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НАЦІОНАЛЬНА АКАДЕМІЯ ВНУТРІШНІХ СПРАВ

НАУКОВИЙ ВІСНИК

НАЦІОНАЛЬНОЇ АКАДЕМІЇ ВНУТРІШНІХ СПРАВ

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Problems of releasing a person from criminal liability in connection with bail

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■ **Abstract.** The purpose of the study – determine the possibility of releasing a person from criminal liability in connection with the transfer on bail to another entity, except for the staff of the enterprise, institution, organisation (in particular, the labour collective established by an individual entrepreneur), and suggest appropriate proposals for improving the legislation of Ukraine. Methodology. The methodological foundation of the study is the dialectical-materialistic method of scientific cognition of socio-legal phenomena, and general scientific and specific methods of legal science, namely: system-structural, comparative legal, logical-legal (dogmatic), and statistical. The scientific originality of the study is to prove the possibility within the current legislation to release a person from criminal liability and to transfer them to the bail of the labour collective established by an individual entrepreneur, and to substantiate the expediency of preserving the institution of exemption from criminal liability. This institution must be included in the new Criminal Code of Ukraine, which is currently under active development. One of its essential components should be the release of a person from criminal liability in connection with bail. Therewith, the law should stipulate that the entity that takes a person on bail can be a collective of a legal entity or its separate subdivision, and a labour collective established by an individual entrepreneur (if the accused is a member of the relevant collective). Conclusions. The list of sureties can be extended by the legislator, in particular, by persons who deserve trust and special trust. When applying to the court with a petition, they must undertake written obligations, the content of which is subject to explicit legislative regulation (with a mandatory list of specific control measures to monitor the behaviour of the person released from criminal liability)

■ **Keywords:** dismissal; criminal liability; bail; humanisation; collective; business entity; legal entity; natural person; entrepreneur

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■ Introduction

The national legal system tends to abandon strict punitive measures and apply alternative forms of crime prevention. Such forms include the institution of exemption from criminal liability provided by the current criminal legislation. One of the types of such release that occupies a prominent place in the practice of application is the release from criminal liability in connection with the transfer of a person on bail. Such type of dismissal allows a person who has committed a crime, under some circumstances and conditions, not to be criminally liable, but to plead guilty and reform within the work collective and prove that they are capable of coexisting in society as a regular member of it and not to violate the law [1].

The presence of these provisions in criminal legislation is an indicator of the level of civilisation of society. It is confirmed by a significant number of international legal acts adopted in this area, and the results of recent scientific research; [2-4]. But current trends in domestic law-making raise doubts about the political will to support such a course.

To reform the legislation of Ukraine, in particular criminal law, the Decree of the President of Ukraine No. 584/2019 of August 7, 2019, established the Commission on Legal Reform, part of which is the Working Group on the Development of Criminal Law, one of the key tasks of which is to ensure the development and submission to the President of Ukraine of coordinated proposals on improving the legal system of Ukraine considering the current challenges and requirements of a democratic society, in particular the preparation and generalisation of proposals for amendments to the legislation on criminal law. The group has now completed the discussion of the General Part and several sections of the Special Part of the new Code. The text of the draft new Criminal Code of Ukraine was published on March 29, 2021.

Theorists and practitioners discuss different positions in this project [5-10]. However, today there is a lack of attention from scientists of the institute of exemption from criminal liability. It is of great concern that the mentioned draft Criminal Code of Ukraine eliminates this institution as such. It contradicts the concept of humanisation of criminal legislation.

As rightly noted in the scientific literature, in terms of humanism, the institution of exemption from criminal liability is associated with the economy of judicial repression, respect for the inalienable rights and freedoms of the person who committed the crime, and the establishment of favourable criteria for exemption from criminal liability, depending on age, health, ability to work and other characteristics. In the rule of law, when addressing the issues of criminal liability, special attention is paid to the intersectoral institute of exemption from criminal liability as a compromise in the restoration of social justice and the promotion of law-abiding behaviour [11].

The national legislator has established that a person who has committed a criminal offence or a minor crime for the first time, except for corruption criminal offences, violations of traffic safety rules or operation of transport by persons who were driving vehicles under the influence of alcohol, drugs or other intoxication or under the influence of drugs, that reduce attention and speed of reaction and sincerely repented, may be released from criminal liability with the transfer of it to the bail of the staff of the enterprise, institution or organisation at their request, provided that within a year from the date of transfer to bail it justifies the trust of the staff, does not evade educational measures and does not violate public order (Part 1 of Article 47 of the Criminal Code of Ukraine).

