds and the means of our state in the development of medicine of other countries.

So, in 2013-2015, the Ministry of Health transferred $ 2,431 million and 616,2 thousand euros to the medical institutions of foreign countries. 6 transplantations of bone marrow from a family donor (adult population), 8 cardiac transplantations, 5 – liver, 18 – kidneys from living donated donors and corpses were made for these funds.The Accounting Chamber has analyzed that the difference between the cost of conducting such operations in Ukraine and abroad varies very significantly. In Ukraine, about 1122 heart transplants, 116 liver transplants and 5623 kidney transplants, respectively, could be carried out for these funds.For example, in 2014-

2015, the cost of kidney transplantation in Belarus was 60 thousand dollars, and in Ukraine – about 16 thousand, liver – 140 and 54 thousand respectively [1].

Realizing all the greatness of the problem, the Ministry of Health has actively developed and submitted to the Verkhovna Rada for consideration the bills on amendments to the Law of Ukraine "On transplantation of organs and other anatomical materials to man" for the last five years and, finally, on May 17, 2018, the Verkhovna Rada of Ukraine adopted in the second reading the Law "On the Application of Transplantation of Anatomical Materials to a Man" (hereinafter referred to as the Law), for which 255 people were elected [2], is currently signed by the President of Ukraine.Entry into force of this law will result in the need for regulating civil relations arising from one side of the relatives of the deceased person and person in need of organ transplantation from the deceased, the other – that occur between patient and medical institution that performs surgeries on transplantation and elucidation of the legal nature of these relations and the order of their realization, which is the subject of research within the limits of this article. Based on the research subject main tasks planned for execution within this article are: clarify the legal nature of the relationship transplantation, analysis of current legal basis of the regulation, regulation defects and determine specific ways to improve the regulatory bases transplantation in Ukraine.

**Statement of the main provisions.** According to Art. 1 of the Law of Ukraine "On organ transplantation and other anatomical materials to man" of July 16, 1999 (hereinafter referred to as the Law 1999), transplantation is a special method of treatment involving the transplantation of an organ or other anatomical material taken from a person or animal [3].Article 1 of the adopted Law specifies that transplantation is a special method of treatment, consisting in the transfer of anatomical human material from the donor to the recipient and aimed at restoring human health [2].

According to the definition of the World Health Organization, transplantation is the transfer of living or dead tissue or organ between individuals of one or the same type [4, p.320]. Despite the fact that there is a medical law in Ukraine that has several definitions, one of which was given by Stetsenko S.G., namely: "medical law is a complex branch of law, which includes a set of legal norms regulating social relations in the field, in the legal literature there is no single point of view regarding the nature of the relations that arise in the provision of medical care, and in particular, in the case of transplantation"[5].

When analyzing medical law, we understand that it has as a circle of specific industry principles, concepts, terms, etc., and it applies the methods of legal regulation that are borrowed in other areas of law, including the norms of administrative law and civil law, which we think are used in greater volume, that is inter-branch law.In examining the problem of medical law, we drew attention to the fact that the opinions of scientists who studied this issue were divided, and some of them think that the relations that arise in the provision of medical care, including transplantation, are administrative and legal, and arise based on an administrative agreement, arguing that the relationship between the medical institution and the patient is of a dominant nature, since the latter is obliged to adhere to the regulations and regime of the medical institution.

M.N. Maleina, on the contrary, considers that the administration of a medical institution has powers of authority and implements them only in relation to its employees, but in relation to the service of patients, these powers can not be applied, since the obligations to comply with the regime of a medical institution arise at the will of the citizen, and may be terminated at the request of the patient at any time, which denies the administrative and legal nature of the relationship [6, p.67].In our opinion, medical law uses administrative law in matters relating to the direct management of medical institutions, licensing issues, tenders for the purchase of medical equipment and medicine, as well as other management issues, as well as norms of civil law concerning the provision of services to citizens, the provision of diagnostic services, prevention, treatment and rehabilitation. We think that the relationship between the medical institution and the patient is civil law, since the legal relationship provides freedom of choice of the behavior of the parties, but it regulates their rights, duties and responsibility.Also, in medical law, the norms of criminal law, labor law, family law, etc. are also used.

As we have already mentioned, medical law has specific sectoral principles.

It is very important to ensure the inviolability and protection of the principle of transplantology: the donor person should not be known to the recipient, and vice versa, except for marriage, family ties.

To date, only transplants from relatives are permitted in Ukraine, but from 2019, in ac-

cordance with the law on transplantology, the process of transplantation of kidneys from corpses, which in our opinion, is a great achievement.

But the issue of donation from relatives also remains relevant, although it is not clear who is a close relative. Analyzing family law, we understand that the concept of marriage – a family union of woman and man, registered in the state registration body of civil status, it is defined. But, unfortunately, there is no clear definition of the concept of "close relatives"[7].The most precise definition of the concept of "close relatives" is, in our opinion, contained in the Criminal Procedure Code, Article 3, paragraph 1, subparagraph 1, namely: "close relatives and family members – husband, wife, father, mother, stepfather, stepmother, son, daughter, stepchild, stepchild, brother, sister, grandfather, grandmother, great-grandfather, great-grandfather, grandchild, granddaughter, great-grandson, grand-daughter, adopter or adopted, guardian or trustee, person under guardianship or care, as well as persons living together, connected by common way and having mutual rights and obligations, including those who live together but who are not married" [8].There are three main types of donation. The first is the donation of organs from a living person: the removal of anatomical materials from a living donor is possible in the case of family donation or cross-donation. The second is donation from a living person, but it is the removal of anatomical materials capable of regeneration (self-reproduction), including hematopoietic stem cells, which can be carried out from a living donor who is not a close relative or a family member of the recipient. And the third is the donation of corpses, which consists in the fact that every adult capable person has the right to provide written consent or disagreement with the removal of anatomical materials from his/her body for transplantation and/or production of bioimplants after determining her condition as irreversible death (brain death or biological death) in accordance with the law (hereinafter – consent or disagreement with the post-mortem donation).The person who submitted the application has the right to withdraw, or to submit the next, which is entered in the register, automatically excluding the previous one. Every adult legal person has the right to appoint an authorized representative who, after the death of this person, will give his/her consent. Only an adult capable person who consciouslyand voluntarily gave consent to this can be a plenipotentiary representative. If the deceased person has not expressed his/her consent or disagreement with the post-mortem donation, has not determined his/herauthorized representative, the consent is requested from the second spouse or one of the close relatives of this person (children, parents, siblings) who is available to ask for such consent and written confirmation of its delivery. In the absence of the said consent, a person who undertakes to bury him/her is requested. In case of death of a person under 18 years of age, consent may be given by the parent or other legal representatives of this person.Of course, in order to prevent abuse, minimize unlawful transplantation, the law provides for a number of bans on donation, both from living donors and for cadaverous donations that need to be improved.For example, in our opinion, the issue is not resolved in relation to cadaverous donation, in the event that an adult, capable person has given consent to the removal of anatomical materials from his/her body for transplantation and/ or production of bioimplants after determining his/her condition as irreversible death (brain death or biological death) in accordance with the law, made it consciously, immediately before voluntarily taking part in hostilities, understanding the full risk.This person died or his/her consent to donation would be considered whether this consent would be invalid, since Article 17, paragraph 4, of the Act prohibits the removal of anatomical materials from his/her body for transplantation and/or bioimplant production after determining his/her condition as irreversible death (brain death or biological death) in accordance with the law, who died during an anti-terrorist operation and other military operations during direct involvement in the implementation of measures for the national security and defense, repression and deterrence the armed aggression of the Russian Federation in the Donetsk and Luhansk regions, being directly in the areas and during the period of implementation of these measures, and other military actions [2].But some of the prohibitions in our opinion are unfounded and contradict common sense. One such prohibition is the prohibition on being a donor to a person serving sentences in places of deprivation of liberty.

According to Article 3 of the Constitution of Ukraine, a person, his/her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is responsible to a person for its activities. The assertion and guarantee of human rights and freedoms is the main responsibility of the state [9].Article 27 of the Constitution of Ukraine states that every person has an inalienable right to life. No one can be arbitrarily deprived of life. The duty of the state is to protect human life. Everyone has the right to protect his life and health, life and health of others from unlawful encroachments [9].

We must understand that these rights – for life and health, the right to fatherhood, motherhood, the right to the protection of the life and health of their children, parents – are inalienable human rights, that is, they protect even persons serving a sentence of imprisonment. And the state is the guarantor of these rights, and the state's duty to protect human rights.If a person serving a sentence in a place of deprivation of liberty is ill, he/she needs an organ transplant operation and a close relative agrees to be a donor, then in these circumstances the legislator says that the operation can be done and the state will find the opportunity to provide the necessary conditions, to comply with a special regime regarding the person of the recipient (convicted) during the operation.

But for some reason to become a donor to his/her close relative, parent or child, a person serving sentence in places of deprivation of liberty can not.We consider this ban to be unwarranted because the legislator has determined that the removal of anatomical materials from a living donor is possible in case of family donation or cross-subsidization, which makes it impossible for any abuses, since in any case the person becomes a donor in order to save his close person, and in our opinion, the state should allow persons serving sentences in places of deprivation of liberty, if necessary, to become a donor to their close relative, and to provide all the necessary conditions for this.Of course, when it comes to extracting anatomical materials that are capable of regeneration (self-reproduction), including hematopoietic stem cells, it can also be done by a living donor who is not a close relative or a family member of the recipient, then this should include a prohibition, on the donation of a person serving sentences in places of deprivation of liberty.According to the statistics of Ministry of Health, each year in Ukraine about 5000 people require transplants of organs and cells, of whom more than 3400 die without waiting for surgery.

**Conclusion.** It should be noted that according to the sociological group "Rating", which conducted a survey among Ukrainians in July-August last year, 63% of respondents supported the human right to donate their organs after death in order to save or improve the lives of other people [1]. Therefore, in our opinion, the legislative provision on the prohibition of life support for the sake of rescuing close relatives, persons serving sentences in the places of deprivation of liberty needs to be revised, because speaking of the prohibition of being a donor to a person serving in places of deprivation of liberty, we are talking about the prohibition of the person-recipient of the opportunity to become a healthy person or even to live.

***References***

1. Ігноровані органи. В чому проблема з трансплантаціями в Україні / *Любов Акуленко – виконавчий директор ГО «Український центр європейської політики».* URL: https://life.pravda.com.ua/health/2017/02/17/222633/.

2. Про застосування трансплантації анатомічних матеріалів людині: Закон України від 17 травня 2018 року № 2386а-1. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/JH1UA7IV.html

3. Про трансплантацію органів та інших анатомічних матеріалів людині: Закон України від 16 липня 1999 року. *Відомості Верховної Ради України*. 1999. N 41. Ст. 377.

4. Большая медицинская энциклопедия: в 11 т. / Гл. ред. М. Ковалев. Т. 11. Москва: Сов. Энцикл., 1979. 590 с.

5. Стеценко С.Г., Стеценко В.Ю., Сенюта І.Я. Медичне право України: підручник; за заг. ред. С.Г. Стеценка. Київ, Правова єдність, 2008. 507 с.

6. Малеина М. Н. Человек и медицина в современном праве: учебное и практическое пособие. Москва: БЕК, 1995. 92 с.

7. Семейний Кодекс України. *Відомості Верховної Ради України*. 2002. № 21-22. Ст.135.

8. Кримінальний процесуальний Кодекс України. *Відомості Верховної Ради України*. 2013. № 9-10. № 11-12. № 13. Ст. 88.

9. Конституція України: Закон України від 28.06.1996 р. № 254к/96-ВР. *Відомості Верховної Ради України.* 1996. № 30.

*Received to editorial office 07.06.2018*

**Summary**

With the adoption of the Law of Ukraine "On the application of transplantation of anatomical materials to man" on May 17, 2018, an algorithm for the creation of a unified state information system of transplantation, consisting of the following registries.

To date, the issue of establishing death of the brain has already been regulated by law. In our opinion, a major step has been taken to allow organ transplants to be performed using body organs, but there are also many controversial provisions on this issue, and it is imperfect.

***Keywords****: transplantation, donor, living donator, corps organ, recipient, close relatives, medical law.*

**Ricardo Furfarro**
Dr of Law
*(University of Business and Social Sciences, Buenos Aires, Argentina)*

*DOI: 10.31733/2078-3566-2018-2-134-146*

# A VIEW ON THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS FOR PHARMACEUTICALS IN A GLOBALIZED CONTEXT. KEY CONNOTATIONS DERIVED FROM HAVING LEGAL CERTAINTY PROMOTING FOREIGN INVESTMENT

**Фурфаро Р. ПОГЛЯД НА ЗАХИСТ ПРАВ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ НА ЛІКАРСЬКІ ЗАСОБИ В ГЛОБАЛІЗОВАНОМУ КОНТЕКСТІ. ОСНОВНІ КОНОТАЦІЇ, ЩО ВИПЛИВАЮТЬ ІЗ ПРАВОВОЇ ВИЗНАЧЕНОСТІ, ДЛЯ СПРИЯННЯ ІНОЗЕМНИМ ІНВЕСТИЦІЯМ**. Стаття має на меті вивчити вплив, який може мати примусове патентне ліцензування третьої сторони, різко шкодячи правам винахідника. Розширення патентів на фармацевтичні продукти все ще є суперечливим предметом міжнародної дискусії, особливо в слаборозвинених та країнах, що розвиваються, і, отже, можна загалом констатувати, що примусове ліцензування перевизначає права патентовласника, що випливає з патенту.

З ухваленням закону близько 24,5 патентів та промислових корисних моделей підпали під національну законодавчу базу щодо інтелектуальної власності, яку Аргентина привела у відповідність до розвинених країн відповідно до вимог СОТ щодо аспектів прав інтелектуальної власності, пов'язаних з торгівлею (ADPIC / TRIPs). Це незважаючи на той факт, що правова невизначеність у межах верховенства права, безсумнівно, зазнала впливу, оскільки законодавець не міг чітко, стисло і прозоро відображати величину економічних засобів правового захисту, на які власник патенту має право, а також конкретні параметри компенсації та стандарти, які мають бути присуджені.

***Ключові слова**: винаходи та відкриття, фармацевтичні продукти, патентні права, правова визначеність у межах верховенства права.*

## 1. Intellectual property and pharmaceutical products

In order to understand the issues that this article pretends to bring into debate, it is in the first place necessary to state that the basis for patent protection is what we generally know as intellectual property rights These rights constitute a true asset from which the owner will try to get as much benefits as possible from the exclusive commercial rights (with no competition at all), he hold on the invention protected by the patent. These rights or privileges are recognized to the inventor or patent holder for being the one to discover a new pharmaceutical compound, new therapeutic properties on an existing compound which deserve patent protection, an existing pharmaceutical product which has less adverse effectsthan the currently existing ones, one which may bring to the patient a more convenient administration than those in place, or with less adverse effects for the consumer or patient than those existing in the market at the time an application for patent protection is filed.

As it normally happens in these cases, there are those who are in favor of patent protection for pharmaceuticals and those which are against. Those defending patent protection rights argue that patents are the most powerful incentive that the pharmaceutical industry can have to develop new compounds,with the favourable impact that this fact brings in order to create a positive legal certainty context. This kind of context provides for a stronger enforcement of the rule of law which creates the required conditions to motivate inventors for new developments, for innovation, and for the discovery of new and last generation pharmaceutical compounds

On the other hand, detractors of patent protection for pharmaceuticals, consider that such protection will affect competition, and that the access to such compounds will be the sole discretion of the inventor or patent holder. In such case, they argue, that if inventors or patent holders do not find adequate economic conditions in certain markets, or if they consider that the rule of law and legal certainty in a certain context is undermined, then they will withhold

from launching a product, thus preventing the consumer or patient to have ready access to it whenever he needs it. As a consequence of such withholding, public authorities are to consider to grant a third party a compulsory license on the patent.

In order to understand the true implications brought by patent protection on pharmaceuticals, it is fundamentally necessary to analyse the consequences of such protection which may bring some light to the topic on debate. One of the first immediate effects is the positive impact that patent protection has on creating legal certainty and strengthening the rule of law. The debate has also brought political discussions in Argentina to which we will now refer in this article. It is a important fact to consider that universities and educational institutions, in any context, have a central role in investigations that lead to inventions and pharmaceutical developments.A "populist" approach sustain the idea that public universities, while doing investigation for pharmaceutical development, they identify and "privatize" traditional knowledge of original ancestry population, aboriginal groups and agricultural workers, together with their genetic resources. Such political approach views that patents arising from these investigations provide considerable funds to universities which tend to give them more an increasingly trade profile, leaving aside the academic one that these institutions traditionally have. Unfortunately, these investigations have become a growing source of political debate and resistance, inasmuch as the affected communities and the political organizations behind them, are guided by ideological objectives more than anything else. This line of thought is focused more on political, ideological and power-oriented models, than giving intrinsic value to the intellectual property in itself and the benefits that it may bring to these communities in terms of fighting disease.

This is what is traditionally known as the geopolitics of intellectual property reflected on how important power relations are structured and are consolidated at the political level in a globalized world, when, on the other hand, key issues such as life conditions and subsistence of large populations and communities are under scrutiny, and should provide an alternative to the mere trade of intellectual property rights

Unfortunately, there is not enough focus on therapeutic improvements that intellectual property brings to the development of new pharmaceutical compounds which fight diseases such as ebole, dengue and chikungunya.

Within intellectual property, and qualitative and quantitative speaking, inventions and discoveries constitute at the very top of the list, with innovations of various sorts, including within the area of last generation pharmaceutical compounds. Key question here is to know how protection of intellectual property through a patent protection system or framework have improved legal certainty and the rule of law, bringing new additional inventions, discoveries and innovations in the area of pharmaceuticals. A patent is an exclusive right granted by the State to a business entity, individual or other type of organization for a defined invention on a product or process which offers a new approach to way to do something or a new technical solution to a certain problem. Such exclusive right has a limited duration, which in the majority of the legislations of the world, is fixed for twenty (20) years, at the end of which, the invention enters into the public domain.

Chaloupa (1994) considers that the supreme capacity of the human being in applying its mental and spiritual resources to a "development and creation conception", common to to every invention and discovery (page 68). The concept of intellectual property involves ideas, concepts and expressions created by human intelligence, and considered as the criteria for coming up with intellectual results. Sherwood (1993) has stated that "this intellectual products, when protected by the community in general, are converted into true intellectual property and have a very positive role in the economic development of a nation(page 74). The promotion of research activities and developmental work, have been for a good number of years, a high priority in developed nations, including the United States of America. Without the eyes and emphasis on education and continuous incentives to the investigational and developmental activities, countries like the United States of America have never reached its present level of progress and growth. After years of experiments in diverse initiatives, a conclusion has been reached that the most effective and efficient way of obtaining the best results in investigation and development activities, is involving the private sector and at the same time, ensuring that those conducting investigation, will have the benefits and control over its results in the market place. Guaranteed rights of those conducting investigation and development activities, as well as those that are involved in innovative initiatives, have been for decades, the fundamental basis of development of the most advanced nations, and that it the real secret of its increasing development.

Today, more than ever before, modern societies consider that in order to have progress,

there is a need for innovation, and that development goes hand to hand with discoveries and inventions. "The incentives for members of a community to decide investments on investigation and development of new lines of thought, are base on the protection of intellectual property rights" (Zuccherino-Guimarey y Caballero, 1992, page139).

The legal framework, in the various countries, protect this type of property, in a positive way allowing the inventor to enjoy the economic benefits of its inventions, and also avoiding that others con use or apply his invention. The patent system has proved to be the only efficient tool to provide legal certainty and enforce the rule of law, at the time of granting incentives to the investment in investigation and development activities that can generate new valuable knowledge which in turn will add more to the welfare of the community

"Advanced countries have grown from having a powerful heavy industry sector to the industry based on knowledge (Whitney,1992, page 11). This is the main reason the United States of America have focused so much on intellectual property protection.The promotion of investigation, discovery and development have been for a long period of time a high priority for now developed nations. Without putting strong focus and emphasis on education and promotion of investigation and development, nations like the United States of America and others could have never reached its present level of development. Experience at the global level have proved that investigation and development would not have been possible without involving the private sector, ensuring that those who actively participated in these creative activities would benefit from their results in the marketplace

Over time, the United States of America and other advanced countries, have been focused in strengthening the rights of investors, and this policy have been maintained without changes during a long period of time and continues to be in force. Furthermore, Article 1, Section 8$^{th}$ of the Constitution of the United States of America, have provided for the promotion of the arts and sciences, granting to authors and inventors the exclusive right over its respective discoveries and inventions for a limited period of time. Focus placed on progress has still today a very relevant role and positive effects.

It was then that in the field of research and development of the pharmaceutical industry, the policy on protection of intellectual property rights, and the legal certainty arising out of it, have resulted in huge capital investments for the development of new drugs and compounds with lifesaving effects. Societies of advanced nations, including that of the United States of America, have understood that a healthy and growing economy depends on the existence of a continuous innovation process. As we have said before, the United States of America has experienced a transition from what is commonly known as a heavy industry, to one based on knowledge. This tendency has increased the interest for intellectual property protection, with a consolidation of the rule of law and a legal certainty context which have promoted new inventions, discoveries and developments

**2. Patentability requirements**

Both the ADPIC-TRIPS legislation as well as the Argentine legal framework which incorporated such legislation into domestic law, refer to the patentability requirements for pharmaceuticals and other products in general. They provide that inventions of products and procedures are patentable, as long as they are new, constitute an inventive activity and have and industrial application. In terms of novelty for an invention that is under patent application submission, such novelty should not be part of the current state of art at the time of the submission. And what do we have to understand for "state of art"? It is all the technical knowledge which is the public domain prior to the date in which the patent application is filed, or in certain cases, where a priority is acknowledged through a verbal or written description, the existence of the product in the market o through any other means of communication or information, in the country where the application had been submitted or abroad.

It is worth mentioning that the Argentine legislation follows the criteria of the legal framework of developed nations in terms of defining the "state of art" concept. It is therefore essential to be fully aware of the state of art, so that in a rule of law context, it could be simply defined if a patent for a pharmaceutical should be granted, for representing something new, and not already part in the current state of art.

In terms of invention activities, another requirement for the grating of a patent, is that the creative process of the patent in question or its results, do not emerge from the current state of art, in the criteria of an individual who would be considered a sort of expert in the technical matter in question.

**3. Intellectual property protection**

Intellectual property refers to the creation of the mind: inventions, literary or artistic pieces, symbols, names and even images used in trade. Within the concept of intellectual property, there are two (2) well defined categories, one of which is the well-known industrial property which includes patents, trademarks and industrial designs. The other category is related to copyrights and involves literary, musical and artistic work.

There are quite a number of imperative reasons to protect intellectual property. In the first place, progress and welfare of the human being are based on the ability to innovate in the-technological and cultural fields. Secondly, a legal framework protecting new developments is an incentive to invest additional resources, and promote new innovations. Last but not least, the promotion and protection of industrial property foster economic development and growth, generating new jobs and industries, as well as improving the quality of life in human beings.

An effective and fair intellectual property framework contributes to countries' developing its creative potential as a powerful tool for economic development and social and cultural welfare. Such a framework or system focuses on the establishment of a balance between the innovator's own interests and that of the State, providing a context in which creativity and development can flourish in the benefit of humanity. Protection of intellectual property has become a topic of increasing importance, and in the last thirty-five (35) years, all bilateral and multilateral agendas among countries and organizations have referred to intellectual property protection as a key priority. Musich (1993) considers that the international dimension of intellectual property has been been increased due to:

a) A larger participation in international trade of products and services with high technological contents, such as those found in pharmaceuticals;

b) Technology transfer with the use of key toolss such as licenses and other means of investments; and

c) The increasing expansion of intellectual property violation.

A patent protection means that an invention under such patent, cannot be made, used, distributed, sold or marketed without the consent of the patent holder. Enforcing patent rights in a court of law, allows to litigate against patent infringement. On the other hand, a court of law, may rule against the validity of a patent claimed by a third party, if the latter has sustainable grounds to consider the patent to be invalid and null.

A patent holder has the right to decide who can use the invention under the patent during the period in which the invention is protected. In such case, the patent holder can authorize or license the patent to third parties in accordance to terms and conditions they can mutually agree on. Patents constitute incentives for individuals, recognizing them for their creativites and allowing them to receive material compensations for marketable inventions.

These incentives promote innovation and guarantee improvements to the quality of life of human beings.

Prior to the enactment of Law 24.481 in Argentina, the rejection by the various government administrations to recognize and grant patent protection on pharmaceuticals, was considered by western democracies as a serious violationof the rules of international trade, and an evident transgression of the rule of law and legal certainty. Directive 2004/48/CE issued by the European Parlament on April 29, 2004 refers to the actions and procedures implemented in Europe in order to ensure compliance with intellectual property rights and their protection.

**4. Legal certainty and rule of law**

What is the concept of legal certainty and rule of law? These are principles that provide certainty and trust in the general public over the rights that individuals have as well as how they will be protected, in the case of violation. Such principles provide a context of civic trust on the Judiciary, sustained on reasonable grounds of predictability, which is the basis of the State of Law, the legal framework and the stability of the democratic system. Enforcement of the law is another key important value in a legal certainty context and the rule of law. It provides the individual the tool to develop actitivies in a predictable and secure manner. The word "seguridad" in Spanish is derived from the latin word "securitas", which in turn comes from the adjective "secures" which means that individuals can trust the legal system. The State, as having full public powers, is required to regulate on individuals' relations, sets forth the legal rules to be complied with, and should create a legal certainty and rule of law context, having

full accountability for the Executive, the Legislative and the Judiciary.

At the end of the day, legal certainty and rule of law provide individuals a guarantee that the State will recognize human rights and those rights over their assets, and in the event they are violated or infringed, there will be suitable tools to protect and compensate such violation and infringement. Typical principles derived from the legal certainty and rule of law are the general irretroactivity of the law, the inclusion of all felonies and misdimenours and their punishment, all constitutional guarantees, the statute of limitations, and res judicata, among others.

In the majority of the legal frameworks, we can find ad hoc rules focused on ensuring the legal certainty and the rule of law. For example in Spain, such principles are expressed and contained in statutes which are at the top of the legal rank, as well as in Article 9.3 of the Spanish Constitution passed in 1978.

Similarly, in Chile, article 7 of the Political Constitution provides that no public power, individuals or group of individuals, will attribute themselves any authority or rights which had not been specifically granted by the Constitution or the laws.

In Argentina, there is, unfortunately, no definition in the legal framework of what the concepts of rule of law and legal certainty mean. This has caused the volume of foreign investment that Argentina has received in the past years, have been less than that received by other Latin American nations, confirming the rule that when there is less legal certainty and rule of law, then there is less foreign investment arriving to a country.

**5. Promotion of investments**

When there is full protection of intellectual property, there is evidence it is a solid attraction to investment. Why? There is predictibility and fixed rules for those who risk their capital, new jobs are created, and additional amounts in taxes are paid. This is allowing the State to have more funds to spend in specific areas such as education and health, and there is room for an increased association between public and private universities for research and development of new pharmaceutical compounds. It is what we can generally call a virtuous cycle. At the same time, pharmaceutical companies obtain benefits from their investments, reinvesting in the research of new pharmaceutical principle which derive in innovative life saving compounds. Long-term investments take time and money to develop, benefiting those countries which receive them, and the patients who need to treat their diseases.

Capital earnings from long-term investments by companies, also take a considerable amount of time to generate, but legal certainty and the rule of law is the ideal context for new inventions, discoveries and innovations.

**6. Expansion of international trade**

The evolution of the world economy during the past decade, reflected in high prices for commodities, and a cyclic slowdown of industrial economies, have given emerging nations an exceptional opportunity to be integrated to the global trade context.In this sense, there has been a systematic reference to the economic growth of the so called “Asiatic tigers”, namely Malaysia, Hong Kong, Singapore, Korea and Vietnam, as well as those countries which since 2009, have been part of the BRICs group, which includes Brazil, Russia, India, China and South Africa, and which have substantially increased their participation in the context of the global international trade. A strong industrial growth has been evident in all of these countries, starting at a 1,6% participation as a whole in 1960, and reaching 8% in 1991 (Cediquifa 1992, page 32). Only all of the countries being part of BRICS has had a participation in the world trade of 13.1% in 2006. All of these countries have reinforce their legal framework for patent protection.

In Latin America, Chile, Mexico, Peru and Argentina, have amended their patent protection framework on pharmaceuticals, and this step has allowed to substantially increased exports of their products. The United States of America and the European Union have adopted policies to totally or partially close their markets to products originated in countries violating, or not adequately protecting intellectual property rights. They consider that lack of patent protection constitutes an unfair practice and therefore, they implement retaliation policies against violating nations.

The truth is that today there is an universal acknowledgment of the importance of intellectual property rights because of their positive economic impacts. It is also a way of honoring culture and scientific research. The investor is the owner of his discoveries, and should not have any interference in fully enjoying his rights on the inventions, including granting licenses

on them. Intellectual property has been recognized as a property right, as well as a fundamental human right. Vázquez (1994) has asserted:"It was in 1791 that the French National Assembly had declared that all new ideas which could be expressed or developed to be useful for the community, belonged to those who have come up with such ideas, and denying such right or acknowledgment, would constitute an attack on individual rights(page 43).

Notwithstanding the above, there are still narrow individual points of view, with ideological and political contents, which consider that the defense of a standarized intellectual property protection system by multinational companies, such as ADPIC-TRIPS, have the sole purpose of promoting their own commercial and economic interests,. Such positions have considered that intellectual property protection is only a very strong tool for powerful economic concentration which causes an increase of inequalities in the community which is typical of the globalization process. In this sense, this point of view considers intellectual property as one of the most relevant dimensions of geopolitics in contemporary capitalism

**7. Advantages of a patent system**

Now, which are the advantages of a patent system? Patent law responds to the following situation: the inventor who comes up with an industrial invention may file an application for patent protection. Rozanski (1993) considers that patent law does not only have the purpose of recognizing inventors' efforts but also attain an increase in the technical and industrial level of knowledge for the benefit of the community (page 3). Mechanisms designed to annul, limit or restrict patent rights, are seen to be new types of confiscation violating the rule of law. An agreement for a patent license on a pharmaceutical product, is the result of a negotiation between the patent holder and the licensee. They mutually and reciprocally understand that it is in their best interest to work together in order to commercially exploit the invention protected by the patent. This type of agreements involves transfer of technology. Legislation for patent protection should provide for legal certainty creating an adequate context for multiplying license or other type of agreements where the commercial risks is shared by two or more parties.

But the question is how past experience has reflected that legal certainty and rule of law can be limited or totally restricted? In the first place, pharmaceutical products have been banned from patent protectionin certain jurisdictions. In the second place, even if patent protection is granted, the most popular tool to limit it, is the imposition of compulsory licenses, by which the patent holder is forced to grant an authorization to a third party to commercially exploit the patent. Compulsory licenses ban the exclusive right to commercially exploit the invention protected by the patent, which is the essence of patent rights. And this is the reason why compulsory licenses on patents are generally granted in exceptional cases, such as in the event of a national emergency duly sustained, where the patent holder's right should also be considered. In the past, the ex-Soviet Union sustained the idea that the inventor should only be granted a recognition for his invention or discovery, but no the exclusive right to commercially exploit his patent, and for that purpose they created what was generally known as the"Certificates for the Invention", which constituted a flagrant failure in the recognition of the inventor's efforts to develop his invention

Compulsory licenses can be granted, for example, due to the lack of commercial exploitation of the patent, abuse of dominant position in the market, and in the event of emergencies, generally identified as of public interest. A patent system which is recognized to be first class cannot be sustained in a wide and discretional granting of compulsory licenses. If the State has the right and power to decide on patent inventions on those who really innovate, in order to grant licenses on them to third parties for commercial exploitation, there is a risk to make compulsory licenses a new form of confiscation. If this is the case, there will be no new investments in research and development. It is highly recommended that compulsory licenses be only exceptional, restricted to a few cases, and non-discretional, so that rights of the patent holder are only limited to a minimum expression, and that the patent holder receives adequate compensation. An ideal legal framework should harmonize the interests of the parties, and should focus on the welfare, health protection and the interest and progress of human beings. For this purpose, innovation and research should be promoted, on the one side, and an adequate functioning of the market should be achieved, on the other, so that there is full guarantee that economic, scientific and knowledge resources are attained.

**8. The evolution of the Argentine patent system**

Argentina has fortunately left behind its negative background characterizedby the failure to recognize patents rights on pharmaceuticals originally contemplated in Law 111 passed in 1864. Notwithstanding the fact that in the current Argentine legal framework, there are provisions contemplating a few exceptions to patent rights over pharmaceutical products. If in the current legislation a few exceptions to patent law are found, as described above,, those exceptions are not the ones that may result in a lack of the rule of law

No doubt, it is certainly complex to determine when those exceptions should apply in such a way that patent rights are to be downgraded. However, intellectual property should have more weight in Argentina so that exceptional limitations to be imposed, should be considered to be a restriction to legal certainty and the rule of law.

In order to have an idea of the evolution of patent protection in Argentina, its is key to be aware of the progress that Argentine law has experimented in terms of the protection of the invention of pharmaceutical products. Looking at this topic from a mere constitutional perspective, the interpretation of Article 17 of the Argentine Constitution is very clear as it provides that authors and inventors are the exclusive owners of their inventions or discoveries meeting the requirements of inventions. In addition, Article 14 of such fundamental law recognizes that a state of law is based in the recognition of private property. While individual private property of assets and goods is without any time limitation, that of inventions is restricted to twenty (20) years from the date a patent application is filed.

As indicated ut-supra, inventors' rights have been regulated by law 111 passed in the nineteenth century and later amended by Decree 12025 from 1957. Law 111 provided that all inventions and discoveries (meeting the requirements of an inventions) granted their authors or inventors the exclusive right to commercially exploit the invention during the time period and conditions set forth by law. Patent rights are reflected in titles known as "Patent Inventions". Article 4 of Law 111, did not recognize patent protection for pharmaceuticals with the sole purpose, at that time, of avoiding monopolic enterprises in the health area which is extremely sensitive in the community.Due to the fact that this legal framework was not aligned with the approaches designed on a worldwide basis for a patent protection framework for pharmaceuticals, Argentina was imposed commercial sanctions with the purpose of forcing a change in the legislation, and specially by the United States of America. It was in 1995 that due to these sanctions and commercial pressures, Argentina decided to start changing its patent legal framework, and Law 24425 was passed, adhering to the treaty which created World Commerce Organization, in which ADPIC-TRIPS is a part of it. Here minimum standards to be complied by all members for intellectual property protection were established. Several attempts to pass bills of law to change the actual patent framework, did not go through either in the Senate or in the Low Chamber ( or Chamber of Representatives ). At the end of 1996, law 24766 was passed. It was known as the law for confidentiality on information and products. This statute was passed to have Argentina comply with commitments that were made as a consequence of adhering the country to the World Commerce Organization. The contents of the statute are clear, and provide for the patentability of pharmaceuticals as well as the process of keeping the pharmaceutical data submitted for health registration approval, as confidential. A key step forward on the passing of new legislation by the Argentine Congress, was Law 24481 known as the new patent legislation, which replaced old Law 111. In only fifteen (15) articles, the new statute provides for the patentability of pharmaceuticals, as well as the process or processes involved in coming up with the product.

In addition, the National Institute of Intellectual Property was created. This is the authority of application of the above mentioned laws in respect to patents and inventions. Life of patents is set forth for twenty (20) years, and as indicated ut supra, as from the date of filing. The patent is on the head of the inventor and/or successors, who have the right to assign the patent and can enter into agreements involving patents, which means that the patent holder has the right to grant third parties the right to use or commercially exploit the invention by assigning the patent title, and receiving a royalty at a rate and in the terms and conditions to be agreed by the parties.

In terms of using the patent inventions without due authorization from the patent holder, Argentine patent law 24.481 currently in force, follows ADPIC-TRIPS provisions. Exceptional situations contemplating compulsory licensing, have a negative impact on intellectual property rights, as well as on the legal certainty and rule of law context.

Although certain justified limitations on the use of patent inventions in extreme situa-

tions may be considered certainly reasonable when there is a public interest involved, there is no doubt at all that patent rights are affected and there is a negative impact on investors' trust on the context in which such limitations take place. In the case of pharmaceutical products, it was generally considered that limitations as described may only be justified to the right of access by the community to health benefits. It is then, in the power of INPI to establish, based on sustainable requests and on a court decision, limited exceptions to patent rights ( Law 24481, Article 41). In general, INPI has reasonable discretionality to establish the limitations in question, as the law does not provide, in a taxative manner, for the cases in which such limitations are duable. The wording in Law 24481 provides that such limitations to patent rights should neither unreasonably restrict the patent holder's ability to exercise its rights on the patent, nor cause an unreasonable damage to the patent holder's interests taking into account the legitimate interests of any third parties.

Such provisions are, in my opinión, absolutely insufficient and unfortunately confirm that restrictions to patent rights are not as taxative in the statute as they should be by all means, in order to provide enough legal certainty to inventors.

Language in the statute also provides that exceptions to patent protection cause a real damage to the patent holder, and that there should be sustainable grounds to justify that damage. Was the real intention of the legislator to say that damages are justified in the case of pharmaceutical patents, when there is a need to priorize a public interest, such as health protection? It is very difficult to know whether or not this has been the real intention. However, article 42 of the Argentine patent law provides for one of the exceptions to patent rights held by the patent holder. This is the case where a potential patent user had been unsuccessfully trying to obtain a license from the patent holder during a one hundred and fifty days (150) days period, and where three (3) years had gone through, since the date the patent had been granted, or four (4) years had passed since the patent application had been filed, during which the patent had not been commercially exploited, no firm plans had been put in place for such commercial exploitation, or, once the commercial exploitation had started, it had been suspended or interrupted during more than one (1) year. In such cases, INPI is empowered to grant an authorization to use the invention protected under the patent, without the consent of the patent holder, unless the latter can reasonably argue that due to force majeure situations recognized by Argentine law, or due to delays in obtaining health registration for a pharmaceutical or controversies with such health registration, he could not commercial exploit the patent invention, or had to suspend or interrupt it, whichever the case may be. For the purpose of defining force majeure, lack of economic resources to commercial exploit the invention or lack of economic viability of such, are to be excluded.

In light of the supreme value of intellectual property, and in order to consolidate the rule of law and legal certainty, it is necessary to contemplate that prior to the granting of a compulsory license, the State should lead the opening of a negotiation stage involving the patent holder and the petitionary. Argentine patent law 24.481 provides that INPI is required to summon both parties to a hearing, and, if no agreement is reached, INPI will define the reasonable compensation that the patent holder should receive.

Here, it may be the case, as some experts in the subject consider, that summoning to only one hearing is not sufficient. Summoning to a second hearing is both convenient and justifiable so that the parties can bring all the evidence they have in a sort of discovery stage, and based on the legal arguments set forth in the first hearing, in order to bring legal certainty to the patent holder, to ensure that the economic compensation to be received is appropriate, in the event a compulsory license on the patent is granted.

It is the State that should be concerned in ensuring, that the parties' arguments had been heard, and that once the discovery stage is over, and based on the evidence produced, the economic compensation to be received by the patent holder is fully fair, reasonable and sustainable

It is, however, true that in the event of a health or sanitary emergency, or even in a context of a serious risk to the State security, as provided in Article 45 of Law 24.481, there might be an urgent and immediate requirement or need for a pharmaceuticalcompound. In those circumstances, the State should ensure that intellectual property rights of the patent holder are not violated, and in the event a limitation or restriction is unavoidable, the patent holder is required to be duly and reasonably compensated and indemnified as in any rule of law context.

In addition, Article 44 of the same statute, provides for another case in which the State can decide on grating an authorization to exploit a patent without due consent of the patent holder. In this case, there is no prior hearing to which the parties are summoned. This specific

circumstance does not contribute to have legal certainty and a rule of law context.

This is the case where the patent holder might have incurred in certain anticompetitive practices such as (i) refusal to supply the market with the product in question under reasonable commercial conditions, (ii) actions or conducts which in a reasonable way may be considered as impeding, restricting, limiting or negatively impacting or affecting on commercial or productive activities, or (iii) fixing prices which are considered to be excessive compared to the median price of the same type of products in the market, or discriminatory prices. Without the chance to be summoned or listened in a hearing, and with no discovery stage to be able to produce evidence, defense rights of the patent holder are considered to be unreasonable restricted in this case (as provided by Article 18 of the Argentine Constitution) where a compulsory license is granted with no consent from the patent holder.

**9. Compensation to be received by the patent holder in the event of compulsory licenses.**

Both ADPIC-TRIPS and the Argentine legal framework provide that in the event a compulsory license is granted on a patented invention (without the consent of the patent holder), the patent holder is required to receive a fair, adequate and reasonable compensation. Is this a good wish statement? What kind of compensation the patent holder in the event of a pharmaceutical patent, is entitled to receive in order to be considered fair and reasonable?

Unfortunately, in the case of Argentine Patent Law 24.481 has an ambiguous wording, which brings lack of clarity to the topic in question. It provides that the patent holder will receive a reasonable compensation ( i.e. in the form of a remuneration), which shall be set for the according to the circumstances of the case, and taking into consideration certain circumstances, such as the economic value of the compulsory license granted by the State, the average royalty rate generally accepted and in force in the business sector in question for commercial licenses entered into independent parties. In the pharmaceutical business, these criteria cannot be considered objective parameters or standards in order to set forth a compensation amount which would create legal certainty for the patent holder in a true rule of law context. Which is the criteria that the State (with the participation of the Ministry of Economy, INPI, the Ministry of Health -in the event of pharmaceutical products-, and the Ministry of Defense-when there is a national security matter involved-, should use in order to set forth and define an economic value for the granting of a compulsory license. There are no clues in the statute to give response to this question. In addition, there are no criteria to determine or define the average royalty rate for the pharmaceutical business in commercial license agreements among independent parties. Which are the therapeutical classes which should be taken into consideration to reach that definition?

The legislator, when wording the bill of law which then turned out to be Law 24481 should have included in the wording a whole list of parameters to be taken into account for compensation purposes, in order to give certain legal certainty to the patent holder.Unfortunately, such full list of parameters are missing, leaving the patent holder in a sort of unprotected situation, as in the event he does not agree with the amount of the compensation decided unilaterally by the State, he will have to go to court so that such amount is revised and increased. This fact results in a situation which is harmful for the patent holder, having also a negative impact on legal certainty and on the rule of law.

It would be reasonable and fair to sustain, as a general principle, and in order to set forth a whole list of parameters for compensation purposes, that the granting of a compulsory license should be assimilated for legal purposes, to a patent violation. From an objective, and not subjective point of view, there is no doubt that it is a patent violation as the patent holder is not giving his consent to the use of the patented invention. Therefore, we should not be talking here about a mere economic compensation, but an indemnity for damages (including lost profit) taking into consideration the hypothetical royalty as one of the parameters (and not the only one) to be considered for calculation purposes of such indemnity. It is important to keep in mind that patent licenses constitute a very complex and varied universe integrated by different type of contracts, in many cases different among themselves, not only in the various business sectors, but also in the same business área.

This is why the statute should be amended, to leave an static and royalty based indemnity model, to a whole model of contractual universe, based on which a fair indemnity payment should be calculated, in terms of royalties and also in terms of compensatory damages, including loss profits, reimbursement to the patent holder of all costs invested in research and devel-

opment to come up with the pharmaceutical invention, as well as all expenses originated in the grating of the compulsory license.

Undoubtedly, litigation processes on pharmaceutical patents are complex, and deal with extraordinary difficult technicalities typical of the pharmaceutical market, and which make it difficult to make a thorough assessment of the facts brought to the discovery stage, until there is a full agreement that a pharmaceutical patent is valid, is in force and have been violated.

However, a final challenge should be faced, which is having to find a solution to an important issue related to the determination of the hypothetical royalty which the patent holder would have received in the event of entering into a voluntary (and not compulsory) license in free market conditions, and as complementary basis for defining the indemnity for damages (including but not limited to lost profits) that the patent holder is entitled to received in the event a compulsory license is granted on his patented invention.

It is strictly a legal issue, which comprises technical matters such as the calculation of the lost profits, compensatory damages, and other costs and expenses which cannot be duly resolved, if economic, accounting and other economic and financial issues are notdealt with.

How do we manage to calculate, the benefits obtained by a patent infringer, in the event of a patent infringement case? By the same token, how do measure the benefits of a third party who has been granted a compulsory license by the State.without making a full assessment of the research and development costs, and distinguishing between gross and net income. This is not an area where the legal professionals feel comfortable even with experts providing their expert couselling at the court level. It is then necessary to look at ways of throwing some light on this issue, and for this purpose, a good solution which most legislators use is to create a fictio iuris (legal fiction), which is the hypothetical royalty. It should be considered only as one of the indemnity options in favor of the patent holder when the patent has been infringed. It is based on the price the infringer should have paid the patent holder for the granting of a patent license through the infringer could have commercially exploit the patent invention, on terms and conditions compatible with the market place and on a full legal basis. The key and most difficult issue here is defining what a fair price is. And this is because pharmaceutical patent licenses constitute, per se, a whole complex universe, and thus, it is important to set forth certain parameters or standars which should allow to determine a fair price for a license. For such determination, it will be essential to look at documented evidence, such as accounting certifications from the books of high reputation pharmaceutical companies, opinions from accounting experts and pharmaceutical leaders of opinion and chambers, as well and customs and normal practices in the pharmaceutical business. These are some of the parameters and criteria which should be used to determine a fair price.

At the same token, different criteria should also be used in order to define damages and lost profits parameters in order to adequately indemnify and compensate the patent holder whose rights are being restricted and infringedby the granting of a compulsory license.

Key elements such as the economic weight and importance of a pharmaceutical patented invention, its originality, actual and future applications, its administration, adverse effects compared to other pharmaceutical products which compete in the same marketing segment, years of patent validity as from the date the compulsory license is granted, and the number and types of compulsory licenses which may be granted on the patented invention. Some authors have assimilated this case as that of an abusive and unfair enrichment by the third party to which the compulsory license is granted

This implies that the patent holder whose patent right has been unfairly restricted, has the right to demand monetary compensation for lost profits that the patent holder should have received (including but not limited to royalties) in the event he could commercially exploit the invention has been. This is legally known as the payment of a*damnum cessans*. We can also see here the application of the *ex re ipsa* doctrine, as it is reasonable to think that in the event of the granting of a compulsory licensing, there is a third party beneficiary on the one side, and on the other, the lack of payment of the price for the license implies that there is unfair and unreasonable enrichment by such beneficiary. This doctrine promotes the payment of indemnities, when the beneficiary receives economic benefits based on rights which are exclusive reserved to the patent holder.

It should be concluded, then, that it is an evident damage to the patent holder, and at the same time it constitutes a benefit for the beneficiary of the compulsory license granting. In addition, marketing practices are also required to be taken into account, and these reflect that, in many cases, there is full consensus to make and advance payment of royalties, and then a

fixed royalty rate based on monthly sales, many times with a minimum payment guaranteed.

In conclusión, the characterization of a hypothetical royalty implies, on the basis of a legal fiction, the right of the patent holder to receive from the beneficiary of the compulsory license, the price the latter should have paid the former in the event he had the right to legally exploit the patent invention. In addition, the costs in which the patent holder should have incurred in the manufacturing, market launching, and promotion and marketing of the patented invention, should be considered and calculated in order to define the indemnity and compensatory amount which the patent holder is entitled to receive in the event a compulsory license is granted. This calculation will also take into account, based on fair market assessments, the share that the pharmaceutical product could have, so that an estimation of the units which may be sold during the period of the compulsory license can be made. This is carried out for the sole purpose of reaching a fair and reasonable monetary compensation for the patent holder

For that purpose, there should be full knowledge of the negotiation terms and conditions on which any successful negotiation for a pharmaceutical patent is based.

If it difficult to set forth the parameters to be applied to any license of industrial property, it is still more complex to do it in the case of pharmaceutical patent licensing, as we may find several types of licenses, which is a peculiarity of this business sector. Pharmaceutical products imply an extraordinary investment of funds and effort in research and development, a later huge investment to create awareness on the product within the medical and scientific communities, medical training, promotional expenses and so forth. Net benefits are received by the patent holder almost at the end of the product patent cycle time, when minimum investments, and the pharmaceutical product has reached its maximum economic and monetary return.

These three (3) different stages in the product cycle time, result in three (3) well differentiated types of pharmaceutical patent license, which should be carefully analysed to choose which of them should be considered at the time of considering a hypothetical license/ That is to say thatin the case of pharmaceutical patents, the first issue to take into account is the type of license which would be applicable to the case in question, considering the time of the product in its cycle life since its launching date, as this is key to determine the economic commitments the patent holder has assumed. It is then necessary to examine three (3) types of licenses for pharmaceutical products, each with its own peculiarities, as follows:

1) First stage or research stage, starting with the invention, the pre-clinical phase, and including the development of clinical assays and assessments in Phase III of the pharmaceutical product development process, after passing Phases I and II, and the different types of clinical assessments to be carried out at an estimated investment of Euros One Billion per molecule, only in the European Union, and with a timeframe calculated between 10 and 12 years. The patent applicant is focused on intensive research and development in this first stage.

2) Second stage or registration stage, marketing and Phase IV of the research process , also called post authorization. The focus in this stage is fundamentally centred on the information dissemination and promotion of the pharmaceutical molecule so that it is a process of creating awareness among the scientific community (for future medical drug prescription). There also complementary health registration activities, the post authorization research that all pharmaceutical compounds undergo, monitor activities on drug effects, and potential development of new pharmaceutical compounds based on the one already developed. This phase ends with the so called consolidation of the pharmaceutical product in the marketplace, although some of the activities involved belong to the next stage.

3) Third stage or maturity stage, which in the cycle time of the pharmaceutical product, it is sufficiently matured in the marketplace, and therefore requires less investment of resources, being the time of estimated increased profitability for the patent holder. Even after the date of patent expiration, the pharmaceutical compound should be providing the patent holder considerable income, with much less amounts of funds investment to disburse.

Finally, in terms of calculating the indemnities to which the patent owner is entitled to, it is key to bear in mind that the intellectual capital is, in the case of pharmaceuticals, the most import asset, that a Company may have, to be able to have a competititve market share and product/legal entity profitability. In addition, and for mergers and acquisitions purposes, intellectual capital is also key to decide whether or not, transactions negotiations will come to a successful closing.

One of the key factors impacting on the success or failure of a pharmaceutical company, is the degree in which it commercially exploits the intellectual capital it really possesses, and

how business risks are considered and managed. A mix of economic value and the legal concept of property should be considered. An asset

should be value in terms of how much benefits it can generate, and the net present value applied to such benefits. The golden rule applied to the economic and commercial value, is that it cannot be determined in abstract, as such value should be considered and determined in a certain context, at a certain time, and under particular circumstances. This rule is of key importance when determining the real value of intellectual property rights.

Why? It is because in all circumstances and in every transaction, each of the parties will be giving a certain value to the object of the transaction, as per such parties' particular circumstances and interests

**10. Conclusions**

As described in this article, and in comparison with what has really happened in developed countries, the protection of intellectual property rights on pharmaceuticals in Argentina, has been a very slow and controversial process. In contrast with what has occurred in the USA and other developed nations, there was an strong opposition from political and economic sectors to protect pharmaceuticals inventions with patents. Different arguments have been used to defend this opposition, such a general price increase for pharmaceutical products, the lack of protection of the local pharmaceutical industry and others which have proved to be totally unsustainable, and which have unfairly challenged the rule of law and have contributed to create a weak legal certainty context, which is totally inappropriate for innovation, research and development activities. This is against what the Argentine Constitution provides for, which the protection of inventive and creative activities in the scientific sector and others.