The practical implementation of this provision has several problems relating to the legal nature, prerequisites and grounds for exemption from criminal liability in connection with bail, aspects of which have already been explored by domestic scholars [1; 12; 13].

In the research, the problems that have been lacking scientific attention will be outlined. One of them is the possibility of exemption of a person from criminal liability in connection with the transfer of some legal entities, belonging to the circle of entities specified in Article 47 of the Criminal Code of Ukraine (enterprise, institution, organisation), to the bail of the collective, which belongs to the circle of subjects specified in Article 47 of the Criminal Code of Ukraine, encourages discussion among scientists and practitioners. In particular, it concerns associations of co-owners of apartment buildings, religious communities, branches of political parties, separate divisions of business entities, etc.

The purpose of the study is to determine the possibility of releasing a person from criminal liability in connection with the transfer on bail to another entity, except for the staff of the enterprise, institution, organisation (in particular, the labour collective established by an individual entrepreneur), and suggest appropriate proposals for improving the legislation.

The following tasks have been identified to achieve this purpose:

- 1) to substantiate the possibility of exemption of a person from criminal liability in connection with the transfer of the person on bail to the labour collective established by an individual entrepreneur in modern legal realities;
- 2) to determine the general grounds for such dismissal and specifics of their legal assessment in modern conditions;
- 3) to substantiate the expediency of preserving the possibility of releasing a person from criminal liability in connection with the transfer of the person on bail in the draft of the new Criminal Code of Ukraine (with the definition of the specifics of legislative regulation).

The scientific originality of the study is to prove the possibility within the current legislation to release a person from criminal liability on the guarantees of the labour collective established by an individual entrepreneur and to substantiate the expediency of preserving the institute of exemption from criminal liability in the new Criminal Code of Ukraine.

■ Outline of the Main Material

In judicial practice, the problem of the possibility of releasing a person from criminal liability in connection with the transfer of the person to the bail of the labour collective of such a business entity as a sole proprietor periodically arises. After all, the exact definition (lexical construction) that combines the concepts of a collective and one person is immediately (intuitively) perceived as violating logic. Thus, accordingly, the prosecution, in the case of filing a petition of this content, rejects the possibility of its satisfaction, guided by the fact that the individual entrepreneur is not an enterprise, institution or organisation, and therefore, by the provisions of Art. 47 of the Criminal Code of Ukraine, is not a subject that can bail the accused.

Considering the above, it is established:

1) an employee of business entities that explicitly falls under the legislative definition of an enterprise, institution or organisation can be released from criminal liability in connection with the transfer to the bail of the labour collective;

2) an employee of business entities that do not fall under this definition (in particular, individual entrepreneurs) – is not allowed.

This approach contradicts Article 24 of the Constitution of Ukraine, which states: “Citizens have equal constitutional rights and freedoms and are equal before the law.

There can be no privileges or restrictions on the grounds of race, colour, political, religious and other beliefs, gender, ethnic and social origin, property, place of residence, language or other characteristics”.

Thus, in the case of refusal to release a person from criminal liability in connection with bail (based on the fact that the staff of the individual entrepreneur is not a proper subject of bail), the accused is discriminated against based on the place of work by depriving them of the right to be released from criminal liability in connection with bail to the labour collective.

In addition, it should be noted that the definition of an enterprise is contained in Part 1 of Article 62 of the Commercial Code (CC) of Ukraine, which states that an enterprise is “an independent business entity established by the competent state authority or local self-government body or other entities to provide for public and personal requirements through the systematic implementation of production, research,

trade and other economic activities in the manner prescribed by this Code and other laws”.

The above definition is fully consistent with the provisions of the legislative regulation of sole proprietorships contained in Chapter 5 of the Civil Code (CC) of Ukraine. In addition, the definition of enterprise fully corresponds to the definition of small business entities, which is given in Part 3 of Article 55 of the Civil Code of Ukraine, which states: “Small business entities are: individuals registered by the procedure established by law as individual entrepreneurs, whose average number of employees for the reporting period (calendar year) does not exceed 50 people and the annual income from any activity does not exceed the amount equivalent to 10 million euros, determined at the average annual exchange rate of the National Bank of Ukraine”.