Moreover, this has been a real example that in Argentina, intellectual property has not been a real priority, and tht there has been a very poor appreciation of how innovative and value-added activities like the pharmaceutical business, could contribute to the country's economic growth and development, with a very positive impact in the development of true life saving products. The passing of Argentine Patent Law 24.481 has helped to create a legal certainty context which has promoted compliance with the rule of law, and has ensure new and valuable investments in a promising sector like the pharmaceutical business. However, there is still road for improvement, and the patent holder should be guaranteed to receive a fair, reasonable and comprehensive compensation/indemnity in the event a compulsory license is granted.

***References***

1. Alberti E. (1970). *Protección judicial de las patentes de procedimiento de producción de drogas medicinales*. Buenos Aires: Jurisprudencia Argentina.

2. Aracama Zorraquin, E. (1965). *Patentabilidad de productos medicinales*. Buenos Aires: Jurisprudencia Argentina.

3. Beier, S. (1977). *Patentwesen und seine Informationsfunktion – gestern und heut (El sistema de patentes y su función de información – ayer y hoy).* London: International Review of Intellectual Property and Competition Law.

4. Bercovitz, A. (1978). *El derecho de patentes como medio para recompensar el esfuerzo investigador: Limitaciones y problemas actuales*. Buenos Aires: Civitas.

5. Bidart Campos, G. (1982). *La Corte Suprema*. Buenos Aires: Allende y Brea.

6. Breuer Moreno, P. (1957). *Tratado de patentes de invención*. Buenos Aires: Perrot.

7. Chaloupa Pedro (1994). *La Insoportable Desigualdad de los Iguales*. Derechos Intelectuales. Buenos Aires: Astrea.

8. Chaloupa, P. (1995). *In dubio contra patentem*. *Derecho Intelectuales.* Buenos Aires. Astrea.

9. Etcheverry, R. (1976). *Derecho Comercial y Económico*. Buenos Aires: Astrea.

10. Malapert, P. & Fornes, J. (1879*). Nouveau commentaire des lois sur les brevets d'invention.* Paris: Económica.

*11.* Musich, A. (August 20, 1993). Desarrollo de la industria químico-farmacéutica. *Diario La Nación*, page 26.

12. Naisbitt, J. & Aburdene, P. (1986). *Megatrends 2000*. New York: Williams.

13. O'Farrell, E. (1994). *Patentes y medicamentos*. *Derechos Intelectuales.* Buenos Aires: Astrea.

14. Otamendi, J. (10 de junio de 1993). Las comparaciones son odiosas. *Diario La Prensa*, page 16.

15. Padilla, M. (1971). Una ley inexplicable y una sentencia injusta. Cooperación entre ciencia y empresa. El valor de la propiedad intelectual. *La Ley 1986(*II), pages 340-342.

16. Robinson, W. (1890). *The Law of Patents for Useful Invention.* New York: Limm.

*17.* Rozanski, F. (1999) *Controversias en torno del nuevo régimen de patentes de*

18. *invención y de la ley de protección de la información confidencial*. Buenos Aires: Astrea.

*19.* Sherwood, R. (1993*). Beneficios que brinda la protección de la propiedad intelectual a los*

*países en desarrollo. Derechos Intelectuales.* Buenos Aires: Astrea.

20. Vanossi, J. (1969). *El derecho a la propiedad de patentes de productos farmacéuticos. Inconstitucionalidad del artículo 4 de la ley 111*. Buenos Aires: Universidad Católica Argentina.

21. Vanossi, J. (1969). La protección constitucional y legal de patentes de productos farmacéuticos: lo peligros de una confusión jurisprudencial. Buenos Aires: La Ley. Pages 141-147.

22. Vázquez, A. (1991). *Patentes Farmacéuticas. Derecho Argentino y Comparado. Derechos Intelectuales*. Buenos Aires: Astrea.

23. Whitney, P. (1992). *Fronteras de la Investigación. Derechos Intelectuales*. Buenos Aires: Astrea.

24. Zuccherino, D., y Guimarey y Caballero, F. (1992). Derecho de patentes y desarrollo económico. *Rdco*, Pages 139-263.

25. Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio. URL: https://www.wto.org/spanish/tratop_s/trips_s/trips_s.htm.

26. Cediquifa (1992). Cooperación entre ciencia y empresa. El valor de la propiedad intelectual. URL: http://www.cediquifa.edu.ar/pub.

27. Comisión Económica para América Latina y el Caribe. URL: http://www.ipea.gov.br/bric/textos/100409_BRICBaumann2.pdf.

28. Constitución de España. URL:www.boe.es/aeboe/consultas/bases_datos/doc.phd?id=BOE-A-1978-31229).

29. Constitución de la República de Chile. URL: www.biblio.juridicas.unch.ch/libros/libro.htm?l=1408.

30. Constitución de la Nación Argentina. URL: www.csjn.gov.ar/ConstitucióndelaNaciónArgentinaPublic.

31. Constitución de los Estados Unidos de América. URL:www.archives.gov.

32. Inconstitucionalidad del artículo 4 de la ley 111. Buenos Aires: Universidad Católica Argentina.

33. Ley 111 de Patentes de Invención y Modelos de Utilidad. Recuperada de URL: www.obligado.com.ar/elDial.com.doc.

34. Ley 11.723 de Propiedad Intelectual. URL: www.infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=42755.

35. Ley 24.481 de Patentes de Invención y Modelos de Utilidad. URL: www.infoleg.gov.ar/infolegInternet/verVinculos.do?modo=2&id.

36. Ley 24.766 de Información y Productos legítimamente bajo control de una persona y que se divulguen indebidamente de manera contraria a los usos comerciales honestos. URL: www.infoleg.gob.ar/infolegInternet/anexos/40000-44999/.../norma.htm

37. Normas sobre Propiedad Intelectual en la Unión Europea. URL: www.europa.eu/legisltation_summaries/internal_market/businesses/intellectual_.

38. Organización Mundial de la Propiedad Intelectual. URL: www.wipo.int/edocs/pubdocs/es/intproperty/450/wipo_pub_450.pdf.

*Received to editorial office 12.07.2018*

**Summary**

The purpose of this article is to investigate and analyse on the impact that granting compulsory licenses on patents for pharmaceuticals to third parties have, while also negatively affecting the exclusive rights of the patent holder. Patents on pharmaceuticals still continues to be a controversial topic both in Argentina, and in developing countries. As a general principle, we can state that compulsory licensing violates exclusive rights of the patent holder.

With the enactment of Law 24.481 on patents and industrial utility models, Argentina aligned its intellectual property framework to that of developed countries, following a requirement made by the World Trade Organization (WTO) in what it concerns to the agreement on the aspects of intellectual property rights related to trade –ADPIC/TRIPs--. However, there are some stilllanguage flaws in the wording of the Law 24481 as those related to (i) the lack of definition of the economic compensation that the patent holder is entitled to receive in the event a compulsory license is granted to a third party on the former's patent, and (ii) the lack of fixed parameters or standards to calculate such compensation. These flaws are affecting the business context in terms of legal certainty, and investors appear to skeptical at the time of deciding an investment.

***Keywords****: inventions and discoveries, pharmaceutical products, patent rights, legal certainty within the rule of law.*

**Maryna Yunina**
Ph.D.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-147-150*

# THE ROLE OF PERSONAL LAW AND NATIONALITY IN THE DEFINITION LEGAL CAPACITY OF LEGAL ENTITIES IN PRIVATE INTERNATIONAL LAW

**Юніна М. РОЛЬ ОСОБИСТОГО ЗАКОНУ ТА НАЦІОНАЛЬНОСТІ У ВИЗНАЧЕННІ ПРАВОЗДАТНОСТІ ЮРИДИЧНИХ ОСІБ У МІЖНАРОДНОМУ ПРИВАТНОМУ ПРАВІ.** Досліджено роль особистого закону та національності у визначенні правоздатності і дієздатності іноземних юридичних осіб у міжнародному приватному праві. Автором охарактеризовано також критерії визначення національності іноземних юридичних осіб та сучасні тенденції у визначенні національності юридичних осіб. При цьому зроблено висновок про те, що поняття особистого закону і національності взаємозалежні та взаємообумовлені: національність юридичної особи визначає її особистий закон, а зміст особистого закону залежить від того, яку національність має юридична особа. Особистий закон юридичної особи відповідає на питання, чи є дане утворення юридичною особою, яким є обсяг його правоздатності, а національність юридичної особи дозволяє кожній державі визначити державну приналежність юридичної особи, що є підставою встановлення певного правового режиму діяльності цього суб'єкта у певній країні.

***Ключові слова:*** *іноземна юридична особа, особистий закон, національність юридичної особи, цивільна правоздатність юридичної особи, цивільна дієздатність юридичної особи.*

**Formulation of the problem.** In today's socio-economic conditions, the processes of internationalization and globalization of social life, which have not crossed the activities of legal entities, which are not limited to the borders of one country, are becoming increasingly popular. More and more legal entities are becoming transnational or attracting foreign capital to carry out their activities. The indicated processes make a legal person one of the main subjects of international private law relations, the definition of which legal status on the basis of analysis of legal categories of nationality and personal law is one of the topical issues of modern international private law. Particular attention should be paid to the recognition of the legal capacity of foreign legal entities by the country on the territory of which such a legal entity intends to carry out or carries out its activities, as well as the determination of the legal status of legal persons operating outside the country of their nationality.

**Analysis of publications that initiated the solution to this problem**. In the study of the nationality and personal law of legal entities in the international privat law, as well as their role in determining the legal capacity of a legal entity paid much attention to authors such as MM Boguslavsky, E.O. Kharitonov, N.O. Saniahmetova, R.O. Halfina, GS Fediniak, SM Heda, R.V. Chernolutsky and others.

**The purpose of this article** is to study the role of personal law and nationality in determining the legal capacity of legal entities in private international law.

**Presenting main material**. Legislation of the majority of countries of the world proceeds from the fact that the concept of legal capacity and legal capacity of legal entities coincides in content, since these two concepts almost always exist inseparably, that the presence of legal capacity in a legal entity means at the same time that it also possesses capacity [14, p. 122].

In modern science of civil law, there is no consensus on the nature of the legal capacity of a legal entity. Thus, according to the general rule established by the Civil Code of Ukraine, a legal entity has a general legal capacity. Art. 91 of the Civil Code of Ukraine determines that a legal entity is capable of having the same civil rights and obligations as an individual, other than those which by their nature may belong only to a person. Also, the principle of general legal capacity is enshrined in the law of France on associations, whose activities are aimed at profit, and in the legislation of England on legal entities created by a special act of the king [16, p. 77-78]. That is, the general legal capacity gives the right to a legal entity to acquire any civil

rights and carry civil duties, except for those for which the prerequisite is the inherent qualities of a person. It is believed that the legalization of general legal capacity was initiated by the First Council Directive (March 9, 1968), which provided for the responsibility of the campaign to third parties and for such actions that go beyond the objectives of the charter [3, p. 88].

However, in some countries, legislation recognizes legal entities as having special legal capacity, that is, entitles a legal entity to acquire rights and obligations in accordance with the purposes specified in the statute, contract or legal act. This type of legal capacity is enshrined in the laws of Japan, Italy and some other states [13]. In the United States the ultra vires principle is formally considered (agreements beyond the scope of the legal entities are considered invalid), however, the legal capacity of legal entities is actually legalized [1, p. 481-493].

Taking into account the differences in the legal capacity of national legal entities and foreign legal entities operating in the territory of Ukraine, which is due to the provision of the foreign legal entity not only the rights and obligations enshrined in the law of Ukraine, but also those rights and obligations , which are granted to a foreign legal entity by the law of the relevant foreign state and the norms of international agreements, in our opinion, should be recognized by foreign legal entities for the availability of special legal capacity. The term "special" in this case means a complex of exceptions and restrictions that distinguish the legal regime of the activities of foreign legal entities from the regime of Ukrainian legal entities [17, p. 16].

In order for a foreign legal entity to have the opportunity to carry out business activities in other countries, it is necessary to resolve the issue of recognizing the legal capacity of such a foreign legal entity and allowing it to carry out business activities in the territory of the state, as well as the conditions for such activity. Thus, the admission of foreign legal entities to the conduct of economic or other activity on the territory of Ukraine and the legal status of such persons are regulated by the legislation of Ukraine, that is, the law of place of business is applied. However, a legal entity can not have more rights abroad than it would have under a personal law.

The definition of the legal capacity of foreign legal entities and the companies formed in their participation in Ukraine is based on the conflict laws of Ukraine and international agreements. In accordance with the Law of Ukraine "On Private International Law" the legal capacity of foreign legal entities on the territory of Ukraine is determined by the personal law (charter) of a legal entity (Article 26 of the Law).

In order to clarify the law and order, which acquires the meaning of a personal law of a legal person and on the basis of which its legal status is determined, it is necessary to identify this person as a foreign or national entity, that is, to determine the nationality of this legal entity.

In the science of international private law, under the nationality of a legal entity, such a property that determines the legal relationship between a legal entity and a state, its state affiliation, which submits this legal entity to the relevant order and puts it under the protection of a particular state, will acquire it. The indicated means means that the legal entity in all spheres of creation, operation and termination of activity is subject to the rules adopted in the respective state. From this point of view, "nationality" is characterized as the legal person's affiliation with the legal order established in a state, the interconnection of its rules in force in that state that govern the conditions for the emergence, activity and termination of the existence of legal entities. The national rule-of-law of the state acquires the character of the personal law of a legal entity, which defines its civil law, becomes its personal law.

Analyzing legal literature, we can conclude that to date, private international law has not produced a single universally accepted concept of determining the nationality of legal entities. Several criteria have been developed in the science of international private law, on the basis of which the nationality of a legal entity is determined. Such criteria are, for example, the criterion for the main activity, the criteria for the location of the bodies of management of a legal entity, the criterion of the place of establishment, and others. In accordance with these principles, private international law distinguishes doctrine of residence (the law of the place of residence of the governing bodies of a legal entity), the doctrine of the "center of operation" (place of business), the doctrine of incorporation (the law of the place of establishment of a legal entity) [4, p. 215].

At present, in the European states two main criteria for determining the legal status of a legal entity - the criterion of incorporation (assimilation) and the criterion of residence (place of residence) are used.

The residence criterion is used in a sufficiently large number of countries, for example

in France, Germany, Belgium, Poland and other countries of continental law. According to this criterion, a personal law (nationality) of a legal entity recognizes the law of the location of its administrative center.

Despite the fact that most EU Member States use cetera of residence in practice, some countries, such as Great Britain, Denmark, Ireland, Czech Republic, the Netherlands, adhere to the criterion of incorporation. The main content of this criterion is that the legal entity has the nationality of the country in accordance with the law of which it is based.

The Law of Ukraine "On Private International Law" to determine the legal status of a legal entity and to determine the extent of its civil capacity, also applies the criterion of incorporation. According to Article 25 of the said Law, the law of a legal entity is the law of the country of the legal entity. The legal entity is recognized as the state in which the legal entity is registered or created otherwise in accordance with the law of that State [10].

The criterion of incorporation is also used in other normative acts of modern Ukrainian legislation. For example, in Art. 1 Law of Ukraine "On the regime of foreign investment" stipulates that investors who carry out investment activities in the territory of Ukraine may be legal entities established in accordance with the legislation of a different law than the legislation of Ukraine.

One can agree with the idea that the advantages of the incorporation criterion are its clarity and ease of installation, since the administrative act of registration of a legal entity is easily identified in time and space; without the consent of the state, under the laws of which a legal entity is registered, it can not change its nationality; if the activity of a legal entity is recognized as undesirable for the State of incorporation, it may eliminate this legal entity not only in its own country, but also abroad [9, p. 208].

The undoubted advantage of the incorporation criterion is also that if a legal person has already been created in accordance with the legislation of the country of incorporation and if its foundation was not invalid, then such a legal entity can transfer the seat of its bodies from one country to another without losing primary right-subjectivity.

Despite these advantages, this criterion has a number of shortcomings, which may include the absence of a link between the law of the place of establishment of a legal entity and the law of its place of business, resulting in the provision of unlimited opportunities for founders for numerous manipulations when creating a legal entity. The choice made by the company's founders in favor of the law of the country where the company was incorporated may violate the interests of the country in which the company carries out business operations, as well as the interests of creditors located in this country [7, p. 217].

However, analyzing the legal literature, we can conclude that under present conditions none of the existing conflict criteria for determining the nationality of legal entities can not be favored. Each of them highlights one side of the problem: the criteria for determining the nationality of legal entities by the nationality of individuals included in it - the relationship of a legal entity with individuals, it is directly interested in it; the criterion of incorporation - the connection with the law-order, generating a legal entity; accommodation criterion - connection with property complex, guarantee of interests of creditors. However, the application of each of these criteria alone is not sufficient to determine the legal status of legal entities in all possible cases [6, p. 34-35].

Legislation and law enforcement practices of many states increasingly abandon the "absolute" character of classical conflict criteria, replacing them with mixed criteria. The doctrinal is justified by the importance of taking into account the various aspects of the activities of legal entities, for the purpose for which their nationality is determined. At the same time, two or more criteria for determining nationality are often used simultaneously, using one as the main one, and the other as an additional one.

All these processes confirm the legal opinion shown in the legal literature that the state-of-the-art state of private international law provides grounds for the gradual decline of the role of numerous classical collision bindings and the replacement by a small number of basic principles to determine the law to be applied to legal relationships [5, p. 15]. These principles include the current principle of finding the closest connection of the legal relationship with a specific law and order, finding the most favorable law and order, taking into account the imperative rules of the court of the country.

**Conclusions.** Thus, the notion of personal law and nationality is interdependent and interdependent: the nationality of a legal entity is determined by its personal constitution, and the content of the personal law depends on the nationality of the legal person. The personal law of

a legal entity answers the question of whether this formation is a legal person, which is the extent of his capacity. Nationality of a legal entity allows each state to determine the state affiliation of a legal entity, which is the basis for establishing a certain legal regime for the activity of this entity in a particular country, the limits of its subordination to legislative and administrative acts of the state to which this legal entity belongs, and the state in which it carries out its activity.

***References***

1. Бернхем В. Вступ до права та правової системи США. Київ, 1999. 560 с.
2. Богуславский М.М. Международное частное право: учебник. Москва: Юрист, 2002. 408 с.
3. Васильев Е.А., Зайцева В.В., Костин А.А. Гражданское и торговое право капиталистических государств. Москва: Междунар. отношения, 1993. 560 с.
4. Звеков В.П. Международное частное право: курс лекций. Москва: «Инфра-М», 1999. 686 с.
5. Кабатова Е.В. Изменение роли коллизионного метода в международном частном праве. Международное частное право: Современная практика / под ред. М.М. Богуславского и А.Г. Светланова. Москва: ТОН-Остожье, 2000.
6. Корецкий В.М. Проблемы международного частного права в договорах, заключенных советскими республиками с иностранными государствами. *Избранные труды.* Кн. 1. Киев, 1989. 240 с.
7. Кох Х., Магнус У., Винклер фон Моренфельс П. Международное частное и сравнительное правоведение. Москва: Международные отношения, 2001. 400 с.
8. Міжнародне приватне право: навч. посібник / за ред. В.М. Гайворонського, В.П. Жушмана. Київ: Юрінком Інтер, 2005. 366 с.
9. Пєтров В.В. Особливості цивільної правосуб'єктності юридичних осіб: окремі аспекти. *Актуальні проблеми держави та права*. 2008. С. 205-208. URL: http://www.apdp.in.ua/v43/37.pdf (дата звернення: 21.05.2018).
10. Про міжнародне приватне право: закон України від 23.06.2005 р. *Відомості Верховної Ради України*. 2005. № 32. Ст. 422.
11. Суворов Л.Л. Проблема отделения личного статута юридического лица от его государственной принадлежности в современном международном частном праве. *Журнал международного частного права.* 1995. № 3. С. 3-12.
12. Федіняк Г.С. Межі здійснення правосуб'єктності юридичними особами України за кордоном (приватно-правовий аспект). *Право України*. 2003. № 12. С. 126-129.
13. Хєда С.М. Поняття та обсяг цивільної правосуб'єктності іноземних юридичних осіб за законодавством України. *Вісник Хмельницького інституту регіонального управління та права*. 2002. № 2. С. 48-50. URL: http://nbuv.gov.ua/UJRN/Unzap_2002_2_16 (дата звернення: 21.05.2018).
14. Цивільне право України: підручник / за ред. Є.О. Харитонова, Н.О. Саніахметової. Київ: Істина, 2003. 560 с.
15. Чорнолуцький Р.В. Проблеми правосуб'єктності осіб у колізі ному праві України: автореф. дис. на здобуття наук. ступеня канд. юрид. наук: 12.00.03. Одеса, 2006. 20 с.
16. Шимон С.І. Цивільне та торгове право зарубіжних країн: навч. посібник (Курс лекцій). Київ: КНЕУ, 2004. 220 с.
17. Юніна М.П. Уніфікація право- та дієздатності юридичних осіб у міжнародному приватному праві: автореф. дис. на здобуття наук. ступеня канд. юрид. наук: 12.00.03. Харків, 2011. 22 с.

*Received to editorial office 29.05.2018*

**Summary**

The article deals with the study of the role of personal law and nationality in determining the legal capacity and capacity of foreign legal entities in international private law. The author also describes the criteria for determining the nationality of foreign legal entities and the current trends in determining the nationality of legal entities.

***Keywords:*** *foreign legal entity, personal law, legal entity's nationality, civil capacity of legal entity.*

# CRIMINAL LAW AND CRIMINOLOGY. CRIMINAL PROCEDURE AND FORENSIC SCIENCES

**Andriy Andrushko**
Ph.D., As. Prof.
*(the Uzhgorod National University)*

## GENERAL SOCIAL PREVENTION AS A PRIORITY DIRECTION OF HUMAN TRAFFICKING PREVENTION

*DOI: 10.31733/2078-3566-2018-2-151-154*

**Андрушко А. ЗАГАЛЬНОСОЦІАЛЬНЕ ЗАПОБІГАННЯ – ПРІОРИТЕТНИЙ НАПРЯМ ЗАПОБІГАННЯ ТОРГІВЛІ ЛЮДЬМИ.** У статті загальносоціальне запобігання розглядається як пріоритетний напрям запобігання торгівлі людьми. Відзначається, що проблема торгівлі людьми має глибоке соціально-економічне підґрунтя, а тому пріоритетними мають бути загальносоціальні заходи запобігання цьому явищу. Підкреслюється, що мінімізувати проблему торгівлі людьми можна лише завдяки відчутному поліпшенню економічної ситуації в державі, створенню нових робочих місць, забезпеченню гідних умов для життя і праці. Все це, зрозуміло, можливе лише у разі здійснення в Україні глибоких соціально-економічних перетворень. Іншого шляху вирішення цієї проблеми, на переконання автора, не існує.

***Ключові слова:*** *загальносоціальне запобігання злочинності, торгівля людьми.*

**Formulation of the problem**. The problem of human trafficking continues to be relevant to Ukraine. According to official statistics, for 2013, the Public Prosecutor's Office bodies has recorded 130 cases of trafficking in human beings, for 2014 – 118, 2015 – 110, 2016 – 114, for 2017 – 340* such crimes [2]. Meanwhile one should keep in mind the high level of latency of this encroachment [3, c. 194]. In recent years, experts have noted the increase in number of victims of trafficking in people [4], which is associated, in particular, with the armed conflict in the Donbas [5]. Thus, in 2017, the mission of the International Organization of Migration (IOM) in Ukraine identified and assisted 1259 people affected by trafficking in human beings for the purpose of labor and sexual exploitation in 28 countries including Ukraine. This is the largest number of people affected by trafficking in human beings, to whom the IOM has assisted since 2000; this number is 9% higher compared to the number of victims identified in 2016 [6].

We must admit that much has been done to combat human trafficking and minimize the negative effects of this phenomenon over the past few years. Among the most important steps is that in February 2016 the Government Social Anti-Trafficking Program has been adopted for the period up to 2020 and indicative amounts of its financing at the expense of the government and, local budgets, as well as of other sources were foreseen; increase from 1 November 2016 of one-time financial assistance to victims of trafficking from one to three subsistence minimum; two times increase in the number of staff members of the National Police Department involved in the human trafficking combatting. At the same time there is still much to be done to overcome the shameful phenomenon of human trafficking in Ukraine.

**Analysis of publications which initiated research on solution of this problem**. Promising ways to prevent human trafficking have been developed by such scholars as V.S. Batyrgareyeva, M.G. Verbensky, V.V. Golina, T.A. Denisova, V.O. Ivashchenko, K.B. Levchenko, O.V. Lysoded, O.V. Naden, A.M. Orlean and others. However the problem



* The sharp increase in the number of recorded cases of trafficking in human beings in 2017 is rightfully explained by criminologists as a a consequence of the fact that the Ministry of Internal Affairs of Ukraine declared this year a year of human trafficking combatting, and as a result, this was reflected in the "pursuit" of indicators [1, c. 23].

retains its relevancy, and therefore requires further research.

**The purpose of the article** is to consider the general social prevention as a priority trend in the prevention of trafficking in human beings.

**Presenting main material**. Prevention of trafficking in human beings should be considered as a multi-level system of government and civil society measures aimed at eliminating or neutralizing the causes and conditions of these crimes on the general social, special criminological and individual levels.

To implement measures for trafficking in human beings preventing a system of preventive measures has been created. The subjects of the prevention of trafficking in human beings are the system of government bodies, officials, public organizations, social groups and individuals, who direct their activities to identify, eliminate and neutralize causes and conditions that determine the existence and reproduction of the analyzed crimes, as well as the preventive effect on persons who are potentially inclined to commit such crimes.

The analysis of the circle of subjects of the prevention of trafficking in human beings has proved their considerable diversity. In the context of general social prevention of these acts we should mention first of all the subjects of general competence, which create the legislative basis in the field of human trafficking combatting, approve comprehensive programs to combat trafficking in human beings, control and coordinate their implementation, carry out administrative functions for the human trafficking prevention, organize and coordinate work of relevant entities of the system for the prevention of trafficking in human beings, provide adequate resources for those purposes etc. (Verkhovna Rada of Ukraine, President of Ukraine, Cabinet of Ministers of Ukraine and other central and local executive bodies). Specialized subjects for the prevention of trafficking in human beings should include the National Police of Ukraine, structure of which includes the Department for Human Trafficking Combating, the State Border Protection Service, the Security Service of Ukraine, international and national women's non-governmental organizations (the International Women's Human Rights Center "La Strada-Ukraine" actively works in the direction of the prevention of trafficking in women and provision of help for the victims of such trafficking), institutions for the assistance of people who have suffered from human trafficking etc.

In Ukraine, in order to implement measures aimed at preventing trafficking in human beings an appropriate legal and regulatory framework has been established. First of all, we should mention the Law of Ukraine "On Combating Human Trafficking" of September 20, 2011 [7], as well as the State Social Program on Combating Trafficking in Human Beings for the period up to 2020, approved by the Resolution of the Cabinet of Ministers of Ukraine on February 24, 2016 [8].

General social prevention of crime is a complex of socio-economic, legal, cultural, educational, organizational, managerial and other measures aimed at further development and improvement of social relations, elimination of negative phenomena and processes taking place in society along with elimination or neutralization of the causes and conditions of crime [3, c. 143; 9, c. 112]. The main objectives of this preventive activities are to overcome or limit the criminogenically dangerous contradictions in society, the gradual eradication of various negative phenomena. The effectiveness of general social prevention can be ensured by a well-balanced and purposeful socio-economic state policy [10, c. 19]. According to V.V. Golina, the realization of a truly socially oriented policy in the country creates economic, organizational, managerial, political, legal and other prerequisites for the effective implementation of criminal legal and special criminological crime prevention [10, c. 21]. General social prevention is the basis, the foundation of special criminological prevention; the better d social prevention works, the narrower is the "range" of special prevention [11, c. 319–320].

Thus, the task of general social measures is not to directly impact on crime, but to solve the most important problems of social life. Relevant measures should be directed primarily to circumstances that are external to the nature of crime, in particular, serious disbalances in the economic development and the associated low living standards of the majority of the population, unemployment, lack of conditions for self-realization of individuals, destruction of moral principles of society, devaluation of universal values etc.

In our opinion, measures of the general social prevention of trafficking in human beings are of decisive and strategic importance. The priority of general social prevention is emphasized by O.V. Lysoded, who reasonably argues that the trafficking in human beings is generated primarily by factors of an economic and social nature and therefore special criminological measures of prevention achieve only limited success [12, c. 190]. The most important measures of the general social nature which must be implemented first, can be classified as follows: socio-economic (significant increase of material welfare of the population, decrease of unemployment, increase of the level of wages, struggle with poverty); cultural-educational (raising the cultural level, citizens' consciousness and responsibility,

forming a moral position oriented to universal values); organizational and managerial (implementation of the effective reform of the judiciary and law enforcement agencies).

The main reason that force people to seek work abroad, where they eventually become victims of exploitation, are unemployment in their homeland, low wages and poverty. Regarding this fact the problem of unemployment should be a matter of great importance. It is known that recently one of the main factors of its aggravation has been the increase in tension in the Ukrainian labor market, especially in regions with a large number of displaced persons [13, c. 168]. It should be emphasized that the highest unemployment rate is traditionally characteristic of the youngest age groups (15–29 years) [14], i.e. those who constitute a group of potential victims of trafficking in human beings. Internally displaced persons are a category of people who face high risks of trafficking [15], since some of these people are in a difficult financial situation and they have to accept dubious job offers in order to survive in unknown cities. Faced with financial difficulties, some of the internally displaced persons decide to go to work in Russia. However, this is the country of particularly high risk for the Ukrainian citizens. According to the Ukrainian representative office of the International Organization for Migration, the Ministry of Internal Affairs of Ukraine and the human rights organization "La Strada-Ukraine", the absolute majority of Ukrainian citizens were victims of labor exploitation in Russia [6; 16; 17]. At the end of 2016, law enforcement agencies revealed a network of recruiters who helped to traffic Ukrainians as labor force to the Russian Federation. Those who wished to earn money were allegedly sent to work in Russia, where they were subjected to labor exploitation under threat of imprisonment [18].

It is clear that without deep socio-economic transformation, the investment of significant budget funds, as well as without attracting investments into the economy, it is impossible to create enough new jobs in Ukraine. The complexity of this problem is also that it is necessary not only to significantly reduce the unemployment rate, but also to substantially increase the remuneration for work, since the availability of work in Ukraine is not at all a guarantee of a comfortable existence. It is also necessary to gradually solve the problem of gender imbalances in wages, since today men's salary exceeds wages of women by 33,5% [14].

The Poverty Reduction Strategy adopted by the Cabinet of Ministers of Ukraine on March 16, 2016, which identifies the key tasks that need to be done to overcome poverty and improve living standards in Ukraine, has a programmatic value. The analysis of the main directions, tasks and ways of realization of the Strategy allows us to conclude that its provisions are of declarative nature. The document states that financing of the implementation of this Strategy is carried out within the limits of state funds and local budgets, funds of compulsory state social insurance, and other sources not prohibited by legislation. At the same time, it is quite obvious that, as of today, the revenue part of the budget does not allow implementation of the tasks outlined in the Strategy, especially those relating to the real increase in wages and a decent subsistence minimum [9, c. 116]. Of course, the achievement of significant results in overcoming poverty is only possible if deep socio-economic transformations are carried out.

The ability to provide decent living for oneself and one's family at home will eliminate the need to seek a better life abroad, thus minimizing the risk of trafficking. Nowadays a broad information campaign aimed at explaining potential threats related to dubious employment is needed among the population. Despite the fact that much has been done in this direction, the population is not well informed about this problem. Thus, according to a sociological survey conducted by the international human rights organization La Strada-Ukraine together with Ukrainian and German partners, 8% of migrants would agree to any work abroad, regardless of conditions; almost 30% absolutely do not know anything about the problem of trafficking in human beings; the same share of respondents do not know where to address if they fall into a situation of labor or sexual exploitation [16].

Effective prevention of trafficking involves not only overcoming socio-economic contradictions, but also resolving contradictions in socio-cultural and moral-psychological areas of public life. It has to be noted that a significant part of the Ukrainian population has lost socially useful landmarks and seeks primarily for material enrichment. In this context, V.I. Shakun rightly notes that "the change in the political and socio-economic order in Ukraine has contributed to a certain shift in the consciousness of its citizens, when the availability of money has become the determining factor pushing out other values, first of all moral, with which more than one generation of Ukrainians was born and grew" [19, c. 376]. B.M. Golovkin rightully points out that spiritual and moral well-being depends to a large extent on the material well-being but not completely determined by it. Increasing the living standards and material well-being does not guarantee and does not provide for overcoming the problem of lack of spirituality, the deformation of the consciousness, the distorted system of values, but only

creates a favorable ground for this [20, c. 320]. It is necessary to promote the universal values at the state level, to establish high moral and spiritual ideals in the society, to take decisive steps in the struggle against the propagation of permissiveness, double morality, and the cult of money. In order to achieve this goal, mass media, street social advertising, etc. should be widely used. Measures should be taken to help strengthen the institution of the family, improve the position of women in society, increase the sexual culture of adolescents and young people, and make conditions for harmonious development and self-fulfillment of the individual. An important role in this area, obviously, belongs not only to government institutions, but also to religious and public organizations, educational institutions.

Among the organizational and managerial measures to prevent trafficking in human beings we should, first of all, mention effective judicial reform and reform of law enforcement agencies. The relevancy and completeness of these reforms will be measured by an increase in the level of people's trust in the law enforcement and judicial system, overcoming corruption, ensuring the implementation of inevitability of responsibility principle.

**Conclusions**. Summarizing the issues discussed in the article we should outline that general social measures are crucial for the successful prevention of trafficking in human beings in Ukraine. We should keep in mind that the problem of human trafficking has a profound socio-economic background, and therefore priority should be given to general social measures to prevent this phenomenon. In this regard, there is no doubt that minimizing the problem of human trafficking can only be achieved through tangible improvements in the economic situation in the country, the creation of new jobs, and decent living and working conditions. All this, of course, is possible only in case of deep socio-economic transformations in Ukraine. There is no other way of solving this problem, according to our belief.

***References***

1. Батиргареєва В.С. Щодо сучасних рис явища торгівлі людьми в Україні та особливостей його запобігання. *Протидія незаконній міграції та торгівлі людьми:* матеріали ІІ Міжнародного науково-практичного симпозіуму (м. Івано-Франківськ, 16-17 березня 2018 року). Івано-Франківськ: Редакційно-видавничий відділ Університету Короля Данила, 2018. С. 21–25.

2. Статистична інформація про зареєстровані кримінальні правопорушення та результати їх досудового розслідування за 2013–2017 рр. *Офіційний сайт Генеральної прокуратури України*. URL: http://www.gp.gov.ua/ua/stat.html/

3. Кримінологія: підручник / за ред. В.В. Голіни, Б.М. Головкіна. Харків: Право, 2014. 440 с.

4. Спецпосланниця ОБСЄ: В Україні зростає кількість жертв торгівлі людьми. *Deutsche Welle*. 5 серпня 2016 р. URL: http://www.dw.com/uk.

5. Андрушко А.В. Проблема торгівлі людьми в умовах збройного конфлікту на сході України. *Протидія незаконній міграції та торгівлі людьми:* матеріали ІІ Міжнародного науково-практичного симпозіуму (м. Івано-Франківськ, 16-17 березня 2018 року). Івано-Франківськ: Редакційно-видавничий відділ Університету Короля Данила, 2018. С. 11–14.

6. Торгівля людьми в Україні – огляд ситуації, січень – грудень 2017 року. *Програма протидії торгівлі людьми. Представництво Міжнародної організації з міграції (МОМ) в Україні*. URL: http://www.stoptrafficking.org/sites/default/files/mom/documents/CT%20Situation%20UKR.pdf.

7. Про протидію торгівлі людьми: Закон України від 20 вересня 2011 року № 3739-VI. URL: http://zakon3.rada.gov.ua/laws/show/3739-17.

8. Державна соціальна програма протидії торгівлі людьми на період до 2020 року, затверджена постановою Кабінету Міністрів України від 24 лютого 2016 року № 111. URL: http://zakon2.rada.gov.ua/laws/show/111-2016-%D0%BF.

9. Андрушко А.В., Нестерова І.А. Злочинність у сфері туристичного бізнесу: кримінологічна характеристика та запобігання: монографія. Ужгород: ТОВ «ІВА», 2016. 220 с.

10. Голіна В.В. Запобігання злочинності (теорія і практика): навч. посіб. Харків: Нац. юрид. акад. України, 2011. 120 с.

11. Профілактика злочинів: підручник / за заг. ред. докт. юрид. наук, проф. О.М. Джужи. Київ: Атіка, 2011. 720 с.

12. Лысодед А.В. Общесоциальное предупреждение как перспективное направление в борьбе с торговлей людьми. *Злочини проти особистої волі людини:* збірник матеріалів науково-практичного семінару (Харків, 19-20 вересня 2000 р.) / під ред. В.В. Сташиса. Харків: Книжкове видавництво «Лествиця Марії», 2002. С. 188–194.

13. Плинокос Д.Д., Бойченко В.С., Коваленко М.О. Дослідження впливу внутрішньо переміщених осіб на стан ринку праці України. *Глобальні та національні проблеми економіки*. 2016. Вип. 13. С. 166–171.

14. Стратегія подолання бідності, схвалена розпорядженням Кабінету Міністрів України від 16 березня 2016 р. № 161-р. URL: http://zakon2.rada.gov.ua/laws/show/161-2016-%D1%80.

15. Андрушко А.В. Внутрішньо переміщені особи як потенційні жертви торгівлі людьми. *Здійснення та захист прав внутрішньо переміщених осіб*: матеріали ІІ Міжнародної науково-практичної конференції (20 квітня 2018 р., м. Ужгород) / за заг. ред. О.Я. Рогача, Я.В. Лазура, М.В. Менджул. Ужгород: ТОВ «РІК-У», 2018. С. 138–141.

16. Стадник Г. Переселенці – серед потенційних жертв торговців людьми. *Deutsche Welle*. 10 квітня 2015 р. URL: http://www.dw.com/uk.

17. Переселенці і торгівля людьми. *Galinfo*. 13 липня 2015 р. URL: https://galinfo.com.ua/articles/chy_ryzykuyut_pereselentsi_z_donbasu_staty_zhertvamy_torgivli_lyudmy_199363.html.

18. Аваков заявив про викриття вербувальників для трудової експлуатації українців в РФ. *РБК-Україна*. 15 грудня 2016 р. URL: https://www.rbc.ua/ukr/news/avakov-zayavil-razoblachenii-verbovshchikov-1481793890.html.

19. Шакун В.І. Суспільство і злочинність. Київ: Атіка, 2003. 784 с.

20. Головкін Б.М. Корислива насильницька злочинність в Україні: феномен, детермінація, запобігання: монографія. Харків: Право, 2011. 432 с.

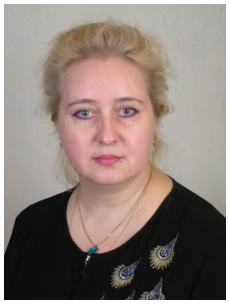
*Received to editorial office 11.06.2018*

**Summary**

In this article the universal social prevention has been considered as a priority direction in the prevention of trafficking in human beings. The author has emphasized that it is possible to minimize the problem of trafficking in human beings only due to the tangible improvement of the economic situation in the country, the creation of new workplaces and the ensuring of decent living and working conditions.

***Keywords:*** *general social crime prevention, trafficking in human beings.*

**Oleksandr Duylovskiy**
*(Southern operative-territorial union of National Guard of Ukraine)*



**Svetlana Shalgunova**
Ph.D, As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

**Taisiya Shevchenko**
lecturer
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-155-159*

## CRIMINAL LEGAL ASPECTS OF ACTIVITY OF SERVICEMEN ARE ON IMPLEMENTATION OF ORDERS IN CRIMINAL LEGISLATION OF FOREIGN COUNTRIES

**Дуйловський О., Шалгунова С., Шевченко Т. КРИМІНАЛЬНО-ПРАВОВІ АСПЕКТИ ДІЯЛЬНОСТІ ВІЙСЬКОВОСЛУЖБОВЦЯ ПРИ НЕВИКОНАННЯ НАКАЗУ ЗА КРИМІНАЛЬНИМ ЗАКОНОДАВСТВОМ ЗАРРУБІЖНИХ КРАЇН.** Автори розглядають питання правової регламентації виконання наказів та розпоряджень військовослужбовцями державних військових формувань (Збройних Сил України та інших, утворених відповідно до закону), під час військової служби. Також авторами проведено порівняльний аналіз кримінальної відповідальності за невиконання наказу вищестоящого військового начальника в кримінальному законодавстві України та інших країн. Для порівняння, автори взяли кримінальні кодекси як країн пострадянського простору, так і тих, що до нього не входили (Японія, Швеція, Китай, Болгарія). В статті наведено спільні риси та відмінності в розумінні такого військового злочину, як невиконання наказу, формулювання його основного складу злочину, кваліфікуючи ознаки. Також проаналізовано та здійснено порівняння видів кримінальних покарань, що мають бути застосовані за невиконання наказу різними категоріями військовослужбовців.

***Ключові слова****: військова служба, порушення дисципліни, злочин, невиконання наказу, кримінальне покарання за невиконання наказу.*

**Formulation of the problem.** In the conditions of intensifying of criminogenic situation in a country the special disturbance causes the level of criminality in law enforcement authorities and state soldiery forming. Especially dangerous is a feasance of offences and crimes by the workers of MIA and servicemen of the National guard of Ukraine. The degree of public ununconcern of such displays is high enough, as unlawful actions from the side of such categories of persons cause harm to not only state law-enforcement interests, but also substantially reduce the level of trust of population to the system MIA and operating power on the whole. In addition, the common falling of level of morality and legal culture in the population of our country similarly is negatively reflected and in consciousness of young people that come on service to the organs of police and National guard of Ukraine.

**Connection of problem is with important scientific and practical tasks.** The select theme of research is executed within the limits of subjects of scientific researches of department of criminal right and criminology of the Dnepropetrovsk State University of Internal Affairs, and answers the subjects of researches of criminology in Ukraine, to priority directions of the scientific providing of activity of organs of internal affairs of Ukraine on a period 2015-2019 (an order of MIA of Ukraine is from 16.03.2015 № 275), Conceptions of development of science of criminology in Ukraine at the beginning XXI of article and recommendations of the Coordinating bureau from the problems of criminology of Academy of legal sciences of Ukraine.

**The purpose of this study** is to investigate the criminal law aspects of servicemen's activity in executing orders in the criminal legislation of Ukraine and foreign countries.

**Analysis of scientific researches and publications in that the decision of this problem is founded an author leans on that.** Study of circumstances that assisted the feasance of violations of discipline and legality in the state soldiery forming and in law enforcement authorities attracted attention scientists in different times of development of the Ukrainian state system. M. Tahantsev, M. Gernet, C. Ordynskiy, I. Tarasov, E. Tarnovskiy, Г. Feldstein, I. Foynitskiy, M. Chubinskiy called to the problems of decision of different forms and types of criminal behaviour. Works of the marked authors became precursors and soil of realization of modern criminal law and criminology researches of soldiery crimes.

Among modern authors it is possible to name M. Khavronuk, M. Melnik, however, works of the marked authors were sent to research of criminogenic situation in the Armed Forces of Ukraine. As for a situation in internal troops, and from 2014 - to the National Guard of Ukraine, - then paid attention this question it was not.

**Exposition of basic material of research is with the complete ground of the got scientific results.** Character and terms of passing of military service, and also them specific features, limit circle of communication of servicemen, specific official and professional tasks that depend upon servicemen, clear establishment in the penal law of specific situation and time of committing crime of this group and others like that, all of it stipulated a forming necessity for the home criminal legislation of separate division of Special part of criminal code (CC) of Ukraine on questions their criminal responsibility. The same approach is kept in most foreign countries. Special criminal law norms that determine the circle of criminal acts of servicemen and specific order of bringing in of them to criminal responsibility, vitally necessary taking into account a specific services and executable duties by persons that pass military service after an appeal or by contract. Such approach can be explained by that the group of soldiery crimes appeared in penal laws so a long ago, as well as most in general lines criminal syllables of crimes. Regardless of place of location of soldiery crimes (in a separate division or head of Special part of criminal code, independent legislative act), is the group of independent criminal acts that have a separate family object. There is the order of execution and passing of military service set by a legislation such. Only for all soldiery crimes (crimes against the set order of military service) after the criminal codes of foreign edges an unifying moment are presence in each of codes of the soldiery crimes, distinguished within the limits of separate division or head, and such crime, as non-fulfillment of order of military commander or chief. Thus categories of servicemen, that can accomplish this crime and be confessed by his subject, can be different: mobilized for implementation of the special tasks (as, for example, in Ukraine, for participating in an anti-terror operation in the Donetsk and Luhansk areas), serve (both ordinary and officers) a serviceman of urgent service (both ordinary and officers), serviceman of contract. The only look of legislators of different countries to this act is constrained, in our view, with one of basic and main principles of organization of military service and military business on the whole, - by principle of undivided authority. This principle envisages the absolute sub-

mission of all categories of servicemen the soldiery commanders and chiefs regardless of their level (both direct and higher).

For the military legislation of Ukraine 1991 to traditional was and remains on it time approach of location of criminal law norms that envisage responsibility for crimes in the field of military service, within the limits of separate head or division of Special part of criminal code. He was saved on this time. Founding of such approach were Bases of criminal legislation of the USSR and Statute about soldiery crimes [1]. Position about soldiery crimes after 1917 was the first legislative act of the allied value, in that the general grounds of criminal responsibility of servicemen and liable for military service persons were determined for soldiery crimes. Certainly, that including of all positions of this legal act to the criminal codes of Ukraine, that operated in the period of 1923-1991, as well as other allied republics of the former USSR, was obligatory. By this Statute criminal responsibility was envisaged both for non-fulfillment of order and for resistance to implementation of order (articles 3, 2). In 1927 new Statute was accepted about soldiery crimes (what operated 1959 to, id est, to new reform of criminal legislation), that it was related to reformation of military criminal legislation [2]. Each time the norms of military criminal law changed at reformation of military legislation. Unlike position of 1924, in position of 1927 the circle of soldiery crimes was extended, the new types of soldiery crimes are entered, but such crime, as non-fulfillment of order was stored. The new stage of reformation of military legislation, that was marked passing an act "About criminal responsibility for soldiery crimes" passed in 1958 [3] (what operated 1991 to)and fastened basic principles of criminal legislation in relation to soldiery crimes. This law contained the concept of disobedience, as a constituent of military crime of "non-fulfillment of order". Yes, in particular, it is marked in a article to 2 p. of "a" law, that an open refuse confesses disobedience to execute the order of chief, the same as other intentional non-fulfillment of order of chief [4, a. 22]. The table of contents of non-fulfillment of order, as publicly dangerous act, included for itself one of next actions or inactivity: 1) non-fulfillment by a serviceman of actions that is contained in the order of military commander or chief; 2) feasances of actions, that is straight forbidden by an order; 3) implementations of order improper character (failure to observe of the terms of his implementation marked in an order : time, place, pattern of behavior, volume of actions and others like that). The aggravating circumstances of disobedience were name the following: feasance of disobedience by the group of persons, heavy consequences, war-time or battle situation (a article is 2 paragraphs of "b", "c") [4, a. 22-28]. In a article 3 the examined law there was the second concept of disobedience, but without the signs indicated in the point of "a" article 2 [4, a. 28]. Differentiation of disobedience and non-fulfillment of order took place only on the signs of subjective side, namely - after a form and type of guilt. If disobedience could be perfect only intentionally, then non-fulfillment of order - only from a carelessness. At the feasance of non-fulfillment of order under extenuating circumstances - a law allowed to apply the norms of disciplinary character (in obedience to positions of the Disciplinary charter of the Armed Forces of the USSR, article of 3 p. of "b") to the serviceman, and for aggravating (war-time or battle situation) - only criminal (a article 1 p. of "в").

Thus, approach in forming of division of soldiery crimes and in operating CC of Ukraine, that it was accepted in 2001, stored the same, as well as in soviet time. In an operating criminal code in the division of XIX of Special part criminal responsibility is envisaged for crimes against the set order of military service (soldiery crimes).

Although, in General part of CC of Ukraine, as well as in the codes of other countries (criminal codes of Georgia, Belarus, Lithuanian and Latvian Republics) that entered in the complement of the USSR, such new type of circumstance that eliminates criminality of act is brought in, as implementation of order or order (a article 41 CC of Ukraine) [5]. Positions of home legislation fasten a right for a serviceman not to execute a criminal order or order that releases him both from disciplinary and from criminal responsibility obviously, regardless of time of feasance of such non-fulfillment of order.

It is necessary to mark that in the criminal codes of foreign countries of post-soviet space the same approaches were saved in forming of group of soldiery crimes, that and in soviet time. Yes, in the criminal codes of Azerbaijanian Republic (article 327) [6], Republics of Kazakhstan (article 366) [7], Republics of Tadjikistan (article 366) [8], Kyrgyzstan (article 354) [9], the same as in CC of Ukraine, the concept of military crime is certain in the separate articles, and in the code of Belarus in a note to the head 37 such concept is given [10]. In the criminal codes of Republic of Armenia, Republic of Moldova, Estonian Republic, Republic of

Bulgaria a concept of military crime is not in corresponding divisions and heads. In the criminal codes of Chinese Republic of People's, Japan, Sweden the division of soldiery crimes is not distinguished in general, and only some of them are included to the heads of Special part. Yes, in CC of Peoples Republic of China it is a head 1 "Crimes against state security" and head 2 "Crimes against public safety".

About such military crime, as non-fulfillment of order the question is also not in all adopted penal laws. Yes, in the criminal codes of Kyrgyzstan in a article 39 [9] but Republics of Uzbekistan in a article 40 [14] by the concept of Kyrgyzstan implementation of order or order of chief, in thereby and military implementation of the duties envisaged by position and official duties is embraced, and in CC of Lithuanian Republic in a article 30 to him enters yet implementation of professional duties [15]. In addition, in CC of Kyrgyzstan in a article the 355 question is about non-fulfillment to the inferiors of order of the chief given in the set order, that caused substantial harm to interests of service [9]. In a article 328 CC of Azerbaijanian Republic the question is about obvious abandonment from implementation to the inferiors of order of the chief given in the order set by a law, and similarly intentional non-fulfillment of order in other form, that caused substantial harm to interests of military service [6]. Non-fulfillment to the inferiors confesses in CC of Republic of Armenia non-fulfillment of order [7]. In CC of Republic of Moldova the concept of non-fulfillment of order is indehiscent, but it is marked that it is intentional actions that pulled at after itself a damnification to official interests in considerable sizes (article 364) [17]. In CC of Republic of Tadjikistan non-fulfillment confesses non-fulfillment of order by the inferior of order of the chief given in the set order, that caused considerable harm to interests of service in default of signs of disobedience (open abandonment from implementation of order of chief, or other intentional non-fulfillment of order) (articles 368, 367) [18].

Actions perfect from a carelessness or frivolousness (article 439) confess in CC of Republic of Belarus non-fulfillment of order, but separately distinguish the concept of disobedience (article 438) as open abandonment from implementation of order of chief or other intentional non-fulfillment of order (disobedience), after the exception of cases, when an inferior refused to execute a criminal order scienter [10]. Intentional non-fulfillment of official order of chief, perfect a person, that has for such misconduct a disciplinary penalty the term of action (article 247) did not run across on that, confesses in CC of Estonian Republic non-fulfillment of order [19].

In CC of Sweden criminal responsibility of serviceman is envisaged in case of refuse to come to heel or insubordination to the order given a higher chief, or if he detains implementation of such order (article 5) superfluously [13].

Thus, it is possible to mark that legislators of countries of post-soviet space, though went out from general for all norms, but after acquisition of independence actively began to work on creation of new penal laws. By the basic terms of bringing in of servicemen criminal responsibility, the following confess non-fulfillment of order : to execute a 1) refuse of serviceman order; 2) refuses touch the order given only by a higher military chief; 3) orders, what serviceman, refuse to execute, given in the set order; 4) orders given by a higher military chief do not contain the obvious signs of unlegality; 5) non-fulfillment of order can be intentional (codes of Azerbaijanian Republic, Republic of Kazakhstan, Republic of Armenia, Republic of Moldova, Estonian Republic) or careless or frivolous (codes of Belarus are Republics of Tadjikistan, Kyrgyzstan).

By the terms of release from criminal responsibility at presence of such circumstance that eliminates criminality of act, as implementation of order or order, foreign legislators name: a 1) order (order) is obligatory for implementation; 2) orders given by a person are in her capacity; 3) obligatory observance of form of knowing of order (codes of Republic of Бєларусь, Republic of Kazakhstan, Republic of Tadjikistan); 4) orders are directed in relation to a that person that must execute (after an official submission) him; 5) legitimacy of implementation of order a that person that got him even at a damnification (codes of Kyrgyzstan, Republic of Uzbekistan); 6) realization of fact of uncriminality of order (absence of obvious criminality of order) (codes of Ukraine, Latvian Republic); 7) careless character of operating under implementation of order, that train damnification (and at presence of intentional, connected with implementation obviously of criminal order - criminal responsibility is not eliminated).

**Conclusions and prospects of further scientific researches.** Thus, such corpus delict, as non-fulfillment of order a serviceman, always needs the detailed research of his not only objective but also subjective signs, clear establishment of form and type of guilt, namely atti-

tude of serviceman is toward non-fulfillment order got a from a higher military chief; what was realized by a serviceman at such refuse: or he realized the public ununconcern of the inactivity or her consequences; pursued here some certain aim: to execute other order, or not to execute got, on what reasons and others like that. Such approach will allow to dissociate the legitimate act of serviceman from violation of discipline, offence and crime, and to set the presence of such circumstance that eliminates criminality of act, as implementation of order or order (a article 41 CC of Ukraine) [5]. Such comparison of objective and subjective signs legitimate and criminal will allow to set that not only.

***References***

1.The bases of criminal law of USSR. Position is about soldiery crimes by 31.10.1924. *The collection of laws of USSR and decree of presidium of supreme soviet of USSR.* 1924. № 21. P. 207.

2.Position is about soldiery crimes by 27.07.1927 г. *The collection of laws of USSR and decree of presidium of supreme soviet of USSR.* 1927. № 50. A. 505.

3.The law of the USSR «About criminal responsibility is for soldiery crimes» by 25.12.1958. *The collection of laws of USSR and decree of presidium of supreme soviet of USSR.* 1959. № 1. P. 10.

4.Comment of law on criminal responsibility for military crimes / Ahmetshin H., Medvedev A., Samoylov E., Ter-Akopov A.; under a release: Gorniy A. (prolusion). M.: Legal literature, 1981. 152 p.

5.A criminal code of Ukraine: is a current legislation with changes and additions by the state on September, 1, 2017 (official text). K.: Palivoda A., 2017. 212 a. (Codes of Ukraine).

6.Criminal Code of Azerbaijan/ Scientific editing, preface I. Ragimova. Translation from Azerbaijanian by B. Abbasov. S-Pb.: Publishing house « legal center Press», 2001. 325 a.

7.Criminal code of Republic of Kazakhstan from a 16.07.1997. № 167-1 (changes are brought). Put in an operation by Law of Republic of Kazakhstan from 16.07.1997 № 168-1 "About introduction to the action of the Criminal code of Republic of Kazakhstan" with 01.01.1998.

8.Criminal code of Republic of Tadjikistan. With changes and to additions, by the brought in Laws RT № 684 from 13.11.1998, № 877 from 10.12.1999, № 498 from 12.03.2001, № 6 from 12.05.2001.

9.Criminal code of Kyrgyzstan. (In the release of Laws from 21.09.1998 № 124, 9.12.1999 № 141, 23.07.2001 № 77, 19.11.2001 № 92) . (Put in an operation by Law from 1.10.1997 № 69).

10. Criminal code of Republic of Belarus from 09.07.1999 № 275-З. Accepted by House of representatives 02.06.1999 Approved by Advice of Republic 24.06.1999 (in a release of Laws of Republic of Belarus from 08.05.2002 № 98-З, from 24.06.2002 № 112-З).

11. Criminal code of Chinese People's Republic/ under a release by A. Korobeev, translation from Chinese by D. Vichikov. S-Pb.: Publishing house «legal center Press», 2001. 303 a.

12. Criminal code of Japan / scientific editing and preface by A. Korobeev. S-Pb.: Publishing house «legal center Press», 2002. 226 a.

13. A criminal code of Sweden / is the Scientific editors of N. Kuznetsov and S. Belyaev. Translating into the Russian language of S. Belyaev. S-Pb.: Publishing house «legal center Press», 2001. 320 c.

14. Criminal code of Republic of Uzbekistan.

15. Criminal code of Lithuanian Republic.

16. Criminal code of Republic of Armenia. Accepted 18.04.2003.

17. Criminal code of Republic of Moldova № 985 - XV from 18.04.2002. on April, 18 2002 № 985-XV.

18. Criminal code of Estonian Republic. The real Code is put in an operation by a separate law. (Repealed - 12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350).

19. Criminal code of Republic of Bulgaria / scientific release by A. Lukashov. Translation from Bulgarian by D. Milushev, A. Lukashov, prolusion by I.Aydarov. СПб. : S-Pb.: Publishing house «legal center Press», 2001. 298 a.

**Summary**

The authors consider the legal regulation of the execution of orders by servicemen of state military formations (The Armed Forces of Ukraine and others formed in accordance with the law) during military service. Also, the authors conducted a comparative analysis of criminal liability for failure to comply with the order of a superior military commander in the criminal law of Ukraine and other countries. For comparison, the authors took the criminal codex of both post-Soviet countries and those that were not included in it (Japan, Sweden, China, Bulgaria). The article presents the common features and differences in the understanding of such a war crime, such as non-compliance with the order, the formulation of its main component of the crime, qualifying attributes. Also analyzed and compared the types of criminal punishments that could be applied in case of non-compliance with the order by different categories of military personnel.

***Keywords:*** *military service, violation of discipline, crime, non-execution of an order, criminal punishment for failure to execute the order.*

**Kyselov I.O.,** Ph.D.

**Filipp A.V.,** Ph.D.

*(the Dnipropetrovs'k State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-160-164*

# CURRENT STATE AND MAIN TRENDS OF INTENTIONAL MURDERS IN UKRAINE

**Кисельов І.О. Філіпп А.В. СУЧАСНИЙ СТАН ТА ОСНОВНІ ТЕНДЕНЦІЇ УМИСНИХ ВБИВСТВ В УКРАЇНІ.** В статті досліджується сучасний стан умисних вбивств та умисних вбивств з кваліфікуючими ознаками в Україні. Проаналізовано динаміку цих злочинів за останні 5 років, визначено їх основні тенденції. Дослідження базується на узагальнених статистичних даних за 2013-2017 років.

У підсумку авторами запропоновано зосередитися на найбільш важливих тенденціях навмисного вбивства в Україні за останні п'ять років (з 2013 до 2017 року):

а) загальна кількість навмисних вбивств, що щорічно реєструється в Україні, поступово зменшується (говорячи про абсолютні рівні);

б) частка навмисних вбивств у складі злочинів, спрямованих проти життя та здоров'я, значно зросла (станом на 2013 рік - 8,1%, а на 2017 рік - 13,3%), майже в 1,5 раза;

в) деякі види навмисних вбивств показують тенденції до збільшення. Зокрема, навмисними вбивствами є: 1) небезпечні для життя багатьох людей; 2) з хуліганських мотивів; 3) на замовлення; 4) вчинено групою осіб за попередньою змовою; 5) вчинено особою, яка раніше вчинила умисне вбивство;

г) певні види умисних вбивств показують тенденції до скорочення. Зокрема, це навмисні вбивства: 1) двох чи більше осіб; 2) з надзвичайною жорстокістю; 3) з корисливих мотивів; 4) вчинені з метою приховування чи полегшення іншого злочину; 5) у поєднанні з зґвалтуванням або жорстоким задоволенням сексуального бажання неприродним способом.

***Ключові слова:*** *злочини проти життя та здоров'я, динаміка злочинів, умисне вбивство, кваліфікуючі ознаки.*

**Formulation of the problem.** Violent crime has always been at the center of the attention of criminologists.Itgoeswithoutsaying thatcrimes against the personare one of the most dangerous.Attacks on the life and health of people at all times were in the focusof serious public interest, and as it is knownthe consequences of these actions cannot be recovered.

As some scientists rightly point out in their research on this subject, "the issue of criminal responsibility for encroachment on life belongs to those who have probably never been under the spotlight of the researchers"[1, p. 1].In turn, key indicators of violent crime and crimes against life - especially homicides are in the focus of criminologists' interest.

Besides, a rate of homicides and assaults on human health is an indicator of the level of country development, criminal situation in it and effectiveness of the state. Rates of intentional murders also reflect the moral standard of society.

Changes in the socio-economic situation in Ukraine, taking place in recent years, led to some changes in the structure of violent crime.First of all, we talk about intentional murders.The dynamics and structure of this kind of crimes have been seriously changed since 2013.

The relevant processestake place against the background of numerous reforms (including the law-enforcement sphere) and separate, negative events which are taking placein the east andin the south of Ukraine. In general, the crime rate has changed significantly compared to previous years.

**Analysis of publications which discuss the solution to this problem.** The problem of

violent crime in general, and intentional murder in particular has been the topic of research of many scientists: A. I. Avanesov, Yu. M. Antonian, V. S. Batyrgerayeva, Yu. V. Baulin, V. V. Vasilevich, M. G. Verbensky, B. M. Golovkin, I. M. Danshin, O. M. Dzhuzha, A.I. Dolgov, V.F. Zakharov, A.P.Zakalyuk, A.F.Zelinsky, O. V. Kopan, O. M. Kostenko, G. L. Krieger, V. V. Lunyov, A. M. Litvak, S. A. Shalgunova, O. M. Yakovlev and others.

Despite the relevance of these researches, the problem of intentional murders not thoroughly investigated over the last five years.The exceptions are some studies that do not give a comprehensive picture of the state and dynamics of intentional murders in general and certain types of qualified homicides, in particular.

**The purpose** of the article is to explain the latest trends ofintentional murders and intentional murders in aggravating circumstances.

**Basic content.** First of all, it should be noted that the current situation in the area of intentional and incautious murders and in the area of violent crime in general, is different from that which was observed at the time before the "Revolution of Dignity". One of the reasons for significant changes in statistical data is, of course, the introduction of a new (at that time) Criminal Procedural Code of Ukraine and changes in the reporting procedure.In addition, one of the reasons for the "deterioration" of the criminal situation in the country is the complicated transitional "post-revolutionary" period.

In general, it should be noted that, including by the end of 2013, the overall level of violent crime, which was fixed annually by law enforcement agencies, was lower than that which exists today.At the same time, the state and structure of violent crime also changed from 2013 to 2017, and this was already happening in the "new" conditions.

Analyzing changes in the dynamics and structure of intentional and incautious murders, we will consider them along with the total number of crimes registered in a given year, as well as the total number of registered crimes against life and health.Since 2013, more than 500 thousand crimes are officially registered in Ukraine annually. Thus, in 2013 there were 56356 crimes registered, in 2014 – 529139, in 2015 – 565182, in 2016 – 592604, in 2017 – 52391.As can be seen, the total number of crimes registered annually by law enforcement agencies varies, with a significant increase in registered crimes in 2015-2016, and a noticeable decrease in their total number in 2017 [2].

The dynamics of crimes against life and health clearly demonstrate the tendency towards a reduction in their total number.As of the end of 2013, 71444 crimes against life and health were registered in Ukraine, in 2014 - 61064, in 2015 - 53317, in 2016 - 45660, in 2017 - 37826. As we can see in absolute numbers, the number of annual registered violent not self-serving crimes decreased by almost at half times.It should also pay attention to the fact that reducing the number of violent crimes against the person took place against the background of moderate growth and reduction of the general level of crime.This conclusion indicates that the determinants of violent crime and crime in general – do not coincide. At the same time, changes in violent crime in quantitative terms are contrary to the general tendencies of crime in Ukraine.

Turning to the consideration of intentional murders and crime, the object of which is life, it must be said that since 2013, there has been a general increase in the number of intentional killings, which are recorded each year.In 2013, 5792 intentional murders were recorded in Ukraine without aggravating circumstances (qualified under Part 1 of Article 115 of the Criminal Code of Ukraine) [3]. In 2014 there were 11018, in 2015 - 7993, in 2016 - 5870, in 2017 - 5029 "ordinary murders". As can be seen from absolute indicators, the number of these crimes has changed quite significantly over a short period of time. By the end of 2017, there has been a decrease in the level of intentional murders in Ukraine compared to previous years and the beginning of the analyzed period (2013).

At the same time, it should be taken into accountthat these indicators do not reflect the actual trends in uncomplicated murders. In spite of a decrease in the absolute number of registered killings annuallyduring 2013-2017 (with the exception of their increase in 2014-2015), in fact, there is an increase in their relative weight.So, if in 2013 the share of uncomplicated intentional murders (Part 1 of Article 115 of the Criminal Code of Ukraine) amounted to 8.1% of the total number of crimes against life and health, then in 2017 this figure is 13.3% (at this, in some years, was 18% (2014) and 15% (2015). Of course, this is a rather negative feature of the situation.Despite a significant overall reduction in violent crimes against life and health, the proportion of intentional murders over the past five years has increased by almost 1.5 times.In the general context (in relation to crime in general), the proportion of uncomplicated intention-

al murders remains the same, accounting for about 1% of all crimes recorded during the year on the territory of Ukraine.

Continuing consideration of the main trends of intentional killings committed in Ukraine during the last five years, it should be noted that there are "internal" tendencies that are inherent in certain types of murders.Part two, art. 115 of the Criminal Code of Ukraine, in the relevant paragraphs, provides a wide list of qualifying features of intentional murder. So, it is appropriateto analyze the state and dynamics of some of them.

First of all, it is necessary to pay attention on the fact that the committing of intentional murders with certain qualifying features is not very widespread in Ukraine. We are talking about qualifying features, which year by year almost did not find its expression in the data of criminal law statistics.Among these crimes are: intentional murder of hostage, murders related to the kidnapping; intentional murder of a person or his close relative in connection with the performance of this person's official or civic duty; intentional murder based on the grounds of racial, national or religious intolerance. Over the past five to seven years, no more than 3-5 facts of these crimes are recorded per year.In the criminological literature, different points of view on this situation are expressed.In the vast majority of cases, it is indicated by defects in the documentation and investigation of the relevant crimes (including the difficulty of proving the above aggravating circumstances), as well as deliberate, intentional "understatement" of the "undesirable" indicators (for example, qualification as an ordinary murder, murder based on grounds of racial, national or religious intolerance). However, it must be stated that the state and dynamics of intentional murders, as well as their relative weight, with the qualifications considered above, remain "stable". This statement is based on the data of criminal law statistics.

Another is the situation with certain types of qualified intentional killings, stipulated in the relevant paragraphs of part two of Article 115 of the Criminal Code of Ukraine. The most common practice (given the statistical data) is the qualifying feature of anintentional murder as if it was committed by a group of people by its previous collusion.In other words, among all cases of intentional murder with aggravating circumstances, it most often is committed by two or more persons. An analysis of available statistics shows that there was a significant increase in such crimes over the last years.

If the 2013 murders committed by two or more persons have been registered 85, in 2014 - 154 in 2015 - 134 in 2016 - 115 in 2017 - 110. Of course, we can say that in 2017, such facts are registered less comparing to 2014 and 2015. At the same time, comparing the beginning and the end of the analyzed period, we can say that the number of intentional murders in Ukraine, committed by a group of people over the past five years, has increased by almost 30%. There is no doubt that there is a significant increase, which indicates the existence of negative trends in group and organized crime directed against human life in Ukraine.

Considering such a kind of qualified intentional murder as deprivation of the life of a minor child or a woman who is in a state of pregnancy obviously for a criminal, tendencies of increase should be noted. By the end of 2013, 41 cases of a deliberate killing of a minor child or a woman who is in a state of pregnancy obviously for a criminal were registered in Ukraine, but starting in 2014, this indicator does not decrease below 60 facts per year.

In particular, in 2014, there will be 60 murders of this qualification, in 2015 - 66, in 2016 - 68, in 2017 - 65. It is also interesting that, unlike other types of qualified intentionalmurders and ordinary domestic murders in general, the number annually committed murders on this aggravating circumstance does not end in 2016-2017 years, which is accompanied by exacerbation of the socio-political situation in Ukraine, active hostilities in the east, and so on.Compared to 2013, the number of intentional murders of a minor child or woman is in a state of pregnancy obviously for a criminal, increased by almost 50%, and it is worrying.

Along with the above-mentioned type of intentional murders, demonstrates trends of increasing ofmurders in a way that is dangerous to the lives of many people are present.At the end of 2013, such facts almost were not recorded in Ukraine.During this year, 4 facts of intentional murder in a way dangerous to the lives of many people were officially registered. At the same time, in 2014, there were 214 murders registered, in 2015 - 352, in 2016 - 35, and in 2017 - 26.The sharp increase in the number of crimes against life can be explained, byconducting of active military actions in eastern Ukraine, where a significant part of intentional murdershave this qualifying feature.Nevertheless, we should to pay attention to the fact that after the end active phase of hostilities, the annual number of murders committed in a way that is dangerous for the lives of many people did not return to the indicators of 2013, but it remained rather high.

The indicators of intentional murders with hooligan motives also demonstratetrends for increasing. By the end of 2013, the total number of registered murders with this qualifying feature was 19. Since 2014, the number of such intentional killings is increasing, with a decrease in 2015-2016.Thus, in 2014, there were - 29 facts, in 2015 - 19 in 2016 - 16 to 2017 - 23 compared to the beginning of the period under review, the number of murders with hooligan motives increased by almost 20%.And although, in absolute terms, the number of such crimes is relatively small, in terms of "growth" there are disturbing changes.

A similar situation is about intentionalmurderby order. Such facts are difficult enough to investigate and prove, they also have the high level of latency. So, we can say that the given data do not fully demonstrate the real situation in the country.Nevertheless, there has been an increase in intentional murdersby order, over the past five years, in Ukraine. In 2013, there were registered 7 such murders, in 2014 - 13, in 2015 - 8, in 2016 - 12, in 2017 - 9. Thus, from 2013, there was a steady increase of them, with the exception of almost double increase in 2014 and 2016.

Special interest among qualified corpus delicti of murders goes to murder committed by a person who previously (already) has committed a murder. As it is known, among those who committed anintentional murder there is a low rate of relapse.At the same time, since 2013 there is a clear, negative trend towards their annual growth. There are more and more cases in which those who used to be involved in the intentional murder are being prosecuted. It should be noted that these trends were present even before the analyzed period (in particular, in 2004-2012), when there was a double increase in the proportion of special recurrence, for persons who committed an intentional murder [4, c. 76].If in 2013 this figure was equal to 64 facts per year, then in 2017 it is already 78. In this case, a significant increase in the relapse of intentional murders was observed in 2014 and 2016 (by 96 facts during the year, for each year), and in 2015, significantly more repeated murders were registered - 76 crimes.

Comparing the beginning and the end of the analyzed period, it can be said that the number of annual intentional murders committed by those who had previously committed an intentional murder, increased by almost 23%.

Considering the statistics of intentional murder in Ukraine over the last five years, it is also necessary to note the tendency to reduce their number on certain qualifying features.In particular, the number of annual perpetrators of intentional murder has been reduced for such aggravating circumstances as: a) two or more persons; b) with extreme cruelty; c) of mercenary motives; d) in order to conceal another crime or facilitate its commission; e) combined with rape or violent satisfaction of sexual desire in an unnatural way.Undoubtedly, some of the qualifying attributes, mentioned above, are quite widespread in view of the statistics of past years.

So, for example, except for the years of intense fighting in the East of Ukraine (2014 and 2015), the number of intentional murders of two or more people has decreased. If in 2013, were registered 93 such facts, in 2014 - 617, in 2015 - 319, in 2016 - 91, in 2017 - 67. In view of the beginning and end of the analyzed period, the number of murders, which have this qualifying feature, decreased by almost 28%.

We have a similar situation with registered murders with extreme cruelty.In 2013, 39 murders with extreme cruelty were officially registered, in 2014 - 24, in 2015 - 22, in 2016 - 17, in 2017 - 26. Despite the fact that the general trend towards a systematic reduction of their level ends in 2017, compared to 2013, they became less by 33%.

In addition, the number of registered intentional murders with profit motives significantly reduced. If by the end of 2013, there were registered 136, and in 2014 - 146, in 2015 - 110, in 2016 - 123, in 2017 – 96 intentional murders with profit motives. Thus, in general, the total number ofintentional murders with profit motives was reduced by 29%.

It should also be noted that the reduction in the number of registered intentional murders committed with an aim of concealing or facilitating another rcrime (data for years and number of registered cases: 2013 - 20, 2014 - 19, 2015 - 17, 2016 - 14, 2017 - 9), as well as intentional murders combined with rape or violent satisfaction of sexual desire in an unnatural way (2013 - 10, 2014 - 13, 2015 - 8, 2016 - 9, 2017 - 8).

Taking into account the fact that in practice there may be a mistake and wrong qualification of encroachment on human life, we should also analyze statistical data concerning intentional grave bodily injuries that caused the victim's death.Over the past five years, there has been a trend towards a significant reduction in such crimes (according to official statistics). Thus, in 2013, 791 grave bodily injuries, which caused the death of the victim, were recorded, in 2014 - 759, in 2015 - 673, in 2016 - 695, and in 2017 - 604.The rate of decline of these acts,

in general, coincides with the total number of intentional murders recorded every year. This allows us to conclude sufficiently high reliability of information that is displayed and analyzed.In addition, we can conclude that there are currently no generally noticeable tendencies towards mass re-qualification of acts (from intentional murder to grave bodily harm that caused death), since the general decline can be seen in both directions.

**Conclusion.** Summing up, we should to focus on the most important tendencies of intentional murder in Ukraine over the last five years (from 2013 to 2017):

a) the total number of intentional murders (all) that are annually registered in Ukraine is gradually decreasing (while talking about absolute levels);

b) the proportion of intentional murders (all) as a part of crimes against life and health has increased significantly (as of 2013 - 8.1%, as of 2017 - 13.3%), almost at 1.5 times;

c) certain types of intentional murders show tendencies to increase.In particular, those intentional murders are: 1) a way dangerous to the lives of many people; 2) with hooligan motives; 3) by order; 4) committed by a group of people by its previous collusion; 5) committed by person who previously committed intentional murder;

d) certain types of intentional murders show tendencies for reduction.In particular, those intentional murders are: 1) two or more persons; 2) with extreme cruelty; 3) with profit motives; 4) committed with an aim of concealing or facilitating another rcrime; 5) combined with rape or violent satisfaction of sexual desire in an unnatural way.

***References***

1. Яремко Г.З. Асоціація норм про вбивство в кримінальному законі України: законодавча доцільність чи недолугість? *Часопис Академії адвокатури України.* 2012. № 16 (3). С. 1-7. URL: http://e-pub.aau.edu.ua/index.php/chasopys/article/viewFile/290/311.

2. Статистична інформація про стан злочинності та результати прокурорсько-слідчої діяльності за 2013-2017 роки. URL: https://www.gp.gov.ua/ua/statinfo.html.

3. Кримінальний кодекс України від 05 квітня 2001 р. *Відомості Верховної Ради.* 2001. № 25. Ст. 131 (станом на 18.04.2018). URL: http://zakon5.rada.gov.ua/laws/show/2341-14.

4. Ігнатов О.М. Кримінально-правова характеристика осіб, які вчиняють умисні вбивства. *Науковий вісник Херсонського державного університету*. 2013. № 5. Т. 2. С. 71-76.

*Received to editorial office 06.06.2018*

**Summary**

The article deals with the current state of intentional murders and intentional murders with qualifying features in Ukraine. The dynamics of these crimes over the past 5 years has been analyzed, their main tendencies are determined. The research is based on generalized statistics data for 2013-2017 years.

***Keywords:*** *crimes against life and health, the dynamics of crimes, intentional murder, qualifying features.*

**Myroslava Kulyanda**
Judge of the Court of Appeal of Chernivtsi region

*DOI: 10.31733/2078-3566-2018-2-164-170*

## MODERN CONDITION AND FEATURES OF PROVISION AND DEVELOPMENT OF APPEALING PROCEEDINGS IN UKRAINE

**Кулянда М. СУЧАСНИЙ СТАН ТА ОСОБЛИВОСТІ СТАНОВЛЕННЯ Й РОЗВИТКУ АПЕЛЯЦІЙНОГО ПРОВАДЖЕННЯ В УКРАЇНІ.** Роботу присвячено дослідженню становлення та основних етапів розвитку апеляційного провадження в Україні. У науковій статті здійснено історико-правове дослідження щодо становлення та розвитку апеляційного провадження в кримінально-процесуальному законодавстві України на різних етапах її історії. Визначено момент виникнення інституту апеляції на території України та основні етапи його розвитку.

У підсумку автором стверджується, що інститут апеляцій та розгляду судових рішень існував з VIII століття. Розвиток рішень апеляційного суду склав велику кількість етапів залежно від історичних реалій, рівня розвитку процедурного законодавства, правової культури та ступеня автономної особистості в державі та суспільстві.

***Ключові слова:*** *становлення, розвиток, апеляційне провадження, Апеляційний Суд, оскарження.*

**Formulation of the problem.** The process of reforming the criminal justice system is

still ongoing, so you can expect that of historical and legal analysis carried out within this article regarding the establishment and development of the appeal proceedings, will use the experience and avoid conflicts and errors that met at different stages of development of domestic criminal procedural legislation.

**Analysis of publications that initiated the solution to this problem.** The issue of checking court decisions was the subject of scientific statements in the works of Yu.B. Bolshakov, O. Y. Kostyuchenko, N.R. Bobechko, D.O. Zakharova, I.Y.Mironikova, O.V. Ostrogliada, O.S. Kashki, V.A. Poznansky, V.I. Shishkin, V. M. Khotenets, V.V. Serdyuk, V. I. Slipchenko etc., but available scientific research does not cover all aspects of the institution of appeal proceedings, including issues related to its formation and development.

**The purpose** of this article is a new scientific result in the form of a generalization of legislation and theoretical views on the formation and development of appellate proceedings in Ukraine. To achieve this goal, the following tasks must be performed: 1) to carry out a historical and legal study on the formation and development of appeal proceedings in the criminal-procedural legislation of Ukraine at various stages of its history; 2) determine the time when an appeal institution was established on the territory of Ukraine and the main stages of its development.

**Presentation of the main research material.** In the science of criminal procedural law, the history of the formation and development of appeal proceedings is poorly researched. As for the national understanding of the appeal, most of the territory of Ukraine has evolved over the centuries in line with European views and ideals, and the appeal institute has long been known to it. Since the end of the VIII century, justice was divided into secular and church and carried out under customary law, the princes' statutes "and" lessons learned "Church statutes, Byzantine collections and" n Truth "[1]. Among the scholars, there is no unity in the issue of the possibility of challenging court decisions in this historical period. In this historical period there were also private-ownership courts, they were also called patrimonial courts or courts dominant. Under their jurisdiction fell grave peasants (procurements, serfs, outcasts). On the basis of Art. 56 Spatial edition of "n Truth" (XII century.) Purchase could go "to complain to the prince and the judges" [2, p. 28]. According to the Church's statutes, the decisions of the spiritual courts were not subject to appeal: "Do not like these courts and it's hard to judge the prince, neither his nobles, nor the judges" [3, p. 138]. Decisions of the princely courts were also final and were not subject to appeal. In them sat themselves or princes, or posadniky or tiuny [4, p. 77]. Another group of scientists, in particular I. D. Belyaev, O. Mironenko, Yu. A. Chernushenko, believe that the decisions of all courts were final and not subject to appeal [5, p. 339]. However, with such categority, one can only agree on the decisions of the princely and church courts.

In the period of the accession of the Ukrainian lands to the Kingdom of Poland and the Grand Duchy of Lithuania, the appeal of judicial decisions had certain peculiarities. In Galicia, which in the second half of the XIV century was in the Kingdom of Poland appeal judgments veche carried to court public gentry province, which was higher appellate authorities and met three times a year. From the 15th century the appeal was carried out before the king, and since then the decline of the assembly courts began. From the courts of Western Ukrainian cities, appeals were sent to the court of Lviv, and from there to the commissar's court in Krakow. Subsequently, the appeal to the magistrates' courts was carried out before the royal court. In the Grand Duchy of Lithuania, the acclaimed Letter of 1457 and the Sudebnik Casimir in 1468 [6], the competence of domicile (domains) courts was legalized and regulated. According to the mentioned acts, the gentlemen-gentlemen had the right to independently carry out legal proceedings against the peasants. Mandatory order procedure for the consideration of criminal proceedings by courts was introduced with the adoption of the Statute of 1529.

In the XIV-XVI centuries, the trial of the Grand Duke in the Lithuanian-Russian state was the highest judicial institution. In contemporary sources of law he called "court Business", "own court household" and sometimes "trial before oblychnistyu economic", "mayestat Business" (Charter 1529, Sec. VI, Art. 36, Statutes 1566, Section IV, Art 68, Statute 1588, Section IV, Art. 29) [7, p. 2-106; 8]. The court could consider any criminal proceeding in person with the participation of honorary masters or entrust legal proceedings to trustees (commissioners, assessors, chancellors, marshalers). As noted by historians, "the main burden Commercial Court nose in solving criminal proceedings at the first instance, and in consideration for their appeals against the decisions of other courts" [6]. Grand Duke reviewed appeals against sentences of lower courts and trustees and otzov (complaints to judges) [9, p. 41].

The next step in introducing the trialness of the court was the decision of the Brest Seimas dated May 23, 1542 [10]. In accordance with the terms of the act, the plaintiff was not entitled to

apply to the economic court, if the owner was in Poland, but was obliged to appeal to the governor and the elder. Complaints on their decision in this case were filed in the court of the Pani Council. Initially, the Pani-Council court was an advisory body to the prince, and subsequently exercised judicial functions in the absence of the great princes and met in court sejm twice, and from 1551 - once a year. In 1588, the Pani Council Court was completely replaced by the Seymov Court, which began to resolve particularly important criminal proceedings and appeals against decisions on individual cases. The verdict of the Sejm Court, as noted by historians, was not subject to appeal, but the king retained the right to pardon the convict. [6]. Appeals against sentences of city courts, where the Magdeburg law was applied, were considered by the courts of the administrative centers of the Old Believers and the voivodeships.

Appeals against sentences of city courts, where the Magdeburg law was applied, were considered by the courts of administrative centers of the Old Believers and Voivodeships.

Among the Ukrainian population of the Lithuanian-Russian state there was also a cop (public) court. The appellate court for the smoking courts was the court of the governor [6]. Thus, the judgments of the smoke courts were subject to appeal. On the Right Bank, the smoke courts existed until the end of the XVIII century, and on the Left Bank - until the middle of the XVIII century.

The Zemsky privilege of 1457 gave the feudal lords the right to sue their peasants. At the decision of the regional (local state) courts appeals were filed: on the decision of the governors, voivods, old people, the emperor - to the economic court; to the decision of the helpers of the governor - to the governor. An economic court could appeal to the decisions of the Zemsky court. Appeals against the decisions of the Crowd courts were also filed in the court of the owner, and after the creation of the Lutsk Tribunal - to him. The decisions and sentences of magistrates' courts in large cities were filed with a commercial court, in city councils - voivods or old age, in private-ownership cities - the owner of the city. After the Union of Lublin in 1569 and the formation of the Commonwealth, for most cities with Magdeburg law, the highest court was the Sejm Court in Warsaw, and after 1581 - the Main Tribunal of the Grand Duchy. Appeals to decisions of the hetman's court (military) were submitted to the Sejm Court, and after the creation of the Grand Tribunal of the Grand Duchy - to him.

In the middle of the XVI century on the lands of the Grand Duchy of Lithuania was conducted judicial reform. In Grodesk courts, which were divided into lower and higher, judges were the elders and voivods. Higher were the courts of the second instance, which considered the appeals. Appeals could still be made to the central courts. The Lithuanian charter of 1566 established rules for appeals and the transfer of criminal proceedings to the owner's judgment. Thus, the Statutes of 1566 and 1588 have finally approved the order of consideration of these proceedings.

In 1581 a central judicial body was established - the Main Tribunal of the Grand Duchy, which acted in the Lithuanian and Belarusian lands. Already at the end of 1581, the Main Lithuanian Tribunal acted as the main appellate instance in the Grand Duchy of Lithuania, Ruthenia and Zhemaytiysk (official name of the state), which included the lands of Ukraine [11, p. 201]. Analysis of the statute "The method of tribunal rights" allows us to conclude that he replaced the economic court [12, p. 2-16]. The jurisdiction of the Tribunal included the consideration of criminal proceedings at first instance and the review of appeals against the verdicts of Zemsky, City and Sub-Comorian courts, as well as lordships against gentry convicted of death penalty, imprisonment or a large monetary fine (Statute 1588, p. III, art. 11) [8].

According to T. I. Bondaruk, the main Lithuanian court became the main appellate instance [13, p. 108]. The decisions of the General Tribunal were not subject to appeal. They could not appeal to a commercial court or a court of justice [12, p. 3-4].

The Constitution of the Verkhovna Rada of 1578 approved the highest judicial appellate court for local courts of Volyn, Bratslav and Kiev voivodeships - the Lutsk Tribunal. For the first time, his work was investigated by M. Yasinsky [11]. This Court of Appeal was similar to the Lublin Tribunal in Poland, was an elected body and consisted of judges. The constitution for the approval of the tribunal was attributed to its competence, in particular, the examination of appeals in criminal proceedings against the decisions of the Zemsky, Grodsky and Sub-Sea Courts. Appeals to the decisions of city courts with Magdeburg law reviewed the royal court. During the appeal, an appeal was filed, a court order was appealed against. A feature, as noted by historians, was that the tribunal could not touch upon those circumstances that were not subject to the consideration of the local court and were not reflected in its decision. The outcome of the criminal proceedings could be the adoption or adoption of a new decree [14]. Ac-

cording to the analysis of judicial practice, the decision of the Lutsk Tribunal, as well as the decision of commissar courts, could be appealed to the royal court [6].

In the years 1589-1590, the Rzeczpospolita subordinated to the Lublin Tribunal all the non-Polish provinces - Volyn, Bratslavshchina, Kyiv Region and Prussia, in connection with which the Lutsk Tribunal ceased to exist. Thus, after the liquidation of the Lutsk Tribunal, the general Lublin Tribunal began to appeal.

According to historians, in Zaporizhzhya Sich, from the second half of the sixteenth century, the judicial functions were performed by a palacio colonel, a chicken ataman, an ataman, and sometimes even a whole kish [15, p. 86-87]. The procedural activity of the courts was based on the rules of customary law. The appeals against the sentences of the Palanca Court were carried out in the Courier Court, which was the appellate instance in relation to them. Appeals against the decision of the courthouse began to be referred to the court military judge. Most criminal proceedings were considered by a military judge. A military judge could have been appealed to the ataman of the Cossack. Criminal proceedings for serious crimes were transferred to a military judge for consideration by the Ataman or the Military Council. The Ataman Court was considered the highest instance for all courts.

During the Hetmanate (second half of the XVII-XVIII centuries), the judicial system of the Commonwealth, which was the estate, was destroyed. In accordance with the "Instructions to the courts" of 1730 Hetman D. Apostol, regimental courts (existed until 1763) acted as first instance courts for the hundredth and regimental officers and as courts of the second - an appellate instance on hundreds of courts (existed until 1763). In cities, Magistrate Courts operated under the Magdeburg Law. It was possible to appeal to the decisions of these courts from 1721 to the regimental and hetman chanceries.

In the period under consideration, the norms regulating appeals of court decisions were not sufficiently developed. The procedural procedure for appeals of court decisions and review of criminal proceedings was first secured in writing in articles 1-6 of section VI of the Statute of 1529 and developed in subsequent laws passed from 1529 to 1588 years. Therefore, we can not agree with the position of those authors who argue that the first appeal as a form of appeal of judicial sentences was introduced in France CPC 1808, and subsequently borrowed by the laws of other bourgeois states (in Russia, the appeal was introduced after the judicial reform in 1864) [16, with. 203].

The many years of experience of appellate courts and appellate proceedings in Ukraine have been collected, studied and detailed in the "Rights that the Malorussian people are condemning" in 1743. In this legal act, the appeal was defined as the proper recall and transfer of criminal proceedings from the lower court to the higher one, when one of the parties considered itself to be the offended sentence pronounced in the lower court.

Along with the fact that in the Ukrainian state there was a well-developed system of procedural law, in Russia, by the end of the first third of the XIX century, there was the Code of Law of 1649 [17, p. 289] and royal decrees. Since 1722, under the royal decree, the Supreme Court of Appeal, to which all the court decisions were appealed, became the Little Russian Board in Glukhiv, the residence of the Hetman.

At the beginning of the 17th century, the various acts of tsarist Russia (regulations, regulations, ordinances, decrees, orders, instructions, decrees, manifestos) spread on the territory of Ukraine. The judicial process in the Hetmanate was influenced by the Petrov decrees on matters of criminal law of November 12 and 19, 1721, and "On the form of the court" [18].

In the years 1750-1758, the General Judge Fedir Chuikevich wrote a collection entitled "The Court and the Execution of the Rights of Little Russians." The Supreme Court of Appeal was the General Military Court. He acted after the liquidation of the Hetmanate, ceased to exist in 1786. The reform carried out revived the old statutory system of courts in Ukraine and separated the judiciary from the administrative one.

In the Right-Bank Ukraine, the judicial system of the Commonwealth continued to exist. The upper court (appellate) court was the Crown Tribunal. Since 1764, the tribunal of Lublin has been involved in the trials of Ukraine.

Since 1775 Sloboda-Ukrainian, Kherson, Yekaterinoslav, and Tavria provinces operated the judicial system of Russia.

In general, in the first half of the nineteenth century, the judicial organization of Ukraine had the following form:

- the first instance, where the criminal proceedings were considered in essence: for the nobles - the district court, for the townspeople - the city magistrate, for the free peasants - the

lower massacre;

- the second instance - appellate and audit. For all provinces, the Chamber of Criminal Court and the Civil Court were created [19, p. 88].

Senate remained the supreme court for all of Russia.

One of the most consistent bourgeois reforms in Russia in the 1960's and 70's of the nineteenth century was the judicial reform of 1864. In the course of the historical development of the stage of review of court decisions, its types were gradually counted in the Statute of the Criminal Procedure in 1864 to the following: separate appeal, appeal, cassation and restoration of criminal proceedings. The difference between them was the very difference in court decisions. Thus, the decisions and decrees were subject to a separate appeal, incontestable sentences were reviewed in the order of appeal, the final ones - in the order of cassation, in the event that they have not yet acquired legal force. As for the sentences that came into force, only an exceptional recovery procedure was allowed for their viewing. Incomplete judgments were judged by a peace judge or district court without the participation of jurors [18]. They were subject to appeal in appeal proceedings (on all matters of criminal proceedings - essentially the proceedings) in respect of any irregularity in court proceedings and the issuance of a judgment (Articles 853 and 856 of the SCS). Sentences passed by the district court with the participation of jurors, as well as by the congress of peace judges and the judicial chamber as courts of the second instance, were considered final and could be appealed only in the cassation procedure [20, p. 105].

However, in the 1864 Statute of Criminal Proceedings, the appeal and cassation form of appealing judgments of the justice system of the world was limited to the fact that the court could make a final sentence that was not subject to appeal. So, according to Art. 124 SCS, the verdict of the world judge was considered final when he was sentenced to such penalties as a reservation, remark, reprimand, arrest of up to three days, a monetary penalty not exceeding 15 rubles.

The convicts could have appealed the appeals (and the prosecutor - appeal protest) to the judicial chamber, which again considered the criminal proceedings in substance, to the verdicts of the district court, decided without the participation of jurors as inconclusive. In Ukraine, appeals were considered by three chambers: Kyiv, Odesa and Kharkiv [21, p. 275].

The laws of 1889 established a complex system of appellate and cassation instances for local courts. Judicial statutes provided for peace judges one appellate instance - the congress of peace judges and one cassation - the Senate. The second instance of appeals for cases considered by zemstvo bosses and city judges was the county congress. With regard to county district court members, the appellate instance was a district court for them, and the relevant department of the Senate was cassation.

During the "first" Ukrainian People's Republic (Central Council) (November 7, 1917 - April 29, 1918), appeals to court decisions were considered by the appellate courts established on the basis of the Law of 17 December 1917 "On the Court of Appeal" [22] . It was envisaged the formation of three appellate courts: Kyiv, Odesa and Kharkiv, whose competence extended to the surrounding provinces.

During the period of the Hetman's Ukrainian state and government (April 29 - December 14, 1918), according to the "Laws on the interim government of Ukraine" of April 29, 1918 [23], the General Court of the Ukrainian State, the judges of which was appointed by Hetman, remained the highest judicial authority.

In the period of hetmanhood, the Central Council's Law "On the Court of Appeal" of December 17, 1917 was abolished; at the same time, the higher judicial chamber was restored, however, with some changes, which mainly concerned their states and requirements for candidates for corresponding positions.

In the Ukrainian People's Republic at the time of the Directory (December 15, 1918 - November 21, 1920), the Law of January 2, 1919, was abolished by the State Senate and restored the activities of the General Court, but under another name, "The Supreme Court of the UPR", and on January 24, 1919 Law of the UNR on the abolition of the law of the former Hetman government of July 08, 1918, "On the Chambers of Court and Appellate Courts" of January 24, 1919 [24, p. 55-56], appeals courts established at the time of the Central Rada Law "On Appellate Courts" and the Resolution of the Directory of the UNR of July 31, 1919 ("On the opening of the Kiev Court of Appeal") [22, p. 232-233]. Already January 26, 1919, the Directory approved the Law on Extraordinary Military Courts [25], and on August 4, 1920 - the Law on Certain Amendments to this Law [26, p. 49-52], according to which the sentences issued by extraordinary military courts under a simplified procedure were not subject to appeal and were executed immediately (Article 23).

The beginning of legal registration of the court system of Soviet Ukraine was the resolution of the People's Secretariat of the USSR "On the introduction of the people's court" of January 04, 1918 [27, p. 30-33]. This ruling rejected not only the appeal but also the appeal against the decisions and sentences of the people's court and therefore did not create a cassation instance. By resolution formed district, county and city people's courts. In connection with the liquidation of the old judicial system and the introduction of the people's court, the appeal was canceled as allegedly weakening the activity of the court of first instance, complicating and delaying the trial. The establishment of revolutionary tribunals took place after the adoption of the January 23, 1918 Regulations on Revolutionary Tribunals [28, p. 68-69]. The sentences and decisions of the people's court and the revolutionary tribunal were final and were not subject to appeals and cassation appeal.

Thus, in the Soviet period, the appeals institute ceased to exist on the Ukrainian territory, instead of the Provision on People's Courts and Revolutionary Tribunals of the Ukrainian SSR of February 14, 1919 [29, p. 526-530] introduced an institute of cassation, which in content differs from the same name appellate institution of European and world procedural legislation [30, p. 53].

In the Provision on the Judiciary of the Ukrainian SSR of December 16, 1922 [31, p. 779-787], the Criminal Procedure Code of the USSR in 1922 [32], the Criminal Procedure Code of the USSR in 1927 [33] and the Criminal Procedure Code of the USSR in1960 [34] appealed against judicial decisions further developed. During the Soviet period in the criminal process, the cassation appeal and review actually combined the features of classical cassation and some of the appeal elements.

Only after a long time, implementing the Concept of Judicial Reform, the legislator came to the conclusion that another instance was needed to review sentences that were not valid - appeal. According to the CPC of Ukraine (in the wording of 1960), an appellate instance court is a court that examines criminal cases on complaints and appeals against sentences and court rulings that have not become legally valid.

Appellate courts are already established within the framework of an independent Ukraine in accordance with Art. 125 of the Constitution of Ukraine and the Law "On Amendments to the Criminal Procedure Code of Ukraine" of June 21, 2001, No. 2533-111 [35], in connection with the expiration of the transitional provisions of the Constitution of Ukraine and the implementation of the "Small Judicial Reform."

The introduction of the appellate review of criminal proceedings during the first year revealed a number of problems that had to be discussed and resolved. The section of the Fourth CPC of Ukraine, which provided for three types of appeals proceedings, each of which had its own peculiarities, proved to be incomplete. This conclusion can be reached by analyzing the content of Art. 347, part 5 of Art. 349 and art. 382 CPC of Ukraine. As a general rule, appeals against sentences that were not enforceable by local courts, and decisions on the application or non-application of compulsory measures of educational and medical nature, adopted by local courts (Part 1, Article 347 of the CPC of Ukraine) were considered. There was somewhat limited appeal review of the decisions (decisions) on closing the case or sending it for additional investigation, as well as on separate decisions (rulings) and other decisions.

An important milestone in criminal procedural law was the adoption of the new Criminal Procedural Code of Ukraine, which came into force on November 20, 2012 [36]. The legislator in chapter 31 of the CPC of Ukraine consolidated the procedural procedure of appeals, powers and limits of the court of appellate instance. But since 2012, in the article regulating the conduct of proceedings in the court of appeals, a large number of changes have been made. These and other questions will be investigated in other writings. Summing up, it can be stated that the institute of appeals and review of court decisions existed since the VIII century. The development of the appellate court judgments passed a large number of stages depending on historical realities, the level of development of procedural legislation, legal culture and the degree of autonomous personality in the state and in society.

***References***

1. Клейнман А.Ф. Обжалование и опротестование судебных постановлений и определений. М., 2009. 324 с.

2. Русская правда. *Российское законодательство X-XX вв.* М.: Юр. лит., 1984. Т. 1. 432 с.

3. Устав князя Ярослава о церковных судах. *Российское законодательство X-XX веков:* М.: Юр. лит., 1984. Т. 1. 432 с.

4. Кульчицький В.С. Історія держави і права України / Кульчицький В.С., Настюк М.І., Тищик Б.Й. Львів: Світ, 1996. 296 с.

5. Беляев И.Д. Лекции по истории русского законодательства. М., 1901. 575 с.

6. Суд і судочинство на українських землях у XIV-XVI ст. / за заг. ред. П. Музиченка. Одеса: Астропринт, 2000. 180 с.

7. Литовский статут 1529 года. *Временник Московского общества истории и древностей российских.* М., 1854. Кн. 18. С. 2-106.

8. Литовский статут 1588 года. *Законодательные акты Великого княжества Литовского XV–XVI вв.* Ленинград, 1936.

9. Музиченко П.П. Історія держави і права України: навч. посібник. [4-е вид.]. Київ: Т-во «Знання», 2003. 429 с.

10. Ухвала Берестейського сейму від 23 травня 1542 р. *Акты, относящиеся к истории Западной России.* Т. 2. № 222.

11. Ясинський М.Н. Главный литовский трибунал, его происхождение, организация и компетенция. К.: Тип. Н.А. Гирич, 1901. 263 с.

12. Способ прав трибунальских. *Временник императорского Московского общества истории и древностей Российских*. М., 1854. Кн. XXV. С. 2–16.

13. Бондарук Т.І. Західноруське право: дослідження і дослідник. К.: Ін-т держави і права ім. В.М. Корецького НАН України, 2000. 160 с.

14. Положення про революційні трибунали від 23 січня 1918 р. *Хронологічне зібрання законів, указів Президії Верховної Ради, постанов і розпоряджень Уряду Української РСР (1917-1941 рр.).* Т. 1. 1963. С. 68-69.

15. Яворницький Д.І. Історія запорізьких козаків. Львів: Світ, 1990. 319 с.

16. Яблочков Т.М. Учебник гражданского судопроизводства. М., 2009. 345 с.

17. Смирнов А.В. Типология уголовного процесса: дис. … доктора юрид. наук: 12.00.09. М., 2001. 345 с.

18. Фойницкий И.Я. Курс уголовного судопроизводства. Ч. 2. СПб.: Тип. С.С. Спасовича, 2007. 588 с.

19. Викторский С.И. Русский уголовный процесс. М.: Казенная желъзнодорожная Типография Московского узла, 1911. 320 с.

20. Борисенко В.Й. Курс української історії: з найдавніших часів до XX століття: навч. посібник. Київ, 1996. 387 с.

21. Закон УНР «Про заведення Апеляційних Судів» від 17 грудня 1917 р. *Вісник Генерального Секретаріату Української Народної Республіки.* 1917. № 7. 23 грудня. С. 1-4.

22. Закон України «Про тимчасовий державний устрій України» від 29 квітня 1918 р. *Державний Вісник.* 1918. № 1. 16 травня. С. 1–2.

23. Закон УНР «Про Судові Палати й Апеляційні Суди» від 24 січня 1919 р. *Вісник Державних Законів для всіх земель УНР.* 1919. Вип. 7. Ч. 100. 13 лютого. С. 58–60.

24. Закон УНР «Про Надзвичайні Військові Суди» від 26 січня 1919 р. *Вісник Державних Законів для всіх земель УНР.* 1919. Вип. 8. Ч. 102. 18 лютого. С. 58–61.

25. Закон УНР «Про надзвичайні військові суди». Кам'янець-Подільськ, 1920. С. 5–12.

26. Постанова Народного Секретаріату «Про введення народного суду» від 04 січня 1918 р. *Хронологічне зібрання законів, указів Президії Верховної Ради, постанов і розпоряджень Уряду Української РСР (1917-1941 рр.).* К., 1963. Т. 1. С. 30–33.

27. Положення про народні суди і революційні трибунали УСРР від 14 лютого 1919 р. *ЗУ УСРР.* К., 1920. № 25. С. 526–530.

28. Положення про революційні трибунали від 23 січня 1918 р. *Хронологічне зібрання законів, указів Президії Верховної Ради, постанов і розпоряджень Уряду Української РСР (1917-1941 рр.).* К., 1963. Т. 1. С. 68-69.

29. Шевчук П.І. До питання створення та дії апеляційних судів у судовій системі України // Вісник Верховного Суду України. 1998. № 2. С. 5-10.

30. Положення про судоустрій УСРР від 16 грудня 1922 р. *СУ УССР.* Київ, 1922. № 54. С. 779–787.

31. Кримінально-процесуальний кодекс УРСР 1922 року. *УСРР СУ УССР.* 1922. № 41.

32. Кримінально-процесуальний кодекс УРСР 1927 р. Київ: Держполітвидав УРСР, 1950. 148 с.

33. Кримінально-процесуальний кодекс УРСР 1960 року. *Відомості Верховної Ради УРСР*. 1961. № 2. С. 15-17.

34. Законодавство України про судову і правоохоронну діяльність: Організація та діяльність судових органів. Організація та діяльність правоохоронних органів // Бюлетень законодавства і юридичної практики України / відп. ред. В.С. Стефанюк]. Київ: Юрінком Інтер, 2001. 351 с.

35. Кримінальний процесуальний кодекс України від 19.11.2012. URL: http://zakon2.rada.gov.ua/ laws/show/4651-17.

*Received to editorial office 05.06.2018*

**Summary**

The work is devoted to the study of the formation and the main stages of the development of appellate proceedings in Ukraine. In the scientific article the historical and legal study on the formation and development of appeal proceedings in the criminal-procedural legislation of Ukraine at various stages of its history was carried out. The time when appeals are instituted in Ukraine and the main stages of its development are determined.

**Keywords:** *formation, development, appeal proceedings, Appeal Court, appeals.*

**Yevgen Lukyanchikov**
Dr of Law, Prof.
*(the National Technical University of Ukraine "The Igor Sikorsky Kyiv Polytechnic Institute")*

**Viktoriya Lukyanchikova**
Ph.D.
*(the State Research Institute of the ministry of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-171-176*

# EVOLUTION OF COGNITIVE ACTIVITIES MEANS IN THE CRIMINAL PROCEDURAL CODE OF UKRAINE

**Лук'янчиков Є., Лук'янчикова В. ЕВОЛЮЦІЯ ЗАСОБІВ ПІЗНАВАЛЬНОЇ ДІЯЛЬНОСТІ В КПК УКРАЇНИ.** Досліджено процес розвитку засобів пізнавальної діяльності з розслідування злочинів починаючи з їх закріплення у Зводі законів Російської імперії 1857 року. Аналізуються думки науковців щодо визначення специфічних ознак, за якими слідчі дії виділяються з широкого кола процесуальних. Звернено увагу на поступове проникнення прийомів і методів оперативно-розшукової діяльності, спрямованих на негласне отримання інформації у кримінальне провадження.

***Ключові слова:*** *злочин, засоби пізнавальної діяльності, слідчі (розшукові) дії, процесуальні дії, пошук, розшук, розшукова діяльність.*

**Formulation of the problem**. A feature of modern crime is that it is characterized not only by quantitative, but also more qualitative changes. New types of crimes are spreading (in the field of high technology, thefts in the budget and financial and credit spheres), mercenary-violent crime is increasing, the actions of criminals are becoming more violent and cowardly, professionalism, organization and corrupt crime increase. Against this backdrop, in various circumstances, the activity of law-abiding citizens decreases in providing law enforcement authorities with information on crimes and the person who committed them, which became known to them. The consequence of this is the restriction of the information capabilities of law enforcement agencies in timely detection of crimes, establishing all its circumstances and those involved in it. The significant increase in the burden on law enforcement agencies and the increase in the number of crimes that remain undisclosed is an objective precondition for further research, development and application of new cognitive tools and methods of work with sources of information about the circumstances of the crimes that are being investigated by the investigator.

**State of research**. The works of such domestic and foreign scholars as V.P. Bakhin, R.S. Belkin, A.F. Volobuyev, V. I. Galagan, V.G. Goncharenko, A. are devoted to the study of means of cognitive activity on disclosure and investigation of crimes. Yu. Dubinsky, V.A. Zhuravel, O. N. Kolesnichenko, V. O. Konovalova, A. M. Larin, I. M. Luzgin, V. G. Lukashevich, M. A. Pogoretsky, D. B. Sergeyeva, V. Tishchenko, K. O. Chaplinsky, S. A. Shafer, V. Yu. Shepitko, M. Ye. Shumilo and others.

A quick, complete and unbiased investigation of crimes is the task of criminal proceedings (Article 2 of the CPC) and is ensured by the optimal use of cognitive tools for criminal-procedural activities - investigative (search) actions, requiring their in-depth investigation under updated criminal procedural legislation.

The **purpose** of the article is to find out the essence of investigative (search) actions, the definition of approaches to their name, the study of the process of their formation and regulatory consolidation at various stages of the formation of legislation governing legal relations in the field of criminal proceedings.

**Presenting main material.** The gradual movement of Ukraine in the direction of European integration necessitates the updating of legislation. That is why during the development of

a new CPC Ukraine an attempt was made to consolidate the norms that would ensure the rights and freedoms of a person suspected of committing a crime. On the other hand, the other party - the victim, that is, the person who has suffered harm from the crime and needs renewal of his rights and legitimate interests, has not been left without attention. Given the current nature of crime, the need for timely detection of crimes that are being prepared and investigations already committed, the legislator significantly expanded the means of cognitive activity. The current CPC of Ukraine includes Chapter 21, the rules of which regulate the use of new means of cognitive activity - conducting secret investigative (search) actions. In addition, corrections have been made to regulate the technology of certain traditional investigative actions.

Assessing the changes that took place in the criminal procedural legislation of Ukraine with the adoption of the new CPC, A. Solodkov notes, it is safe to state that it has been implemented European standards in the field of human rights ... which have proved their effectiveness in many years in European countries [18, p. 55-56]. To some extent, this applies to the Institute of Investigative (Investigative) Actions, which retained the main means of obtaining information on the circumstances of the crime in the criminal proceedings and the introduction of a new institute of means of cognitive activity of the investigation - secret (investigative) investigations.

Investigative actions - one of the fortified institutes of the criminal process. The origins of their normative consolidation and settlement are contained in the Code of Laws of the Russian Empire in 1857 (Articles 21, 197, 356, 360, 376, 377, etc.), the Statute of the Criminal Procedure in 1864 (Articles 250-258 , 292, 294, 468, 1158 et al.), In which it is directly referred to the general provisions of conducting investigative actions. A number of other rules are devoted to questioning, face-to-face rates, reviews, surveys, searches, and more. An analysis of their content suggests that all of them are aimed at finding sources of crime information, their research and obtaining the necessary information. That is, they all have search, cognitive orientation. So, in Art. 254 of the Statute of Criminal Proceedings is referred to in the following context: "when conducting an inquiry, the police collect all the information it needs through searches, verbal inquiries and silent observation" (highlighted by us). The search relied on the police, but its essence was not disclosed, a list of actions that were to be covered by this notion was not given. It should also be noted that none of the previous normative acts, in addition to the name (investigative actions), did not specify the definition of such actions, which contributed to the formation of different views among scholars on their essence and attribution of those or other procedural actions to investigators.

Thus, O. M. Larin correctly defined the investigative action as a way to implement the rules of criminal procedural law [10, p. 170], attributed to them all procedural actions, even those that were associated with the adoption of applications and reports of crimes [9, p. 59]. This opinion is shared by I. M. Luzgin and refers to the investigative actions of those whose content is: "... mainly the discovery, investigation and evaluation of evidence" and "... management of the prose-SOM investigation, determination of its limits, terms and procedure of proceedings" [11, p. 96]. This definition includes all criminal procedural activities related to the search for sources of information and obtaining the necessary information, as well as the making of procedural decisions.

Other scholars try to identify the specific features of the actions proposed to be attributed to investigators and consider them as a criminal procedure provided for by a combination of operations and methods that are provided by state coercion and that are used in the investigation of crimes to detect, fix and verify factual data, which are relevant for evidence in a criminal case [16, p. 5]. Turning to this question S. A. Shayfer states that each investigative action can be represented as a specific set of cognitive techniques for the detection and display of information of a definite species [21, p. 44].

There are also occasions when in the views of scientists on investigative actions there are no consistency. Thus, formulating the definition of investigative actions, M.I. Bazhanov emphasized that they were being conducted during the investigation in order to collect and secure evidence. However, the list of such actions included the prosecution of a person as a prosecutor, the selection of a preventive measure, the recognition of a person victim, civil plaintiff and civil defendant, etc., which did not have a search engine, cognitive orientation. Rather, they resembled procedural decisions and measures to ensure criminal proceedings [17, p. 202-203]. A certain influence on the formation of such an approach to the attribution of a wide range of procedural actions to the list of investigators was made by the editors of certain norms of the CPC of the Ukrainian SSR in 1922. In Article 111, the legislator listed a list of

investigative actions pro-managementwhich for the investigator was mandatory in the event of recognition of the received materials of inquiry are sufficiently complete: a) the presentation of the charge; b) interrogating the accused; c) drawing up the indictment.

As a result of lengthy discussions, scholars formulated the definition of investigative actions. Under them, it is proposed to understand the actions foreseen by the criminal procedure law aimed at obtaining (seeking, assembling), or verification of evidence already obtained in a particular criminal proceeding. They are a kind (part) of the broader content of the notion of procedural actions carried out by an authorized person at the stage of pre-trial investigation in accordance with established procedural requirements, have a cognitive orientation, that is, always aimed at obtaining, fixing or verifying evidence [8, p. 365]. Such a definition of investigative actions is formulated by A. Ya. Dubinsky, but instead of a generalized subject that they can carry out (full-time person), he lists their list - the investigator or the person conducting the inquiry (and in cases determined by law - the prosecutor and the head investigator unit) [5, p. 215].

All other actions of the investigator in the criminal proceedings are rightly emphasized by M. A. Pogoretsky, although they are procedural as they are carried out by the authorized process subject in a definite CPC of Ukraine in a procedural form and aimed at reaching the goal of solving the problems of criminal proceedings, but they do not matter investigative (search) actions [12, p. 49].

A comprehensive study of the concept and essence of investigative actions was carried out by SA Shafer. Based on the analysis of certain norms of the CPC, he concludes that the term investigative actions is given differently in terms of comprehension - more or less in content. In some cases, the legislator associates this term with the subject of procedural activities and understands any procedurally significant acts of the investigator under investigative actions. In others, it focuses on the cognitive aspect and to investigators include actions that serve as methods for investigating the circumstances of a crime and establishing truth [20, p. 3].

To name one or other actions by the investigators only because they can be conducted by an investigator, we consider it not sufficiently substantiated. In conducting criminal proceedings, the investigator applies a wide range of actions stipulated by the CPC of Ukraine and differ in purpose and cognitive capabilities (measures to ensure criminal proceedings, notification of suspicion, suspension of pre-trial investigation, etc.). The difference between investigative actions from other procedural actions should be determined not by the subject of their conduct, but by the functional, essential characteristic - the search-cognitive character, the direction of obtaining new factual data and verification of those available. Suffice it is noted by MA Pogoretsky that the attribution of actions to the investigators by the subject of the conduct does not reflect their essence and gives grounds for the same actions, if proceeding from the subjects of holding, considered prosecutor's, judicial or those carried out operational divisions [13, p. 178]. There is a logical question, says D. B. Sergeyev, the terminological designation of these investigative (search) actions conducted by the prosecutor (in accordance with clause 4 of Part 2 of Article 36 of the Criminal Code of Ukraine), the head of the pre-trial investigation body (paragraph 6 part 2 of the article) 39 of the CPC of Ukraine) in a court session or at the initiative of the party of defense [15, p. 181-182].

In the future, when operating concepts, investigators (search) actions will come from their search and cognitive character and the focus on obtaining new factual data and checking the available.

When analyzing the concept of investigative (search) actions, it should be noted that such a definition is a novel of the current CPC of Ukraine. For a long time, legislation, theory and practice used the concept of investigative actions, conducted relevant research to determine its content and essence. Differences in the concept of investigators (wanted) actions from the previous "investigative action" legislator, as usual, does not lead. Scientists remain ungrateful, try to guess the thoughts of the legislator, and justify why the traditional investigative actions have gained the names of the wanted people.

These actions, according to D. S. Sergeyev, are of an informative character and an aspirational nature, the essence of which is the attempt of the procedural person to find and properly record in the relevant procedural sources the actual data relevant for the criminal proceedings. It is this aspect of the aforementioned activity that has intensified, in its opinion, the legislator has introduced into the CPC of Ukraine a slightly modified term for the indication of these actions - "investigative (search) actions" [15, p. 183].

We have made an attempt to find the origins for introducing this concept to the CPC of

Ukraine. For this purpose, the criminal procedure legislation of individual countries (Georgia, the Republic of Estonia, the Kyrgyz Republic, Moldova, the Republic of Belorussia, the Russian Federation, the Federal Republic of Germany) was investigated. In the CPC of Moldova, in section IV, the evidence and means of proof do not contain the word "investigative actions", but the means and methods of proof. In the CPC of Germany, actions aimed at obtaining information in some places are called means (§ 100a, 100s, 100i, etc.), and in other investigative actions (§§ 162, 165, 168, etc.). The remaining procedural codes refer to investigative actions, but none of them refers to "wanted", despite the fact that they can all be used to find objects, documents, and information known to the investigator and unknown to a certain time. In this case, the question arises, and what the developers of the current CPC of Ukraine did not satisfy the traditional definition of such actions as investigators without the additional word "search".

Investigating the means of information and cognitive activity, O. N. Kolesnichenko for the first time in the theory of criminology emphasizes that the investigator may instruct the inquiry authorities to conduct "separate investigative investigations" [7, p. 352]. Thus, in the scientific revolution more than half a century ago a new phrase "investigative investigatory actions" appears. Unfortunately, the author did not reveal the essence of this notion, the difference between these actions from other "investigative actions", the possibility of such actions not only the body of inquiry (at that time), but also the investigator himself. Interestingly, the so-called investigatory actions were taken by the developers of the new CPC of Ukraine, chapter 20 of which is called "Investigative (wanted) actions". In Article 3 of this Code, "Definition of the main terms of the Code", as in the previous CPC, the definition of investigative actions is not given. However, in Art. 223 states that investigative actions are actions aimed at obtaining (collecting) evidence or verifying evidence already obtained in a particular criminal proceeding. The definition emphasizes precisely the procedural and cognitive nature of the procedural actions, according to which they relate to investigative (search) actions.

It should be noted that in the theory of forensics there is a distinction between investigative and investigative activities. R. S. Belkin sees it in the fact that the purpose of search activity is to establish and identify a crime and a criminal, and the purpose of the investigation is to prove the fact of committing a crime and blaming the perpetrator. One of the elements of the investigative activity of the investigator, he calls investigative actions, and emphasizes that they are carried out relatively well-known, established objects [1, p. 192-193]. The first investigation of the search should be considered by VI Popov [14]. In the future, the investigator's investigative work problems were reflected in the studies of O. Zakatov [6].

The study of the opinions of scholars on the attribution of those or other actions to the wanted persons is evidenced by the absence of this unity and the wide variety that needs special investigation. We will focus on one of the groups of such actions - investigative actions. These actions, as noted by R. S. Belkin, are carried out only in respect of known, established objects. In such a form, the interpretation of the search is also given in the dictionaries where it is understood as a system of investigative actions and operational measures to identify the disappeared perpetrator, the stolen property, etc. [2, p. 1084] That is, it's about the famous objects that need to be found. At the same time, investigative actions can be carried out to find objects that are not yet known to the investigator. This can occur during the review of the place of the event and other investigative actions, which corresponds more to the notion of no search, and search [2, p. 915].

If investigatory actions can be used to find both known and unknown objects, is it appropriate to add the word "wanted" to them, is it possible to return to the time-tested phrase for their designation "investigative actions". We ask the opponents not to blame us for nostalgia for the Soviet past. The name "investigative action" appeared in jurisprudence much earlier than the Soviet era, it was perceived as traditional to refer to this type of activity and was used for a long time by science and practice.

Analyzing the cognitive tool for investigating crimes, it is impossible to deny that the current CPC of Ukraine, on the one hand, significantly expands the means of obtaining information by the investigator, and, on the other hand, gives him the right to use cognitive techniques that are inherent in operational units, in their essence they are reminiscent of operational-search activities, which were called investigative (search) actions. On this basis, some scholars believe that there was a partial merger of criminal-procedural and operational-search laws [19, p. 107]. Instead M.E.Shumylo points out the partial unification of non-legislation, and the police (operational search) and procedural activities, which provides for the verification of primary data on a possible crime in the field of criminal proceedings under the control of a criminal procedural law with

observance of its forms and guarantees [23, p. 228-229].

At one time, A. Ya. Doubinsky drew attention to the fact that the merging of these two functions (activities) is unacceptable, since it may adversely affect the assessment of evidence, the objectivity of the investigation, the formation of conclusions in criminal proceedings [4, p. 89]. In the scientific and educational literature of the Soviet period, noted M. E. Shumily, the generally accepted position was that the operational-search and criminal-procedural activities confused dangerous [22, p. 24-29].

At the same time, it is difficult to find work devoted to the disclosure of crimes, which did not provide recommendations for the organization of interaction between investigators and operational units of law enforcement. They touched upon the order of exchange of information, first of all collected by the use of operational-search activities at various stages of pre-trial proceedings. Evidence can serve as a scientific and practical manual of G. M. Gapotchenko, issued in 2012 and devoted to the peculiarities of criminal proceedings against the materials of operative and investigative activities [3].

A similar attitude to the possibility and forms of use of information obtained by the use of operational-search activities to a certain extent can be considered justified. At that time, the defense side was significantly limited in collecting and submitting information in favor of its client.

At present, the possibilities for protection have changed and are substantially expanded in identifying and filing sources of information to the court in favor of the defendant. In addition, it should be noted that the independence of the investigator in the adoption of procedural decisions and the conduct of investigative actions is significantly limited. Not so far, when no decision will be taken by the investigator personally without the consent of the head of the investigating unit, the prosecutor or the court. The question arises as to the danger that can be posed in connection with the expansion of the tools of cognitive activity of the investigator, which will be under sophisticated prosecutorial supervision and judicial control.

**Conclusions** The search for modern effective means of obtaining information for the disclosure of crimes in order to bring the perpetrators to justice and resuming the violated rights of the victims will continue. Already, the CCP has been supplemented by Art. 269-1 "Monitoring bank accounts", proposals were made to supplement chapter 16 of the CPC with the paragraph "Measures to ensure criminal proceedings in the field of information technology". Proposals of scientists on improving the information provision of criminal proceedings are aimed at balancing the parties' ability to achieve the truth. The investigator can not remain in a worse condition than the protection side, in providing means for identifying sources of information and filing for court consideration. If the defense party can use any means to identify sources of information other than criminal ones, then the investigator may apply only those provisions stipulated by law in the manner prescribed by him (observance of the procedural form).

***References***

1. Белкин Р.С. Криминалистическая энциклопедия. М.: Издательство БЕК, 1997. 342 с.
2. Великий тлумачний словник сучасної української мови / упоряд. і голов. ред. В.Т. Бусел. Київ, Ірпінь: ВТФ «Перун», 2001. 1440 с.
3. Гапотченко Г.М. Особливості порушення кримінальних справ за матеріалами оперативно-розшукової діяльності: науково-практичний посібник. Донецьк: ПП ВД «Кальміус», 2012. 248 с.
4. Дубинский А.Я. Исполнение процессуальных решений следователя. Правовые и организационные проблемы: монографія. Київ: Наукова думка, 1984. 182 с.
5. Дубинський А.Я. Вибрані праці. К.: Центр учбової літератури, 2014. 430 с.
6. Закатов А.А. Криминалистическое учение о розыске. Волгоград: ВСШ МВД СССР, 1988. 113 с.
7. Колесниченко А.Н. Розыск. Криминалистика. М.: Юр. лит., 1963. С. 352-357.
8. Кримінальний процес: підручник / Ю.М. Грошевий, В.Я. Тацій, А.Р. Туманянц та ін.; за ред. В.Я. Тація, Ю.М. Грошевого, О.В. Капліної, О.Г. Шило. Харків: Право, 2013. 824 с.
9. Ларин А.М. Работа следователя с доказательствами. М.: Юр. лит., 1966. 156 с.
10. Ларин А.М. Расследование по уголовному делу. Планирование, организация. М.: Юр. лит., 1970. 224 с.
11. Лузгин И.М. Методологические проблемы расследования. М.: Юрид. лит., 1973. 215 с.
12. Погорецький М.А. Поняття, зміст та структура кримінального процесу: проблеми теорії та практики. *Право України*. 2013. № 11. С. 42-54.
13. Погорецький М.А. Функціональне призначення оперативно-розшукової діяльності у кримінальному процесі: монографія. Харків: Арсіс, ЛТД, 2007. 576 с.
14. Попов В.И. Розыскная работа следователя. М.: Госюриздат, 1950. 150 с.

15. Сергєєва Д.Б. Поняття та види слідчих (розшукових) дій за чинним КПК України. *Право України*. 2013. № 11. С. 180-188.

16. Следственные действия (процессуальная характеристика, тактические и психологические особенности): учеб.пособие для вузов МВД СССР. Волгоград: ВСШ МВД СССР, 1984. 240 с.

17. Советский уголовный процесс: учебник / под общ. ред. М.И. Бажанова, Ю.М. Грошевого. К.: Вища школа, 1983. 440 с.

18. Солодков А. Забезпечення права на справедливий суд у кримінальному провадженні: окремі питання правозастосування. *Право України*. 2013. № 11. С. 55-62.

19. Ходанович В.О. Проведення негласних процесуальних дій за кримінально-процесуальним законодавством Німеччини, Швейцарії та Франції. *Вісник Академії адвокатури України*. Київ: ВЦ Акад. адвокатури України, 2016. Том 13. Число 3 (37). С. 106-114.

20. Шейфер С.А. Следственные действия. Система и процессуальная форма. М.: Юр. лит., 1981. 128 с.

21. Шейфер С.А. Сущность и способы собирания доказательств в советском уголовном процессе. М., 1972. 130 с.

22. Шумило М.Є. Оперативно-розшукові і слідчі дії: взаємозв'язок і розбіжність (гносеологічна і правова природа). *Становлення системи негласного розслідування у кримінально-процесуальному законодавстві України*: матеріали круглого столу (Київ, 7 жовтня, 2011 р.). К.: ФОП Ліпкан О.С., 2011. С. 24-29.

23. Шумило М.Є. Поліційна і кримінально-процесуальна діяльність: на стику минулого і сучасного. *Вісник Академії адвокатури України*. К.: Акад. адвокатури України, 2015. Том 12. Число 2 (33). С. 223-234.

*Received to editorial office 11.06.2018*

**Summary**

It is studied the origins of the investigative activities mentioned in the Russian Empire Code of Laws in 1857. The study of these activities content shows that its goal is to search of the information about the crime, the research and the necessary information acquisition. It is analyzed the scientists opinions about the definition of specific internals and characteristics allowing to mark the investigative activities between the other procedural acts. The author has a shot to analyze the practicability to use the modified term "operational (search) activities" in the Criminal Procedure Code and shows the not full accordance to the cognitive aspects of these activities. It is notified that there isn't a term "operational (search) activities" in any Criminal Procedure Codes studied by the author and it is supposed to use a term "investigative activities" in the legislation, the theory and the practice. It is drawn attention to the application of the procedures and methods of the operational search activities directed on the surreptitious obtaining of information for the criminal proceeding to have the information about the investigation of the heavy and especially grave crimes committed by the secret and disguised ways usually organized by the criminal groups with corrupted contacts.

***Keywords:*** *the crime, the cognitive activity means, the operational (search) activities, the procedural acts, the search, the detection, the investigative actions.*

**Tetyana Luskatova**
Ph.D.

**Oleksandr Luskatov**
Ph.D., As. Prof.

*(the Dnipropetrovs'k State University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-177-182*

# TRACE PICTURE OF GRIEVOUS BODILY HARM CAUSING VICTIM'S DEATH

**Лускатова Т., Лускатов О. СЛІДОВА КАРТИНА УМИСНИХ ТЯЖКИХ ТІЛЕСНИХ УШКОДЖЕНЬ, ЩО СПРИЧИНИЛИ СМЕРТЬ ПОТЕРПІЛОГО.** У статті досліджено слідові картину умисних тяжких тілесних ушкоджень, що спричинили смерть потерпілого, проаналізовано погляди вчених щодо різних типів відображень, що залишаються внаслідок посягань на здоров'я людини.

Матеріальні сліди завжди є об'єктивними носіями інформації про подію й тому найкращими джерелами для накопичення даних в межах криміналістичних характеристик певної категорії злочинів. Разом з інформацією щодо способів та іншими вагомими ознаками злочинів вони утворюють систему взаємозв'язаних типових зведень, що використовуються для висунення версій. Будучі знайденими, зафіксованими та вилученими в ході оглядів й інших процесуальних дій, проведених при розслідуванні багатьох злочинів, ці джерела інформації аналізуються та узагальнюються науковцями для отримання типових даних про види слідів. Їх систематизація дозволяє більш ефективно використовувати такий комплекс даних для розслідування злочину.

Сліди умисних тяжких тілесних ушкоджень, що спричинили смерть потерпілого, поділено на дві групи з урахуванням суб'єкта, який діє («сліди, в яких відображаються дії правопорушника» та «сліди, в яких відображаються дії жертви»). Відповідно, в межах кожної з них виділено підгрупи слідів, залежно від їх локалізації, зокрема такі, що залишаються на тілі та одязі правопорушника, на тілі та одязі жертви, на знаряддях злочину та оточуючих предметах, а також зміни в обстановці.

Вивчення архівних справ показало, що найчастіше правоохоронцями на місці злочину виявлялись сліди біологічного чи іншого походження (45% випадків), включаючи сліди крові, слини, сперми, сечі, частинки шкірного покриву, хімічні плями. Крім того, непоодинокими були випадки вилучення «залишених» об'єктів (25,5%), зокрема предметів, знайдених злочинцем на місці події або поблизу від нього й використаних для заподіяння ушкоджень; інструментів; пляшок; особистих речей; холодної та вогнепальної зброї; хімічних речовин. Слід зазначити, що на окремих місцях подій взагалі не було виявлено помітних змін в обстановці (16,5% випадків). Причиною цього є спроби злочинців приховати факти скоєння протиправних діянь та їх наслідки. Сліди-відображення вилучались досить рідко (всього 13%).

***Ключові слова:*** *криміналістична характеристика, слідова картина, умисні тяжкі тілесні ушкодження, смерть потерпілого.*

**Formulation of the problem.** Information on various types of traces of intentional grave bodily injuries that caused the victim's death, in conjunction with other elements of the forensic characterization of this category of acts, provides law enforcement with powerful information that helps to build versions and in general promotes a more effective investigation of crimes.

**Analysis of publications which discuss the solution to this problem.** Before consideration of traces characterizing the commission of various kinds of intentional bodily injuries, including serious ones, O.V. Bespechny, L.D. Gauchman, V.G. Drozd, O.M. Dufenyuk, V.V. Loginova V.V. Piaskovsky, S.O. Safronov, E.G. Sakharova, M.G. Shurukhnov and other scholars. However, in their work they are not fully disclosed features of the trace pattern of intentional grave bodily injuries that caused the death of the victim, not enough attention to the systematization of many types of tracks left after committing the crimes of the category. How-

ever, this issue has a certain specificity and requires a more thorough study, which determines the relevance of the article.

**The purpose of the article** is to study the positions of scientists in relation to various types of traces that are detected after intentional injuries and, in particular, those that led to the victim's death; analysis of empirical data obtained on the results of investigation of materials of investigative and judicial practice and questioning of law-enforcers; systematization of traces remaining due to willful grave bodily injuries that caused the death of the victim.

**Basic content.** Criminalistics has been proved, as stated by I.F. Krylov, that it is impossible to commit a crime, not leaving at the same or these traces [11, p. 59]. This determines their unconditional significance in the search for the perpetrator and the establishment of objective evidence of a criminal incident. By considering the relevant element in the forensic character of the crime, in particular the various types of acts against life and health of the individual, scientists offer a broad and narrow understanding of the traces. As M.V. Saltevsky, this category includes a description of material and ideal traces of reflection at the time of the crime [16, p. 420]. To trace a crime in the broad sense of O.N. Kolesnichenko included changes in the real situation of the place of the event; traces - reflection; objects - material evidence; documents - written evidence; persons who may be interrogated as witnesses [19, p. 39-40]. Traces in the forensic description of the crimes of a separate species A.F. Volobuyev outlines how various changes they make to the environment [9, p. 374]. According to V.O. Konovalova, "trail picture" is a set of tracks, reflecting the picture of the crime [6, p. 25].

Analyzing the regular relationships between the individual elements of forensic characteristics, I.M. Luzgin points out that they are established by studying the traces of the crime, which reflect the actions of the offender, the signs of himself or the victim, signs of tools used guilty. According to the scientist, for most acts against the life, health and will of the person is characterized by the formation of traces of violence on the body and clothes of victims, surrounding objects, violation of the situation [7, p. 301].

Consider the positions of scientists about the various types of traces that are detected after intentional bodily injuries and, in particular, those that led to the victim's death.

Traces of causing bodily harm O.M. Dufenyuk suggests grouping as follows: traces on the victim (on the body, clothing, microobjects, etc.), traces of the crime (blood, shoes, hands, transport, microobjects, etc.), traces on the person of the offender (from the blood of the victim, struggle, etc.) [8, p. 283-284]. Study of the trace pattern of bodily injuries allowed V.V. It is logical to state that for this category of crimes, typical examples are the presence of typical traces of weapons and tools; traces of struggle; traces of the victim and wine person in the form of biological secretions, traces of hands, feet and shoes, blood, clothing, various micro-objects and hormonal traces [13, p. 7]. In particular, the scientist emphasizes the detection of traces of human organism in 57% of cases, traces of hands - 29%, traces of feet - 9%, tracks of vehicles - 2%. According to her, 51% of cases remove clothes, shoes with traces of blood and traces of using the tools of crime, and 43% - the very weapon [12, p. 138-139]. V.V. Pyaskovsky notes that the main carriers of information on the spot of causing injuries are the traces left by the victim and the offender, the allocation of the human body, the things of the victim or attacker, objects of the environment [10, p. 449]. According to the results of the investigation of causing harm to E.G. Sakharova states that the traces of such acts are repeated, they become typical for the corresponding methods of crime, place and time of their commission. The scientist highlights the traces of the weapons of the crime (barbed-cutting, dumb hard objects, firearms) that remain on the body and clothing of the victim, elements of the environment; traces of the victim's actions; other traces of the actions of the offender, namely: traces of hands, shoes, blood; microobjects; thrown offenders of things [17, p. 46-51]. Also, S.O. Safronov emphasizes that the method and means of committing bodily harm in the first place will correspond to traces on the body and clothing of a person. Describing their varieties, the scientist also points out the possibility of detecting traces of blood, human secretions, microscopic objects; traces created as a result of various actions of the attacker: strikes, suppression, use of weapons, explosives, electric current, etc .; tracks on guns. He draws attention to the fact that material traces can be created as a result of actions of the victim. Among sources of perfect traces, besides the victim and guilty person, the author gives a wide range of different categories of witnesses [18, p. 25-32]. Consequently, there is a connection between the method of crime and the traces of its application: the latter allow one to determine the first; in turn, based on the data on the method, you can imagine both types of tracks, and objects on which traces can be located.

As pointed out by O.V. Bespechny, the consequences of causing serious harm to health

are various bodily injuries inflicted not only on the victim, and 21.1% - and the offender himself. For this category of crimes are traces of mechanical and other effects on the human body, in particular traces of blood on clothing, tools of crime, sex, walls, objects of the situation; also traces of the gun and often it is; biological traces of the offender and the victim (epithelium, saliva, sweat, hair, etc.). When committing such acts, there are always footprints of shoes and quite often - the traces of hands [2, p. 53-55]. Yes, L.D. Gauhman emphasizes that, when making bodily injuries, traces of blood are usually left; hand prints on individual objects, especially those that could have been caused by damage or blows from which they were caused; certain objects of the offender left at the scene, in particular as a result of the struggle with the victims (parts of clothes, pieces of fabric, etc.) [4, p. 55]. To the typical traces of murder and intentional infliction of serious harm to M.G. Shurukhov refers: the corpse of the victim; tools and means of crime or their share; traces of blood, footwear, fabric, transport, tools of crime, fingers, teeth; parts of clothes; injuries; various microobjects; allocation of the human body; biological objects of human life, etc. [20, p. 517]. Also, N.P. Makarenko notes that the offender, attacking the victim, often encounters resistance, fights with her and breaks her hair, especially if she has to deal with a woman. It remains on the hands of the criminal, clothing and tools. When the victim defends his hair against the attacker, he is exposed at the scene of the event, hands, body, clothes of the victim [15, p. 50].

Traces formed when causing severe bodily injuries, V.G. Drozd proposes to distribute traces of training, traces of causation and traces of influence on the human body. To the trace of this category of acts, the scientist also includes sources of perfect reflections, stating that every fifth crime was committed in the presence of witnesses [5, p. 7]. According to O.V. Yurovsky in the course of the review of places of events in cases of intentional causing of serious harm to health, which casually led to the death of the victim, the following typical objects and traces are revealed: a) guns; clothes; other objects left by the perpetrator; b) traces of blood, fingers, shoes, hair, microparticles, saliva, fuel and lubricants. The scientist emphasizes the struggle and others, testifying to the violent nature of the event [21, p. 134].

The specifics of the investigation of grave bodily injuries that caused the victim's death are such that in most cases (according to our data -81.6%), law enforcement officers are not able to get the perfect traces of the victims themselves, who at that moment already died. However, in the presence of eyewitnesses, using their memory, you can figure out information about the appearance of age, gender, specific signs and other intruder data, essential for their installation.

The analysis of the above positions of scientists indicates that they mainly characterize the material traces. Such approaches are based on the fact that it is difficult to reveal and accumulate more or less objective information about the typical ideal traces of this act in order to fill the content of forensic characteristics, since in its essence, the way of obtaining such data is always subjective, dependent on the perception of individuals, which vary in their ability to assess behavior, external signs of the suspect and others, circumstances of the event, etc. Hence, one should not count on identifying stable correlations between typical data on the ideal traces of a crime and other components of forensic characteristics. Unlike ideal material tracks, there are always objective carriers of event information and therefore the best sources for data accumulation within the specified scientific category. Together with information on the methods and other forensic evidence of crime, they form a system of interconnected model summaries used to promote versions, etc. Scientists are unanimous about the importance of material traces. M.V. Saltevsky notes that the forensic description describes which objects interact with each other in a concrete way, which at the same time form traces, where they are located and what features and properties are characterized [16, p. 421]. Even the behavioral, psychological features of the offender, according to V.O. Volynsky, are reflected in the form of not only perfect, but also material traces of crimes, in a material environment that faithfully reflects the characteristics of the person who committed the crime [3, p. 183]. Material traces of a crime, possessing specific properties, are in each other in certain relations, receive certain states, act as a logically formed system with its internal hierarchy, consistent in space and in time [14, p. 98]. According to E. Anushat, most of the evidence, in particular those arising from the survey, is materially perceptible, and the criminologist's eye reveals them, even the most insignificant data, to which others will not pay any attention [1, p. 16]. Future found, seized and seized during inspections and other investigative (search) actions conducted in the investigation of many crimes, material sources of information are analyzed and summarized by scientists to obtain typical data on types of traces and their use in formulating forensic characteristics of such acts.

During the archival research, we received data on the varieties of individual traces that were removed during the review of places of events. Thus, most law enforcement officers at the crime scene showed traces of biological or other origin (45% of cases), of which traces of blood (39.9%), saliva (1.5%), sperm (0.7%), urine (0, 7%), skin particles (1.8%), chemical spots (0.4%). In addition, cases of extraction of "left" objects (25.5%), including objects found by the perpetrator at or near the site and used for damage (12.2%), were not uncommon; instruments (8.6%); bottles (2.2%); personal belongings (1%); cold (0.7%) and firearms (0.4%) weapons; chemicals (0.4%). It should be noted that at certain places of events no significant changes were detected in the situation (16.5% of cases). The reason for this is attempts by criminals to conceal the facts of committing unlawful acts and their consequences. Traces of reflection were removed quite rarely (only 13%), namely: traces of hands (6,1%), traces of feet or footwear (4%), traces of instruments (1,5%), microobjects (0,7% ) The questionnaire of practical workers showed more optimistic results with regard to trace-mappings (35% of responses), of which: traces of hands - 10.5%, microscopes - 9.1%, trace guns - 8.4%, footprints or footwear - 5,2%, tracks of transport - 1,8%. Nearly equal respondents were determined to identify "left" objects (31%) and traces of biological or other origin (29%). In this case, in their responses also called "random" objects (10.8%) and traces of blood (20.6%). About no significant changes in the situation noted in 5% of responses.

The process of beating the victim of a crime of the investigated category determines the physical contact between the offender's person, his clothes, instruments, and the body and clothing of the victim. As a result, on the surfaces of both contacting persons there are various layers of biological origin, microparticles of clothing, implements. The study of case materials showed that in 37.8% of cases the offender was exposed to active resistance from the victim. Then the attackers on the body reveal bodily injuries in the form of bruises, scratches; on clothes - tears, hair, particles of skin. Other types of behavior were characteristic of the victims, in particular, 15.1% of them were called for help, 21.9% were passive, and 25.2% were trying to escape. It is clear that this caused the appearance of traces of different localization on the body of the victim, and in the latter case - additional traces on the back, on other parts of the body as a result of the fall, and so on.

Consequently, taking into account the above-mentioned scholar's opinions, empirical data, the main material traces of intentional grave bodily injuries that caused the victim's death, should be presented as follows:

**1) traces showing the offender's actions:**

***1.1) traces of violence on the body and victim's clothes:***

*– traces of exposure by hands, legs or other parts of the body:* bodily injuries (hematomas, abrasions, scratches, bites, fractures, the absence of individual organs, etc.); traces of blood; damage to clothes (ruptures, lack of sleeves, collars, pockets, buttons, etc.); clothing contamination (stains, layers of dust, soil, hair, other substances, microobjects);

*– traces of tools used by the offender:* bodily injuries (hematomas, abrasions, scratches, burns, fragmentation, incisions, holes, the absence of individual organs, etc.); traces of blood; damage to clothing (cuts, holes, tears, burns, lack of individual elements, etc.); clothing contamination (spots, layers of rust, fuel and lubricants, soil, particles of plant origin, products of a shot or an explosion, etc.);

*- traces-layers of saliva, urine, stomach contents, other secrets of the offender;*

***1.2) traces of their own body and clothing of the offender:***

*- traces of actions by parts of the body towards the victim:* bodily injuries (hematomas, abrasions, scratches, etc.); traces of blood; damage, clothing contamination;

*- traces-layers of biological excretions of the victim, her hair, skin particles;*

***1.3) traces on the instruments of the crime and surrounding subjects:***

*traces-reflection of hands, feet, shoes, guns, transport;*

*traces of weapons, explosives;*

*microobjects;*

*traces of blood;*

*traces-layers of saliva, urine, tiredness substance, other types of offender;*

***1.4) changes in the situation:***

*movement, damage to individual objects;*

*left weapons, guns, other objects;*

*traces of a fire, an explosion, strong chemical and other substances, etc.;*

**2) traces showing the victim's actions:**

***2.1) traces of the victim's resistance to the body and clothing of the offender, on the tools of the crime:***

*traces of exposure by the hands, feet or other parts of the body; from guns that fall into the hands of the victim:* bodily injuries (hematomas, abrasions, scratches, bites, etc.); traces of blood; damage, clothing contamination;

*traces-layers of biological sacrifices;*

*traces-reflection of her hands;*

***2.2) traces of the resistance of the victim on her own body and clothing:***

*traces of actions by parts of the body towards the perpetrator; from guns that fall into the hands of the victim:* bodily injuries (hematomas, abrasions, scratches, cuts, burns, etc.); traces of blood; damage, clothing contamination;

*traces-layers of biological secrets of the criminal, his hair, skin particles;*

***2.3) traces on surrounding subjects:***

*traces-reflection of hands, feet, shoes, etc .;*

*microobjects;*

*traces of blood;*

*traces-layers of biological sacrifices;*

***2.4) changes in the situation:***

*movement, damage to individual objects, etc.;*

*left things*

In addition, traces of other people, including eyewitnesses, can be spotted on the spot. Their research can provide clarification in the whole mechanism of committing a crime, detecting witnesses, if they disappeared, trying to avoid unnecessary "complications", proving the fact of their presence at the crime scene, etc.

**Conclusions.** The traces of intentional grave bodily harm that caused the victim's death should be divided into two groups, taking into account the actor ("traces showing the actions of the offender" and "traces showing the actions of the victim") within each of the which distinguish subgroups of tracks, depending on the localization of the latter. This system quite fully characterizes the trace of this category of crimes.

***References***

1. Анушат Э. Искусство раскрытия преступлений и законы логики. Київ, 1997. 78 с.

2. Беспечный О.В. Теоретические и практические проблемы расследования преступлений, связанных с причинением тяжкого вреда здоровью: дисс. … канд. юрид. наук: спец. 12.00.09 «Уголовный процесс, криминалистика и судебная экспертиза; оперативно-розыскная деятельность». Барнаул, 2003. 241 с.

3. Волынский В.А. Криминалистическая техника: наука – техника – общество – человек. М.: Юнити-дана, 2000. 311 с.

4. Гаухман Л.Д. Расследование по делам о телесных повреждениях и хулиганстве. М.: Изд. ВНИИ МВД СССР, 1975. 80 с.

5. Дрозд В.Г. Організаційні і тактичні особливості розслідування умисних тяжких тілесних ушкоджень: автореф. дис. … канд. юрид. наук: спец. 12.00.09 «Кримінальний процес та криміналістика; судова експертиза; оперативно-розшукова діяльність» / Дрозд Валентина Георгіївна; Київський національний університет внутрішніх справ. Київ, 2009. 17 с.

6. Коновалова В.Е. Убийство: искусство расследования: монография. Изд. 2-е дополн. и перераб. Харьков: СПД ФЛ Вапнярук Н.Н., 2006. 320 с.

7. Криминалистика: учебник для высших учебных заведений МВД СССР / под ред. профессоров Р.С. Белкина, В.П. Лаврова, И.М. Лузгина. М.: Высшая юридическая заочная школа МВД СССР, 1988. Т. II. 455 с.

8. Криміналістика: навчальний посібник / за заг. ред. Є.В. Пряхіна. Львів: ЛьвДУВС, 2010. 540 с.

9. Криміналістика: підручник / Берназ В.Д., Бірюков В.В., Волобуєв А.Ф.; за заг. ред. А.Ф. Волобуєва; МВС України, Харк. нац. ун-т внутр. справ. Харків: ХНУВС, 2011. 666 с.

10. Криміналістика: підруч. / В.В. Пясковський, Ю.М. Чорноус, А.В. Іщенко, О.О. Алексєєв та ін. Київ: Центр учбової літератури, 2015. 544 с.

11. Крылов И.Ф. Криминалистическое учение о следах: монография. Л.: Изд-во Ленинградского университета, 1976. 198 с.

12. Логінова В.В. Інформаційність слідової картини заподіяння тілесних ушкоджень. *Вісник Київського національного університету внутрішніх справ*. 2010. № 4 (71). С. 136-143.

13. Логінова В.В. Основні положення методики розслідування заподіяння тілесних ушкоджень: автореф. дис. … канд. юрид. наук: спец. 12.00.09 «Кримінальний процес та криміналістика; судова експертиза; оперативно-розшукова діяльність» / Логінова Вікторія Вікторівна; Національна академія внутрішніх справ. Київ, 2012. 17 с.

14. Лукашевич В.Г. Осмотр места происшествия как информационно-тактическая основа организации раскрытия преступлений по горячим следам / В.Г. Лукашевич, И.Х. Турсунов. *Актуальные проблемы совершенствования производства следственных действий: сборник научных трудов.* Ташкент, 1982. С. 96-101.

15. Макаренко Н.П. Техника расследования преступлений: практич. руководство для судебных работников [Репр. воспр. текста изд. 1925 г.]. Херсон: Гринь Д.С., 2013. 164 с. (Место вып. ориг. изд. и изд-во: Харьков, Юридическое издательство НКЮ УССР).

16. Салтевський М.В. Криміналістика (у сучасному викладі): підручник. Київ: Кондор, 2006. 588 с.

17. Сахарова Е.Г. Расследование причинения вреда здоровью: дисс. … канд. юрид. наук: спец. 12.00.09 «Уголовный процесс, криминалистика и судебная экспертиза; оперативно-розыскная деятельность» / Гос. образовательное учр. высшего профессионального образования «Тюменский юридический институт». Тюмень, 2005. 256 с.

18. Сафронов С.О. Методика розслідування умисного заподіяння тяжких і середньої тяжкості тілесних ушкоджень: науково-практ. посібник. Харків, 2003. 175 с.

19. Советская криминалистика. Методика расследования отдельных видов преступлений / В.К. Лисиченко, В.И. Гончаренко, М.В. Салтевский и др.; под ред. В.К. Лисиченко. Київ: Высшая шк., 1988. 405 с.

20. Шурухнов Н.Г. Криминалистика: учебное пособие. М.: Юристь, 2002. 639 с.

21. Юровских А.В. Расследование умышленного причинения тяжкого вреда здоровью, повлекшего по неосторожности смерть потерпевшего: дисс. … канд. юрид. наук: спец. 12.00.09 «Уголовный процесс, криминалистика и судебная экспертиза; оперативно-розыскная деятельность» / Гос. образоват. учреждение высшего проф. образования «Сургутский госуд. ун-т Ханты-Мансийского АО». Сургут, 2005. 249 с.

*Received to editorial office 02.06.2018*

**Summary**

The article investigates the trace of intentional grave bodily injuries that caused the victim's death, analyzes the views of scientists in relation to various types of mappings that remain in the course of intentional attacks on human health.

Material tracks are always objective media about event information and therefore the best sources for data accumulation within the forensic characteristics of a particular category of crimes. Together with information on the methods and other pivotal evidence for crime, they form a system of interconnected model summaries used to promote versions. Once discovered, recorded and seized during surveys and other investigative (search) actions, these sources of information are analyzed and summarized by scientists to obtain information about the types of traces. Their systematization allows more efficient use of the given complex of data for the purpose of investigation of a crime.

Traces of deliberate grave bodily harm that caused the victim's death are divided into two groups, taking into account the acting entity ("traces showing the actions of the offender" and "traces showing the actions of the victim"). Accordingly, within each of them, subgroups of tracks are identified, taking into account their localization, in particular, those that remain on the body and clothing of the offender, on the body and clothing of the victim, on the tools of the crime and surrounding objects, as well as changes in the environment.

The study of archival cases made it clear that most law enforcement officers at the crime scene showed traces of biological or other origin (45% of cases), including traces of blood, saliva, sperm, urine, skin particles, chemical spots. In addition, cases of removal of "remaining" objects (25.5%), including objects found by the offender on the scene or near him and used for damages, were not uncommon; instruments; bottles; personal things; cold and firearms; chemicals.

It should be noted that at certain places of events no significant changes were observed in the situation at all (16.5%). The reason for this is attempts by criminals to conceal the facts of committing unlawful acts and their consequences. Traces of reflection, in particular, traces of the hands, footprints or footwear, traces of tools, microobjects, were removed quite rarely (only 13%).

***Keywords:*** *forensic characteristic, trace picture, intentional grave bodily injuries, death of the victim.*

**Viktoriya Rogalska**
Ph.D.
*(the Dnipropetrovsk State University of Internal Affairs)*

# PROCEDURAL OPPORTUNITIES FOR OBTAINING ITEMS AND DOCUMENTS IN CRIMINAL PROCEEDINGS

*DOI: 10.31733/2078-3566-2018-2-183-188*

**Рогальська В.В. ПРОЦЕСУАЛЬНІ МОЖЛИВОСТІ ОТРИМАННЯ РЕЧЕЙ І ДОКУМЕНТІВ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ.** Роботу присвячено дослідженню процесуальних шляхів отримання речей та документів у кримінальному провадженні. У статті проаналізовано підстави, умови та процесуальний порядок отримання речей і документів в межах виконання ухвали про тимчасовий доступ до речей і документів.

До системи процедурних способів одержання речей та документів у кримінальному провадженні віднесено: добровільне надання справ та документів слідчого; Попит на речі та документи на підставі запиту; отримання речей та документів у межах виконання рішення про тимчасовий доступ до речей та документів; захоплення речей та документів під час пошуку; 2) добровільне надання виступів та документів пропонується скласти протокол про добровільний прийом речей або документів відповідно до статті 104 КПК України з посиланням на ч.2 ст. 93 і ч.2 ст. 100 КПК України. Якщо речі або документи отримані від учасників кримінального провадження, які мають таке право (потерпілий, підозрюваний, цивільний позивач, цивільний відповідач, їх представники та законні представники, захисник), - також з посиланням на відповідну статтю, де таке право регулюється; 3) визначаються підстави, умови та процедурна процедура тимчасового доступу до речей та документів у кримінальному судочинстві.

***Ключові слова**: отримання речей і документів, захід забезпечення кримінального провадження, тимчасовий доступ до речей і документів, кримінальне провадження.*

**Formulation of the problem.** To ensure the tasks of the criminal process, which are regulated in Art. 2 of the Criminal Procedural Code of Ukraine (hereinafter referred to as the CPC of Ukraine), the legislator imposes certain obligations on the subjects of criminal proceedings and defines their rights. At the same time, the government hopes that the subjects of criminal proceedings will actively participate in the criminal process, contribute to the achievement of its tasks and in good faith carry out procedural duties. However, the tasks of criminal proceedings do not always coincide with the interests of the participants in the proceedings, and therefore the subjects of this proceeding may hinder the achievement of the tasks specified by the law, by not fulfilling or unduly executing procedural obligations or abusing the rights granted by the legislation. That is why, in order to ensure the achievement of the objectives of criminal proceedings, criminal procedural law provides for the possibility of applying measures to ensure criminal proceedings. These measures make it possible to identify, collect and preserve evidence, to prevent possible unlawful behavior or to exclude the possibility of a suspect, accused of avoiding pre-trial investigation and trial.

Analysis of the reporting of first instance courts on the examination by the investigating judge of petitions, complaints, applications during the pre-trial investigation in the period from 2014 to 2017 by the total number of petitions of the investigator, the prosecutor on the application of measures to ensure criminal proceedings makes it possible to conclude that one of the most widespread among all The measures to ensure criminal proceedings are temporary access to things and documents. Analysis of applications for temporary access to things and documents submitted to courts in the period from 2014 to 2017 (245052 petitions in 2014, 134641 in 2015, 1 130979 in 2016, 257744 in 2017 [1]) indicates that the number of appeals to an investigating judge on its application does not decrease, and in comparison with the last years - only increases.

**Analysis of publications that initiated the solution to this problem.** The questions of application of measures for ensuring criminal proceedings were investigated in their writings by such scholars as: O. M. Humin, G. K. Kozhevnikov, L. M. Loboyko, V. O. Popelyushko, V. I. Slipchenko, L. D. Udalova, O. G. Shilo, O. Yu. Hablo and others, but the available scientific research does not cover all aspects of the institute of measures to ensure criminal proceed-

ings. Although the use of temporary access to things and documents has been repeatedly investigated in recent years since the entry into force of the CPC of Ukraine in 2012, some aspects of the aforementioned criminal proceedings have not been adequately researched.

**Purpose of the article**. This article is a new scientific result regarding the procedural possibilities of obtaining things and documents in criminal proceedings, including during the execution of a decision on temporary access to things and documents.

To achieve this goal, it is necessary to fulfill the following tasks: 1) analyze the procedural ways of obtaining things and documents in criminal proceedings and formulate their system; 2) to investigate the problematic issues that arise when applying temporal access to things and documents and suggest specific ways to resolve them.

**Presentation of the main research material.** System analysis of criminal procedural legislation and the study of the views of scholars on procedural possibilities for obtaining things and documents allowed us to conclude that the investigator as an independent procedural person can access things and documents in the following ways: 1) obtaining the necessary things or documents that will have proof value (voluntary reception); 2) the demand for things or documents (based on the request); 3) application of criminal proceedings - temporary access to things and documents; 4) conducting a search, during which the necessary documents or evidence necessary in a certain criminal proceeding will be seized.

Consider each of the above methods in detail.

In accordance with Part 2 of Art. 93 of the CPC of Ukraine, the prosecuting party carries out collection of evidence, including by obtaining from the bodies of state authority, local self-government, enterprises, institutions and organizations, officials and individuals the things, documents, information, expert opinions, conclusions of audits and acts of inspections [2]. That is, the investigator has the right to collect evidence, if the individual independently exercising his right to submit evidence, appeals to the investigator with a proposal to accept certain things or documents from him.

Obtaining of things and documents in this way occurs when the person is interested in providing things and documents that are relevant for the criminal proceedings and do not contain a secret protected by law, independently appeals to the investigator with the proposal to accept certain things or documents from him. Obtaining such things or documents, consider it necessary to file a protocol on the voluntary reception of things or documents, which should be drawn up in accordance with Article 104 of the CPC of Ukraine, with reference to Part 2 of Art. 93 and Part 2 of Art. 100 CPC of Ukraine. If, however, things or documents are obtained from participants in criminal proceedings that are endowed with such a right (victim, suspect, civil plaintiff, civil defendant, their representatives and legal representatives, defender), then also with reference to the relevant article where such right is regulated. Such a procedure for obtaining things and documents is the most simplified among all existing and is consistent with the CPC of Ukraine, which excludes in the future the adjudication of a judge against the inadmissibility of evidence obtained in this way.

The second method is also provided in Part 2 of Art. 93 CPC of Ukraine, namely: by requesting from the bodies of state power, bodies of local self-government, enterprises, institutions and organizations, officials and individuals the things, documents, information, conclusions of experts, conclusions of audits and acts of inspections.

The request is to bring a party, in writing or verbally, to the prosecution or defense of officials and citizens about the provision of written documents or items; fulfillment of requirements by addressees; acceptance by the parties of the prosecution and protection of objects and fixing this action in criminal proceedings, etc. [3].

Such a claim for things and documents is often carried out by sending a written request to the authorities, local authorities, enterprises, institutions and organizations, officials and individuals regarding the issuance of specific things or documents to the investigator.

In our opinion, this method also has the right to exist, but we believe that it is appropriate to use it only in cases where things and documents do not contain a secret protected by law and there are reasons to believe that the destruction or change of the necessary for the criminal proceedings of things or documents, will not happen.

Thus, for example, if the owner of the right to investigate a criminal proceeding of things and documents is a party to protection, then this method is not very effective, since in many cases the person either refuses to give the official authorized to carry out the pre-trial investigation to the official the requested items and documents, or may even their destroyed if they contain evidence of her guilt in committing a criminal offense.

Consequently, from the above definition, we can conclude that a claim may be applied in such cases if: 1) it is known from whom or where exactly the things or documents are stored; 2) they do not contain a secret protected by law; 3) there is no threat that things or documents will be destroyed or damaged.

The third way is to get things and documents through the application of criminal proceedings in the form of temporary access to things and documents.

To date, the CPC of Ukraine has not provided a clear list of objects, which may be granted temporary access, and which should be obtained by soliciting or obtaining from the state authorities, local self-government bodies, enterprises, institutions and organizations, officials and individuals (Part 2, Article 3, Article 93 of the CPC) [4]. But, given the content of the provisions of Part 1 of Art. 86, parts 2 and 3 of Art. 93 CPC, the application by the party of criminal proceedings of such a method of gathering evidence as the receipt of things or documents (Part 7 of Article 163 of the CPC) during the temporary access to things and documents may be exercised in the following cases: 1) the person in whose possession things or documents do not wish to voluntarily transfer them to a party to criminal proceedings or there is reason to believe that it will not make such a transfer voluntarily upon receipt of the corresponding request or attempt to change or destroy the relevant items or documents; 2) things and documents, according to Art. 162 CPCs contain a law-protected secret, and such extraction is necessary to achieve the purpose of the application of this measure of protection. In other cases, a party to criminal proceedings may claim and receive things or documents provided they are voluntarily provided by the owner without the use of the procedure provided for in Chapter 15 of the Criminal Procedure Code [5].

Thus, the ability to claim things and documents without the use of temporary access associated with their voluntary provision by the owner, as well as the lack of reason to believe that the owner of things and documents will try to change or destroy the relevant things or documents after receiving the request. Therefore, in order to appeal to an investigating judge, a court with temporary access to things and documents will have reasonable suspicion of the investigator about the possibility of changing or destroying things or documents by the person in whose possession they are or information that things and documents contain information that constitute a secret protected by law.

According to Art. 162 of the CPC of Ukraine, the secret protected by law includes:

1) information held by the media or journalist and provided to them on condition of non-disclosure of the authorship or source of information. In accordance with Part 3 of Art. 25 of the Law of Ukraine "On Information", the journalist has the right not to disclose the source of information or information that allows the establishment of sources of information, except when it is obliged to this decision by the court on the basis of the law [6].

2) information that may constitute a medical secret. According to Part 1 of Art. 40 "Fundamentals of Ukrainian legislation on health care", medical workers and other persons who have become aware of illness, medical examination, examination and their results, intimate and family aspects of a citizen's life in connection with performance of professional or official duties , do not have the right to disclose this information, except cases provided by legislative acts [7].

3) information that may constitute a secret of the commission of notarial acts. In accordance with Part 1 of Art. 8 of the Law of Ukraine "On Notary", a set of information obtained during the performance of a notarial act or appeal to the notary of the person concerned, including the person, his property, personal property and non-property rights and duties, etc., constitute a notarial secret [8].

4) confidential information, including those containing commercial secrets. According to Part 2 of Art. 21 of the Law of Ukraine "On Information" confidential is information about an individual, as well as information access restricted to a natural or legal person, other than the subjects of power [6]. And also, according to Art. 505 of the Civil Code of Ukraine, information classified as secret is classified in the sense that it is generally or in a certain form and in aggregate of its constituents is unknown and not readily accessible to persons who normally deal with the type of information to which it in this regard, has a commercial value and was subject to appropriate measures to preserve its secrecy by the person who legally controls this information [9].

5) information that may constitute bank secrecy. Information about the activities and financial condition of the client, which became known to the bank in the course of customer service and the relationship with it or third parties in the provision of bank services, is a bank

secret [10].

6) personal correspondence and other personal records. The Constitution of Ukraine guarantees each prohibition on interference in his personal and family life; ensures observance of the secrecy of correspondence, telephone conversations, telegraph and other correspondence; Prohibition of the collection, storage, use and distribution of confidential information about a person without his consent [11].

7) information contained in operators and telecommunication providers, communications, subscribers, provision of telecommunication services, including receiving services, their duration, content, routes, etc. In accordance with Part 1 of Art. 9 of the Law of Ukraine "On Telecommunications", the protection of the secrecy of telephone conversations, telegraph or other correspondence transmitted by technical means of telecommunications, and information security of telecommunication networks are guaranteed by the Constitution and laws of Ukraine [12].

8) personal data of a person who is in her personal possession or in the database of personal data that is owned by the owner of personal data. The grounds, procedure for accessing and using personal data about a person or obtaining information from existing databases is determined by the Law of Ukraine "On Protection of Personal Data" [13];

9) state secrets. State secret is a kind of secret information that includes information in the field of defense, economy, science and technology, external relations, state security and law and order protection, the disclosure of which may harm the national security of Ukraine and recognized in accordance with the procedure established by the Law of Ukraine "On State Secrets ", Are state secrets and are subject to state protection [14]. The only national classifier of such information is the set of information constituting state secrets [15] [16].

The procedural procedure for the temporary access to things and documents is as follows:

1) the parties, observing the requirements of Art. 160 CPC of Ukraine filed a petition to the investigating judge, court, about the necessity of the application of this measure of protection;

2) an investigating judge, the court carries out a judicial challenge of the person in possession of the necessary things and documents, except in the case of a party to criminal proceedings who has requested to prove the existence of grounds for believing that there is a real threat of change or destruction of things or documents;

3) examination by the investigating judge, court investigating petition for temporary access to things and documents, during which the party to the criminal proceedings who has applied must prove: - that the things or documents to which temporary access is requested: a) are or may be in the possession the relevant natural or legal person; b) by themselves or in combination with other things and documents of the criminal proceedings in connection with which the petition is filed, are essential for the establishment of important circumstances in the criminal proceedings; c) do not constitute themselves or do not include things and documents that contain a secret protected by law. In the case of filing a petition concerning things and documents containing a secret protected by law - a) the possibility of use as evidence of the information contained in these speeches and documents; b) the inability to prove in other ways the circumstances which are supposed to be brought with the help of these things and documents; c) in the case of access to documents containing information constituting a state secret, the presence of the corresponding permission of the person submitting the petition. In the case of a request for the seizure of things and documents, the party to the criminal proceedings must prove that: a) without such a seizure, there is a real threat of change or destruction of things and documents; b) such extraction is necessary to achieve the purpose of access to things and documents.

4) The decision of the investigating judge, the court to order temporary access to things and documents that must comply with the requirements of Article 164 of the CPC of Ukraine, or - to refuse to comply with the relevant petition.

5) Implementation of the decision on temporary access to things and documents. Upon receipt of the decision, the investigator can temporarily access things and documents. A person specified in the decision of the investigating judge, the court on temporary access to things and documents as the owner of things or documents, is obliged to grant temporary access to the court specified in the decision specified in the decisions and documents to the person indicated in the corresponding decision of the investigating judge.

The fourth way of obtaining things and documents may be applied by the party to crim-

inal proceedings in the case:

1) the removal of the things and documents specified in the decision of the investigating judge on the conduct of the search;

2) temporary seizure of things and documents during a search, inspection or search of a person during detention. A search may be carried out as a result of failure to comply with the decision on temporary access to things and documents. In this case, according to Art. 166 of the Criminal Procedure Code of Ukraine, an investigating judge, the court, at the request of the party to the criminal proceedings, which has been granted the right to access to things and documents on the basis of a ruling, has the right to decide on a permit for search in accordance with the provisions of the CPC of Ukraine with a view to finding and removing said things and documents.

Also, the search may be conducted in order to find specific things and documents and to appeal to the investigating judge with a petition for temporary access to things and documents.

In our opinion, the latest version of the search to find specific things and documents is more tactically correct. Since, if the prosecution party has evidence, that the owner of the things and documents containing information relevant to the criminal proceedings may hide or destroy them, then request the application of a criminal proceedings - temporary access to things and documents is not appropriate The owner of things or documents, despite his obligation to provide them, may refuse to do so. If, however, even after this, the investigating judge is asked to search for a search, the question arises: will the expediency of conducting further investigative investigations if the suspect already knows about the need for the party to accuse the access to certain information contained in speeches and / or documents? We believe that no, after all, the person, before receiving the decision of the investigator on the search, there is a certain time that gives him the opportunity to destroy certain things or documents.

Based on the above, we can draw the following **conclusions**: 1) to the system of procedural ways of obtaining things and documents in criminal proceedings include: voluntary provision of investigator's things and documents; Demand of things and documents on the basis of a request; obtaining of things and documents within the limits of execution of the decision on temporary access to things and documents; seizure of things and documents during a search; 2) the voluntary provision of speeches and documents is proposed to be drawn up by a protocol on the voluntary reception of things or documents, in accordance with Article 104 of the CPC of Ukraine, citing Part 2 of Art. 93 and Part 2 of Art. 100 CPC of Ukraine. If things or documents are obtained from the participants in criminal proceedings that are endowed with such a right (victim, suspect, civil plaintiff, civil defendant, their representatives and legal representatives, defender) - also with reference to the relevant article where such right is regulated; 3) the grounds, conditions and procedural procedure for the temporary access to things and documents in criminal proceedings are determined.

***References***

1. Судова статистика. URL: https://court.gov.ua/inshe/sudova_statystyka.
2. Кримінальний процесуальний кодекс України від 13 квітня 2012 року № 4651-VI / Офіційний веб-сайт Верховної Ради України. URL: http://zakon2.rada.gov.ua/show/4651-17/page.
3. Кримінальний процесуальний кодекс України: наук.-практ. коментар: у 2-х т. / О.М. Бандурка, Є.М. Блажівський, Є.П. Бурдоль та ін.; за заг. ред. В.Я. Тація, В.П. Пшонки, А.В. Портнова. Х.: Право, 2012. Т. 1. 2012. 768 с.
4. Головюк І. В., Андрусенко С. В., Тимчасовий доступ до речей та документів як захід забезпечення кримінального провадження, спрямований на збирання та перевірку доказів. *Порівняльно-аналітичне право.* 2013. С. 293-297.
5. Про деякі питання здійснення слідчим суддею суду першої інстанції судового контролю за дотриманням прав, свобод та інтересів осіб під час застосування заходів забезпечення кримінального провадження: Лист Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 05.04.2013 № 223-558/0/4-13. URL: http://zakon4.rada.gov.ua/laws/show/v0558740-13.
6. Про інформацію: Закон України від 02 жовтня 1992 року № 2657-XII. URL: http://zakon4.rada.gov.ua/laws/show/2657-12.
7. Основи законодавства України про охорону здоров'я: Закон України від 19 листопада 1992 р. № 2801-XII. URL: http://zakon4.rada.gov.ua/laws/show/2801-12.
8. Про нотаріат: Закон України від 02 вересня 1993 року № 3425-XII. URL: http://zakon4.rada.gov.ua/laws/show/3425-12.
9. Цивільний кодекс України від 16 січня 2003 року № 435-IV. URL: http://zakon5.rada.gov.ua/laws/show/435-1.
10. Про банки і банківську діяльність: Закон України від 07 грудня 2000 року № 2121-III.

URL: http://zakon4.rada.gov.ua/laws/show/2121-14.

11. Конституція України від 28 червня 1996 року № 254к/96-ВР. URL: http://zakon4.rada.gov.ua/laws/show/254%EA/96-%E2%F0.

12. Про телекомунікації: Закон України від 18 листопада 2003 року № 1280-IV. URL: http://zakon4.rada.gov.ua/laws/show/1280-15.

13. Про захист персональних даних: Закон України від 01 червня 2010 року № 2297-VI. URL: http://zakon4.rada.gov.ua/laws/show/2297-17.

14. Про державну таємницю: Закон України від 21 січня 1994 року № 3855-. URL: http://zakon2.rada.gov.ua/laws/show/3855-12.

15. Звід відомостей, що становлять державну таємницю: затверджений Наказом Служби безпеки України від 12 серпня 2005 року № 440. URL: http://zakon/4.rada.gov.ua/laws/show/z0902-05.

16. Сліпченко В.І. Особливості застосування заходів забезпечення кримінального провадження: методичні рекомендації. Дніпропетровськ: ДДУВС, 2015. 84 с.

*Received to editorial office 17.06.2018*

**Summary**

The work is devoted to the investigation of procedural ways of obtaining things and documents in criminal proceedings. The article analyzes the grounds, conditions and procedural procedure for obtaining things and documents within the framework of the execution of the decree on temporary access to things and documents.

***Keywords**: receipt of things and documents, measures to ensure criminal proceedings, temporary access to things and documents, criminal proceedings.*

**Olena Ryabchynska**
Dr of Law, Prof.
(*the Volodymyr Stashys Institute of Law, the Classic Private University)*

*DOI: 10.31733/2078-3566-2018-2-188-192*

# TAKING INTO ACCOUNT FOR THE RELATIVE SEVERITY OF PENALTIES IN THE CRIMINAL LEGISLATION OF UKRAINE AND GEORGIA: A COMPARATIVE ANALYSIS

**Рябчинська О. УРАХУВАННЯ ПОРІВНЯЛЬНОЇ СУВОРОСТІ ВИДІВ ПОКАРАНЬ В КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ УКРАЇНИ ТА ГРУЗІЇ: ПОРІВНЯЛЬНИЙ АНАЛІЗ**. Проаналізовано актуальні питання реалізації властивостей системи покарань в процесі правозастосовчої діяльності. Акцентовано на тому, що відсутність чіткої регламентації порядку заміни основного виду покарання на більш м'який його вид породжує проблему вибору покарання з множинності м'якших видів, по якій простежуються різні теоретичні підходи.

Відзначено схожість систем покарань, встановлених в кримінальному законодавстві України та Грузії, а також і основних положень, що регламентують певний механізм реалізації їх системоутворюючих ознак при призначенні покарань і вирішенні інших питань, пов'язаних з кримінальною відповідальністю.

***Ключові слова:** система покарань, види покарань, ознаки системи покарань, заміна покарання, більш м'який вид покарання, призначення покарання.*

**Formulation of the problem.** The system of punishments in Ukraine, including various punishments in content and nature, makes it possible to ensure both the differentiation of criminal responsibility and individualization, and the justice of punishment in accordance with the gravity of the crime and the identity of the perpetrator. In the Ukrainian criminal law doctrine, the following basic features of the punishment system are traditionally distinguished: the punishment system is established only by law, that is, no punishment can be freely determined; its type, size, order and grounds for application can be determined only by law; the list of penalties forming the system is mandatory for the court; the list of penalties included in the system is

exhaustive and recorded in the order in which it is given in Art. 51 of the Criminal Code of Ukraine - from the least strictly to the most stringent. These features of the system of punishments, supported by legislatively defined general principles of sentencing, are aimed at ensuring an adequate and fair application of criminal law measures to the guilty person and unity of judicial practice. That is why, in sentencing, an important aspect is compliance with the above properties of the punishment system, which, unfortunately, does not always take place in the practice of judges.

**Analysis of publications on the research topic**. The issue of the implementation of the properties of the system of punishments, certain types of punishments and the general principles of sentencing as a whole has been widely and comprehensively considered by such domestic scientists as T.A. Denisova, V.I. Tyutyugin, V.V. Poltavets, Yu.V. Ponomarenko, V.O. Popras, V.V. Stashys, N.I. Khavronyuk, Yu.V. Shinkarov and others. Nevertheless, the theoretical and practical problems of implementing the properties of the punishment system in imposing punishments in other countries, in particular those that have been developing for a long period of time under a single criminal law doctrine, having similar legislation with Ukraine, which take into account Model Criminal Code for the CIS countries.

**The purpose** of the article is the object of our research interest, we identified the mechanism for implementing this feature of the punishment system as their clear certainty in the degree of rigor in the process of sentencing under the criminal legislation of Ukraine and Georgia in order to find out the most reasonable approaches.

**Statement of the actual material.** The system of punishments provided for in Art. 51 of the Criminal Code of Ukraine (hereinafter - the Criminal Code), includes such types of punishments as: fine; deprivation of a military, special rank, rank, rank or qualification class; deprivation of the right to occupy certain positions or engage in certain activities; public Works; correctional labor; service restrictions for military personnel; confiscation of property; arrest; restriction of freedom; content in a disciplinary battalion; imprisonment for a fixed term; life imprisonment [1].

The main types of punishment are community service, correctional work, service restrictions for military personnel, arrest, restriction of liberty, detention in a disciplinary battalion, imprisonment for a fixed term and life imprisonment. Additional punishments are deprivation of a military, special rank, rank, rank or qualification class, confiscation of property. Penalties such as fines and deprivation of the right to hold certain positions or engage in certain activities can be used both as basic and additional punishments.

In accordance with Art. 40 of the Criminal Code of Georgia types of punishments are: fine; deprivation of the right to occupy positions or engage in activities; socially useful work; correctional labor; restriction of persons for military service; restrictions on the use of firearms; House arrest; imprisonment for a certain period of time; indefinite deprivation of liberty; seizure of property [2].

Thus, the list of penalties under the criminal legislation of Ukraine is broader than in the Criminal Code of Georgia. The approaches of the Ukrainian and Georgian legislators to the allocation of basic and additional punishments are similar, except for such moments: 1) socially useful work as a type of punishment can be appointed both as the main and as an additional punishment; 2) The Criminal Code of Georgia does not contain a normative prescription similar to that in part 4 of Art. 52 of the Criminal Code - only one main punishment can be imposed for one crime, provided for in the sanction of the article (sanctions of the article) of the Special Part of the Criminal Code, to which one or several additional punishments can be attached in cases and in the manner prescribed by law.

Along with the normative prescription relating to the general principles of sentencing, which contains a formalized requirement to impose a stricter punishment among those envisaged for the crime committed only in the case when a less severe type of punishment is not sufficient to correct the person and prevent him from committing of new crimes, in the law enforcement practice of Ukraine the need to appeal to the content of art. 51 of the Criminal Code (Kinds of punishments) arises in the following cases: when clarifying issues of mitigating or strengthening responsibility (Article 5 of the Criminal Code); to identify crimes of minor gravity (part 2 of article 12 of the Criminal Code); in determining the punishment for an unfinished crime and for a crime committed in complicity (Art. 68); in determining a milder punishment than provided for by the law (Article 69 of the Criminal Code); in determining the punishment in the presence of circumstances mitigating the punishment (Article 69-1 of the Criminal Code); in determining the final punishment for the totality of crimes and aggregate

sentences, including when taking into account the rules of addition of punishments (Art. 70-72 CC); 7) when replacing the unserved part of the punishment with a milder one (Article 82 of the Criminal Code).

A similar situation can also be traced when analyzing the norms of Chapter XI (sentencing) of the Criminal Code of Georgia, which require taking into account the relative severity of types of punishments, in particular when: clarifying issues of mitigating or strengthening responsibility (article 3); sentencing in the presence of mitigating circumstances (article 54); the imposition of a punishment milder than provided by law (art. 55); sentencing for unfinished crime (art. 56); sentencing in the recurrence of crimes (art. 58); sentencing on the totality of crimes and sentences (Article 59); addition of punishments (Article 61); replacement of the unserved part of the punishment with a milder type of punishment (Article 73).

Analysis of the relevant norms allows to conclude that there are no fundamental differences in the legislative establishment of the need to take into account the provisions of Art. 51 of the Criminal Code of Ukraine and Art. 40 of the Criminal Code of Georgia. However, certain differences exist in terms of the purpose of punishment for the totality of crimes. Thus, the rules of sentencing for a set of crimes are defined in Part 1 of Art. 70 of the Criminal Code of Ukraine, where it is stated that the purpose of punishment is carried out by: 1) absorbing a less severe punishment by a more severe one; 2) the total addition of the penalties imposed within the limits defined by law; 3) partial addition of the penalties imposed within the limits defined by law.

The Criminal Code of Ukraine does not contain a clear requirement regarding the choice of the principle of sentencing for a set of crimes (except in cases where one of the crimes committed was life imprisonment). At the same time, the Plenum of the Supreme Court of Ukraine gives general recommendations, which are reduced to the need to take into account, along with the identity of the perpetrator and the circumstances mitigating and aggravating the punishment, the number of crimes included in the aggregate, the form of guilt and the motives for each of them, the severity of the consequences , type of aggregate and other [3, p. 265].

An analysis of the judicial practice of sentencing allows us to conclude that "the courts impose a final punishment by absorbing a less severe punishment more severely more often than by fully or partially adding punishments" [4, p. 266]. One of the options for the application of the principle of absorption of punishments in determining the final punishment for a set of crimes in the criminal law doctrine is the situation when the court imposed one of the most severe punishment for one of the crimes forming the aggregate. This position is argumented by the fact that "by establishing the principle of absorption, the law (Part 1 of Art. 70 of the Criminal Code) restricts its application to the observance of only one requirement: a punishment that absorbs another must be more severe, and the punishment that is absorbed is less strict. Since the absorption is not limited to the type of punishment, the application of this principle is possible with respect to punishments of both one type and different types "[5, p. 189-190].

In accordance with Part 1 of Art. 72 of the Criminal Code, when adding punishments for a set of crimes and a set of sentences, a less severe type of punishment is translated into a more strict type, based on the ratio established in this article. Established in criminal law science and tested in practice is an approach in which the choice of a stricter punishment is carried out firstly from its size - in case of assignment for crimes included in the aggregate punishments of one type, secondly - from "its place to the legislative list of punishments established in Article 51 of the Criminal Code in the case of the appointment of different types of punishments in such situations "[3, p. 191]. The same, or rather the same ratio, are the ratios of the types of punishments when they are transferred from the less strict to the more severe, established respectively in Art. 72 of the Criminal Code of Ukraine and Art. 61 of the Criminal Code of Georgia. However, this identity concerns only the transfer of such types of punishments as restriction of liberty, correctional work or restrictions on military service, socially useful labor (public work on the Criminal Code of Ukraine) to imprisonment. The Criminal Code of Ukraine expands the possibilities of the court when translating punishments and provides for options for transferring punishments not only to imprisonment, but also to such punishments as: detention in a disciplinary battalion, arrest, restriction of liberty (parts 2, 3, 4 of article 72 of the Criminal Code). An analysis of judicial practice shows that the Ukrainian courts, despite a fairly detailed regulation of the rules for the transfer of sentences, sometimes make mistakes when applying the provisions of Art. 72 of the Criminal Code. In certain cases, the local courts, in violation of the specified requirements of the law, appointed the final punishment of the defendants, translating the stricter type of punishment into a less severe one [6,

p. 360-361].

Both in the CC of Ukraine and in the CC of Georgia there is no clear regulation of the procedure for replacing the punishment with a lighter one, which gives rise to certain theoretical problems. For example, in the criminal law science there is no single vision of what kind of punishment a court may order according to Art. 69 of the Criminal Code of Ukraine. Some scientists believe that when assigning the main punishment not specified in the sanction of the relevant article (sanction of the article) of the Special Part of the Criminal Code, the judge must take into account the sequence of placement of the types of punishments in accordance with Art. 51 of the Criminal Code [7 p. 194]. A different position is also expressed, which boils down to the fact that "the law does not restrict the court's right to choose a lighter punishment and he decides this question at his discretion, taking into account the circumstances of the particular case and data on the perpetrator. Therefore, it can be any, but necessarily softer than the sanction defined by the sanction from the number of those provided for in art. 51 of the Criminal Code "[8, p. 276; 9, p. 797]. In fairness, it should be noted that the second approach is taken up by judicial practice and is widely used, especially when concluding plea bargains. For example, the sentence of the Irpensky Interdistrict Court of Kyiv Region dated January 29, 2014 PERSON_1 was found guilty of committing a crime under Part 2 of Art. 410 of the Criminal Code of Ukraine (the sanction of which provides for punishment in the form of imprisonment on lines from five to ten years) and a penalty agreed by the parties was imposed in the form of 3 (three) months of arrest in the guardhouse [10].

**Conclusions**. In general, it should be noted the similarity of the punishment systems established in the criminal legislation of Ukraine and Georgia, as well as the main provisions governing a specific mechanism for implementing their systemically important features in imposing punishments and solving other issues related to criminal liability. Without aiming for the purpose of the study, the content of the types of punishments that have undergone significant changes compared to the earlier current legislation, we find general approaches to assessing the degree of severity of types of punishments in the system and determining the general principles of sentencing taking into account the ratio of different types of punishments in the system. Certain differences have also been established in the number of types of punishments provided for in the criminal codes of Ukraine and Georgia, the regulation of individual issues relating to the sentencing of a set of crimes and a set of sentences. Of particular scientific interest is the practice of applying Articles 53-59, 61, 73 of the Criminal Code of Georgia, in order to clarify the situation with compliance with the provisions of the above standards, since even detailed regulation of certain requirements at the legislative level, as Ukrainian law enforcement practice shows, is not always a guarantee of correct and reasonable application of the law in sentencing.

***References***

1. Кримінальний кодекс України станом на 10.06.2018. URL: http://zakon5.rada.gov.ua/laws/show/2341-14.

2. Уголовный кодекс Грузии по состоянию на 30.05.2018. URL: //https://matsne.gov.ge/ru/document/view/16426.

3. Постанови Пленуму Верховного Суду України в кримінальних справах // *Бюлетень законодавства і юридичної практики України.* 2004. № 12. 360 с.

4. Кримінальне право України. Загальна частина: навчальний посібник / Агєєв М.М., Бахуринська О.О., Альошин Д.П. та ін.; за ред. Кашкарова О.О., Робака В.А. Сімферополь: КРП «Видавництво Кримнавчпеддервидав», 2010. 364 с.

5. Зінченко І.О., Тютюгін В.І. Множинність злочинів: поняття, види, призначення покарання: монографія / за заг. ред. проф. Тютюгіна В.І. Харків: Фінн, 2008. 336 с.

6. Судова практика Верховного суду України у кримінальних справах за 2008-2009 роки / за ред. П.П. Пилипчука. Київ: Істина, 2011. 736 с.

7. Науково-практичний коментар до Кримінального кодексу України: у 2-х т. Т. 1 / за заг. ред. П.П. Андрушка, В.Г. Гончаренка, Є.В. Фесенка. 3-тє вид., перероб. та доп. Київ: Алерта; КНТ; Центр учбової літератури. 2009. 964 с.

8. Кримінальний кодекс України. Науково-практичний коментар: у 2 т. / за заг. ред. В.Я. Тація, В.П. Пшонки, В.І. Борисова, В.І. Тютюгіна. 5-те вид., допов. Харків: Право, 2013. Т. 1: Загальна частина / Ю.В. Баулін, В.І. Борисов, В.І. Тютюгін та ін. 2013. 376 с.

9. Велика юридична енциклопедія: у 20 т. Харків: Право, 2016. Т. 17: Криміальне право / редкол.: В.Я. Тацій (голова), В.І. Борисов (заст. голови) та ін.; Нац. акад. прав. наук України; Ін-т держави і права ім. В.М. Корецького НАН України; Нац. юрид. ун-т ім. Ярослава Мудрого. 2017. 1064 с.

10. Вирок Ірпінського міського суду Київської області від 19 лютого 2014 року. Справа № 367/594/14к. URL: http://reyestr.court.gov.ua/Review/37731752.

*Received to editorial office 11.06.2018*

**Summary**

The author has analyzed current issues of implementation of the properties of the system of punishments in the process of law enforcement. It is emphasized that the lack of a clear regulation of the procedure for replacing the main type of punishment with a milder type of it creates the problem of choosing a punishment from a plurality of milder types by which different theoretical approaches can be traced.

***Keywords**: system of punishments, types of punishments, signs of the system of punishments, replacement of punishment, milder type of punishment, sentencing.*

**Ruslan Stepanyuk**
Dr of Law, Prof.

**Sergiy Lapta**
Ph.D., As. Prof.

*(the Kharkiv National University of Internal Affairs)*

*DOI: 10.31733/2078-3566-2018-2-192-197*

# GENESIS AND PROSPECTS OF THE DEVELOPMENT OF IDEAS ABOUT THE NATURE OF CRIMINALISTICS SCIENCE IN UKRAINE

**Степанюк Р., Лапта С. ГЕНЕЗИС І ПЕРСПЕКТИВИ РОЗВИТКУ УЯВЛЕНЬ ПРО ПРИРОДУ НАУКИ КРИМІНАЛІСТИКИ В УКРАЇНІ.** У статті розглянуто історичний аспект розвитку наукових поглядів щодо природи науки криміналістики в Україні. Підкреслено, що уявлення про неї як про виключно правову науку, що залишилось у спадок з часів тоталітаризму, призвело до відставання природничо-технічного напряму і відповідно негативно впливає на подальший розвиток криміналістичних досліджень. Запропоновано додатково вивчити можливість обґрунтування подвійної (юридичної та природничо-технічної) природи криміналістичної науки, у тому числі з урахуванням досвіду США та країн Європи.

***Ключові слова**: юридична наука, криміналістика, природа криміналістики, криміналістична техніка, розслідування злочинів.*

**Formulation of the problem.** The development of Criminalistics as an applied legal science largely depends on the tasks that it faces in connection with the activities of law enforcement agencies in the field of crime prevention. However, so far, Soviet theory of Criminalistics has dominated the national science. Consequently it is increasingly lagging behind the needs of the practice, and is incapable of performing its main function - servicing the criminal process by developing effective means, techniques and methods necessary for use in pre-trial investigation and legal proceedings.

In the modern period, almost all post-Soviet states are characterized by a crisis of Criminalistics. It is noted that this science has not yet been restructured on the rules of competition and only works by inertia in the interests of the preliminary investigation, "does not see" a court investigation, operates inquisitorial stereotypes. In fact, it does not offer practical guides to lawyers, prosecutors, and judges to working with evidence in court [1]. Unfortunately, there are some grounds for such an assessment of the state of Criminalistics in Ukraine.

**Analysis of publications on the research topic**. The issue of developing ideas about the nature of Criminalistics science in modern Ukraine was researched only fragmentarily, in particular, in the works of M.V. Danshin, V.A.Zhuravel, V.V.Yusupov, V.Y. Shepitko and some other authors. However, there remain a lot of discussion aspects in this problem, which requires further scientific research. In particular, it seems necessary to carry out a critical analysis of the existing scientific principles in the field of Criminalistics. And one of the first is the

direction of determining its true nature, and, therefore, the priority tasks and the possibilities of improving both scientific research and practical activity.

**Basic content.** As far as is known, before the October 1917 state rebellion in the Russian Empire, Criminalistics was in its inception stage. During the training of lawyers they used translations of scientific works of foreign authors, as well as the experience of lecturers recruited at European universities. The formation of a new discipline for that time was characterized by some uncertainty about the future path and depended on the influence of relevant Western European approaches.

Since the end of the XIX century the approach of H. Grosswas reflectedin scientific publications.It was based on the recognition of the position of the author in relation to Criminalistics as independent science. It was noted that the subject of Criminalistics should be regarded both rules of use of evidence and the study of criminals and criminal activity in general [2, p. 51; 3, p. 115-117].But also they were implanting a purely natural-technical approach to the understanding of the new field of knowledge, based on the positions of R-A Reissin relation to the “scientific police”, which S. Trehubov offered to call “criminal technology” [4, p. 9].In other words, pre-revolutionary Russian criminalists just failed to formulate a unified approach to understanding the nature and tasks of a new science, and were at the crossroads. They did not decide which path to choose - purely natural-technical (the use of technology in police activities) or integrated (the use of technology, together with legal issues of investigative work).

Until the mid-30's of the last century in the USSR, the development of Criminalistics science had been carried out generally through the implanting of translations of practical guides of foreign authors, mostly German ones. This had been done in order to satisfy the basic needs of practice in the most essential forensic knowledge [5, p. 19]. So, the positive practice of using advanced foreign experience in forensic activity continued. At the same time, Criminalistics itself was often called “criminal technique” or “criminal procedural technique” [6, p. 73; 7, p. 6-7].

In the first fundamental Soviet work on Criminalistics, I.M. Yakimovclearly supported the name “Criminalistics" and exposed foreign achievements of this science, that were progressive for that time the, drawing on the works of Western authors. He emphasized that Criminalistics is one of the sciences that develops separate branches of Criminal Law.It is of a very practical, applied nature and aims to provide scientific assistance to practice, for which it uses the methods of other sciences, mainly natural, medical and technical, and adapts them to the needs of criminal practice [8, p. 5].As O.A. Levy recalls, later I.M. Yakimov was accused of being referring to bourgeois criminaliststoo often. However, not only did he ignore these reproaches, believing that the works of these authors wereveryhelpful, but also invited students to come to his house and take the books of these authors. He said that no onewould be able to find them; allhad been frightened and destroyed them [9, p. XX].

Considering the backwardness of the Soviet state in the field of technology in general, and the forensic technology in particular, as well as the consequences of civil war and subsequent devastation in the country, it should be recognized that the scientists, whohad got basic training and practical experience mainly in tsarist times, chose the perfectly correct path according to generally accepted approaches in leading European countries. However, this period did not last long, until about the beginning of the 30-ies of the last century. During mass political repressions in the USSRit has become deadly dangerous to study foreign experience.

One of the first who started to politicize Criminalistics was B.M.Shawer.In his well-known work leading scientists of that period I.M. Yakimov, H.J. Manns, V.I.Gromov and others were rigorously criticized as "unable or deliberately not willing to understand the reactionary nature of bourgeois Criminalistics, to discover the reactionary line of this Criminalistics and to oppose to it an own line in Soviet Criminalistis" [10, p. 57].

It is clear that in such circumstances it was already impossible to implement advanced foreign achievements in the practice of crimeprevention and in the theory of Criminalistics. A political order was created for the construction of a new, "unique" Soviet Criminalistics. Accordingly, in the textbook of 1935, ithas already been fundamentally opposed to “bourgeois” science [11, p. 6].Criminalistics as an "investigation discipline" was started. It was pointed out that historically Criminalistics as a science appears only where it is inextricably bound up with the investigation, where it considers the investigation as the only process in which the role of the investigator is activated [10, p. 56]. Hereafter, the idea of an investigator as the main consumer of forensic recommendations was developed widely. It was emphasized that Soviet sci-

entists hasbegan to deviate from the influence of western criminalists, when, for understanding the subject of Criminalistics, along with the methods of using natural and technical sciences in order to combat crime, they adopted methods of their own investigation - its organization, planning and conduct [5, p. 25]. Also, in the textbooks of that period it was noted that bourgeois criminalists consider Criminalistics as nonlegal science and supposedly seek for ways to remove it from legal norms in order to facilitate and justify the use of forensic means and methods in the illegal practice of eavesdropping on telephone conversations, perusal of correspondence, etc. [12, p. 18-19].

It seems expedient to emphasize especially the harmfulness for the further development of science the path of gradual self-isolation of Soviet Criminalisticsthat was chosen in those days, and the beginning of systematic work aimed at opposing it to the Criminalistics of other civilized countries. It is clear that this was done in the light of state policy.Obviously, it is not possible to blame the scientists who, in the conditions of massive political repressions of the 1930s and later, were forced to act in this way in the rigid conditions of totalitarianism. However, we think that this error led to the crisis in Criminalistics.

O.M. Larinjustly noted that the "cold war" had a negative impact on the development of Soviet Criminalistics. Then the information on the achievements of foreign Criminalistics was minimized and decorated with secrecy labels. The study of Western European and American works in this area was generally allowed only to “expose the reactionary essence of bourgeois Criminalistics”. This prevented the development of use of foreign experience and, accordingly, the development of Criminalistics [13, p. 14].

The Soviet Criminal Procedure, as a vivid example of its inquisition model, was inherent in the crucial role of the preliminary investigation. Accordingly, the preconditions emerged in the subsequent representations of Criminalistics as a science exclusively on the investigation, the field of knowledge about the means, techniques and methods of investigation. It was not accidentally that the concept of H. Gross was taken, since he, at the time, especially noted that, unlike the testimony of witnesses, material evidence had to be collected and grouped to a hearing before a court, and it is quite correct to assert Criminalistics that the center of gravity the process must be transferred from the trial for the period of the preliminary investigation [14, p. XI-XII].In the USSR, not only was the gathering of material evidence gradually transferred to the stage of the preliminary investigation, but also the whole process of proof, while the court was given a formal role, which in fact consisted of the approval (sometimes not approval) of the investigator's indictment by issuing the verdict. Therefore, it is not surprising that on this ground, Criminalistics, as a science intended to serve criminal justice, began to go through the development of recommendations primarily for the preliminary investigation. At the same time, by the mid-1950s, the dominant concept of Criminalistics as a natural science ceased to satisfy the Soviet criminalists, and it was entirely, in our opinion, logical attempts to substantiate its dual (legal and natural-technical) nature.

It is widely known that M.S.Strogovich consistently expressed the view that Criminalistics has two parts: to a greater extent, legal (criminal-procedural), as well as scientific and technical (in the aspect of the development of techniques of technical and natural sciences) [15, p. 55-56].

P.I. Tarasov-Rodionov in the heat of a decisive critique of the “destructive influence of bourgeois Criminalistics”, whose “burping” he considered to be an understanding of it as an applied technical science, also expressed the right opinion that in Criminalistics there are two directions: a) the main thing - the disclosure and investigation of crimes (legal); b) subsidiary - methods of studying certain types of material evidence (based on the data processed and adapted for these purposes from natural sciences and engineering). The second direction is technical rather than legal, since it is not connected with the direct activity of the investigator, which is legal, but with the activity of expert specialist on issues requiring special knowledge [16, p. 153-154].

We think that the given point of view was somewhat hurriedly rejected by Soviet scholars, which laid the foundations for the further gradual decay of the natural-technical direction in Criminalistics. Scientists of that period indicated that supposedly it was proposed to divideCriminalistics to two different sciences, the Criminalistics itself (legal) and some other, scientific and technical discipline [17, p. 269]. However, neither M.S.Strogovich, nor P.I. Tarasov-Rodionov did not distinguish two different sciences. They ambiguously expressed the legal nature of Criminalistics. It was emphasized that the natural-technical direction is extremely closely connected with the legal and is of a subsidiary nature.That is, an attempt was made to

find a solution to the difficult problem of reflecting the heterogeneous nature of Criminalistics in its definition. But the Soviet ideas about the harmfulness of the idea of the double nature of Criminalistics have become rooted in the literature. For example, in modern textbooks it is also noted that the erroneous views of Criminalistics as a science of dual nature consists in the mechanical division of a unified science into legal and non-legal sections [18, p. 12].Considering the process of formation of scientific knowledge of nature and the subject of Criminalistics, M.V. Danshin observes that the mechanical division of the unified science into two diverse camps, legal and non-legal, impedes the further development of Criminalistics and artificially narrows the scope of its practical recommendations [19, p. 82].But, on the contrary, the negation of the natural and technical nature of Criminalistics technology significantly slows down its development and does not allow conducting full-fledged scientific research in this area.

Thus, the domination of the purely legal nature of Criminalisticsin Soviet science led to the neglect of the direction of forensic technology, and the maintenance of the needs of contemporary inquisitorial proceedings led to focus on the creation of criminalistics recommendations only for the stage of pre-trial investigation, accordingly, ignoring the directions of "Criminalistics for court", "Criminalistics for defence" etc.

Already after the collapse of the Soviet Union, an outstanding scientist-criminalist R.S. Belkinurged to review the understanding of Criminalistics as solely legal science and tried to substantiate its synthetic character. In his view, the new ideas about it as a synthetic science do not mean a return to the concept of its dual nature, emphasizing that the dual, or rather the plural nature, have all the sections of Criminalistics, all its content, but not some special part of it [20, p. 42-43]. This point of view caused vigorous debate and ambiguous assessments. For example, V.Y. Shepitko emphasizes the appropriateness of refining Criminalistics as a science of integral or synthetic nature, indicating that it is a special science, the uprising of which is due to the implementation of the achievements of science and technology in the practice of crime prevention [21, p. 43-44].At the same time V.A.Zhuravel supports the understanding of Criminalistics as a legal science, and notes that such an understanding does not prevent the further processes of integrating the achievements of other sciences and adapting them to the solution of its own problems [22, p. 54].

Modern criminalists of the RF are increasingly saying that post-Soviet Criminalistics is in crisis. It is emphasized that the fundamental cause of the crisis in Criminalistics is its synthetic nature, the absence of an internal systemic and integral picture of scientific knowledge, which constitute Criminalistics [23, p. 772].

In our opinion, the way out of a controversial situation may be just a return to the concept of the double nature of Criminalistics, namely the recognition of the natural and technical nature of its separate section - forensic technology. At the same time preventing the collapse of two sciences is in the plane of the allocation of such unifying features, which clearly indicate the harmfulness of the disparate development of forensic technology and criminalistics tactics, the feasibility of such a mutual penetration of its legal and non-legal provisions that make it expedient to the existence of a single allusion of knowledge. Relevant arguments are widely known and presented by scholars who, in our opinion, substantiated not so much the legal nature of Criminalistics as the unity of its two separate areas - legal and natural science.

This trend is also observed in the leading countries of the world, as there is a mutual influence of approaches to understanding the nature of Criminalistics from different legal families.

For instance, in the United States, where the most developed science of natural and technical nature, called Forensic Science, is increasingly used the term "Criminalistics". It is used in two meanings – broad, as a synonym of "Forensic Science" [24, p. 99] and in the narrow, as a designation of the component of Forensic Science, in particular those of its branches which are referred to the parts of criminalistics technology in Ukraine [25, p. 10]. At the same time, the legal issues surrounding the investigation in criminal proceedings are the subject of another area of knowledge, known as Criminal Investigations. US researchers point out that Criminal Investigations have not yet reached the status of a separate science and only prerequisites for this have been created [26, p. 5].

As for the relationship between Forensic Science and Criminal Investigations, it is noted that the first branch of knowledge is the application of natural and physical sciences to law, and the second – includes recommendations for criminal investigations, including the use of Forensic Science [27, p. 99-100].That is, Criminal Investigations actually includes sections that can be correlated with the legal components of domestic Criminalistics (criminalistics tactics and

methods of investigation), but also contains certain provisions of forensic technology. In turn, Forensic Science, combining the natural-technical sections, also studies specific issues of tactics, for example, the specifics of conducting an investigative experiment [28, p. 654-664]. So, there is a close connection between these disciplines and theissue of type of their relationship remains open.

For Ukraine and other post-Soviet countries, the concept of Criminalistics in the Federal Republic of Germany is particularly useful as it was the German-speaking foundation, on which Soviet and then Ukrainian Criminalistics developed. Today's understanding of German Criminalistics is based on its classification as criminal law science, but non-legal, along with Criminology and Forensic Science (Forensic Psychology, Forensic Biology, Forensic Chemistry, Forensic Physics, Forensic Nuclear Science and other courts disciplines) [29].It is important to note that German criminalists have recently called criminalistics technologyas natural and technical forensics, since this particular name, in their opinion, more accurately reflects the essence of this section, because its subject is reduced not only to technology [30, p. 228].Thus, there is a tendency for mutual penetration of approaches from the English-American and German understanding of Criminalistics, in particular recognition of its heterogeneity. This testifies to the need to further search for common and distinctive features of the legal and non-legal sections of Criminalistics science in order to establish its true nature and further improve the structure.

**Conclusion.** Summarizing the above, we note that the further development of Criminalistics in Ukraine should be in line with the tendencies inherent in the developed countries of Europe and the USA. The Soviet conception of Criminalistics as a legal science with exclusively legal nature led to a significant backwardness of the natural and technical direction of this field of knowledge. Therefore, it seems expedient to return to the recognition of its dual (legal and natural-technical) nature and on this basis to take effective measures to develop scientific research in the field of forensic technology. For this purpose, we consider itis expedient to distinguish the scientific specialty “Criminalistics” not only in the field of legal sciences, but also to provide real opportunities for conducting scientific research on Criminalistics in the field of technical, chemical and biological sciences. It is necessary to catalyze scientific research on the study of best practices in developed countries in order to eliminate the lagging in the use of technical means and special knowledge, both during a pre-trial investigation anda trial, both prosecution and the defense, and not only in the criminal, but also in civil and other areas of legal proceedings.

***References***

1. Александров А.С. Семь смертных грехов современной криминалистики / Веб-сайт «Международная ассоциация содействия правосудию». URL: http://www.iuaj.net/node/342.

2. Левенстим А.А. Доктор Ганс Гросс и его проект улучшения следственной части. *Журнал юридического общества при Санкт-Петербургском университете.* 1896. Кн. 3. С. 47-66.

3. Что такое криминалистика? *Журнал министерства юстиции.* 1900. № 9 (ноябрь). С. 114-125.

4. Трегубов С.Н. Основы уголовной техники. Научно-технические приёмы расследования преступлений. Петроград: Изд. Юридического книжного склада «Право», 1915. 334 с.

5. Белкин Р.С. История отечественной криминалистики. М.: НОРМА, 1999. 496 с.

6. Тагер А.С. О предмете и пределах науки об уголовном суде. *Право и жизнь*. 1924. Кн. 1. С. 50-74.

7. Натансон В.М. Основы техники расследования преступлений в конспективном изложении. Харьков: Б. и., 1925 (тип. ВУСПС им. П. Иванова). 22 с.

8. Якимов И.Н. Криминалистика. Руководство по уголовной технике и тактике. Новое изд., перепеч. с изд. 1925 г. М.: ЛексЭст, 2003. 496 с.

9. Леви А.А. Вступительная статья // В кн..: Якимов И.Н. Криминалистика. Руководство по уголовной технике и тактике. Новое изд., перепеч. с изд. 1925 г. М.: ЛексЭст, 2003. 496 с. С. XIX-XXIV.

10. Шавер Б.М. Предмет и метод советской криминалистики. *Социалистическая законность*. 1938. № 6. С. 56-82.

11. Криминалистика. Кн. 1 Техника и тактика расследования преступлений: учебник для слушателей правовых вузов / под ред. А.Я. Вышинского. М.: Гос. изд-во «Советское законодательство», 1935. 285 с.

12. Советская криминалистика: учебник / под ред. Р.С. Белкина. М.: Юр. лит., 1979. 464 с.

13. Ларин А.М. Криминалистика и паракриминалистика: научно-практическое и учебное пособие. М.: БЕК, 1996. 192 с.

14. Гросс Г. Руководство для судебных следователей как система криминалистики. Новое

изд., перепечат. с изд. 1908 г. М.: ЛекстЭст, 2002. 1088 с.

15. Строгович М.С. Курс советского уголовного процесса. М.: Изд-во Академии наук СССР, 1958. 703 с.

16. Тарасов-Родионов П.И. Советская криминалистика. *Вестник университета имени О.Е. Кутафина (МГЮА).* 2016. № 8. С. 150-157.

17. Белкин Р.С., Краснобаев Ю.И. О предмете советской криминалистики // Белкин Р.С. Избранные труды. М.: Норма, 2009. С. 268-275.

18. Криміналістика: підруч. / В.Ю. Шепітько, В.О. Коновалова, В.А. Журавель [та ін]; за ред. В.Ю. Шепітька. 5-те вид. переробл. та допов. Київ: Ін Юре, 2016. 640 с.

19. Даньшин М.В. Криміналістика XXI століття: місце у системі наукового знання: монографія. Харків: ХНУ імені В. Н. Каразіна, 2013. 480 с.

20. Белкин Р.С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики. М.: НОРМА, 2001. 240 с.

21. Шепитько В.Ю. Криминалистика XXI века: предмет познания, задачи и тенденции в новыхусловиях. *Современное состояние и развитие криминалистики: сб. науч. трудов* / под ред. Н.П. Яблокова и В.Ю. Шепитько. Харків: Апостиль, 2012. С. 41-54.

22. Журавель В.А. Вибрані твори. Харків: Вид. агенція «Апостіль», 2016. 704 с.

23. Холопов А.В. Синтетичность криминалистики как причина кризиса. *Современное развитие криминалистики и судебной экспертизы как реализация идей Р.С. Белкина:* материалы международной научно-практической конференции к 95-летию со дня рождения ученого, педагога, публициста (г. Москва, 22-23 ноября 2017 г.) Москва: РГ-Пресс, 2018. С. 770-775.

24. Michael L. Birzer and Cliff Roberson. Introduction to Criminal Investigation. CRC Press, Taylor & Francis Group, 2012. 372 p.

25. Lyman, Michael D.Criminal investigation: the art and the science / Michael D. Lyman. 6th ed.Published by Prentice Hall. 2011. 668 p.

26. Woods, Devere D. O'Hara's fundamentals of criminal investigation / by Devere D. Woods, Jr. 8th ed. Springfield, Illinois: CHARLES C THOMAS • PUBLISHER, LTD, 2013. 606 p.

27. Michael L. Birzer and Cliff Roberson. Introduction toCriminal Investigation. CRC Press, Taylor & Francis Group, 2012. 372 p.

28. Scientific evidence in criminal cases / Andre A. Moenssens, Fred E. Enbau, James E. Starrs. 3rd ed. 1986. 1241 p.

29. System der Kriminalwissenschaften. URL: http://www.gletschertraum.de/Kriminalistik1/ SystemderKriminalwissenschaften.htm.

30. Сокол В.Ю. Особенности криминалистической техники в Германии. *Общество и право*. 2009. № 4 (26). С. 228-231.

*Received to editorial office 11.07.2018*

**Summary**

The article deals with the historical aspect of the development of scientific views on the nature of the science of Criminalistics in Ukraine. It is emphasized that the idea of it as the only legal science left in the heritage from the time of totalitarianism has led to a lagging natural and technical direction and consequently negatively influences the further development of research in the field of Criminalistics. It is proposed to further explore the possibility of substantiating the dual (legal and natural-technical) nature of forensic science, taking into account the experience of the United States and European countries.

***Keywords:*** *legal science, Criminalistics, nature of Criminalistics, forensic technique, Investigation of crimes.*

**Olena Soldatenko**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

**Oleksandr Yunatskyy**
Ph.D., As. Prof.
*(the Zaporizhzhya National Technical University)*

*DOI: 10.31733 / 2078-3566-2018-2-198-202*

# PROBLEMS OF EVIDENCE IN THE COURT OF APPEAL IN CRIMINAL PROCEEDINGS

**Солдатенко О., Юнацький О. ПРОБЛЕМИ ДОКАЗУВАННЯ В СУДІ АПЕЛЯЦІЙНОЇ ІНСТАНЦІЇ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ.** Проблеми реалізації чинного кримінального процесуального закону, численні законопроектні пропозиції вказують на недостатню ефективність судової системи та контролю в кримінальному судочинстві, формалізацію процесу прийняття відповідних процесуальних рішень. Це також може свідчити про те, що процес реформування інституту судового контролю триває, відбувається пошук шляхів його вдосконалення, створення доступної та ефективної системи судочинства, що відповідає європейським цінностям та стандартам захисту прав людини.

Однією з гарантій забезпечення захисту прав та свобод громадян України в кримінальному судочинства виступає можливість апеляційного оскарження рішень судів першої інстанції, що не набрали законної сили та розгляд цієї скарги апеляційними судами.

З огляду на це, контрольна функція суду апеляційної інстанції вимагає глибокого вивчення та якісно нового осмислення, що мають на меті удосконалення та підвищення ефективності апеляційного провадження.

Слід зазначити, що судове рішення визнається таким, що відповідає фактичним обставинам кримінального провадження у випадку, якщо в його основу покладено висновки, що ґрунтуються на достовірних доказах, досліджених безпосередньо під час судового розгляду. За будь-яких умов судове рішення не може бути визнано таким, що відповідає фактичним обставинам кримінального провадження, якщо судом не перевірені та не спростовані доводи на захист обвинуваченого та не усунуті сумніви в його винуватості, які могли вплинути на правильність застосування закону України про кримінальну відповідальність, на визначення виду покарання або на застосування примусових заходів виховного чи медичного характеру.

Визначення належності, допустимості та достовірності доказів дозволяє апеляційній інстанції оцінити їх достатність для ухвалення судом першої інстанції, слідчим суддею правосудного рішення. Питання про достатність належних, допустимих і достовірних доказів є надзвичайно важливим у їх оцінці, оскільки дозволяє суду апеляційної інстанції встановити неповноту, неточність та суперечності в доказовому матеріалі.

Запроваджена у законодавстві модель апеляційного провадження потребує вдосконалення. Серед проблем оцінки доказів судом апеляційної інстанції слід відзначити відсутність чіткого алгоритму дій, що негативно впливає на однозначність формування внутрішнього переконання суддів апеляційної інстанції та не дозволяє остаточно дати відповідь на запитання про правосудність (неправосудність) оскарженого судового рішення.

***Ключові слова:*** *суд апеляційної інстанції, апеляційне провадження, доказування, дослідження доказів, оцінка доказів.*

**Formulation of the problem**. The problems of the implementation of the current criminal procedural law, numerous legislative proposals point to the ineffectiveness of the judicial system and control in criminal proceedings, and the formalization of the process of adopting relevant procedural decisions. This may also indicate that the process of reforming the judicial control institute is ongoing, seeking ways to improve it, and creating an accessible and efficient justice system that is consistent with European values and human rights standards.

One of the guarantees of the protection of the rights and freedoms of Ukrainian citizens in criminal proceedings is the possibility of appeals against appeals against decisions of first

instance courts that have not come to legal effect and consideration of this complaint by appellate courts.

In view of this, the control function of the appellate court requires a thorough examination and a qualitatively new understanding aimed at improving and improving the effectiveness of the appeal proceedings.

**Analysis of publications that initiated the solution to this problem**. The theoretical basis for studying the issues of appeal proceedings is the research on the problems of proving in the stages of reviewing court decisions, which are executed on the basis of the past legislation (V.B. Alekseyev, V.G. Goncharenko, M.M. Grodzinsky, O.M. Kopyeva, M.P. Kuznetsov, P. A. Lupinska, M. M. Mikheyenko, N. M. Peretyatko, M. M. Polyansky and others). There are very few special studies on this subject. There are only separate scientific works, which pay attention to the specifics of evidence in the court of appeal (N.B. Bobechko, NV Kitsen, SO Kovalchuk, VI Marinov, VI Slipchenko, etc.). .

**The purpose** of this article is to establish the problems of studying evidence in the court of appellate court in criminal proceedings.

**Presenting main material**. Appeal proceedings are the stage of criminal proceedings, in which the court of higher instance, on appeal complaints of participants in criminal proceedings in accordance with the law, reconsiders court decisions of the court of first instance that have not acquired legal effect. The purpose of the appeal proceedings is to provide a correction by the higher court of errors and violations of the requirements of the law, which were adopted during the pre-trial investigation and proceedings in the court of first instance, guaranteeing the rights and interests protected by the law of the participants in criminal proceedings, the establishment of legality and justice in criminal proceedings [1, p. 338].

In accordance with Part 4 of Art. 31 CPC, a criminal proceeding in an appeal procedure is carried out collectively by a court of not less than three professional judges and is conducted in accordance with the rules of trial in the court of first instance (Articles 342-345 of the CPC), taking into account the features envisaged by Chapter 31 of the CPC of Ukraine [2].

As a rule, the appellate court reviews the court decisions of the court of first instance within the scope of the appeal. The Court of Appeal has the right to go beyond the limits of appeals requirements in the following cases:

1) if the situation of the accused does not deteriorate;

2) if the situation of the person concerning which the issue of the application of compulsory measures of medical or educational nature was resolved does not deteriorate;

3) if there are grounds for making a decision in favor of persons who have not lodged an appeal. In this case, the court of appeals is obliged to make a decision in favor of these persons.

In the presence of an appropriate petition of the participants in the criminal proceedings, the court of appeal is obliged:

- re-examine the circumstances established during the criminal proceedings, provided that they are not investigated by the court of first instance in full or in breach of procedure;
- to examine evidence which was not investigated by a court of first instance, only if, during the trial of the first instance court, there was a request for the examination of such evidence;
- to examine evidence which became known after the decision of the court of first instance. It should be borne in mind that such evidence may be filed by participants in court proceedings or demanded by a court in the presence of a petition of the participant in criminal proceedings in preparation for an appeal.

As a result of appeal proceedings following a complaint to a verdict or a court of first instance, the court of appeal has the right: to leave the sentence or a decision unchanged; change judgment or ruling; cancel the sentence in whole or in part and adopt a new verdict; cancel the decision in whole or in part and adopt a new ruling; to revoke a sentence or order and to close a criminal proceeding; cancel the verdict or the decision and appoint a new trial in the court of first instance.

According to Art. 409 of the CPC, the grounds for canceling or changing the court decision are: incompleteness of the trial; inconsistency of the court's findings in the court decision with the actual circumstances of the criminal proceedings; substantial violation of the requirements of the criminal procedural law; incorrect application of the law of Ukraine on criminal liability.

It should also be noted that a court decision is deemed to correspond to the actual circumstances of the criminal proceedings if it is based on conclusions based on reliable evidence,

investigated directly during the trial. In any circumstances, a judicial decision can not be recognized as being in accordance with the actual circumstances of the criminal proceedings, if the court has not verified and refuted the arguments in defense of the accused and the doubts in his guilt that could affect the correct application of the law of Ukraine on criminal liability , on the definition of the type of punishment or on the use of compulsory measures of an educational or medical nature.

In addition, in Part 1 of Art. 411 of the CPC provides the grounds, in the presence of which a verdict, a ruling can be canceled or changed from the grounds of non-compliance of the court decision with the actual circumstances of the criminal proceedings:

1) the findings of the court are not supported by evidence, investigated during the trial;

2) the court did not take into consideration the evidence that could significantly affect its conclusions;

3) there are contradictory evidence which is essential for the court's findings, the court decision does not indicate why the court took into consideration some evidence and rejected others;

4) the court's conclusions, set forth in the court decision, contain significant contradictions [3].

Thus, the issue of the study of evidence and its assessment in the appellate court is the most important when making the right decision.

In examining these issues, one should also draw attention to the fact that the CPC does not have an independent article devoted to the peculiarities of studying evidence by the appellate instance. Court of Appeal conducts research of evidence according to the rules established by Art. 84-94 CCP, taking into account the features envisaged by Chapter 31 of the CPC of Ukraine.

Verification of the compliance of the court decision with the actual circumstances of the criminal proceedings may be carried out in the process of proof, which, according to Part 2 of Art. 91 CCP is conducted by collecting, verifying and evaluating evidence.

In addition, taking into account the provision that the appellate review is based on the rules of trial in the court of first instance, it can be concluded that the means of studying the evidence will be identical. However, litigation in an appellate court should not duplicate evidence-based research conducted in the court of first instance. It should be carried out to the extent that is sufficient and necessary to verify the legality and validity of sentences or decisions, taking into account the arguments and requirements set forth in the appeal complaint [4, p. 244].

Also note that u. p. 18 of the Resolution of the Supreme Court of Ukraine of 21 January 2016 in the case No. 5-249x15, the court notes that the immediacy of the examination of evidence means the request to a court of law to investigate all the evidence gathered in a particular criminal investigation by questioning the accused, victims, witnesses, expert , reviewing material evidence, announcing documents, playing back audio and video, and so on. This ambiguity of criminal proceedings is important for the complete clarification of the circumstances of the criminal proceedings and its objective resolution. The directness of the perception of evidence enables the court to properly investigate and test them (as each individual evidence, and in conjunction with other evidence), to evaluate them according to the criteria set forth in Part 1 of Art. 94 CPC, and to form a complete and objective view of the actual circumstances of a specific criminal proceedings [5].

It should be borne in mind that the legislator uses the term "research evidence" during a criminal proceeding in an appeal procedure without disclosing its contents. Therefore, it can be assumed that in accordance with Article 23 and Part 2 of Article 91 of the CPC, the study of evidence is carried out through their verification and evaluation.

However, such a widespread interpretation of the study as a combination of verification and evaluation can not be completely correct, since, based on the general provisions of evidence, the assessment of evidence follows after their verification and expressed in the final procedural documents of the Court of Appeal. Moreover, the identification of research evidence with their re-faith is also not entirely legitimate.

This position is confirmed by the fact that in the doctrine of the criminal process, under the study of evidence, it is understood that the activity carried out by the subjects in the prescribed procedural form of the law is carried out in relation to the analysis of their content in view of the full presentation, the logical sequence, the absence of contradictions, inaccuracies, gaps, comparison with other available evidence in the criminal proceedings, the clarification of

their coherence, the establishment of sources of evidence, and the conduct of procedural actions aimed at their verification. Hence it follows that the study of evidence takes place both through the thinking (logical) and practical - [6, p. 237]. To operate evidence, to use in the proof, they must be studied, therefore, the study of evidence is a necessary element of proof [7, p. 40].

It should be noted in particular that the study of evidence in the stage of appeal proceedings has a number of peculiarities that are determined by the nature of this stage, as well as its general provisions, such as the subject of appeal, the scope of appeal review and the inadmissibility of turning to the worst.

Unlike a study, verification of evidence is an activity aimed at confirming (negating) the information contained in them. Checking evidence means gathering data on which to draw a conclusion on its authenticity and admissibility.

It should be noted that certain features of verification of evidence are typical for the court of appeals. Firstly, depending on the grounds of appeal, it is conducted optionally. In other words, in cases where the parties are not challenging the actual facts and circumstances themselves when appealing to a court of first instance, proof is not required.

Secondly, in the appellate instance, the verification of evidence is not complete (truncated). Unlike the proceedings before the court of first instance, not every evidence is subject to verification in an appeal, but only one that is in any way related to the appeal filed.

Thirdly, the action of Art. 349 CCP does not apply to appeal proceedings, so evidence in the appellate instance may consist of direct investigation of evidence, and be limited to the study of evidence based on the proceedings.

With regard to the assessment of judicial evidence, it is the most important component of prostitution in the court of appellate instance. The assessment of evidence is, first of all, a logical (mental) process for the study of such properties as belonging, admissibility, authenticity and sufficiency and forming a conclusion about them. She, like any other act in the criminal process, has a target orientation and is designed to solve many problems.

Even when verification of evidence in an appellate instance is not in demand, the assessment of evidence is carried out at each appellate investigation. However, it has its own special features compared with the assessment of evidence by the court of first instance.

1. The assessment and reassessment of evidence should be distinguished. Estimates are subject to all new evidence in the proceedings or received in the court of appeal. All evidence available in the proceeding is subject to re-evaluation by the court of appellate instance or its re-evaluation.

2. The assessment of evidence is always carried out by the court of appellate instance. It can be conducted not only in their direct research, but also in their study only on the materials of criminal proceedings. It depends on whether the court of appellate instance carries out the proof or substantiation of its own conclusion.

3. The assessment of the evidence in the appellate instance is not complete (truncated) in character in the light of the assessment of evidence in the court of first instance. This applies both to the volume of evaluated evidence and to the evaluation of specific properties of evidence. The peculiarity of the assessment of the appellate instance is also manifested in the scope of work with certain properties of evidence. Thus, the court of first instance evaluates the affiliation, admissibility, authenticity of the second proof and the sufficiency of their aggregate in order to make a decision in the case. In an appeal, however, it is not always the court to investigate all the properties of evidence, they can be investigated separately, in combination, or not at all examined.

In addition, the amount of evidence to be assessed by the court of appellate instance may not coincide with the scope of the assessment of the first instance. It can be extended in comparison with the evidence that was evaluated in the court of first instance, by providing them with parties or by gathering new evidence by the court of appeal.

4. The lack of immediacy in the study of most of the evidence is another distinctive feature. As was noted, the assessment of evidence by the court of appellate instance is carried out at each appellate review. However, the scope and ways of knowing the actual circumstances (direct or research on criminal proceedings) depend on what grounds for appeal decisions are made and from the fact that the court of appellate instance provides evidence or substantiation of its own conclusion.

According to judicial practice, it is precisely during the assessment and reassessment of evidence in the appellate court that there are many unresolved issues. The explanations of the

higher judicial authorities do not solve them, and even more confusing, leading to delays in the consideration of cases or even intentional violations.

As we have noted, Ukraine's Supreme Court expressed its legal position on this issue in the case No. 5-249x15 dated January 21, 2016. It has been generally observed by the High Specialized Court for Civil and Criminal Cases. In accordance with the provisions of Article 23 and part 4 of Article 95 of the CCP, based on the principle of direct evidence of an investigation, the Court of Appeal has no right to give them a different assessment than that given by the court of first instance, if these evidences was not investigated in the appeal review of the verdict.

That is, if the Court of Appeal merely refers to the testimony of witnesses, which he did not interrogate, and at the same time give another assessment of this evidence as evidence, then such a decision can not be regarded as lawful and well-founded, and therefore it is subject to cancellation with the prize-giving of a new consideration in the court of appeal authorities

Given the absolute majority of judges of the appellate instance, this legal position of the Armed Forces is not sufficiently substantiated, moreover, it is contradictory and non-consecutive [8].

**Conclusions.** Thus, determining the membership, admissibility and authenticity of evidence allows the appellate instance to assess their sufficiency for the approval of the court of first instance, the investigator judge of the justice decision. The question of the sufficiency of appropriate, admissible and reliable evidence is extremely important in their assessment, since it allows the court of appellate authority to establish incompleteness, inaccuracy and contradiction in the evidence [9].

The model of appeal proceedings introduced in the legislation needs to be upgraded. Among the issues of appraisal of evidence by the court of appellate instance, it should be noted that there is no clear algorithm of actions that adversely affects the unambiguousness of the formation of the internal convictions of the judges of the appellate instance and does not allow to finally answer the question about the justice (unrighteousness) of the challenged judicial decision.

***References***

1. Кримінальний процес: підручник / за заг. ред. В.В. Коваленка, Л.Д. Удалової, Д.П. Письменного. Київ: Центр учбової літератури, 2013. 544 с.

2. Кримінальний процесуальний кодекс України станом на 24.04.2018 р.: Закон України від 13.04.2012 № 4651-VI. URL: http://zakon3.rada.gov.ua/laws/show/4651-17.

3. Про деякі питання порядку здійснення судового провадження з перегляду судових рішень у суді апеляційної інстанції відповідно до Кримінального процесуального кодексу України: лист Вищого спеціалізованого суду від 21.11.2012 № 10-1717/0/4-12. URL: http://zakon3.rada.gov.ua/laws/show/v1717740-12.

4. Маринів В.І. Окремі питання доказування в апеляційному провадженні за новим Кримінальним процесуальним кодексом України. *Докази і доказування за новим Кримінальним процесуальним кодексом: матеріали міжнародної науково-практичної конференції* (6-7 грудня 2012 р., м. Київ). Харків: Видавець Строков Д.В., 2013. С. 243-245.

5. Постанова ВСУ від 21 січня 2016 року у справі № 5-249кс15. URL: http://www.scourt.gov.ua/clients/vsu/ vsu.nsf/(documents)/E84BAE31236A51A1C2257F7D00414217.

6. Бобечко Н.Р. Апеляційне та касаційне провадження у кримінальному судочинстві України: дис. … д-ра. юрид. наук: 12.00.09. Львів, 2016. 498 с.

7. Соркин В.С. Особенности процессуального доказывания в уголовном судопроизводстве: монография. Гродно: ГрГУ, 2002. 96 с.

8. Правова позиція ВС щодо правил оцінки та переоцінки доказів обмежує повноваження апеляційної інстанції та призводить до порушень прав обвинувачених. URL: http://zib.com.ua/ua/125221-pravova_poziciya_vs_schodo_ocinki_ta_pereocinki_dokaziv_apel.html.

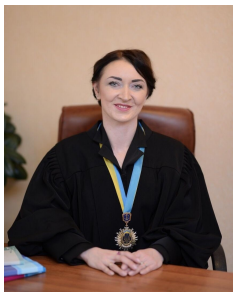
9. Бобечко Н.Р. Оцінка доказів судом апеляційної інстанції у кримінальному провадженні. *Часопис Академії адвокатури України*. 2013. № 3. URL: http://e-pub.aau.edu.ua/index.php/chasopys/article/view/709/713.

*Received to editorial office 11.06.2018*

**Summary**

The article deals with the peculiarities of the investigation of evidence in the court of appeal in the criminal proceedings. The essence, rules, and also the problematic moments of the research of evidence at the stage of appeal production, namely, their verification and evaluation, are determined.

***Keywords:*** *Court of Appeal, appellate procedure, proving, study of evidence, examination of evidence.*



**Irina Shapovalova**
judge of the Pavlograd's district court
of Dnipropetrovsk Region

# SHORT REVIEW OF THE APPLICATION OF THE ECHR PRACTICE BY JUDGE-INVESTIGATORIN IMPLEMENTATION OF JUDICIAL CONTROL BY READINESS INVESTIGATION

*DOI: 10.31733 / 2078-3566-2018-2-203-208*

**Шаповалова І. КОРОТКИЙ ОГЛЯД ЗАСТОСУВАННЯ ПРАКТИКИ ЄСПЛ СЛІДЧИМ СУДДЕЮ ПРИ ЗДІЙСНЕННІ СУДОВОГО КОНТРОЛЮ ЗА ДОСУДОВИМ РОЗСЛІДУВАННЯМ.** В статті приведено огляд прецедентної практики ЄСПЛ, яку автор вважає за доцільне рекомендувати для застосування в робоі слідчого судді. Суспільний запит на забезпечення високих стандартів судочинства та захисту прав особи, в тому числі при здійсненні досудового розслідування презюмує обов'язок слідчого судді щодо здійснення ним судового контролю за досудовим розслідуванням. Розгляд клопотання про застосування запобіжного заходу є одним з основних функціональних обов'язків слідчого судді. Обізнаність особи при розгляді клопотання про застосування запобіжного заходу стосовно його процесуальних прав є одним із основних гарантій забезпечення справедливого судового розгляду. Відповідно до ч. 2 ст. 8 КПК, принцип верховенства права у кримінальних справах застосовується в світлі практики Європейського суду з прав людини. Крім того, кримінально-процесуальне законодавство України застосовується з урахуванням практики Європейського суду з прав людини, відповідно до ч. 5 ст. 9 КПК України. Автором проведено аналіз рішень ЄСПЛ через призму правової норми – ч.2 ст.193 КПК України, оскільки саме ця норма зобов'язує слідчого суддю забезпечити контроль за дотриманням прав особи, відносно якої подано клопотання про застосування запобіжного заходу і є однією з базових гарантій справедливого судового розгляду. Ґрунтовне дослідження, в контексті прецедентної практики ЄСПЛ, положень ч.2 ст.193 КПК дозволяє дійти висновку про те, що ці норми викладені законодавцем у тісному взаємозв'язку з положеннями ст. 206 КПК України.

***Ключові слова:*** *слідчий суддя, права підозрюваного, судовий контроль, прецедентне право, рішення ЄСПЛ.*

**The purpose of this article is** to analyze the practice of the European Court of Human Rights, which, in the opinion of the author, fully reveals the content and essence of the fundamental rights of the suspect when considering a request for a preventive measure.

Consideration of a petition for the use of a preventive measure is one of the main functional assignments of an investigating judge. A person's knowledge of a petition for the application of a preventive measure in relation to his procedural rights is one of the basic guarantees of ensuring a fair trial.

The principles of the current criminal procedural law define the duties of the general rules for considering such a request, as well as the requirements for mandatory explanation to the suspect when considering a request for the application of a preventive measure of his rights (Part 2 of Article 119 of the CPC of Ukraine).

**Presenting main material.** Investigative judges play a significant role in improving the quality of pre-trial investigation and in observing the rights, freedoms of participants in criminal proceedings, and ensuring an effective and impartial investigation of criminal offenses. The main purpose of the investigating judge is to enforce the judicial protection of the rights and legitimate interests of persons involved in the criminal proceedings and to ensure the legality of the proceedings in the pre-trial phase. It predetermines the specific character of the criminal-procedural function performed by him, which is to ensure the legitimacy and justification of limiting the constitutional rights and freedoms of a person in pre-trial proceedings in a criminal case.

Thus, part 2 of Art. 193 CPC of Ukraine, investigating judge, court, to which the suspect arrived or delivered, charged with participating in consideration of a petition for the application of a preventive measure, is obliged to explain his rights:

1) have a defender;

2) to know the nature and grounds of suspicion or accusation;

3) know the reasons for his detention;

4) refuse to give explanations, indications regarding suspicion or accusation;

5) give explanations regarding any circumstances of his detention and detention;

6) to investigate material evidence, documents, testimonies, which the prosecutor refers, and provide things, documents, testimonies of other persons to refute the arguments of the prosecutor;

7) make a request for a challenge and examination of witnesses whose testimony may be relevant for the resolution of the issues.

According to Part 2 of Art. 8 of the CPC, the principle of the rule of law in criminal proceedings is applied in the light of the practice of the European Court of Human Rights. In addition, in accordance with Part 5 of Art. 9 CPC of Ukraine, the criminal procedural law of Ukraine is applied taking into account the practice of the European Court of Human Rights.

Since the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 has a number of peculiarities, its provisions are general in nature, and human rights are largely stated in it in abstract, appraisal form, the correct understanding of its norms is disclosed in decisions of the ECHR, which contain legal positions regarding the essence of the provisions of the international legal act, as well as the content and scope of the rights guaranteed to it.

In accordance with the practice of the ECHR, national authorities, in particular the courts, must interpret and apply national law in accordance with Art. 5 of the Convention (ECHR judgment of 10 June 1996 in Benham v. The United Kingdom) [1]. The precedent practice of the ECtHR in complaints concerning violation of Article 1, Article. 5 of the Convention establishes the requirement that deprivation of liberty be "lawful", in particular with respect to the "procedure established by law".

In this regard, the Convention refers to the norms of national law and establishes an obligation to ensure compliance with the substantive and procedural rules of the law, but it also requires that any deprivation of liberty be ensured by the purpose of Article. 5 of the Convention, in particular the protection of persons from arbitrariness.

Item 1 of Part 2 of Article 119 of the CPC of Ukraine, the right of the suspect to have a defense counsel is determined when considering a request for the use of a preventive measure.

The Convention for the Protection of Human Rights and Fundamental Freedoms ensures that each person charged with a criminal offense has at least the right to defend himself or herself in person or to use legal aid to a lawyer chosen at his own discretion or, in the absence of sufficient funds to pay for a lawyer's assistance, to receive such assistance free of charge, when required by the interests of justice; ... "

In the case of Zagorodniy v. Ukraine, the ECHR stated that a person against whom criminal charges had been made that did not wish to be defended personally should be able to use legal aid of their own choosing. In paragraph 55 of this judgment, in the Court's opinion, leaving the question of limiting the right to free choice of counsel unresolved for a long time, the state authorities have created a situation that is incompatible with the principle of legal certainty enshrined in the Convention and is one of the basic elements of the rule of law (see , mutatis mutandis, judgment of 2 November 2010 in Stefanica and Others v. Romania (application no. 38155/02, paragraph 31). Consequently, the applicant's right to free choice of counsel was limited in a manner incompatible with the requirements of Article 6 §§ 1 and 3 of the Convention [2].

Item 2 of Part 2 of Article 119 of the CPC of Ukraine, the right of the suspect to know the nature and grounds of suspicion or accusation is determined.

According to the author, the defining aspect of the provision of this right will be the reference to Article 7 of the Convention, according to which no one can be found guilty of any criminal offense on the basis of any act or omission which at the time of its commission did not constitute a criminal offense in accordance with national law or international law. There can also be no more severe punishment than that which was to be applied at the time of the commission of a criminal offense.

This standard has found its application in § 62 of the Verenets v. Ukraine judgment, the ECHR has emphasized that the safeguard established in article 7 of the Convention, which is an essential element of the rule of law, is a prominent place in the system of protection under the Convention. This statement is underlined by the fact that it does not allow any exceptions, even under article 15 of the Convention during a war or other public danger. This warranty shall be interpreted and applied as follows from its subject matter and purpose, in such a way

as to provide effective protection against arbitrary prosecution, conviction and punishment. In its practice, the Court acknowledged that, no matter how clearly the provision was formulated, in any field of law, including criminal law, there would be an inevitable element of judicial interpretation. There will always be a need for clarification of fuzzy rules or those that require adaptation to changing circumstances. On the other hand, although certainty is imperative, it can lead to excessive stiffness, and the law must be able to keep up with changing circumstances.

Accordingly, many laws are inevitably formulated in terms that are to some extent unclear, and whose interpretation and application is a matter of practice [3].

In accordance with Clause 3 of Part 2, Article 119 of the CPC of Ukraine, the suspect has the right to know the reasons for his detention.

The most significant guarantee of human rights, established by Art. 29 of the Constitution of Ukraine, there is the right to liberty and personal integrity. According to this article, it is provided that no one may be arrested or detained except in a motivated court decision and only on the grounds and in accordance with the procedure established by law. In the case of an urgent need to prevent or stop the crime, authorities authorized by law may apply the detention of a person as a temporary precautionary measure, the validity of which for 72 hours. should be verified by the court. The detained person is released immediately, if within 72 hours. since the moment of detention she was not given a motivated court decision on remand in custody. Every arrested or detained person must be promptly informed about the reasons for his arrest or detention, clarifies his rights and has been given the opportunity, from the time of his detention, to defend himself personally and use the lawyer's assistance. Every detainee has the right at any time to challenge his detention in court. The arrest or detention of a person should be immediately reported to relatives of the arrested or detained person.

The said norm of the Constitution of Ukraine almost completely reproduces the provisions of Art. 5 of the Convention.

Thus, according to clause 1 of Art. 5 of the Convention everyone has the right to liberty and security of person. No one shall be deprived of his liberty except in accordance with the procedure established by law, and in such cases as:

(a) The lawful detention of a person after being convicted by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful requirement of the court or for the performance of any duty provided for by law;

c) the lawful arrest or detention of a person committed for the purpose of bringing it before a competent authority established by law on the basis of a reasonable suspicion of having committed an offense or if there are reasonable grounds to consider it necessary to prevent the commission of an offense or escape from it after its commission;

d) the detention of a minor on the basis of a lawful decision for the purpose of the application of educational measures of an educational nature or lawful detention of a minor in order to bring him before the competent authority established by law;

e) lawful detention of persons for the prevention of the spread of infectious diseases, legal detention of mentally ill, alcoholics or drug addicts or vagrants;

(f) The lawful arrest or detention of a person committed in order to prevent her illegally entering the country or a person subject to measures for deportation or extradition.

In clause 2 of Art. 5 of the Convention states that everyone who is arrested must be immediately informed in a language which he understands of the reasons for his arrest and of any charges against him.

By the requirements of clause 3 of Art. 5 of the Convention, anyone who has been arrested or detained in accordance with the provisions of paragraphs. "C" clause 1 of Art. 5, must immediately appear before a judge or other official authorized by law to exercise judicial power and must be provided with a court hearing within a reasonable time or release during the proceedings. Such a dismissal may be conditional on guarantees to appear at a court hearing.

According to Clause 4 of Art. 5 of the Convention, everyone who has been deprived of his liberty as a result of arrest or detention has been granted the right to initiate proceedings in which the court determines the lawfulness of the detention without delay, and decides to release if the detention is unlawful.

In clause 5 of Art. 5 of the Convention it is established that anyone who is a victim of arrest or detention carried out in contravention of the provisions of this article is entitled to a legal remedy for the right to a refund.

The ECHR, considering the statements of citizens of Ukraine on violation of the re-

quirements of Art. 5 of the Convention in the vast majority of cases establishes Ukraine's violation of the requirements of the provisions of paragraphs 1, 3, and 4 of the said article of the Convention, which, in the case of "Kharchenko v. Ukraine" (ECHR judgment of 10 February 2011), noted that the violation by Ukraine of the provisions of Art. 5 Conventions are systemic [4].

In the practice of the European Court of Human Rights in respect of compliance with the provisions of paragraph 1 of Art. 5 of the Convention requires that deprivation of liberty be "lawful", in particular with respect to the "procedure established by law". In this regard, the Convention refers to the norms of national law and establishes an obligation to ensure compliance with the substantive and procedural rules of the law, but it also requires that any deprivation of liberty be ensured by the purpose of Article. 5 of the Convention, in particular the protection of persons from arbitrariness.

As stated above, the right to liberty and security of person is a fundamental and fundamental right of a person, investigating judges should pay particular attention to ensuring this right when considering a petition whose solution may lead to a significant restriction of such a right.

Item 4 of Part 2 of Art. 193 of the CPC of Ukraine, the right of the suspect to refuse to give an explanation, indications regarding suspicion or accusation is determined.

The exclusion of liability for refusing to testify against himself, enshrined in Article 63 of the Constitution of Ukraine, is an important guarantee of protection against unlawful pressure on a person in order to force her to establish the basis for bringing her to justice. This is an important guarantee of observance of the provision on the presumption of innocence of the person who imposes the burden of proving the person solely on the prosecution's part. Compliance with the right not to testify against oneself is an integral part of realizing the right of a person to a fair and public hearing of his case by an independent and impartial tribunal established by law, enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In view of the notorious facts of the violation of freedom from self-exclusion during the conduct of criminal proceedings, the observance of international human rights principles expressed in the practice of the European Court of Human Rights (hereinafter - the ECHR), which is a source of law in Ukraine, is extremely relevant.

The emergence of the right to freedom from self-disclosure should not be related to the procedural status of a person. The ECHR emphasized in its decision in the case of "Shabelnik v. Ukraine": "The Court notes that it was apparent from the first interview of the applicant that his testimony was not merely a testimony to a crime witness, but, in fact, a confession in his deed. From the time when the applicant first confessed, it was no longer possible to assert that the investigator had no suspicion of the applicant's involvement in the murder "[5].

Paragraph 5 of Part 2 of Article 119 of the CPC of Ukraine, enshrined the right of the suspect to give an explanation of any circumstances of his detention and detention.

According to Art. 28 of the Constitution of Ukraine everyone has the right to respect for his dignity. No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.

According to Art. 62 of the Constitution of Ukraine, a person is considered innocent in committing a crime and can not be subjected to criminal punishment until her guilt is proved in a lawful manner and is established by a conviction of a court. The prosecution can not be based on evidence obtained illegally, as well as on assumptions.

In its decisions, the ECtHR notes that Art. 3 of the Convention protects one of the fundamental values of a democratic society, this article prohibits any form of torture or inhuman or degrading treatment, regardless of the circumstances of the case or conduct of the victim (Labit v. Italy). The Court further finds that the distinction between the concepts of "torture" and "inhuman or degrading treatment" was introduced in order to "mark the particular level of the cruelty of deliberate inhuman treatment which leads to serious and cruel suffering" (judgment "Ireland v. Great Britain") [6].

The ECHR is bound by its supranational nature and sees that it must be very careful about the exercise of the functions of the court of first instance if it is inevitably not due to the circumstances of the case. It should be borne in mind that the appraisal of the evidence of the ECHR is based on the criterion of proof "beyond reasonable doubt" (Avshar v. Turkey). Such proof must come from a combination of signs or irrefutable presumptions, sufficiently significant, clear and consistent with each other [7].

Item 6 of Part 2 of Article 119 of the CPC of Ukraine, defines the right of the suspect to

investigate material evidence, documents, testimony referred to by the prosecutor, and provide things, documents, testimony of other persons to refute the arguments of the prosecutor.

The relevant principles are set out in the judgment in the case of "Shatsshashvili v. Germany". The Shatszashvili case concerned complaints from the applicant, who was sentenced to robbery and grave abduction, who claimed that his trial was unfair, since neither he nor his counsel had any opportunity at any stage of the consideration of the issue of single direct witnesses. When he was summoned for testimony during a trial, witnesses living in Latvia refused to attend, based on medical evidence indicating that they were traumatized by a crime. Subsequently, the court of first instance again unsuccessfully tried to get their presence, offering several options and asking for legal aid from the Latvian authorities. Finally, the German court held that there were insuperable obstacles to hearing the two witnesses and ordered that the minutes of their interviews by the police and the investigating judge be read in court. The Grand Chamber found that there had been a violation of Article 6 of the Convention by nine votes to eight. He acknowledged that, given the importance of the allegations of unified witnesses, measures to counteract the use of the first instance court were insufficient to provide a fair and proper assessment of the unreliable evidence [8].

In the above judgment, the ECtHR states that use as evidence of statements obtained at the stage of investigation and judicial investigation does not in itself violate article 6, subject to the rights of the defense. As a rule, these rights require that the defendant be given adequate and proper opportunity to appeal and ask a witness against him - when that witness makes his statements or at a later stage in the proceedings.

Item 7 of Part 2 of Article 119 of the CPC of Ukraine determines the right of a suspect to file a request for a challenge and questioning of witnesses, whose testimony may be relevant for resolving the issues.

The criteria for the inadmissibility of evidence by the ECtHR are left to the discretion of the national legislature, by refraining from imposing specific requirements. Analyzing the practice of the ECtHR, it can be concluded that when deciding on the inadmissibility of evidence, national courts should be mindful of the possibility for the accused to challenge the admissibility of evidence, to object to them, and the circumstances in the process of gathering evidence that would allow them to be considered inadmissible.

This right does not entail visiting and verifying each witness on behalf of the accused, but only "under the same conditions as witnesses against him."

The relevant principles in this regard were summed up in the judgment of Pern v. Italy: "The Court observes (...) that the admissibility of evidence is, above all, the issue of regulation by national law. The Court's task under the Convention is not to decide whether witnesses were admitted as evidence, but to ascertain whether the trial as a whole, including the manner in which the evidence was produced, was fair (... ) In particular, as a general rule, national courts should assess the evidence that comes to them, as well as the authenticity of the evidence that the accused attempts to file (...). Consequently, it is not enough for the defendant to complain that he is not allowed to deny certain witnesses; he must, moreover, support his request, explaining why it is important that the witnesses concerned be heard, and their evidence must be necessary to establish the truth "[9].

According to the author, the above-mentioned decisions of the European Court of Human Rights should be recommended for the study of judges and employees of the pre-trial investigation body and the prosecutor's office.

An important aspect, in view of the above, is that any allegations or statements made by a suspect, accused, made during the consideration of a petition for the application of a preventive measure, can not be used to prove his guilt in a criminal offense in which he is suspected of committing, accused, or in any other offense (Part 5 of Article 193 of the CCP).

Despite the relatively short duration of the CPC of Ukraine (from 2012), the high standards of human rights set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms are constantly being implemented in the practice of the investigating judge in order to comply with high standards of legal proceedings.

A thorough investigation, in the context of case-law of the ECHR, of the provisions of Part 2 of Article 119 of the CCP, suggests that these norms are set out by the legislator in close connection with the provisions of Article 206 of the CPC, the provisions of which provide for the duties of a judge for protection the violated right of a person within the limits of procedural measures which are carried out in a criminal proceeding.

There will not be an innovative statement that the protection of violated rights of a per-

son is possible only if the investigator's judge actively pursues his initiative. In this context, we can not ignore the decision of the ECHR in the case of "Shchokin v. Ukraine" of 14.10.2010 (Statements No. 23759/03 and 37943/06). In this judgment, the ECtHR has defined the concept of the quality of the law, an existing requirement that it be accessible to stakeholders, clear and predictable in its application.The lack of necessary clarity and precision in the national legislation violates the requirement of "quality law". In the event that national legislation has led to ambiguous or multiple interpretations of the rights and responsibilities of individuals, national authorities are required to apply the most favorable approach to individuals [9].

**Summing up the above**, we note that due process of judicial control over a pre-trial investigation by an investigating judge is possible only if there are two factors in common: the provision by the investigating judge of the rights of a person during the consideration of a petition for the application of a preventive measure, the prevention of a violation of the procedure for considering such a petition and a motivated judicial decision on the results of his and is the way in which high standards of human rights are set out in the Convention for the Protection of Human Rights and Fundamental Freedoms , should be implemented into the practical activities of investigating judges.

The above prescribes the necessity of methodological introduction in the theory of criminal process of the issue of optimizing the practical application of the decisions of the ECHR to ensure the observance of the rights, freedoms and interests of individuals in criminal proceedings during the pre-trial investigation.

***References***

1. Caseof Benham v. The United Kingdom. URL: www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/895eb1efa8003dfa2d.pdf.
2. Case of Zagorodniy v. Ukraine. URL: http://zakon5.rada.gov.ua/laws/show/974_739.
3. Case of Vierentsov v. Ukraine. URL: http://zakon3.rada.gov.ua/laws/show/974_434.
4. Case of Kharchenko v. Ukraine. URL: http://zakon5.rada.gov.ua/laws/show/974_662.
5. Case of Shabelnik v. Ukraine. URL: http://zakon0.rada.gov.ua/laws/show/974_457.
6. Case of Labita v. Italy. URL: http://zakon2.rada.gov.ua/laws/show/980_009.
7. Case of Avshar v. Turkey. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/SO2487.html.
8. Carlo Ranzoni, Judge of the European Court of Human Rights. The right to examine witnesses under Article 6 §§ 1 and 3 (d) of the European Convention on Human Rights: Speech of the VI International Forum on the European Court of Human Rights case law of 10 November 2002.
8. Case of Pern v. Italy. URL: http://zakon3.rada.gov.ua/laws/show/980_051.
9. Case of Shchokin v. Ukraine. URL: http://zakon.rada.gov.ua/laws/show/974_858.

*Received to editorial office 29.08.2018*

**Summary**

The principles of the current criminal procedural law determine the responsibilities of the general rules for considering such a request, as well as the requirements for mandatory explanation to the suspect when considering a request for the use of a preventive measure of his rights (Part 2 of Article 119 of the CPC of Ukraine). Consideration of a petition for the use of a preventive measure is one of the main functional assignments of an investigating judge. A person's knowledge of a petition for the application of a preventive measure in relation to his procedural rights is one of the basic guarantees of ensuring a fair trial. The purpose of this article is to analyze the practice of the European Court of Human Rights, which, in the opinion of the author, fully reveals the content and essence of the fundamental rights of the suspect when considering a request for a preventive measure. According to Part 2 of Art. 8 of the CPC, the principle of the rule of law in criminal proceedings is applied in the light of the practice of the European Court of Human Rights. In addition, in accordance with Part 5 of Art. 9 CPC of Ukraine, the criminal procedural law of Ukraine is applied taking into account the practice of the European Court of Human Rights.

***Keywords:*** *investigating judge, suspect's rights, judicial control, case law, decision of the ECHR.*

## POLICING: LEGAL, ORGANIZATIONAL AND STAFF SUPPORT

**Gustavo Ramos**
*Head of territorial Police Department*
*Local police of Santander*
*Address of Head Quarter Castilla*
*sergeant of police (Spain)*

**Vita Kononets**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733 / 2078-3566-2018-2-209-213*

### THE APPLICATION OF TECHNICAL MEANS OF FIXATION OF LEGAL OFFENCES BY POLICE AND THE USE OF THE EVIDENCE INFORMATION BY THE COURT: THE COMPARATIVE ANALYSIS OF UKRAINE AND SPAIN

**Рамос Г., Кононець В. ЗАСТОСУВАННЯ ПОЛІЦІЄЮ ТЕХНІЧНИХ ЗАСОБІВ ФІКСАЦІЇ ПРАВОПОРУШЕНЬ ТА ВИКОРИСТАННЯ ДОКАЗОВОЇ ІНФОРМАЦІЇ СУДОМ: ПОРІВНЯЛЬНИЙ АНАЛІЗ УКРАЇНИ І ІСПАНІЇ.** Стаття присвячена правовому регулюванню правових підстав використання працівниками поліції технічних засобів фотографії, зйомок, відеозаписів на підставі Закону України "Про Національну поліцію". Узагальнено матеріали Єдиного державного реєстру судових рішень щодо винесення судами рішень з питань використання технічних пристроїв. Розглянуто законність використання технічних засобів та надання відеодокументів як доказів у судовому процесі України та Іспанії. Проаналізовано питання використання відеозапису, що має забезпечити найбільш точну та повну фіксацію фактів, які мають доказову силу.

Стаття присвячена вивченню та обговоренню питань, пов'язаних із використанням технічного обладнання поліцією, зокрема, у процесі встановлення фотографій та відеозаписів для правопорушень. Вона відіграє важливу роль у пошуку злочинців та правопорушників, допомагає збирати докази, вивчати документи та інші суттєві докази.

***Ключові слова**: судова поліція Іспанії, інтервенція, технологічні засоби розслідування Іспанії, попередні докази, попередньо встановлений тест, правовий хакер, експертна експертиза.*

**Formulation of the problem.** The issues related to the use of technical means in the process of fixation of legal offenses by police, in particular during the implementation of photos and video fixation, are currently very relevant.It plays an important role in the search for criminals and offenders, assists in collecting evidence, exploring documents and other material evidence.After investigating the judicial practice of the Unified State Register of Court Decisions, which clearly indicated the testimony of technical devices as "investigated in court evidence" and listed as added to the protocol, we came to the conclusion that in most cases the court guided and relied on Art. 251 of Code of Ukraine on Administrative Offences [2], under unclear circumstances, makes a decision to refuse to recognize a particular video document as proof of an administrative case.Consequently, one of the research aspects of the scientific article is to establish a practical procedure of case investigation during the examination in court, in the event that all procedural documents of the case reflect the conformity of the procedure for the use of video of the offense committed.Establishing the circumstances of a court position that does not take into consider or does not take into account video materials provided by the police?Why does the court not always perceive a recording from a video recorder as an obvious fact of an offense committed that does not require additional and more evidence base?

**Analysis of recent publications.** In science, the problem of the use of technical means is the subject of attention of a number of scientists, among which one should note such scien-

tists as O.V. Jafarova, A.E. Golubov, V.O. Ivantsov, S.O. Shatrava and others.

**The aim of this article** is a comparative analysis of the use and application of technical means for fixing offenses according to the legislation of Ukraine and Spain. Analyzed the materials of the Unified State Register of Court Decisions concerning the issuance by the courts of rulings on issues related to the use of technical devices in fixing illegal actions in Ukraine and Spain.

Achieving this purpose, involves solutionof the following **tasks:**

- to summarize the materials of the Unified State Register of court decisions regarding the issuing of rulings by courts on issues related to the use of technical devices in fixing illegal actions;

- to formulate suggestions and recommendations regarding the improvement of the normative base by the bodies of the National Police.

Taking into account the different character and the chosen direction for the judge to make a trial, it should be noted that the chosen way undoubtedly affects the course and results of the trial in court. Most often, in judgments or other court decisions, there is ambiguity in satisfying or refusing to engage the results of photo or video as evidence. In one case, in the absence of this kind of evidence, the judge asks for the attraction or withdrawal of such record, which actually drags the time of the trial.And in other cases – on the contrary, in the presence of the necessary video denies its evidential character and generally rejects the ability to be included in the case. Such position of judges is very ambiguous, incomprehensible and requires a detailed study from a scientific and practical point of view, and in the future, with the formation and adoption of an instruction to determine the algorithm of actions when evaluating video evidence for different categories of cases, taking into account all important aspects.As in certain cases, the permissibility of video recording may explain and accelerate the trial with the fair and legal sentencing by the court.And in the case of absence of an appropriate carrier of evidence, the trial can go a deadlock and even in the worst case to bring the innocent person to criminal responsibility.

First of all, we would like to point out that this is a rather complicated phenomenon in court activity, since it is difficult to clearly state at what grounds the court makes one or another decision, not always following the rules of Code of Ukraine on Administrative Offences. In my opinion, the court, when deciding on a sentence, takes into account its own convictions in relation to this case and acts in accordance with the situation happened. But it is also equally not legally correct, because it does not meet precisely such requirements as impartiality and objectivity.As an example, it is possible to consider the Resolution of the Court of Appeal on the case No. 490/11314/16-r dated 02/24/2017 in the city of Mykolayiv. It is precisely if to turn to the statistics on the fact of consideration of materials for the offense provided for in Art. 130 of Code of Ukraine on Administrative Offences, its state remains unclear and constantly changes.

Let's take into account the event, which took place with the participation of the ATO volunteer Stepan Panchuk, who was in the state of intoxication twice was arrested by police officers.After that, two cases were brought to the court, which were already illegal because there were no repeats in itsown right. According to the result of the first trial, the court made a decision not to the benefit of the volunteer, namely, *"to adjudge guilty a person in the commission of an administrative offense stipulated in part 1 of Art. 130 of Code on Administrative Offenses and to impose an administrative penalty in the form of a fine of 600 non-taxable minimum incomes of citizens equal to 10,200 /ten thousand two hundred/ hryvnias with the deprivation of a right to drive vehicles for a period of 1 /one/ year.*

*In the petition of the public organization of "PARTICIPANTS OF THE OPERATIONS", people were asking about the transfer of materials in the case of bringing Panchuk S.O. to administrative responsibility according to the part 1 of Art. 130 of Code of Ukraine on Administrative Offences for consideration of the public organization "PARTICIPANTS OF THE OPERATIONS".*As a result of the consideration of the appeal, the court discharged the person from responsibility: *"...Examined the materials of the case, taking into account the circumstances of the administrative offense, the nature of the offense committed and the identity of the person who sincerely repented, is positively characterized by a public organization, and also his engagement in volunteering, taking into account the nature of the offense and the offender, consider it expedient to discharge him from administrative responsibility and apply to him a public sanction... To transfer the case materials to the public organization for its consideration. Proceedings onbringing to the administrative responsibility – to close"*[4].

Investigating such practice of consideration of cases, we came to the conclusion that a large number of appealed rulings, issued by police according to Art. 130 of Code of Ukraine on

Administrative Offences and court rulings on bringing a person to responsibility based on the specified article, provides for the attempt of the offenders to avoid responsibility, because the court during the investigation of the case does not take into account the video fixation provided by the police as evidence, which resulted in the number of those challenged regulations [4]. Also, if we return to the analysis of the decisions made by the bodies of court, we can conclude that there are two reasons why the court satisfies the appeal in its entirety:1) the lack of procedurally correct protocol about administrative violation;

2) the petition about the appointment of examination of police officers' video recordings.Only on the basis of these aforementioned nuances the court decides the case in favor of the offender.Police video in all developed countries of the world is a system of types, methods and techniques used to the conducting of fixation or prevent illegal actions, in order to provide the court with visual evidence, which should be considered as one of the main blocks of evidence.Theuse of video recording ensures the most accurate and complete fixation of facts that have the evident value. Video shooting does not replace the photo, but complements it, allows to capture objects not only in statics, but also in dynamics.

That is why the legislation of Spain for photo and video fixation in the activities of the police is one of the undisputed evidence when considering the materials of the offense in court.Thus, we want to provide a comparative characteristic of the involvement of technical means of fixation by police officers in case of criminal offenses according to the Spanish legislation.Given that under Spanish law, there is only a Criminal Code for all types of offenses with appropriate distinction for easy, medium and heavy crimes.Thus, based on the Spanish legislation, when considering a case in court, police must provide the evidence of the suspect's guilt being confirmed, including an "inquisitional exam" organized by means of photographs and video fixation confirming the fact of the offense, so that in these cases of its realization is absolutely necessary, as stipulated in Art. 152 of the CCO of Spain [18], "the reliability, accuracy and consistency of recognition or identification can not be denied, because the individuals who have witnessed, became accused, are recorded and stored by the police in the appropriate "photos of the suspect".

As already mentioned, if it is technically possible, it is desirable, according to the legislation of Spain, to take a picture or video in order to provide more power of persuasion when considering a case in court.Thus, identification can be absolutely necessary for the conviction of the accused, in accordance with the procedure of trial, with the use of appropriate evidence of photography, video fixation, therefore, it is necessary that every legal and constitutional requirement is fulfilled, otherwise the consideration of the case will not be fully considered.Video and photographic recognition are supportive, especially when the suspect is not identified. Thus, the CCO of Spain determines that if there is a suspect who is not fully identified, intelligence should be conducted directly [17].The Supreme Court, by its decision, confirms the legality of the photographic identification, but as such a preliminary proof, which was legally carried out within the framework of a police investigation.The most expedient according to the law of Spain are considered to be evidence submitted to the court, which have the following nature:

For each identified person, it is necessary to submit the appropriate protocol.•The number of photos and videos accompanying each suspect must consist of the quality in sufficient amount, which makes it possible to identify them in photos and videos without any doubt.•The law provides the suspect with the opportunity to demonstrate all means of protection connected with the links identified to him (that is, to provide data justifying him, etc.). During the demonstration of photo of a suspect it is convenient to accompany those who have similar characteristics and in similar formats of photographic reproductions.

Like all procedural acts, it must be signed by the parties, including the lawyer.In an accident № 503/2008 of July 17 (case about terrorist attacks "11 M") with reference to the proposal No. 1202/2003 of September 22, states that "polls at the police headquarters or in the court at an earlier stage, or by studying photographs or intelligence structures, are allowed when necessary to identify a person" [11]. Moreover, the law provides for the right to a presumption of innocence, so photo fixation must be supported by testimony and other material in the case. I also want to note that, unlike Ukrainian legislation, the Spanish provides for the possibility of fixing the offense by any means of fixation, and the chest chambers from the police are certified accordingly.Unfortunately, to date, the patrol police use non-certified technical equipment; therefore, it would be appropriate to create an appropriate technical base to provide the police with unique, functional means of photo and video shooting for the effectiveness of activity and the prevention of illegal and prohibited manifestations (fraud, corruption) in rela-

tion to means and information stored on it.

Also, I considered the "Instruction on the procedure for keeping a single record in the police authorities statements and reports of criminal offenses committed and other events" approved by Order No. 1377 dated November 6, 2015 [3] and found the following disadvantages: the lack of a clear deadline for storing documents on the fact of registration of the offense, there is generally no information on how the technical records are registered and where they are stored, as in Section II, paragraph 3 of this instruction stated that material for committing an offense containing the signs it is forbidden to transfer to another police body without registration in the SA journal and entering information into the Uniform Register of Pre-trial Investigations, that is, we again see a gap in this document, where it is not specified again, nothing about the technical details of the devices.

Therefore, in my opinion, it would be appropriate to create a single base for the general functions to which would include such as the preservation of information during the period of appeal and the possibility of providing it from the appropriate server to court. As a result I consider it necessary to create a certain instruction "On approval of the interaction of the bodies of the National Police and the court to provide evidence-based video information from electronic servers," which will speed up the exchange of records and its research and further admissibility as evidence in court.

**Conclusions**. Consequently, accumulation, fixation, systematization, generalization of information used to solve a wide range of police tasksis an integral and necessary part of the work of the police. Unfortunately, the legislative base is not at all tied to the practice of law enforcement, and it takes many years to perfect the relationship between the driver and the police, and the offense and sanction.That is, taking into account the material set out and the regulatory framework for regulation and, in general, fixing the photo and video fixation by the police to the appropriate institute, it should be noted that video recording as evidence in court is the most effective and least corrupt.

After taking into account the provisions of Art. 84 of the CPC of Ukraine, where the sources of evidence are indicated, we can conclude that, for example, the expert's opinion can be rigged by bribing an expert; testimony of witnesses or other eyewitnesses in general to buy.But the video provides a real perception of events that have happened in the past without distortion, as opposed to the testimony of others, who, in their story, are guided by guesses and only by own subjective perceptions of one or another situation.

***References***

1. Про Національну поліцію: Закон України від 2 липня 2015 р. № 58-VIII. *Відомості Верховної Ради України*. 2015. № 40-41.

2. Кодекс України про адміністративні правопорушення. Введений дію Постановою ВР Української РСР 8074-XI від 07.12.84, із змінами і доповненнями за станом на 4 квітня 2016 року.

3. Наказ від 06.11.2015 № 1377 «Про затвердження Інструкції про порядок ведення єдиного обліку в органах поліції заяв і повідомлень про вчинені кримінальні правопорушення та інші події». URL: http://zakon3.rada.gov.ua/laws/show/z1498-15.

4. Оскарження постанови по ст. 130 КУпАП. URL: http://pravova-rada.com/ua/296-obzhalovanie-postanovlenija-po-st-130-kuoap

5. Наказ Департаменту патрульної поліції НПУ від 03.02.2016 № 100, яким затверджено «Інструкцію про порядок зберігання, видачі, приймання, використання нагрудних відеокамер (відеореєстраторів) працівниками патрульної поліції та доступ до відеозаписів з них».

6. Наказ Департаменту патрульної поліції НПУ від 24.11.2015 № 14/1 «Про порядок зберігання, використання відеозапису з відеореєстраторів патрульних».

7. Конституція України: прийнята на п'ятій сес. Верховної Ради України 28 черв. 1996 р.: із змін., внес. згідно із Законом № 2222-IV (2222-15) від 8 груд. 2004 р. Харків: Ігнатекс-Україна, 2009. 48 с.

8. Крапивін Є. Нагрудна камера (відеореєстратор) патрульного: правове регулювання і порушення права на приватність. URL: http://umdpl.info/police-experts.info/2016/04/14/article-videofixation.

9. Про інформацію: Закон України від 02 жовтня 1992 р. № 2657-XII. URL: http://zakon0.rada.gov.ua/laws/main/2657-12.

10. Про захист персональних даних: Закон України від 01 червня 2010 р. № 2297-VI. URL: http://zakon0.rada.gov.ua/laws/main/2297-17.

11. HUDOC European Court of Human Rights. URL: http://hudoc.echr.coe.int/eng#{"fulltext":["Costello Roberts"], "documentcollectionid2": ["GRAND-CHAMBER","CHAMBER"],"itemid":["001-57804.

12. Рішення Конституційного Суду № 2-рп/2012 від 20.01.2012. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/KS12002.html.

13. Кодекс адміністративного судочинства України від 06 липня 2005 р. № 2747-IV. URL: http://zakon3.rada.gov.ua/laws/main/2747-15.

14. Цивільний процесуальний кодекс України від 18 березня 2004 р. № 1618-IV. URL: http://zakon3.rada.gov.ua/laws/main/1618-15.
15. Господарський процесуальний кодекс України від 06 листопада 1991 р. № 1798-XII. URL: http://zakon3.rada.gov.ua/laws/main/1798-12.
16. Справа № 63/161-10 Харківського апеляційного господарського суду. URL: http://reyestr.court.gov.ua/Review/12456762.
17. Закон Организационной Полиции // Ley Institucional de la Policía Nacional, No. 96-04. URL: http://hoy.com.do/la-nueva-ley-organica-de-la-policia-nacional-590-16-otra-letra-muerta-iii.
18. CARACTERIZACIÓN DEL CONCEPTO DE EVIDENCIA DEMOSTRATIVA Y SU USO EN EL JUICIO ORAL / Ana Milena Cristancho Vargas Universidad Católica de Colombia. URL: :http://editorial.ucatolica.edu.co/ojsucatolica/revistas_ucatolica/index.php/Juridica/article/view/672/690.
19. https://www.elconfidencial.com/espana/2018-04-26/la-manada-video-audio-grabacion-agresion-pamplona_1555486.

*Received to editorial office 01.06.2018*

**Summary**

The article deals with the legal regulation of the legal grounds for the use by police officers of technical means of photography, filming, video recording, on the basis of the Law of Ukraine "On the National Police". The materials of the Unified State Register of Court Decisions concerning the issuance by the courts of rulings on issues related to the use of technical devices are summarized. The legality of the use of technical means and the provision of video documents as evidence in the judicial process of Ukraine and Spain are considered. The question of the use of video recording, which should provide the most accurate and complete fixation of facts that have probative value, is analyzed.

The article is devoted to the study and discussion of issues related to the use of technical equipment by the police, in particular, in the process of photo and video fixing for offenses. She plays an important role in the search for criminals and offenders, assists in collecting evidence, exploring documents and other material evidence.

***Keywords:*** *judicial police of Spain, intervention, technological means of investigation of Spain, preliminary evidence, pre-installed test, legal hacker, intelligence expert test.*

**Vyacheslav Kuzmenko**
Dr of Ph. S., Prof.

**Tetyana Pakulova**
As. Prof.

**Yuliya Nahorna**
lecturer

*(the Dnipropetrovsk State University of Internal Affairs)*

## TEACHING THE HUMANITIES TO FUTURE LAW ENFORCEMENT OFFICERS

*DOI: 10.31733 / 2078-3566-2018-2-213-218*

**Кузьменко В., Пакулова Т., Нагорна Ю. НАВЧАННЯ ДИСЦИПЛІН ГУМАНІТАРНОГО ЦИКЛУ МАЙБУТНІХ ПРАВООХОРОНЦІВ**. У статті досліджується специфічний дидактичний матеріал у викладанні гуманітарних дисциплін при підготовці правознавця, який обов'язково має бути представлений у межах загального історико-філософського підходу у викладанні філософії та дає можливість формувати категоріальне мислення майбутніх фахівців в галузі права. Проаналізовано специфічні особливості правознавчої діяльності під час навчання, яка є

єдиним психічним і фізичним процесом, який конкретизується ознаками професіоналізму у сфері юриспруденції, – високою духовністю. Визначено, що тільки філософія як саморефлексія культури через світоглядну двійцю «я – світ» здатна привести мислення до меж, за якими знаходиться лише те, що називають метафізикою, яка є узагальненням у сфері невербального досвіду.Лише практична філософія як основа правознавчої діяльності з потреби являється деонтологічною, а відповідно, припускає високий рівень духовності. Саме деонтологія робить філософський дискурс етичним. З'ясовано, що, основний чинник у викладанні гуманітарних дисциплін при підготовці правознавця – це не лише ознайомлення його з історико-філософським процесом у схематизованому виді, але і постійне виявлення деонтологічної складової кожного філософського вчення, починаючи з античності.

Виділено важливий аспект, що деонтологічний контекст, в якості моделі «що мусить» яскраво представлений у філософських ученнях античності, християнської середньовічної культури, Нового часу. Акцентовано увагу, що саме аналіз деонтологічної складової кожного філософського вчення в історії філософської думки дозволить формувати світогляд майбутнього правознавця, розвивати його категоріальне мислення. Окрему увагу зосереджено на особливостях навчання працівників правоохоронних органів англійській мові та її особливостях у межах реформування поліції України, зокрема, надано характеристику рівня володіння англійською мовою працівниками поліції в Україні, здійснено порівняльний аналіз щодо рівнів володіння англійською в інших країнах та визначено основні шляхи підвищення ефективності навчання майбутніх правоохоронців.

***Ключові слова**: гуманітарні науки, духовність, працівник правоохоронного органу, transfer,деонтологія.*

The problem of social harmony – spirituality has always been scrutinized, but has not been solved in any cultural-historical period of the human race. It has not been solved up to now. It is worthwhile mentioning that it is impossible to prolong life in our common house – on the planet Earth without reflecting the problem of spirituality, without uniting different ethnic formations and every individual.

We cannot but point out that any historical stage of society development, parcelated by the representatives of historical studies and other social types of knowledge, any socio-ethnical formation in general and micro communities belonging to it aimed at achieving social harmony – spirituality. Moreover, they aimed at working out the laws based on morality and natural right, which would influence the renaissance of spirituality.

One can state that the society in general is spiritual and every individual is spiritual too provided harmony has been achieved.

However, we would rather not bind spirituality only with religious basics of the society as it is believed sometimes. Let us analyze it in a broader context. We will make an attempt to disclose the complexity of the category 'spirituality' which is to be included in a set of notions. It is important to define the basic notions. Firstly, the notion of cognitive activity which belongs to the society of researchers who are busy with the search of the sample of harmonious, that is, spiritual society. Secondly, the notion of methods – ways which belongs to the society of the ideologists, who lead socio-ethnical formation to harmony – spirituality. Thirdly, the notion of being attached to the worked out sample of spirituality which belongs to every individual, so to the society in general.

The development of a spiritual individual can be realized in the society where spirituality exists and is backed up. Spirituality is transferred from the whole to its part, from the society to every concrete individual.

Speaking about the sample of harmony, we would like to draw your attention to the fact that in any cultural-ethnic epoch of the society development there has never been another sample of harmony but harmoniously structured space.

So, at first one should comprehend space harmony basics, then find ways of involvement to it. It is impossible to comprehend space with intelligence only. The space, as the researchers state, is infinite. A man cannot comprehend that there is an infinity – his life is ultimate. Infinity is a regular form of our reflection. The space harmony can be comprehended only emotionally, later on intelligence will try to structure the understandable chart of space harmony and with the help of empirism to define the laws of some of the constituent parts of this chart.

Thus, ontology of spirituality in a society is triunity, which consists of comprehending principles – the basics of spirituality, objectives and ways to achieve them. Firstly, it is pursuing the objective consisting of comprehending the principles of space sophistication as the sample of harmony basics in the society. Secondly, the search of ways of space balance transferring to the social relations sphere. Thirdly, defining the society constant striving aim in general and an individual to emotional and rational comprehension of space harmony basics.

Ontology of spirituality in a society means comprehension of possibilities and creation of sophistication by way of altering varied peoples' souls emotional states.

The ontology of individual spirituality is a constant diligent work of a soul which enables to accept the sample of harmony worked out in the society. While doing this the individual learns how to restrain his negative – vicious emotional expressions of his soul.

More times than not in the history of the human race development the understanding of spirituality differed in different socio-ethnic formations and did not always coincide with the sample of space harmony. It depends on socio-political, demographic, geographical and some other conditions under which the society lives in every concrete period of its development. The laws of the society in every cultural-historical period are deduced empirically, they do not always reflect the sample of space harmony. The Archaic society thinking of harmony differs from that of family, private property and state periods.

One of the tasks of a contemporary jurist – to spiritualize the person who addresses him through his understanding and respect towards the natural right of every citizen of the society, sticking to the duty ethics – deontological principle.

We would like to stress that the root weapon of every jurist is the skill for logical reasoning, making conclusions, and persuading people. This skill has been worked out in the process of learning and teaching.

We cannot but say why exactly these constituents of spirituality to which we lead the person through education are the most valuable and that is why are of the utmost importance in a contemporary legal expert preparation – the professional who can think independently and persuade other people.

In the works by ancient Roman jurists they speak about jus natural – nature right and nature law alongside of jus civile – civil law which is the positive law and jus gentium – the law of nations.

One of the ancient Roman lawyers Ulpianus wrote that natural law is the law which the nature taught all living beings: this law is imbedded not only for the human race but for all the animals as well.

In Ancient Rome period the natural law was defined with a greater degree of justification and determination than in ancient Greece epoch. However, in ancient Rome state there were no scientific approaches to that phenomenon, there were no legal doctrines but only some definite statements – drafts to the theories, which were to be worked out much later.

In the Middle Ages the theoretical development of natural law was enriched in a limited scale. It was caused by the fact that intellectual development in the mentioned period was limited by religious beliefs.

Modern Age has become the time of natural law theories development. It was right that period when natural law theories developed considerably. Bourgeois revolutions proclaimed principles of equality for all people, freedoms and other rights. The most vividly it was captured in Constitutional legal acts of the USA and France. United States Declaration of Independence, 1776, declares that all people are created equal; they are endowed by their Creator with certain unalienable rights, that life, liberty and the pursuit of happiness are among them.

Natural rights were guaranteed by French Declaration of the Rights and Liberties of Man and of the Citizen in 1789, enacting clause of which declared that the representatives of the French people had determined to set forth in a Declaration the natural, unalienable, and sacred rights of man including liberty, property, safety and resistance to oppression.

The mentioned above and any other constitutional provisions securing natural rights are due to some legal ideas creation. H. Grotius, T. Hobbes, J.-J. Rousseau, P. Holbach gave birth to new legal tendencies.

Later on, in XIX century, the theory of natural law went through a crisis caused by fade of liberal-democratic wave, as well as by the growth of other directions of law sciences.

Deontology is the doctrine of the ethics of the must. In modern philosophy deontology is interpreted as the ethics of the duty, different from the ethics of the good or from axiology. The ground for this differentiation is the fact that there are two formally and functionally different ways of moral stand declaration – in the form of the imperatives, expressing obligation or prohibition, and in the form of the judgments, expressing approval and disapproval. Claiming good and evil to be specific and at the same time equal notions leads to understanding deontology and axiology as two relatively independent branches of ethics, each having its own problematics.

Not often deontology is treated as a special conception fighting for logical priority, the

primary nature of duty, to compare it with the good and denying in such a way the independent state of axiology. For example, I. Kant, who is considered to be the founder of this approach, stated that the notion of the good is derived from the notion of the duty. It is the good, which the duty demands, the attempt to define the good without duty will give us only an empirical image about the object of pleasure but not the notion of the moral good as it is. The similar position is occupied by modern deontological intuitionalism, which is opposed to axiological intuitionalism.

One more thesis of ethical deontology is the negation of necessity to take into account motives, objections and consequences of this or that behavior to qualify it as moral in general: moral peculiarity of the behavior is defined only by imperative impulse, 'energy' of duty, but not what it is performed for. By this statement, deontology opposes itself to teleological and consequential ethics – hedonism, utilitarianism.

All these theoretical collisions are caused mainly by the difference of philosophical and metaphysical principles the mentioned conceptions are based on. In real moral perception, formal differences between the good and the duty do not shelter the logical unity and are not the obstacle for adequate relevant interchange of these notions in the related contexts.

However, speaking about the lawyer's task – to spiritualize the individuals, it is necessary to emphasize that every lawyer is to gain the proper education to be able to fulfil the task set.

We would like to stress that creating the theory of an ideal state, the ancestor of the first wave of European rationalism – Platon formulated the idea that education and teaching are socially oriented and explained that education does not mean only teaching and developing a person's mental ability. Education is not just ethical or esthetical and certainly not physical upbringing. According to Platon, they are all inseparable parts of education and serve as the essential component of the ideal state preservation.

Platon stressed: the choice of way of living depends not only on inherent characteristics of the soul, but also on those acquired through education and teaching. According to Platon, the four spiritual values acquired through education – justice, courage, the truth and common sense.

Jurisprudential activity to which the person is getting ready being a student has a number of peculiarities. Firstly, if to speak about Hegelian 'abstract law' as 'in itself and for free will itself', the activity of every lawyer is the basis for jurisprudence in general. Secondly, analyzing jurisprudential activity from the same point of view, it should be treated in its outer realization – phenomenological. Thirdly, professionalism of a lawyer – is, among other things, the quality of the action created by the subject of the activity in the sphere where 'the good' is what the duty demands.

So, the activity of a lawyer is treated as the whole mental and physical process, which is characterized by professionalism in the sphere of jurisprudence. It is worthwhile mentioning the fact that the interpretation of the category 'activity' has been controversial among philosophers for many centuries. We would like to stress the fact that only philosophy as self-reflection of culture through worldview pair 'I – world' can lead thinking to the limits, beyond which there is only metaphysics. It is necessary to acknowledge that only metaphysics serves as generalization in the sphere of non-verbal experience.

Practical philosophy as the basis of jurisprudential activity when needed is deontology. It is Deontology that makes philosophical discourse ethical. Thus, the basic factor in teaching philosophy and other propaedeutic disciplines, while teaching a jurist – is not only getting him to know the historical and philosophical process in simplified form, but also constant detecting a deontological constituent of every philosophical study since the ancient world. We would emphasize again a very important aspect that deontological context, as the intended pattern, is represented in philosophical studies of the ancient world, Christian middle-aged culture, Modern Times.

In our opinion, it is the analysis of deontological constituent of every philosophical study in the history of philosophical conception will let generate the outlook of a future jurist, develop his categorical thinking.

In modern philosophy, deontology is usually treated as ethics of the duty, different from ethics of the good and axiology. The basis for this differentiation is the existence of morality in two formally and functionally different ways of moral stand declaration – in the form of the imperatives, expressing obligation and prohibition, and in the form of judgments, expressing approval or disapproval. Recognition of the duty and the good as specific and at the same time equal terms leads to understanding deontology and axiology as two relatively independent

branches of ethics, each having its own problematics. It is not uncommon when deontology is interpreted as a separate conception, advocating logical priority, 'primacy' of the duty before the good, thus denying the independent status of axiology. The attempt to define the good apart from the duty gives only empiric view of the object of pleasure, but not the notion of the moral good as it is.

Another task of developing Ukraine as a democratic state requires a comprehensive solution of police reform, improvement of their activities in terms of staffing and proficiency training of employees. It is natural that the police of different countries are interested in the professional interstate partnership to effectively join forces against a common problem - organized crime, human trafficking and other illegal actions. In the latest reality it is essential for law enforcement and public security in the country to reform the training. Strategic direction is to form a new psychology of police. Further reform of police training and education presupposes a new generation of law enforcement officers outlook which, unlike in Soviet times, serves human values and principles of humanism and democracy, understanding of freedom as the most important achievement of society [1].

Developing international cooperation with law enforcement agencies and foreign countries, the leadership of the Ministry of Internal Affairs of Ukraine considers the review and application of foreign experience of education to be the main objectives of Police higher educational establishments. The police system of developedcountries, especially those of the UK, USA, France, have extensive experience of combating crimes. They lay a mark on the organization of training of qualified personnel, developing international cooperation not only in matters of law enforcement, but also education, training experience exchange of police servicesand agencies [2].

However, an equally important area of police reform is to improve the educational process at universities preparing future police officers in terms of their professional mastering English. It is necessary to improve the learning process, gradually moving from the theoretical to the practical part and thus adjusting the process of police training to European standards. It is sufficient to amend the curricula with the greater number of practical training hours. The first step towards it was the adoption of the Law of Ukraine «On National Police» in the 2015.

The past years show that cooperation of Ministry of Internal Affairs of the European institutions (for example the OSCE) is aimed at improving educational training programs for police officers, taking into account European standards. But, as experience shows, this cooperation has not come into practical use in the educational process and is still under discussion.

International relations will definitely expand the outlook of the police, the scope of their professional knowledge, enrich experience, and provide an opportunity to review the achievements of foreign colleagues and compare them with domestic achievements, make appropriate adjustments to their practice.

With the above mentioned, we understood that developing and reforming law enforcement, the state is strengthening international cooperation with international police organizations, creating the police headed by worthy candidates in a new patrol police and conducting a re-certification among existing employees of «old» «militia». However, the question, is why the government, having experienceof working with international organizations, did not provide adequate training of future police officers in professional learning a foreign language?

International organization «Education First», which is the world leader in providing educational services for studying foreign languages, conducted a study among 60 countries in terms of English proficiency of their citizens. In 2013 Ukraine was included for the first time in the rankings, showing quite a good result with 27 point rating and factor of 53.09, which belongs to the category «Moderate Proficiency» - moderate knowledge.

Despite the fact that the Ukrainians do not travel much comparing with European and Asian countries, the average level of English of our citizens is almost the same as that of inhabitants of Japan, with indicators index 53.09 vs. 53.21. In addition, Ukrainians speak English better than Russians - 51.08, but significantly worse than Poles - 62.65, calculated according to the index of English [3].

However, the level of «moderate knowledge of English»is not enough for law enforcement officers. Police officers in big cities of Ukraine, where foreign citizens travel pretty much or study in the academies and universities should know not only explain how to get to certain areas or where there is some street or building. Not mentioning about accepting applications to committing misdemeanors, crimes interview with foreigners as victims, witnesses or suspects, drawing up administrative protocols to establish the circumstances of the event, taking the message on the

phone of the offense. Nowadays it is a big problem, because the level of English of police officers is low due, firstly, to the fact that experienced police officers did not consider it necessary to study it, and secondly, young police officers know it only at a conversational level. But it is not enough to be able to speak English on general topics, they need to know and be able to use legal terminology in professionally oriented situations.

In order to improve the level of English among the population the President of Ukraine Petro Poroshenko issued a decree declaring 2016 the Year of English [5].

Following the instructions of the President of Ukraine, a pilot year English course for police officers was launched in the capital - Capital English for Police. MayorV. Klitschko said that the English language would be effective for police work, because Kyiv is getting a lot of foreign visitors. It is believed that this project of Capital English for Kyiv Police is not only modern, but also communicative and meets international standards.

Similar centers of learning English for police officers were opened in other big cities of Ukraine.

Placing high hopes that knowledge of English police will give a chance to better respond to foreigners' applications receiving messages by «102» to investigate crimes. Politicians believe that this is one of the important steps in reforming the police [4].

Referring again to the statistics we can see that according to «Education First» Scandinavian countries have the best result, Poland has taken - 8th place, Ukraine – 27th, and Russia – 31st place. The question is, what does the level of English in Poland depend on? First, our colleagues from the police open borders for free movement throughout the EU, which allows to work closely and exchange experience with police in other countries, and secondly, to improve English language skills at the professional level, communicating with foreigners, thirdly, the Polish police officers have the opportunity to study in Europe and undergo training in various EU countries. Take for example the International Law Enforcement Academy in Budapest, which was founded in 1995 with the support of law enforcement agencies in the USA, Western Europe and the Government of Canada, the aim of teaching in which is to promote more effective cooperation between law enforcement agencies of different countries, and ensure conditions of effecting a permanent and professional development and growth by changes in lifestyle to a positive direction.

In conclusion, one must add that if our country passes all stages of reform, and Ukraine, as a country that wants to live in a better European conditions in the European Union, will get the opportunity to live in a new way, to depart from the old Soviet stereotypes and take European mentality. The Citizens of Ukraine will open the borders for free movement to Europe, which will motivate learning English, and those who choose not an easy way of a police officer will have a chance to more closely collaborate with foreign colleagues and share experiences in practical activities that forward the level of English and fill it with legal terminology.

***References***

1. Братковський А.В. Зарубіжний досвід професійної підготовки працівників правоохоронних органів: організаційно-правовий аспект. *Європейські перспективи*. 2013. № 4. С. 71-78. URL: http://nbuv.gov.ua/UJRN/_2013_4_15.

2. Європейська Правда. Украина опередила Россию по уровню владения английским. URL: http://www.eurointegration.com.ua/rus/news/2014/10/9/7026667.

3. Зозуля Є.В. Міжнародне співробітництво в контексті реалізації програм реформування системи внутрішніх справ України. *Юридичний науковий електронний журнал*. 2015. № 5. С. 22-26.

4. Новое время. I am a police officer. У Києві запустили безкоштовні курси англійської мови для поліцейських. URL: http://m.nv.ua/ukr/Ukraine/events/i-am-police-officer-u-kijevi-zapustili-bezkoshtovni-kursi-anglijskoji-movi-106318.html.

5. Указ Президента України «Про оголошення 2016 року Роком англійської мови в Україні» (2015, № 641). URL: http://zakon5.rada.gov.ua/laws/show/641/2015.

*Received to editorial office 11.06.2018*

**Summary**

The article deals with spiritual approach to teaching the humanities to futurelaw enforcement officers in terms of conducting sessions in philosophy and English.The theme is urgent as spirituality is transferred from the whole to its part, from the society to every concrete individual which is paid the utmost attention in the times of democratic society formation and police system reforming.

***Keywords:*** *the humanities, spirituality, law enforcement officer, transfer, deontology.*

**Michael (Mike) Antoniv**
Member of the Wales Parliament,
Wales Public Prosecutor

**Roman Myronyuk**
Dr of Law, Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

# THE FOREIGN EXPERIENCE OF PUBLIC CONTROL OF POLICE ACTIVITY AND ITS IMPLEMENTATION IN UKRAINE

*DOI: 10.31733 / 2078-3566-2018-2-219-224*

**Антонів М., Миронюк Р. ЗАРУБІЖНИЙ ДОСВІД ГРОМАДСЬКОГО КОНТРОЛЮ НАД ДІЯЛЬНІСТЮ ПОЛІЦІЇ ТА ЙОГО ВПРАВАДЖЕННЯ В УКРАЇНІ**. Здійснено аналіз моделей побудови та функціонування системи правового забезпечення та організації громадського контролю за діяльністю поліції провідних країн світу.

З урахуванням аналізу зарубіжного досвіду реалізації окремих форм громадського контролю за діяльністю поліції в цілому ряді країн і в окремих країнах зокрема визначено перспективні шляхи його впровадження в Україні, до яких слід віднести: 1) визначення та нормативне закріплення підстав, форм і способів залучення громадян до охорони громадського порядку в новому Законі України «Про участь громадськості в охороні громадського порядку», який повинен бути розроблений і прийнятий на заміну Закону «Про участь громадян в охороні громадського порядку і державного кордону»; 2) визначення в Законі «Про Національну поліцію» однією з форм громадського контролю за діяльністю поліції - участі на добровільних засадах громадян в охороні громадського порядку, виявлення, фіксації та розслідуванні обставин скоєння правопорушень та злочинів та вжиття заходів щодо усунення причин та умов їх здійснення. А також визначення та нормативного закріплення в ньому організаційних форм участі громадян в охороні громадського порядку і порядку взаємодії громадськості з поліцією; 3) розробку та прийняття державної і муніципальних програм участі громадськості в охороні громадського порядку і безпеки, які повинні визначати дієві а не формальні підстави, форми і порядок такої діяльності, в тому числі закріплювати механізм взаємодії поліції і громадськості в цій сфері; 4) забезпечення державної і муніципальної підтримки створення Асоціації підтримки поліцейської діяльності, як громадської організації, яка створюється на добровільних засадах громадянами для участі в діяльності поліції, в тому числі для поліпшення надання поліцейських послуг населенню. Саме через мережу пунктів діяльності такої асоціації громадяни можуть: отримувати консультаційні послуги в сфері дозвільної та ліцензійної діяльності поліції; доводити інформацію про потреби громадян в поліцейських послуги, наприклад, посилення патрулювання місць з тимчасово підвищеним рівнем суспільної шкідливості або небезпеки; інформувати керівництво поліції про факти порушення і зловживання посадовим становищем поліцейськими і здійсненні ними корупційних діянь; ініціювати проведення особистих зустрічей громадян з керівниками підрозділів поліції; здійснювати відбір шляхом відкритого голосування представників громадськості в громадських, консультаційних, наглядових радах за діяльністю поліції та членів атестаційних комісій з відбору та атестації поліцейських; 5) запровадження діяльності моніторингової групи за дотримання поліцією прав і свобод громадян на рівні апарату Національної поліції; 6) визначення порядку звітування керівника поліції на засіданні місцевої ради; 7) запровадження загальнодержавного рейтингу безпеки регіону, як основного показника діяльності поліції та показника громадської думки про діяльність поліції регіону.

***Ключові слова**: поліція, громадський контроль, засоби та способи громадського контролю, зарубіжний досвід, напрями впровадження.*

**Formulation of the problem.** As a member of the Council of Europe, Ukraine, in accordance with the Paris Charter for a New Europe of November 21, 1990, assumed the responsibility to accede to international human rights standards, to establish internal guarantees of their implementation, based on generally accepted international legal guarantees, enshrined in the relevant international legal norms.

The need to introduce uniform international standards into the work of the police is conditioned by the increase in the level of transnational organized crime, the rapid pace of population migration in the world, the significant differences in national policing systems, and the problem of ensuring human rights in the police activity. The signing of international

agreements also stipulate in the police activities the strict observance of standards in the field of human rights protection during the implementation of law enforcement functions, the need to respond to the emergence of new types of crimes and act in accordance with international human rights standards.Therefore, there is an urgent need to harmonize the principles of the National Police of Ukraine (hereinafter – NP) with world (in particular European) standards. First of all, it refers to the transition from the punitive to the socio-service content of its activities, the transformation of the police into a law-enforcement institution of the European model, which should provide law-enforcement services to citizens. The basic principles of police activity among the others in the Law of Ukraine "On National Police" dated July 2, 2015 (hereinafter – the Law) defined openness and transparency as well as interaction with the population on the basis of partnership, which in turn provides the basis for returning trust in this law enforcement body and its legal activities aimed primarily at servicing citizens in the law-enforcement sphere [1].

Therefore, based on the new "servicing" function of the police, the main customer of police services is the people of Ukraine, its citizens, who, by paying taxes, hold the police, and that's why have to legally determine the guarantees of control over their activities. Modern latest Ukrainian legislation regulating the system of rights of citizens in general and the observance and protection of their police provides certain opportunities for public control over the activities of the police, but the forms of such kind of public control, technologies and methods of its implementation need to be improved taking into account the foreign to all the European experience of public control over the activities of the police.

Thus, **the purpose of the scientific article** is to find out the means and methods of public control over the activities of the police in foreign countries (before the whole of Europe) and to identify the directions of its implementation in the national doctrine of the development of public control institutions for the activities of the National Police in Ukraine.

In order to accomplish the purpose within the article, the following *tasks* will be solved: the means and methods of public control over the activities of the police and the status of their legislative consolidation are determined; the efficiency and expediency of its application in the light of the positive international experience of the implementation of the control functions of civil society in the field of police activity have been determined.

**Basic content.** According to the current legislation, and in particular Section VIII "Public Control over Police Activity", the Law of Ukraine "On National Police" regulates the following forms of public control over police activities: receiving and publishing a report on police activity; control over the activities of the head of the police and the adoption of a resolution to distrust it; through interaction between the heads of territorial police bodies and representatives of local self-government bodies; by involving the public in the consideration of complaints about actions or omissions of police officers [1].

Despite the existence of legally defined forms of public control over the activities of the National Police, it is necessary to determine the means and methods of its implementation, which may include: 1) representation of the public in collegial bodies under the central and territorial units of the NP; 2) public participation in the discussion and preparation of legal acts regulating the activities of the NP; 3) direct appeal of citizens to the organs of the NP for the purpose of obtaining information about their activities; 4) circulation of mass media to the units of the National Defense Agency in order to obtain public information about their activities and its disclosure; 5) the participation of representatives of the public in the selection of personnel in the state of emergency and the certification of personnel; 6) participation of representatives of the public in the course of official examination of complaints about actions or inactivity of the police; 7) organizing public opinion polls on the activities of the NP; 8) the obligation to report to the public on the results of its activities; 9) participation of human rights public organizations in the development of programs of activities of the NP.

In the basis of the systematic study of forms of public control over the activities of the police in foreign countries and the ways of its implementation, we rely on the principle of selectivity, which is based on the study of international experience of successful political, economic, social plan countries (France, United Kingdom, Germany, USA, Canada, Japan) in which the public is actively involved in the activities of the police.

First of all, it should be noted that international standards for the interaction of police forces with the public are defined in Resolution No. 690 (1979) of the Parliamentary Assembly of the Council of Europe on the "Declaration on the Police" of May 8, 1979, Strasbourg [2], Recommendations (2001) 10 of the Committee of Ministers to the States Parties to the Council Europe "On the

European Code of Police Ethics", adopted by the Committee of Ministers on September 19, 2001 at the 765th Deputy Ministers' Meeting [3] and United Nations General Assembly Resolution 34/169. Code of Conduct for Law Enforcement Officials of December 17, 1979 [4].The police declaration in many countries is the basis of the professional standards of the police, and although it has no legal force, its main provisions have been enshrined in the European Code of Police Ethics adopted as an additional regulatory document of the Council of Europe.

The aforementioned documents recommend that States organize their police in accordance with the professional standards for the interaction of police forces with the public and provide that: the activities of the police are conducted in close contact with the public and the effectiveness of the police depends on public support; police agencies, in addition to ensuring law and order, perform social and service functions in society; the public's trust in the police is closely linked to their attitude to the public, in particular, their respect for human dignity and fundamental human rights and freedoms; the police should be organized in such a way as to promote good police links with the public and, if necessary, to cooperate effectively with other bodies, local communities, non-governmental organizations and other public representatives; the police should be organized in such a way as to deserve public respect as professional lawyers and services to the public; police organizations should be prepared to provide objective information about their activities to the public without disclosing confidential information.

It should be noted that among the diversity of forms of public oversight of police activities in foreign countries, the active participation of the public in co-operation with the police, aimed at taking a number of preventive measures aimed at preventing (minimizing) violations of public order, and eliminating the consequences of such violations, are most effective, especially at the local (municipal) level, in particular: taking part in the patrolling of administrative-territorial units (streets, parks, squares, sports, musical and other entertainment arenas, public facilities and pipeline transport); participation in joint meetings of local police and municipalities; participation in the protection of public order in the event of an enhanced version of the police service (in case of natural disasters, massive violations of public order, demonstrations, rallies, during preventive measures and measures to eliminate the consequences of terrorist threats, etc.). It should be noted here that such involvement of the public in joint activities with the police takes place in the overwhelming majority of the citizens' initiative, and only in an exceptional case, for example, in disaster recovery, on the initiative of the police or public authorities.

Unfortunately, in the current legislation, and in particular Section VIII "Public control over the activities of the police" of the Law of Ukraine "On National Police", such forms of interaction between the public and the police did not find their normative consolidation, and perhaps this is due to the fact, that the long-standing practice of involving the public in participation in the police activities was to forcibly involve citizens as people's warriors in order to safeguard public order, has not been effective in recent years.Since such forms of interaction between the public and the police as involving the holding of meetings, participation in the selection of personnel in the police, public assessment of the results of the police activities were almost non-existent, they formed the basis of the new Law "On National Police" as a normative act which is primarily regulated police but not public activities.

Despite this, the legal framework for the possible participation of citizens in the activities of the police is still determined by the Law of Ukraine "On Citizen Participation in the Protection of Public Order and the State Border" of June 22, 2000, No. 1835 III [5], in particular in Article 1 of this Law, which states "public formations for the protection of public order and the state border may be established on the basis of public amateurs as consolidated units of public formations, specialized units (groups) of assistance of the National Police to assist in preventing and terminating the protection of the life and health of citizens, the interests of society and the state from illegal encroachments, as well as in the salvation of people and property during a natural disaster and other extraordinary circumstances" [5].

In this connection, the foreign experience of the participation of the public in the law enforcement and human rights activities of the police and its adaptation in Ukraine is of great interest. Despite the existence of specially created public institutions the main function of which is to ensure public order and security, and this function is entrusted to the police in most countries of the world, public involvement in police activities is essential and appropriate in some aspects: as an auxiliary subject of police activity that in most conflict situations a citizen-policeman acts as a certain social arbiter; as a subject controlling the activities of the police; as a subject that saves budget funds directed at public order protection.Indeed, it is

sometimes citizens who have witnessed a crime or are aware of a crime that is preparingto provide police with invaluable assistance in the prevention and investigation of crimes, as well as the maintenance of law and order in a particular area (primarily at the place of residence of citizens). It is no coincidence that in most countries the emphasis in the law-enforcement and human rights activities of public authorities is primarily on preventing crimes and other offenses with the help of the public. The first world-wide model of policing based on public support and participation was introduced by Robert Pillin the United Kingdom in 1829.Then, for the first time, it was suggested that police autonomy is an unjustified strategy. Police can not perform its duties efficiently and on time without relying on the support of community associations and residents of the areas servicing the police units. The result of this policy was the creation of a so-called new police, which worked closely with the population [6, p.160]. The cooperation between the police and the citizens is that they establish such relationships between them, in which they together solve the problems of fighting crime and maintaining the rule of law at the place of residence of citizens. In this case, as some researchers rightly noted, "it is triggered one of the basic principles of the functioning of the police: public security and the rule of law – a common concern for the state and society; the police will provide assistance only in cases where the efforts of the public is not enough"[7, p. 11-13].

The proper interaction of the public with the police can be carried out solely on the basis of voluntary and organizational securing. It should be noted here that in many countries, the police bodies have structural units (subdivisions), the staff of which exclusively engages in interaction with the population. Police and citizen cooperation is carried out through various community councils, committees, associations, which include representatives of trade unions, religious and other public associations. Undoubtedly, not all voluntary associations can withstand time checks and work efficiently, but in foreign practice there are many viable forms of participation of the population in the work of the police in combating crime and maintaining public order.But it remains obvious that the police bodies should support and stimulate the public's engagement. It should be manifested in the fact that the public relations police inspector should carry out the following work: keeping records of citizens involved in the protection of public order and interacting with the police in various forms, such information should be public (open), be made public in Mass media on official electronic pages of the police, except for cooperation in the field of operational-search activity; to petition the licensing authorities for the pre-emptive right to wear such firearms for traumatic weapons by such citizens (in the case of legislative consolidation in Ukraine of such a right of citizens); to petition the police supervision in charge of encouraging citizens' data, including the awarding of state awards and merits.

Beyond the borders of European countries, it should be noted the experience of interaction between the public and the police in Japan, where the level of crime is rather low and not least the reason is the high self-awareness of citizens and their effective cooperation with the police. For organizational support of such interaction at each police station there are offices of the Association for the Prevention of Crime, the member of which can be every citizen. It is interesting that the association includes not only ordinary citizens willing to cooperate with the law enforcement agencies, but also the association of persons by professions, whose representatives often become victims of criminal assaults (public transport drivers, banking workers, retail chains, car-, moto-, bicycle couriers and others), or most often provide legal advocacy services – lawyers. Members of the association voluntarily make money for its development. Through the territorial contact areas of the Association, citizens can obtain the necessary advice or effective legal assistance. Employees of contact areas work closely with police personnel, especially in case of committing a crime or seeking a missing person [6, p. 160].

Separate attempts to involve the public in engagement with the police would not have had a proper effect, if not national programs of public-policing interaction that were adopted and implemented in Great Britain, France, Germany, the United States, and aimed at effective cooperation between the population and the law enforcement agencies. So, in many European countries there is a public organization “Stop Criminal”, which helps the police in combating crime, ensuring the proper state of law and order in the regions, carrying out preventive, educational, advisory work. Branches of this public organization are located on the territory of police stations, which greatly improves the cooperation of members of the organization with police officers [8, p. 90].

The organization and implementation of such programs in Ukraine should start with the formation and analysis of public opinion about the activities of modern police. A positive im-

age and high results of activity, impeccable reputation and an appropriate level of culture are key components of the professional success of the police, including in the field of communication with the public and community formations.

On the basis of analysis of legislative provision and organizational principles of public control over law enforcement agencies, in particular by police in foreign countries, it is advisable to state that the implementation of public oversight of police activities in foreign countries is carried out in the following forms: 1) ensuring the availability of citizens to decisions taken by law enforcement agencies (for example, in the United States, where the Federal Bureau of Investigation publishes on its official website all the case files that civil organizations often file from to score); 2) the availability of police services for visiting citizens and the creation of a hotline for the police (call center) to provide advice to the population (based on Georgia's example); 3) survey of citizens (through social networks, for example through the Facebook page) on the feasibility of improving police services and the effectiveness of using police equipment (for example, in the UK and Sweden on the feasibility of placing video surveillance cameras in certain public places); 4) public participation in a survey on the state of law and order in the region and the assessment of the police actions of the region and its leader (for example, in Canada and Australia); 5) the activities of the Public Councils at the police, acting as an advisory body, which includes specialists from various adjacent police activities – transport professionals, sports and medicine, developing together with the police regulations on law and order (in most countries of the world); 6) the activities of monitoring services (e.g., "Law Enforcement Monitoring Associations" in Germany), the main purpose of which is to independently evaluate the activities of the police and to prepare and publish a report on its activities at the request of the territorial community or at the request of the police organization itself.

Summing up, we note that optimizing the interaction of police with the public in the context of law enforcement activities has the main goal – to give a new impetus to positive domestic practices of involving citizens in police activities, which are time-tested and supported by the public and implement the best positive experience of the activities of the police structures of the world with regard to the forms, methods and procedures for public interaction with the police, implemented in one particular country, and which is more or less adapted to those countries that had similar stages of Ukraine statehood and show prospects for its development.

**Conclusions.** Taking into account the analysis of foreign experience in the implementation of certain forms of public control over the activities of the police in a number of countries and in particular countries it becomes possible, in particular, to identify prospective ways of its implementation in Ukraine, which should include: 1) determination and normative consolidation of the grounds, forms and methods of involving citizens to the protection of public order in the new Law of Ukraine "On public participation in the protection of public order", which should be developed and adopted to replace the Law "On the participation of citizens in the protection public order and state border"; 2) the definition in the Law "On National Police" of one of the forms of public control over police activities – participation in voluntary activities of citizens in the protection of public order, detection, fixing and investigation of the circumstances of committing offenses and crimes and taking measures to eliminate the causes and conditions for their implementation. As well as the definition and normative consolidation in it of organizational forms of citizen participation in the protection of public order and the order of interaction of the public with the police; 3) development and adoption of state and municipal public participation programs in the protection of public order and security, which should determine the effective rather than formal grounds, forms and procedures for such activities, including the establishment of a mechanism for the interaction of the police and the public in this area; 4) ensuring state and municipal support for the establishment of the Association for the Support of Police Activity, as a public organization, which is created on a voluntary basis by citizens for participation in the activities of the police, including to improve the provision of police services to the population.It is through the network of points of activity of such an association citizens can: receive advisory services in the field of licensing of the police; provide information on the needs of citizens in police services, for example, increased patrolling of places with a temporary increased level of social harm or danger; inform the police supervision of the facts of violations and misuse of the police officers' position and of committing them with corruption; to initiate personal meetings with the heads of police units; to conduct selection by means of open voting of representatives of the public in public, consultative, supervisory boards for the activities of the police and members of the appraisal commissions for the selection and attestation of the police.

***References***

1. Про Національну поліцію: Закон України від 2 липня 2015 року № 580-VIII. *Відомості Верховної Ради України*. 2015. № 40-41. Ст. 379.
2. Декларація про поліцію: Резолюція Парламентскої асамблеї Ради Європи № 690 (1979) від 8 травня 1979 р. URL: http://zakon5.rada.gov.ua/laws/show/994_803.
3. Про Європейський кодекс поліцейської етики: Рекомендації Комітету Міністрів державам-учасницям Ради Європи від 19 вересня 2001 року / Офіційний сайт Центру політико-правових реформ. URL: http://pravo.org.ua/files/Criminal%20justice/rec1.pdf.
4. Кодекс поведения должностных лиц по поддержанию правопорядка: Резолюция 34/169 Генеральной Ассамблеи ООН от 17 декабря 1979 г. URL: http://zakon2.rada.gov.ua/laws/995_282.
5. Про участь громадян в охороні громадського порядку і державного кордону: Закон України від 22 червня 2000 року № 1835-III. *Відомості Верховної Ради України*. 2000. № 40. Ст. 338.
6. Долгополов А.М. Організаційно-правові питання діяльності громадських формувань з охорони громадського порядку і державного кордону в Україні: дис. … канд. юрид. наук: спец. 12.00.07 / Долгополов Анатолій Миколайович. К., 2008. 268 с.
7. Бесчастний В., Гребеньков Г. Взаємодія міліції й населення як стратегічний напрям діяльності органів правопорядку. *Віче*. 2013. № 12. С. 11-13.
8. Денисюк С.Ф. Громадський контроль за правоохоронною діяльністю в Україні: адміністративно-правові засади: дис. … докт. юрид. наук: спец. 12.00.07. Київ, 2010. 393 с.

*Received to editorial office 07.06.2018*

**Summary**

The article analyzes the models of construction and functioning of the legal support system and organization of public control over the activities of the police of the leading countries of the world.

Taking into account the analysis of foreign experience in the implementation of certain forms of public control over the activities of the police in a number of countries and in individual countries, in particular, the prospective ways of its introduction in Ukraine are identified.

***Keywords:*** *police, public control, means and methods of public control, foreign experience, directions of implementation.*

**Eduard Ryzhkov**
Ph.D., As. Prof.
*(the Dnipropetrovsk State University of Internal Affairs)*

## SOCIAL NETWORKS AS INTERESTED OBJECTS OF LAW-ENFORCEMENT BODIES

*DOI: 10.31733 / 2078-3566-2018-2-224-228*

**Рижков Е. СОЦІАЛЬНІ МЕРЕЖІ ЯК ОБ'ЄКТ ІНТЕРЕСУ ПРАВООХОРОННИХ ОРГАНІВ.** У статті розглядається соціалізація мережі Internet, та її вихід на істотно новий рівень, що і зумовлює необхідність врахування значного масиву оперативної інформації в практичній діяльності правоохоронних органів.

У сучасному інформаційному суспільстві соціальні мережі все частіше використовуються не за своїм основним цільовим призначенням. Все частіше вони стають як знаряддям, так і місцем скоєння злочину. Дана тенденція вимагає від правоохоронних органів не тільки здійснення моніторингу та пошуку осіб в цілях оперативно-розшукової діяльності, але і у інтересах досудового розслідування.

Дедалі виникає необхідність використання різноманітних Інтернет ресурсів, як джерел оперативно-значущої інформації. Інформаційні масиви соціальних мереж виступають дієвим інструментом протидії злочинним проявам та джерелом інформації, яка становить оперативний інтерес.

***Ключові слова:*** *соціальні мережі, правоохоронні органи, оперативно-розшукова інформація.*

**Problem statement and the state of its research**. Assessing the current scientific and technical situation in the world, it can be argued that humanity develops in an era of information society. In recent years, information, becoming one of the decisive factors in the development of modern society, is gaining increasing importance. Information processes that are observed in the world affect not only the scientific and technical sphere, but also on a wide range of social relations. In particular, such a manifestation is the impact of social networks on the world community.

It is natural that with the expansion of the use of social networks, the number of offens-

es related to this technology is increasing as they become not only a method of committing crimes, but also an instrument. It is the use of scientific and technological achievements in the commission of crimes that has always caused many problems for law enforcement agencies in the world.

A number of scholars, in particular I.A., were engaged in research on the problems of using social networks in law enforcement activities. Voronov, O.V. Bochek, Ye.O. Zvonok, VO Golubev, O.E. Corinth, M.V. Korchevsky, LA Osipenko, E.D. Patarakin, V.V. Pizhugida, E.V. Ryzhkov, Yu.V. Stepanov, M.Yu. Litvinov and others. At the same time, it should be noted that the work of predecessors is sufficiently substantiated and fundamental, but they require additional comprehension, addition and interpretation, first of all, in the modern youth environment.

The **purpose** of this article is to study the peculiarities of using social networks in the interests of law enforcement.

To achieve this goal it is supposed to solve the following scientific tasks: to analyze the genesis of the history of the emergence and concept of the social network; to explore functions, tasks and features of social networks; to carry out a comprehensive analysis of the legal basis for the use of information; obtained through social networks in law enforcement activities; characterize the international experience of using social networks by law enforcement agencies; to conduct a comprehensive analysis of ways to search and use information that is of operational interest in law enforcement activities to counteract criminal manifestations.

**Presenting main material**. Analyzing the goal and tasks set forth, it should be noted that the concept of "social network" is not new in science, but at different stages of the development of information networks, its content and thematic content constantly changed, depending on the evolution of technologies.

Exploring the genesis of the development of social networks as a social and legal phenomenon, we consider it expedient to propose the following stages of periodization.

The first stage is 1971-1995. The first social network using computer technology has become the technology of e-mail, which was introduced in 1971, and was used by the US military in the ARPA Net network.

The second stage (1995-2004) dates back to 1995, when Classmates.com, the first social network in the modern sense, was created by Randy Conrad. The concept of this network at that time met the needs of both separate social groups and society as a whole.

The next stage is from 2004 to the present. Begins with the foundation in 2004 of Facebook, which in a few years became the most popular social network in the world. At the heart of this network is the mechanism of communication, but in a different plane, which led to a revolution in this area. The number of active users by mid-2016 - more than 900 million. In 2006, its analogue appears - Vkontakte, which numbers more than 157 million users.

In 2006, the microblogging service Twitter launches - a system that allows users to send short text notes (up to 140 characters) using a web interface, SMS, instant messaging, or third-party client applications.

In 2010, Instagram is gaining momentum - a resource for sharing photos and videos, both recording, and in real time. By 2017, the number of users reaches 200 million people.

As reported in the study conducted for the Internet Association of Ukraine (InAU), in April 2015, there are 12.8 million regular Internet users aged 15 and over in Uanet. The highest level of attendance is among young age groups: 65% of Internet users belong to the age group from 15 to 29 years old and 35% to 30 to 44 years old. Every third Ukrainian uses the Internet on a monthly basis, and every fifth is practically every day [1].

According to a recent study by We Are Social and Hootsuite, in 2017, the number of people using social media around the world was more than 3 billion [4].

The number of active users of the main social platforms was: Facebook - more than 2 billion (remains the leading social network in 119 of 149 countries), YouTube - 1.5 billion. Significantly increased use of WhatsApp applications - 1.2 billion, Facebook Messenger - 1, 2 billion users [5, p. 205].

Among those who communicate using social sites, only 28% teach on their profile (page in the social network) the maximum of personal information, the main part - 69% of them outline the minimum of information. The reliability of this information in many (69%) is 100 percent. 73% of respondents are sure that if necessary they can easily remove their page from the social site.

Among the benefits of communicating in social networks, respondents said: accessibility, efficiency, informative, anonymity, ease of use, cost-effectiveness and the ability to use at

any time, you can find the right people, communicate with those who are far away and at the same time keep in touch with a few people at the same time and so on. Among the disadvantages they highlighted: lack of information, lack of visual and emotional contacts, artificiality, superficiality and lack of communication, misconceptions about people, anonymity, dependence, spam, viruses.

The processes that are observed at the present stage of society's development require prompt response from law enforcement agencies. Therefore, it is reasonable to assume that to date there is a problem of legal regulation of the use of information obtained through social networks in law enforcement activities. In our opinion, this issue should be considered from the standpoint of: analysis of national legislation on the use of social networks in the activities of the National Police; International experience of using social networks by law enforcement agencies of the world.

Taking into account that in the XXI century the influence of informatization on public life is increasing, in Ukraine a number of laws and regulations on legal regulation of public information relations have been adopted. Such legislation is based on system-building regulations, such as the Constitution of Ukraine, Ukrainian Codes, Laws of Ukraine "On Information", etc.

However, due to objective and subjective reasons, modern information law does not have a clear, hierarchical construction, unity, complexity, which causes a contradictory interpretation and application of its norms in practice, in particular because of the fact that separate integral problems are solved in various normative acts fragmentarily and without reconciliation.

In the framework of this topic and the tasks set, it is expedient to analyze some of the provisions of the Constitution of Ukraine, the Laws of Ukraine "On the National Police of Ukraine", "On Operational Investigative Activity", "On Information", "On Access to Public Information".

First, the Constitution of Ukraine in Clause 7 of Art. 116 stipulates the duty of law enforcement authorities to take measures to ensure the defense and national security of Ukraine, public order and the fight against crime [2].

Secondly, the Law of Ukraine "On the National Police of Ukraine" does not explicitly stipulate the use of social networking opportunities in law enforcement activities, but Art. 27 allows police officers to use information resources.

Describing the information received in the established legal order, it is advisable to pay attention to the Law of Ukraine "On information".

So, according to Art. 11 of the specified Law - information about an individual (personal data) - this information or a set of information about an individual that is identified or can be specifically identified [3].

It is important that the collection, storage, use and distribution of confidential information about a person is not allowed without its consent, except in cases prescribed by law, and only in the interests of national security, economic welfare and the protection of human rights. Confidential information about an individual includes, in particular, information about her nationality, education, marital status, religious beliefs, state of health, as well as address, date and place of birth. Nevertheless, Article 22 allows police officers to collect this information, since after the receipt of personal information into the social network, it becomes public.

Summing up the provisions of the aforementioned normative acts, it seems appropriate for us to highlight the following: the analysis shows that Ukraine's legislation on the use of information from social networks in law-enforcement activities has its disadvantages. Various laws and regulations that regulate public relations, the object of which is information, were adopted at different times without the proper agreement of the conceptual apparatus. Thus, the notion of a social network on the Internet is not contained in any regulatory legal act that regulates these relations.

Effective work of law enforcement bodies depends on many factors, first of all, the use of modern forces, means and methods of operative-search activity. Thus, the use of the latter provides for the effective detection and suppression of crimes, which is especially important in the modern conditions of informatization of society [9, p. 42].

Unlike Ukraine, law enforcement agencies of the world have been monitoring social networks for a long time, which allows them to warn and timely detect not only offenses committed through the Internet, but also using traditional means. Thus, the Italian police are using social networks for the operational development of members of organized crime [5]. The peculiarity is that the Italian police apply only certain areas for the use of social networks, namely

the monitoring of personal pages of persons of operational interest and analysis of correspondence over the networks. Thus, according to the agreement of the authorized bodies, the representatives of Facebook provide assistance not only to the law enforcement agencies of Italy, but also to the world.

In our opinion, the successful use of the tasks facing the units to combat cybercrime depends on qualitative training. For example, the UK Department of the Interior has included a special course on social media collection in the UK police training program.

The British police have officially recognized the importance of social networks in disclosing crimes by including an appropriate course in the training program for young employees. Future detectives will learn how to collect information from computers and mobile phones and look for crime-related information on social networks.

Network crimes, especially those that occur directly in the middle of the network, are, to varying degrees, endowed with attributes peculiar to crime in general. Monitoring both individual segments and the network as a whole will allow law enforcement agencies to increase the level of disclosure of this type of crime, because social networks represent not only the information array of personal data of the user, but also the basis for communication between individuals [7, p. 85].

Osipenko L.A. in his monograph on the fight against crime in global Internet networks, identifies 4 types of crimes that crumble through it [6, p. 117].

In our opinion, its classification does not accurately reflect the features of this topic, because it does not take into account the individual properties of social networks. This is conditioned both by the scientific novelty of this work and by the fact that social networks are a relatively new socio-legal phenomenon of our time. So, in our opinion, with the help of social networks, the following crimes are committed: "Traditional" crimes, in the implementation of which, social networks are used as the necessary technical means (drugs, weapons, etc.); crimes related to the placement of illegal information in networks: pornography offenses - pornography distribution through global networks, offering or granting access to it, obtaining for themselves or others through the computer system, storage of pornography in a computer system; network computer crimes - they include network marketing, investment projects, fake marriage offices.

The annual report of the 2001 International Narcotics Control Board (INCB) states that drug trafficking is increasingly being carried out through the Internet. Agreements are discussed in closed chambers from law enforcement agencies. The report provides examples of drug purchases in the Czech Republic through an Internet cafe and the Dutch company operating on an international scale that sells hemp seeds through social networks.

One of the most important properties of network computer crimes is their high latency. Establishing true scales of new types of criminal activity is much more complicated than any other. According to experts, from 85 to 97% of network computer intruders does not even appear. Thus, here comes the confirmation principle, according to which "the more complicated the criminal activity, so it is latent."

As you know, in the absence of sufficient material and technical and personnel support for law enforcement agencies, reducing the gap between latent and registered crime can lead to an increase in the absolute number of undisclosed crimes. This circumstance forces certain members of law enforcement agencies to maintain high disclosure rates, refuse to register network computer crimes, the probability of which disclosure is extremely small [6, p. 161].

Consequently, the analysis carried out shows that Ukraine's legislation on the use of information from social networks in the activities of the police has a number of shortcomings. Laws and regulations that regulate social relations, the subject of which I have been informed, were taken at different times without proper agreement of the conceptual apparatus. They have a number of terms that are not correct enough, do not cause unambiguous public reflection, or do not have a clear definition of their content.

Personal information about the user of the social network is not confidential, which enables it to be used by law enforcement agencies to detect and stop the crime, to search for missing persons, and other tasks facing the police. Despite the fact that the legislator did not directly foresee the possibility of using information from social networks in operatively-search activity, but due to the special design of the rules, it becomes possible.

**Conclusion**. Taking into account the above, we can conclude that in the modern information society, social networks are increasingly used not for their main purpose. Increasingly, they become both an instrument and a place of committing a crime. This trend requires law enforcement authorities not only to monitor and search individuals for operational purposes, but

also in the interests of pre-trial investigation. Among the peculiarities of using social networks, it is expedient to distinguish between law enforcement authorities: firstly, the information comes to the social network, as a rule, without the participation of law enforcement officers; Secondly, information contained in social networks is dynamic and, in some cases, actual, because it is constantly updated; on the third - the array of this information in steady dynamics is constantly increasing quantitatively, forming additional interobjects bonds.

Thus, social networks act as a unique source of significant information for law enforcement agencies and require additional legal regulation in order to provide an effective legal basis for the formation of probative reasons in its use.

***References***

1. Інструменти спілкування в Інтернет. URL: http://lib.mdpu.org.ua/e-book/oi/lection7.htm.
2. Number of social media users passes 3 billion with no signs of slowing. URL: then-extweb.com/contributors/2017/08/07/number-so-cial-media-users-passes-3-billion-no-signs-slow-in.
3. Титуніна К.В., Марценко В.Є. Соціальні медіа як засіб комунікації між поліцією та громадою. *Економічна та інформаційна безпека: проблеми та перспективи: матеріали Всеукраїнської науково-практичної конференції* (27 квітня 2018 р., м. Дніпро). Дніпро: Дніпропетровський державний університет внутрішніх справ, 2018. С. 204-208.
4. Конституція України від 28.06.1996. *Відомості Верховної Ради України.* 1996. № 30. Ст. 141.
5. Про інформацію: Закон України *Відомості Верховної Ради України.* 1992. № 48. Ст. 650.
6. Про доступ до публічної інформації: Закон України *Відомості Верховної Ради України.* 2011. № 32. Ст. 314.
7. Кутузов О.В. Спам: проблеми законодавчого регулювання та протидії. *Шляхи та перспективи розвитку кримінального права України: юридичні читання:* матеріали Всеукраїнської студентської конференції (м. Одеса, 7 жовтня 2011 р.) / Одеський державний університет внутрішніх справ. Одеса: ОДУВС, 2011. С. 134-136.
8. Кутузов О.В. Соціальні мережі закритого типу як перспективне джерело отримання оперативно-значущої інформації. *Актуальні проблеми юридичної науки очима молодих вчених:* матеріали всеукраїнської науково-практ. конференції (в авторській редакції) (Донецьк, 24 лютого 2012): матеріали у 2 ч. Донецьк: ЧП «ИД «Кальміус», 2012. Ч. 1. С. 160-163.
9. Кравцова М.О. Кіберзлочинність: кримінологічна характеристика та запобігання органами внутрішніх справ: автореферат … канд. юрид. наук. Харків: ХНУВС, 2016. 19 с.
10. Рижков Е.В., Тітов О.О. Пошук інформації яка становить оперативний інтерес, в мережі Інтернет. *Кібербезпека в Україні: правові та організаційні питання:* матеріали Всеукр. наук.-практ. конф., м. Одеса, 21 жовтня 2016 р. Одеса: ОДУВС, 2016. С. 191-193.

*Received to editorial office 06.06.2018*

**Summary**

The article deals with the socialization of the Internet, and its access to a substantially new level, which necessitates the consideration of a significant amount of operational information in the practice of law enforcement agencies. There is a growing need for the use of various Internet resources as sources of operationally relevant information. Information masses of social networks are an effective tool for combating criminal manifestations and a source of information that is operational interest.

***Keywords:*** *social networks, law enforcement agencies, operative-search information.*

**Svitlana Ryzhkova**
lecturer
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733 / 2078-3566-2018-2-228-231*

## REALIZATION OF CITIZENS' RIGHTS IN PUBLIC ORDER PROTECTION AS PUBLIC ASSISTANTS

**Рижкова С. РЕАЛІЗАЦІЯ ПРАВ ГРОМАДЯН В ОХОРОНІ ГРОМАДСЬКОГО ПОРЯДКУ ЯК ГРОМАДСЬКИХ ПОМІЧНИКІВ.** У статті розглядається реалізація права громадян в охороні громадського порядку як членів громадських формувань та обґрунтовується необхідність запровадження інституту громадських помічників дільничних офіцерів поліції.

Розвиток та запровадження інституту добровільних помічників поліції, визначення їх організаційно-правового статусу, законодавче закріплення індивідуальної участі громадян в охороні громадського порядку надасть реальний поштовх щодо реалізації прав громадян в охороні громадського порядку у співпраці з відповідними підрозділами Національної поліції України та буде

позитивно впливати на ефективність виконання ними правоохоронної функції.

***Ключові слова:*** *дільничний офіцер поліції, член громадського формування, добровільний помічник поліції, Національна поліція*

**Formulation of the problem**. An important role in the implementation of the tasks assigned to the subunit of the National Police, in terms of ensuring public order, prevention and prevention of offenses is the involvement of public representatives in such activities. According to Art. 11, paragraph 1, of the Law of Ukraine "On National Police", the activities of the police are carried out in close cooperation and interaction with the population, territorial communities and public associations on the basis of partnership and aimed at meeting their needs [1].

The basis for such activities is the principle of Community Policing - an approach in the day-to-day work of law enforcement, built in the constant communication of the police and local communities that share the responsibility for security, applies an individual approach to addressing local problems in interaction with the public and responsible authorities [2].

In order to fulfill the tasks of the Ministry of Internal Affairs of Ukraine at the present stage of development, the main priority is the problem of the possibilities of realization of citizens' rights in law-enforcement activity. However, one of the major problems in this issue remains the uncertainty of the forms of citizens' participation on the basis of legislative acts, alternatively, as an independent entity on an individual basis as public police assistants.

**Status of research** The separate aspects related to the organizational and legal status of public assistants (freelance district), devoted to the work of such specialists V.K. Kolpakov, N.I. Sidorenko N.V. Koval, IA Sklyarov, O. M. Bandurka, AM Dolgopolov, D. S. Kablov, M. G. Kolodyazhniy, V. I. Moskowets, A. M. Muzychuk, V. P. Petykov and others. Many issues of the mentioned problem still remain insufficiently investigated or subjected to partial consideration. Therefore, there is a need for improved provision of individual participation of citizens in the protection of public order in interaction with representatives of the National Police.

The **purpose** of the paper is to substantiate the need for the institution of voluntary community police assistants who voluntarily voluntarily have the right to cooperate with district police officers using the experience of such cooperation with law enforcement in previous years in Ukraine.

**Statement of the main provisions**. According to the Strategy for the Development of the Ministry of Internal Affairs of Ukraine until 2020 (the Strategy), the main approaches to implementing the strategy are to serve the society by ensuring respect for human rights and fundamental freedoms as a key value in the activities of the bodies of the Ministry of Internal Affairs, realizing their functions, guided by the needs of man. At the same time, one of the areas of activity is to involve society in the process of creating a safe environment, through close cooperation with territorial communities and society as a whole, as well as the establishment of mechanisms for partnership with civil society institutions [3].

The strategy is a vision of the development of the MIA system as an integral part of Ukraine's national security sector, and defines priorities for their activities, one of which is the safe environment, as well as the observance and enforcement of human rights by the organs of the system.

According to the Strategy, a safe environment for people's lives is ensured by the activity of the bodies of the Ministry of Internal Affairs, their rapid and competent response to emergency situations and events that threaten personal or public security, their prevention and active participation of citizens [3].

Among the main challenges that arise when implementing the relevant goals are: insufficient level of participation of the society in the mechanisms of prevention of offenses; lack of adequate personal security skills and inadequate level of public awareness of their active role in providing public safety.

Based on the above, the strategy is aimed at implementing the appropriate steps. Among them: the development of partnership and social interaction, the creation of mechanisms for joint implementation of tasks by the bodies of the Ministry of Internal Affairs and the population, in particular, territorial communities; Implementation of the principle of community building (activity of the system of the Ministry of Internal Affairs for community needs) in the operational and managerial activities of the Ministry of Internal Affairs; development of institutes of district police and patrol police as the first competent part of cooperation with the population [3].

According to Article 11, paragraph 1, of the Law of Ukraine "On National Police", police activities are carried out in close cooperation and interaction with the population, territorial communities and public associations on the basis of partnership and aimed at meeting their

needs [1].

The realization of the rights of citizens in the protection of public order is its legislative consolidation in the Law of Ukraine "On Participation of Citizens in the Protection of Public Order and the State Border" and determines, in our case, the principles of participation of citizens in the protection of public order. Citizens of Ukraine have the right to create public formations for the protection of public order on the basis of public amateurs as consolidated units of public formations, specialized groups (groups) of assistance to the National Police. Members of public organizations for the protection of public order and the state border may be citizens of Ukraine who have reached the age of 18, have expressed a desire to participate in strengthening the rule of law and in the protection of the state border and are able to carry out on their voluntary business, moral qualities and state of health on the basis of the obligations assumed. In accordance with these conditions, citizens are given appropriate special status as members of public formations and acquire special rights and obligations, social guarantees, and the exercise of the right to participate in the protection of public order. In order to fulfill the tasks specified in this Law, public formations for the protection of public order and their members have the right: 1) to participate in the maintenance of public order, together with the police, and in rural areas - independently by executing specific instructions of the head of the relevant body of the National Police; 2) use in conjunction with police measures to terminate administrative offenses and crimes; 3) to represent and protect the interests of its members in state bodies and enterprises, institutions, organizations, educational institutions; 4) to interact with other bodies of public amateurs involved in activities aimed at conducting individual and preventive work with persons inclined to commit administrative offenses and crimes; 5) to submit to the bodies of state authority, local self-government, enterprises, institutions and organizations, regardless of the forms of ownership, proposals for the prevention of administrative offenses and crimes, the emergence of causes and conditions conducive to their commission; 6) maintain liaison with relevant NGOs from other countries in order to exchange experience [4].

Proceeding from the above, it becomes obvious that the realization of the right of citizens 'participation in the protection of public order is legally fixed only as a collective form of citizens' participation in the protection of public order, and only as members of public formations. This issue has been the subject of scientific discussion on several occasions, although the question of individual form of participation in the protection of public order is still not studied and fragmentary. There is a logical question - why did the legislator not determine the realization of the rights of citizens in the protection of public order, as an individual form of participation? Previously, there were opportunities for citizens to exercise such a right, who voluntarily volunteered to volunteer to help law enforcement agencies on a royalty-free basis.

Analyzing the activities of district police inspectors (hereinafter - the Home -owners), which at one time was regulated by Order No. 550 of 11.11.2010 "On Approval of the Regulation on the Service of District Police Inspectors within the Ministry of Internal Affairs of Ukraine", we establish that district inspectors had the right to involve public Housewives' assistants, among members of community formations [5]. In accordance with such normative attachment to the public assistants, the DEM was fully covered by the legal status of a member of the public formation, which provided him with appropriate guarantees in the performance of his duties in the protection of public order. However, it should be noted that such normative consolidation of individual participation of citizens in the protection of public order did not solve the issue of effective involvement of citizens as public assistants of the home. First, such a mechanism created additional obstacles. In order to cooperate with the community assistant of the district, it was necessary to pre-register the public formations. An analysis of the activities of public groups revealed de facto formal ineffective public formations that did not really fulfill their obligations. Thus, the principle of quantity is not always consistent with the principles of quality.

The above makes it impossible for a free and more effective way to involve citizens as civic assistants, namely their right to individual cooperation without the prior creation of appropriate associations.

With the adoption of the Law "On the National Police", in accordance with the Order of the Ministry of Internal Affairs of Ukraine No. 650 dated 07/27/2017 "On approval of the Instruction on the organization of the activity of district police officers," a police district police officer cooperates with representatives of public groups for the protection of public order, assists in organization their activities, participates in conducting joint meetings, during which measures are being developed and agreed to ensure public safety and order in the areas of service and cooperation with the patrol police [6]. At the same time, the institute of public assis-

tants ceased to exist in accordance with the said order.

In our opinion, the uncertainty at the legislative level of the legal status of such a form of participation of public assistants as the individual participation of citizens in the protection of public order, the lack of political will to change the Law of Ukraine "On Participation of Citizens in the Protection of Public Order and the State Border", led to the leveling of such an extremely important the institution of voluntary participation of citizens in the protection of public order, as voluntary community assistants.

Evidence of positive work, public assistants in the framework of individual participation, in addition to statistical data on their activities, is the documentary film "Ukrainian Sheriffs" [7]. "Ukrainian Sheriffs" is a film by director Roman Bondarchuk about rural volunteers who effectively "replaced" their local militia. It covers the activities of community assistants of the district inspector. The world premiere of the film took place on November 20, 2015 at the Amsterdam International Documentary Film Festival, where she received the Special Jury Prize. On March 26, 2016, the Docudays UA film festival was nominated for the Oscars for the best foreign language film [8].

**Conclusion**. According to the Development Strategy of the Ministry of Internal Affairs of Ukraine 2020 Institute requires a police precinct improvement as one of the first links of cooperation with competent people. Therefore, the development and introduction of voluntary helpers police determine their organizational and legal status, legislative strengthening individual participation of citizens in public order will provide real impetus to implement the rights of citizens in public order in cooperation with relevant departments of the National Police of Ukraine and will positively influence efficiency performance of law enforcement functions.

***References***

1. Про Національну поліцію: Закон України від 2 липня 2015р. № 580-VIII. URL: http://zakon2.rada.gov.ua/laws/show/580-19.

2. Взаємодія поліції та громади (community-policing). URL: https://ecpl.com.ua/publications/vzajemodiya-politsiji-ta-hromady-community-policing.

3. Стратегія розвитку системи Міністерства внутрішніх справ України до 2020 року. URL: http://mvs.gov.ua/ua/pages/strategiya_2020.htm.

4. Про участь громадян в охороні громадського порядку і державного кордону: Закон України від 22 червня 2000 р. *Відомості Верховної Ради України*. 2000. № 40. Ст. 338.

5. Про затвердження Положення про службу дільничних інспекторів міліції в системі Міністерства внутрішніх справ України: Наказ № 550 від 11.11.2010. URL: http://zakon2.rada.gov.ua/laws/show/z1219-10.

6. Про затвердження Інструкції з організації діяльності дільничних офіцерів поліції: Наказ МВС України № 650 від 28.07.2017. URL: http://zakon2.rada.gov.ua/laws/show/z1041-17.

7. «Українські шерифи»: фільм про сільських волонтерів, які «замінили» міліцію. URL: https://www.radiosvoboda.org/a/27421665.html.

8. На «Оскар» від України номінували фільм «Українські шерифи» / Українська правда. URL: https://life.pravda.com.ua/culture/2016/09/9/217833.

*Received to editorial office 06.06.2018*

**Summary**

The article examines the realization of the right of citizens in the protection of public order as members of public formations and justifies the necessity of the introduction of the institution of civic assistants of district police officers.

***Keywords**: district police officer, member of public formation, voluntary police assistant, National Police.*

**Kateryna Tymofiiva**
lecturer
*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733 / 2078-3566-2018-2-232-236*

# MOTIVATION AND CAREER DEVELOPMENT AS KEY FACTORS IN THE UKRAINIAN POLICE

**Тимофіїва К. МОТИВАЦІЯ ТА КАР'ЄРНИЙ РОЗВИТОК ЯК КЛЮЧОВІ ФАКТОРИ В ПОЛІЦІЇ УКРАЇНИ**. У статті здійснено теоретичний аналіз питань мотивації та продуктивності працівників поліції України, а також розглянуто проблеми їх професійної мотивації з урахуванням специфіки цього виду державної служби в правоохоронній системі. Визначено, що ефективність службової діяльності працівників поліції певною мірою визначає їх трудова мотивація, а завданням сучаснихкерівників практичних підрозділів внутрішніх справ є – забезпечити мотивуючі умови служби, здійснювати сприятливий мотиваційний вплив на підлеглих, забезпечити успішну професійнудіяльністькожногоправоохоронцяізлагодженуколективну роботу всього персоналу. Мотивований до службипрацівник сумлінно і результативно працює, самовиражаєтьсяу праці. Вибір лінії поведінки працівника визначають його трудові мотиви. Останні виражаються у внутрішньому спонуканнілюдини. Формування професіоналізму діяльності визначено як найважливішу характеристику працівників системи внутрішніх справ. Розглянуто теоретико-методологічні засади використання технологій мотивації стимулювання працівників системи ОВС та обґрунтовано напрями їх удосконалення.

Висвітлено питання пов'язані з професійною надійністю працівників поліції України: формування професійної надійності майбутніх поліцейських під час навчання, забезпечення професійної та функціональної надійності фахівців на робочому місці та прогнозування надійності працівників ОВС після довготривалого періоду несення служби. Проаналізовано та обґрунтовано ряд факторів, які безпосередньо впливають на розвиток професійної мотивації та робочої продуктивності працівників ОВС. Відношення на робочому місці, само-організація, стрес, стан здоров'я, заохочення та нагорода зі сторони керівництвавизначені домінуючими чинниками поліцейської продуктивної діяльності на робочому місці. У ході роботи визначено, що процес виявлення професійних мотивів і регулюваннятрудової мотивації правоохоронців є досить складним і в той жечас необхідним для здійснення ефективного управління в ОВС.

***Ключові слова:****мотивація, мотивація працівників поліції, ієрархія потреб, продуктивність, найвищі стандарти, фізична допомога, емоційна підтримка, методологічне керівництво.*

Nowadays the issues of being police officer, protection of order and feeling of power are up to the day in our everyday life. Motivating police personnel can be complicated. Supervisors must work hard to ensure officers perform their duties efficiently and effectively. Many factors can negatively affect productivity and cause officers to become complacent, doing the bare minimum necessary. The difficult nature of crime fighting can cause officers to become cynical toward the population as a whole and develop an «us-versus-them» view [3]. A negative attitude in police work can lead to feelings of inconsequentiality toward law enforcement goals and either slow or stop internal motivation.

Officers who begin their careers with an attitude of «saving the world» can become jaded toward that goal after years of witnessing the worst in people. Constantly observing the aftermath of violent crimes, like robbery, rape, murder, and assault, eventually can take its toll on even the most dedicated officer. Administrators must look for ways to offset this constant bombardment of negativity while reinforcing the positive aspects of society and the benefits provided by quality law enforcement practices. This situation clarifies **the urgency of this research**.

**The purposeof the article** is to study the peculiarities of motivating police personnel and to scrutinizedthe ways of their professional self-development.

It is certainly true that this question was discussed by large number of different scientists and psychologists.But one of the most commonly cited theories of motivation is that of

Abraham Maslow. According to his theory, people are motivated based on a hierarchy of needs [5]. At the bottom of this list are basic physiological essentials, such as food, water, and shelter. After obtaining these necessities, people look for safety, security, and a sense of belonging. Individuals then seek out praise and recognition for a job well-done that is related to a quest for improved self-esteem. This is followed by a desire for self-actualization or the potential to grow professionally[5].

A prominent feature of this theory is the need for praise and recognition under the self-esteem model. When properly used by management, praise can be an effective motivator of police personnel. Mark Twain once commented that he could live for two months on a compliment alone. Managers who strive to inspire personnel can adopt this adage and use it as an example of motivational philosophy.

Productivity and motivation are important in any organization. In police agencies, officers have a lot of freedom and discretion and often are unsupervised for many hours of the workday. The individual level of commitment and desire to serve the noble and ethical cause help guide officers' productivity and motivation on the job [2].

Many variables can influence on officers' levels of motivation, including supervisors' attitudes, job environment, and personal factors. Individuals experiencing family problems, health concerns, financial issues, or negative social experiences can exhibit significant declines in productivity and motivation. Job security often can help officers with personal problems as much as a stable personal life can assist them with a difficult work environment [4]. Administrators and direct supervisors seeking to improve work performance should understand this basic psychological process.

The community holds police to a high level of public trust while expecting them to prevent crime, maintain order, and provide an equal and unbiased application of law enforcement. To be an equal opportunity enforcement officer, the individual must be motivated to do the job and held accountable to the highest standards at all times. Fellow officers depend on each other for physical backup, emotional support, and technical guidance [2]. Lack of motivation can be contagious and cause problems for management if not recognized and treated early.

Agencies must have early warning systems in place to recognize symptoms and identify officers experiencing a decline in productivity or a lack of motivation [2]. Computer software programs can recognize possible early warning signs, such as decline in performance, suspicious sick leave patterns, unreasonable uses of force, and increased complaints. Such issues can indicate personal problems that result in a lack of motivation and productivity.

Several theories of motivation exist that supervisors could consider, including Maslow's Hierarchy of Needs, Herzberg's Motivation-Hygiene Theory. Administrators can learn many positive, as well as negative, points from these theories, but they all have one thing in common – the idea that supervisors must know their people [5]. To effectively manage motivation and productivity, leaders must possess the human skills needed to work with employees and have the empathy to understand their issues [5]. This idea also means that supervisors must work as a team with officers and build a cooperative effort for the common goal of the agency. By working closely with and understanding officers, effective leaders can identify problems earlier and create effective solutions to deal with those issues.

Physical fitness holds importance when discussing individual motivation and performance. Of course the first step of being productive in an organization is actually coming to work. Officers who participate in regular exercise programs less likely will develop health-related problems that keep them away from the job and negatively affect their work performance [4]. A police officer's job involves interacting with the public, entering and exiting police cars, walking up steps, apprehending suspects, and performing other physical activities dependent on a high level of physical fitness. Law enforcement leaders must take a hard look at agency physical training standards and long-term health programs to help ensure the highest levels of efficiency and effectiveness [4].

Much of a patrol officer's day is sedentary, often involving seemingly mundane duties, like operating radar from within cars or conducting routine patrol. But, such activities can be interrupted when officers receive calls to apprehend suspects or handle volatile situations. The dramatic increase in heart rate and adrenaline can strain vital organs and muscles not conditioned for this type of response [3].

Although often considered a responsibility of management, a certain level of motivation must come from within the individual.

The profession of criminal justice is similar to others where the productivity of employ-

ees is vital to the bottom line. Whether a business involves farming, sales, construction, teaching, or public safety, evidence indicates that the motivation of the person doing the job is directly proportionate to the level of productivity in that industry [3]. In a criminal justice organization, individual health is important for improving attendance and productivity and related to the safety of the officer and the public. Most law enforcement personnel agree that appropriate physical fitness ensures safe and effective completion of essential job functions [3].

Resent research has shown that the key factors of police officers' motivation are depend on:

▪ *stress*

Law enforcement is broadly considered one of the most stressful occupations and often is associated with high rates of alcoholism, suicide, emotional health problems, and divorce [3]. All of these factors can negatively affect officers' motivation and productivity.

Organizations must strive to recognize and reduce stress associated with the profession to maximize job performance, motivation, and productivity [3]. Although the inherent dangers (e.g., apprehending suspects and facing assaults) of the law enforcement profession create a certain amount of stress, leaders can implement organizational changes that affect supervisory style, field training programs, critical incident counseling, shift work, and job assignments. These internal factors have been rated highly among police officers as major causes of stress. Some officers have reported that the job itself is not as stressful as a call to the supervisor's office [3].

Several consequences of police stress include cynicism, absenteeism, early retirement, emotional detachment from other aspects of daily life, reduced efficiency, increased complaints, and rises in health problems. In a recent survey, nearly 100 percent of respondents agreed that giving recognition can positively impact morale [3].

▪ *praise and recognition*

Money is an extrinsic motivator, while praise and recognition are intrinsic motivators. Effective leaders must stress the importance of such intrinsic motivators as achievement, recognition, fulfillment, responsibility, advancement, and growth [3].

▪ *self-motivation*

Although often considered a responsibility of management, a certain level of motivation must come from within the individual. In a 2003 study on the effects of self-motivation, the actions of police gang unit members in Gothenburg, Sweden were observed. The researcher identified several ways officers can reduce burnout and increase motivation to survive a long career in law enforcement. The intense stress of working constantly in tough, crime-ridden neighborhoods caused officers to desire transfers and redeploy to «nicer» areas as a way to avoid becoming too cynical [3].

Police officers also can seek different specialized jobs within the organization to help self-motivate and reduce individual stagnation. Large departments often have greater opportunities for internal transfers. Many officers in this study served for several years in the patrol division, then later applied for deployments as investigators, school resource officers, crime prevention officers, or specialized response-team members [2]. These jobs all require different training and varied core job responsibilities that can reinvigorate an officer's professional drive.

Because a substantial part of motivation remains with the officers themselves, the level and need for self-inspiration increases as officers rise in rank to supervisory roles [2]. An important part of a supervisor's function is to lead by example and, above all, have a positive attitude. Self-motivation is a prime ingredient in that formula. According to the U.S. Marine Corps officers' training statement, «Officers have to…self-motivate to keep themselves inspired and focused on the mission. This is the reason they don't sing cadences » [2]. If leaders do not motivate themselves, who will do so? And, how can unmotivated leaders expect exceptional performance from subordinates?

Another way persons can increase their own motivation is by examining their strengths and what makes them truly happy and then looking at their weaknesses with a degree of self-examination. For instance, someone could compile a journal with photographs of family members and special events that are inspiring and motivational. By reviewing and adding to the journal regularly, it can serve as a powerful motivator and a reminder for individual inspiration.

▪ *attitude*

Research data confirmed that officers' individual attitudes can influence their level of productivity and motivation. In one study officers who perceived traffic enforcement as a personal priority engaged in more enforcement efforts and subsequently issued more citations

[3]. They also were influenced by the ideal that management rewarded officers who issued more traffic tickets, and those who agreed with this perception followed suit.

▪ *health and fitness*

The health and physical fitness of officers also can affect their motivation. Many employers have seen increased absenteeism as a result of employees' health issues.Absent workers strain resources, reduce productivity, and increase costs. In police field units, manpower must be maintained at a minimum level, and illness or injury can cause serious cost overruns in overtime and sick-leave reimbursements. In law enforcement organizations, physical fitness is essential and can impede officer performance if not maintained.

To conclude, it should be added that administrators and managers in law enforcement agencies must remain cognizant of the many factors that can influence individual motivation and productivity of police officers. The nature of the job can result in officer burnout, followed by a decrease in the motivation to perform. Recruits starting out in law enforcement with a strong desire to change the world and who possess a great ethical desire to serve the noble cause easily can be swayed toward mediocrity by the contagiousness of other jaded officers. Although some officers who realize a decline in motivation can self-motivate by seeking out interdepartmental transfers or changes in duty assignments, many police agencies do not have such opportunities. In these smaller organizations, supervisors must work harder to discover other ways to improve an officer's performance.

The intrinsic factors of praise and recognition for a job well-done can help improve officers' attitudes and increase their desire for doing the job. As pointed out in Maslow's Hierarchy of Needs, the need for self-esteem is part of the makeup of all individuals. However, supervisors must rely on this sparingly and in coordination with other methods to avoid crossing the boundary of diminishing returns [3]. Too much emphasis on compliments and recognition easily can ruin officer's effectiveness; therefore, they must be distributed with reason and common sense.

Administrators also should recognize the stress associated with police work and strive to create a healthy organizational environment where officers are not subjected to harsh leadership. Police officers have sufficient worries while carrying out their responsibilities without the additional stress of managerial problems [3].When officers perceive interacting with supervisors as causing more stress than dealing with criminals, a fair self-evaluation of management practices clearly is in order.

Management also must set the example for motivation. A positive attitude on the part of a supervisor can directly impact the motivation and productivity of subordinate officers [5]. This makes sense and follows the old saying of «lead by example», a useful adage for all leaders to follow.

Finally, the health and physical wellness of the officer is so important and universally recognized that completion of a physical fitness test is mandated in most recruit training programsEvidence reveals that the level of vitality and health of employees has an effect on the bottom line of achieving the goals of any organization, and the benefits of physical fitness can directly improve an individual's stress level [5]. Administrators who realize the importance of health and fitness can implement sound strategies and strive to improve the level of well-being within their organizations.

Enhancing the motivation and productivity of police officers is a difficult, yet achievable, objective. When administrators, supervisors, and officers are educated about the many ways this can be achieved, they consistently can work together for the common goal.

***References***

1. Emotional Survival for Law Enforcement // Kevin Gilmartin / A Guide for Officers and Their Families. Tucson, AZ: E-S Press, 2002.

2. Improving Workplace Productivity: It Isn't Just About Reducing Absence // Kathy Harte, Kathleen Mahieu, David Mallett, Julie Norville, and Sander Vander Werf / *Benefits Quarterly* (Third Quarter 2011). URL: http://www.aon.com/attachments/human capital consulting/Absence_Improving_Workforce_Productivity_5-7-13 *pdf* (accessed January 26, 2015).

3. Officer Attitudes and Management Influences on Police Work Productivity // Richard Johnson, *American Journal of Criminal Justice* 36, no. 4 (December 2011). P. 293-306. URL: *http://link.springer.com/ article/10.1007%2Fs12103-010-9090-2#* (accessed January 26, 2015).

4. Praise and Recognition: The Importance of Social Support in Law Enforcement // Tracey Gove, *FBI Law Enforcement Bulletin*, October 2005. P. 14-19. URL: *http://leb.fbi.gov/2005-pdfs/leb-october-2005* (accessed January 26, 2015).

5. Self-Motivation and Self-Improvement //Robin Dreeke, *FBI Law Enforcement Bulletin*, Au-

gust 2008, under «Leadership Spotlight». URL: *http://leb.fbi.gov/2008-pdfs/leb-august-2008* (accessed January 26, 2015).

*Received to editorial office 12.06.2018*

**Summary**

The article deals with the issues of motivation and career development of Ukrainian police officers. The factors influencing Ukrainian police productivity have been analyzed. The research is focused on the main points which influence on police motivation.

The results of the research show that enhancing the motivation and productivity of police officers is a difficult, yet achievable, objective.

***Keywords:*** *motivation, police officers' motivation, a hierarchy of needs, productivity, the highest standards, physical backup, emotional support, technical guidance.*

**Oksana Ivchenko**
trainer

*(the Dnipropetrovsk State University of Internal Affairs)*

*DOI: 10.31733 / 2078-3566-2018-2-236-238*

# ALGORITHM OF COMPLEX CONTROL OF TRAINING OF BASKETBALLIST AT THE PREVIOUS BASIS TRAINING STAGE

**Івченко О. АЛГОРИТМ КОМПЛЕКСНОГО КОНТРОЛЮ ПІДГОТОВКИ БАСКЕТБОЛІСТІВ НА ПОПЕРЕДНЬОМУ БАЗОВОМУ РІВНІ ПІДГОТОВКИ**. Одним із напрямків підготовки є якісний зміст та організація системи підготовки, яка базується на єдності організаційних, програмно-методичних основ, матеріально-технічних засобів процесу підготовки і реалізується комплексним використанням. Було виявлено, що в процесі підготовки баскетболістів на етапі попередньої базової підготовки приділяється незначна увага проблемі контролю різних сторін підготовленості й комплексній оцінці підготовленості. Запропонований нами алгоритм комплексного контролю підготовленості використовується для корекції навчально-тренувальної та змагальної діяльності і своєчасного виявлення недоліків та сильних сторін в певних компонентах підготовки. Облік динаміки показників підготовленості баскетболістів 13-14 років у річному циклі дозволить досить раціонально й точно формувати підготовку, вирішувати три групи завдань.

Контроль повинен здійснюватися в навчально-тренувальному процесі щорічно, з урахуванням організаційно-управлінських засобів і оптимальної організації науково-методичних особливостей підготовки юних баскетболістів з метою виявлення більш перспективних спортсменів й пошуку найефективніших засобів та методів оцінки підготовленості юних спортсменів на окремо визначеному етапі багаторічного вдосконалення.

***Ключові слова:*** *алгоритм, комплексний контроль, попередня базова підготовка, баскетбол.*

**Formulation of the problem.**The problem of control preparation young basketballersis still one of the major in sport preparation children's and youth team, whose solutionwill prevent forcing educational trainingprocess of racing for victories in competitions, will contribute preservation of physical and mental health of young sportsmen, accordance the solution of tasks stage of long standingimproving content and intensity of training activity with account for individual and team differences [1; 2; 3; 5].

**Analysis of recent research and publications.** In available literature of this problem [4, 5]data are provided, which display control of competition and training activities, status of varioussides of readiness of basketball players. Some authors suggest an algorithm of control competitive activity of highly qualified athletes: in sports games [1, 2, 4, 7]. Along with this, there is not enough information about the algorithm of complex control of the preparedness of athletes, who specialize in basketball, at the stage of preliminary basic training taking into account the lastachievements of sports science, and in particular, modern tendencies of competitive activity of young athletes during a one-year training cycle.

**Presenting main material.**The current state of the training process of basketball play-

ers onthe basic stage of long-term improvement allowed us to establish,one ofareas of training is the quality content and organization of the training system,which isbased on the unity of organizational, programmatic and methodological foundations, financiallytechnical means of the process and is realized by the integrated use ofspecific methods in combination with pedagogical and medico-biologicalcontrol.

As a result of the questioning of trainers it was revealed, that in the process of preparationbasketball players at the stage of preliminary basic training they givelittle attention to the problem of controlling various aspects of preparedness andevaluation of preparedness.It was revealed that in the control of the preparedness of the young basketball players, trainers are mostly based on statistical protocols competitive activities and on their own experience.

At the same time, experts believe that the necessary conditions for an integrated control of the preparedness of basketball players is to create a balance between all components of the preparedness of basketball players technical, tactical, physical, psychological and functional.These components should be linked in a single system of pedagogical regulation of training of basketball players at the stage preliminary basic training in accordance with the percentage of the load, proposed by the CYSS program, with a particular type of training.

The basis for the improvement of integrated control at the stage preliminary basic training are:

- modern trends in the development of children's and youth basketball (changes rules of the game, calendar of competitions during the annual cycle, the volume of games)
- Inconsistency of the educational material on the program of the ChildrenYouthSportsSchool control tests (one is being studied, another is being monitored, etc.);
- The lack of a differentiated approach to the selection of tests in dependencefrom the age and stage of preparation, the period of the annual cycle;
- lack of a comprehensive assessment of the preparedness of basketball players inthe program of the ChildrenYouthSportsSchool;
- lack of a program for assessing technical and tacticalcompetition activity, developed specifically to control the development of activities withthe tasks of the stage of long-term training of young basketball players [4].

The results of the analysis of the literature, the contents of the curriculum on basketball, thequestioning of the coaches of the Children Youth Sports School became the basis for inclusion in the training process of the control system through the model of the means used for assessment of all aspects of the preparedness of basketball players at the preliminary basic stage training.For this purpose, we developed an integrated control algorithm preparedness of basketball players of 13-14 years.

The rationale for the control algorithm was based on the principles of the system approach, proposed by the team of authors [2], the essence of which is, to organize actions aimed at a comprehensive assessment of preparedness basketball players of 13-14 years, showing regularities and their relationship with competition activity with the aim of their more effective use for further focused training [3].

The control algorithm proposed by us included 5 stages:

- Stage I - organizational events for control;
- II stage - integrated control program
- Stage III - assessment of the psychophysiological state;
- IV stage - assessment of preparedness;
- V stage - an estimation of competitive activity);
- VI stage - a comprehensive assessment of the preparedness of basketball players.

Conducted analysis of competitive and training activities allowed to establish that the current state of the control system in basketball at the stage preliminary basic training needs to be improved in accordance with the modern trends in the development of the game and the organization of competitive activities, as well as achievements of sports science.

Principal differences in the approach and development of the algorithm complex control of the preparedness of basketball players at the preliminary stage basic training are such characteristics of the algorithm: a six-step sequenceof the control algorithm; the tasks of the preliminary basic training phase; selection of informative tests: a) taking into account sensitive developmental periods physical qualities for physical fitness; b) taking into account specific abilities ("sense of time", "orientation in space", etc.) for a special physical readiness; c) taking into account the studied material according to the program CYSS for technical, tactical and theoretical readiness; picking accessible methods for assessing the psychophysiological state of play-

ers; accounting assessment of the state of interpersonal relations in the team; distribution of competitive activities for individual, group and team performance; expansion range of criteria for evaluating competitive activity.

The algorithm of complex control of readiness proposed by us Used to correct training and competitive activities and timely identification of shortcomings and strengths in certain components training. Accounting dynamics of indicators of preparedness of basketball players 13-14 years in an annual cycle will allow to formulate rationally and accurately preparation, solve three groups of tasks: the first group - individual tasks for each player; the second group is differentiated or group tasks; the third group is the task for the team as a whole.

**Conclusion.** Consequently, monitoring should be carried out in the training process annually, taking into account organizational and management tools and optimal organization of scientific and methodological features of training young basketball players to identify more promising athletes and search effective means and methods for assessing the preparedness of young athletes at a particular stage of long-term improvement.

***References***

1. Годик М.А., Комплексный контроль в спортивных играх / М.А.Годик, А.П. Скородумова. М.: Советский спорт, 2010. 330 с.

2. Блауберг И.В. Системный подход. Новая философская энциклопедия / И.В. Блауберг, В.Н. Садовский, Э.Г. Юдин; Ин-т философии РАН. М.: Мысль, 2-е изд., испр. и допол., 2010.

3. Власов А.М. Комплексный контроль физической подготовленности и морфофункционального состояния юных баскетболистов 12-15 лет: дис. … канд. пед. наук: 13.00.04 / Александр Михайлович Власов. Москва, 2004. 142 с.

4. Костюкевич В.М. Теоретико-методичні основи контролю у фізичному вихованні та спорті: монографія / Костюкевич В.М., Врублевський Є.П., Вознюк Т.В. [та ін.]; за заг. ред. В.М.Костюкевича. Вінниця: ТОВ «Планер», 2017. 191 с.

5. Мітова О.О., Сушко Р.О. Методи наукових досліджень у баскетболі. Дніпропетровськ: Інновація, 2015. 216 с.

6. Мітова О.О. Концепція формування системи контролю в процесі багаторічного удосконалення у командних спортивних іграх. *Фізична культура спорт та здоров'я нації: збірник наукових праць* / Вінницький державний педагогічний університет ім. М. Коцюбинського, Житомирський державний університет імені Івана Франка / за ред. В.М. Костюкевича. Вінниця: ТОВ «Планер». 2016. Випуск № 1. 2016. С. 353-359.

7. Платонов В.Н. Система подготовки спортсменов в олимпийском спорте. Общая теория и ее практические приложения: учебник [для тренеров]: в 2-х кн. / В.Н. Платонов. К.: Олимпийская литература, 2015. Кн. 2. 752 с.

*Received to editorial office 21.05.2018*

**Summary**

One of the areas of training is the qualitative content and organization of the training system, which is based on the unity of organizational, programmatic and methodological foundations, material and technical means of the preparation process and implemented by complex use. It was discovered that during the training of basketball players at the stage of preliminary basic training, insignificant attention was paid to the problem of control of various aspects of preparedness and comprehensive integrated control of preparedness. The proposed integrated control of preparedness algorithm is used for correction of training and competitive activities and timely detection of disadvantages and strengths in certain components of training. The account of dynamics of indicators of fitness of basketball players of 13-14 years in the annual cycle will allow enough rationally and precisely to formulate training, to solve three groups of tasks.

Control should be made in the training process each year, taking into account organizational and management tools and optimal organization of scientific methodical features of training young basketball players to identify a promising athletes and finding the most effective tools and methods to assess preparedness of young athletes at some stage multi-speed development.

***Keywords:*** *algorithm, complex control, preliminary basic training, basketball.*

**AUTHORS**

**Andriyevska Lyudmyla** – lecturer of the Civil-Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs

**Andrushko Andriy** – associate professor of the Criminal Law and Procedure Department of the Uzhgorod National University, Ph.D., As. Prof.

**Antoniv Michael** – Member of the Wales Parliament, Wales Public Prosecutor

**Chaplynska Yuliya –** associate professor of the Criminal-Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D., As. Prof.

**Chaplynskyy Kostyantyn** – Head of the Forensic Sciences, Forensic Medicine Psychiatry Department of the Dnipropetrovsk State University of Internal Affairs, Dr of Law, Prof.

**Chipets Oleksandr –** postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Chepik-Tregubenko Olga** – associate professor of the General Law Disciplines Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Dolgoruchenko Kateryna** – senior lecturer of the Theory and History of State and Law Department of the Dnipropetrovsk State University of Internal Affairs

**Duylovskyy Oleksandr** – chief of legal service the Southern operative-territorial union of the National Guard of Ukraine

**Dzhafarova Olena** – professor of the Administrative Police Activity Department of the Kharkiv National University of Internal Affairs, Dr of Law, professor

**Filipp Anastasiya** – senior lecturer of the Criminal Law and Criminology Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Fomenko Andrii** – rector of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Furfaro Ricardo** – law professor at the University of Business and Social Sciences (Buenos Aires, Argentina)

**Gordiienko Lyubov** – specialist's degree in international law, (the Taras Shevchenko National University of Kyiv), master's degree in law (the Yaroslav the Wise National Law University)

**Gritsay Irina** – head of the Department of Social and Humanitarian Disciplines of the Dnipropetrovsk State University of Internal Affairs, Ph.D., associate professor

**Ilkov Vasyl** – Judge of the Dnipropetrovsk Regional Administrative Court, Associate Professor of the Dnipropetrovs'k State University of Internal Affairs, Dr of Law

**Ismaylov Karen** – head of the Department of Cyber security and information support of the Odessa State University of Internal Affairs, Ph.D.

**Ivchenko Oksana** – trainer of the Physical Training Department of the Dnipropetrovsk State University of Internal Affairs

**Komisarov Oleksandr** – Chief Scientist at the Scientific and Organizational Center of the National Academy of the Security Service of Ukraine, Dr of Law, professor

**Kononets Vita** – associate professor of the Administrative Law, Procedure and Administrative Activities Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Korshun Anna** – postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Kotsyuba Sergiy** – postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Kulyanda Myroslava** – Judge of the Court of Appeal of Chernivtsi region

**Kuzmenko Anatoliy** – postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Kuzmenko Vyacheslav** – head of the Philosophy and Politology Department of the Dnipropetrovsk State University of Internal Affairs, Dr of Philos. S., Prof.

**Kyselyov Illya** – lecturer of the Criminal Law and Criminology Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Lapta Sergiy** – associate professor of the Forensic Sciences and Judicial Examination Department of the Kharkiv National University of Internal Affairs, Ph.D., As. Prof.

**Lukyanchikov Yevgen** – professor of the Department of Information Law and Intellectual Property Law of the National Technical University of Ukraine "Igor Sikorsky Kyiv Polytechnic Institute", Dr of Law, Prof.

**Lukyanchikova Viktoriya** – researcher of the State Research Institute of the Ministry of Internal Affairs of Ukraine, Ph.D.

**Luskatov Oleksandr** – associate professor of the Criminal-Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D., As. Prof.

**Luskatova Tetyana** – Ph.D.

**Marchenko Olena** – head of the Research Organization Department of the Dnipropetrovsk State University of Internal Affairs, Dr of Philos. S.

**Mrochko Roman** – postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Myronyuk Roman** – professor of the Administrative Law, Procedure and Administrative Activities department of the Dnipropetrovsk State University of Internal Affairs, Dr of Law, Professor

**Myronyuk Stanislava** – senior lecturer of the Tactics and Special Training Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Nagorna Yuliya** – senior lecturer of the Ukrainian Studies and Foreign Languages Department of the Dnipropetrovsk State University of Internal Affairs

**Nalyvayko Larysa** – vice-rector of the Dnipropetrovsk State University of Internal Affairs, Dr of Law, Professor, Deserved Lawyer of Ukraine

**Oliynyk Volodymyr** – Judge of the Dnipropetrovsk District Administrative Court, Ph.D.

**Oreshkova Alina** – lecturer of the General Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs

**Pakulova Tetyana** – associate professor of the Ukrainian Studies and Foreign Languages Department of the Dnipropetrovsk State University of Internal Affairs

**Polishchuk Maryna –** lecturer of the Civil-Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Ptushkin Dmytro** – postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Ramos Gustavo** – head of territorial Police Department of Local police of Santander Address of Head Quarter, Castilla, Spain, sergeant of police

**Rogalska Viktoriya** – associate professor of the Criminal Procedure Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D.

**Ryabchynska Olena –** Head of the Criminal Law Department of the Classic Private University, Dr of Law, Prof.

**Ryzhkov Eduard –** head of the Economic and Information Security Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D., As. Prof.

**Ryzhkova Svitlana –** lecturer of the Theory and State and Law Department of the Dnipropetrovsk State University of Internal Affairs

**Sambor Mykola** – chief of the monitoring sector of the Pryluky police department of the Main Department of the National Police in Chernigiv Region, Ph.D.

**Samotuga Andriy –** associate professor of the General Law Disciplines Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D., As. Prof.

**Shalgunova Svitlana –** head of the Criminal-Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D., As. Prof.

**Shapovalova Irina –** judge of the Pavlograd's District Court of Dnipropetrovsk Region

**Shendrik Vladyslav** – head of the Operational-Search Activities and Crime Detection Department of the Kharkiv National University of Internal Affairs, Dr of Law, Prof., Deserved Lawyer of Ukraine

**Stashchak Mykola** – professor of the Operational-Search Activities and Crime Detection Department of the Kharkiv National University of Internal Affairs, Dr of Law, Senior Researcher

**Shevchenko Taisiya** – lecturer of the Criminal-Legal Disciplines Department of the Dnipropetrovsk State University of Internal Affairs

**Skyba Eleonora –** professor of the Department of Social and Humanities of the Dnipropetrovsk State University of Internal Affairs, Dr of Philos. S.

**Soldatenko Olena –** professor of the Criminal Procedure Department of the Dnipropetrovsk State University of Internal Affairs, Ph.D., As. Prof.

**Stepanyuk Ruslan** – professor of the Forensic Sciences and Judicial Examination Department of the Kharkiv National University of Internal Affairs, Dr of Law, Prof.

**Tsybenko Oleksandr** – postgraduate student of the Dnipropetrovsk State University of Internal Affairs

**Tymofiyeva Kateryna –** senior lecturer of the Ukrainian Studies and Foreign Languages Department of the Dnipropetrovsk State University of Internal Affairs

**Viznytsya Yuriy** – professor of the Socio-Humanitarian Disciplines Department of the Kryvyy Rig Faculty of the Dnipropetrovsk State University of the Internal affairs, Ph.D., As. Prof.

**Vyshnya Volodymyr** – professor of the Economic and Information Security Department of the Dnipropetrovsk State University of Internal Affairs, Dr of En-ng, Prof.

**Yunatsky Oleksandr** – associate professor of the Private Security Department of the Zaporizhzhya National Technical University, Ph.D., As. Prof.

**Yunina Maryna –** associate professor of the Civil Law and procedure Department of the Dnipropetrovsk State University of the Internal affairs, Ph.D.

**З М І С Т**

ОРГАНІЗАЦІЙНО-ТАКТИЧНЕ ТА ІНФОРМАЦІЙНО-ТЕХНІЧНЕ ЗАБЕЗПЕЧЕННЯ ПОПЕРЕДЖЕННЯ, РОЗКРИТТЯ І РОЗСЛІДУВАННЯ ЗЛОЧИНІВ



ПИТАННЯ ТЕОРІЇ, ФІЛОСОФІЇ ТА ІСТОРІЇ ПРАВА, КОНСТИТУЦІЙНОГО ПРАВА І ПУБЛІЧНОГО АДМІНІСТРУВАННЯ

## ПИТАННЯ ПРИВАТНО-ПРАВОВОГО РЕГУЛЮВАННЯ СУСПІЛЬНИХ ВІДНОСИН

## КРИМІНАЛЬНЕ ПРАВО ТА КРИМІНОЛОГІЯ. КРИМІНАЛЬНИЙ ПРОЦЕС ТА КРИМІНАЛІСТИКА



## ПОЛЕЙСЬКА ДІЯЛЬНІСТЬ: ПРАВОВЕ, ОРГАНІЗАЦІЙНЕ ТА КАДРОВЕ ЗАБЕЗПЕЧЕННЯ

Наукове видання

НАУКОВИЙ ВІСНИК
ДНІПРОПЕТРОВСЬКОГО ДЕРЖАВНОГО
УНІВЕРСИТЕТУ ВНУТРІШНІХ СПРАВ

***Науковий журнал***

2018
Спеціальний випуск № 2 (92)

**Англійською та українською мовами**

Редактор, оригінал-макет – *А.В. Самотуга*

Редактори: *Н.Ю. Веріго, Л.В. Омельченко*

Підп. до друку 21.09.2018. Формат 70x10/16. Друк – цифровий.
Гарнітура – Times. Ум.-друк. арк. 19,00. Обл.-вид. арк. 20,00. Тираж – 100 прим.

Надруковано у Дніпропетровському державному університеті внутрішніх справ
49005, м. Дніпро, просп. Гагаріна, 26, т. (056) 370-96-59
Свідоцтво про внесення до державного реєстру ДК № 6054 від 28.02.2018