Part 4 of Article 62 of the Civil Code of Ukraine provides a list of attributes inherent in an enterprise: “An enterprise is a legal entity, has separate property, an independent balance sheet, accounts in banks and can have seals”. As for such attributes of the enterprise as separate property, independent balance sheet, accounts in banks, and seals, the majority of individual entrepreneurs as small business entities have them, as they cannot function without them.

Thus, the only feature that distinguishes between an enterprise and a sole proprietorship is the status of a legal entity, which the latter is not technically endowed with. In this regard, noted that, according to Art. 51 of the Civil Code of Ukraine: “Regulatory legal acts regulating the entrepreneurial activity of legal entities shall be applied to the entrepreneurial activity of individuals unless otherwise provided by law or follows from the essence of relations”.

On January 14, 2011, the Ministry of Justice of Ukraine provided clarifications regarding the status of the individual entrepreneur, stating that the status of an individual entrepreneur is a legal status that certifies the right of a person to engage in entrepreneurial activity, namely: independent, initiative, systematic, at own risk economic activity performed by business entities (entrepreneurs) to achieve economic and social results and profit.

Therewith, the legal status of “individual entrepreneur” does not in itself affect or in any way limit any competencies of a person arising from their civil legal capacity.

The Ministry of Justice of Ukraine in the said clarification noted that in commercial legislation “legal entity” and “individual entrepreneur” are covered by a common concept – “business entity”.

In addition, it should be noted that a sole proprietorship and an enterprise (as business entities) are covered by a single concept – “business entities”. According to Part 2 of Article 3 of the Civil Code of Ukraine, economic activity performed for the

achievement of economic and social results and to obtain profit is entrepreneurship.

In addition, this clarification of the Ministry of Justice of Ukraine states that an individual entrepreneur in civil and economic relations is a multilateral participant. The principles of its business activity are similar to legal entities, while in private relations, despite any changes in its status, it remains a citizen - an individual. Thus, it is necessary to distinguish between these different spheres of relations.

According to Article 51 of the Civil Code of Ukraine, the provisions of specific (commercial) legislation should be applied to individual entrepreneurs if the subject of regulation is their entrepreneurial activity. Instead, the provisions of civil legislation should be considered if the subject of regulation goes beyond the limits of entrepreneurial activity, affecting the private interests of the subject, and is fully regulated by the Civil Code. After all, a sole proprietor and an individual have different tax and legal statuses. Thus, a sole proprietor is endowed with all the properties of a legal entity.

In addition, it should be noted that, by the provisions of Art. 47 of the Criminal Code of Ukraine, the accused can be taken on bail not by an enterprise, institution or organisation, but by their collective.

The possibility of the existence of the labour collective is provided by the law. After all, the definition of the labour collective is defined in Part 1 of Art. 252-1 of the Labour Code of Ukraine (hereinafter - the Labour Code), according to which the labour collective of the enterprise is established by all citizens who participate in its activities based on the labour agreement (contract, agreement), and other forms regulating the labour relations of the employee with the enterprise.

As stated above, the sole proprietorship, by the provisions of the law, is:

- a small business entity (according to Part 3 of Article 55 of the Civil Code of Ukraine, such entities are individuals registered by the procedure established by law as individual entrepreneurs, whose average number of employees for the reporting period (calendar year) does not exceed 50 people, and the annual income from any activity does not exceed the amount equivalent to EUR 10 million, determined at the average annual exchange rate of the National Bank of Ukraine);

- the employer (according to Part 3 of Article 1 of the Law of Ukraine "On Labour Protection", the employer is the owner of an enterprise, institution, organisation or its authorised body, regardless of the form of ownership, type of activity, management, and an individual who uses hired labour).

The aggregate analysis of these provisions allows asserting that the sole proprietor is authorised to hire employees based on the employment agreement

(contract, agreement), and other forms regulating the employment relationship between the employee and the enterprise. Such employees are hired to perform joint labour activities within the framework of the implementation of the purpose of economic activity performed by the individual entrepreneur. Therefore, a set of employees hired by a sole proprietor constitutes a labour collective.

In the end, in the process of resolving the issue of releasing a person from criminal liability in connection with the transfer of a sole proprietorship to the labour collective, the position of the Supreme Court of Ukraine (SC) should be applied regarding a broad understanding of the terminology of the law. In particular, this is the resolution of December 4, 2018 (case No. 161/3885/16-к), in which it is noted that the established judicial practice of a broad understanding of certain concepts is the reason for applying them to justify court decisions. Thus, the possibility and expediency of exemption from criminal liability should be assessed in light of compliance with the general principles of exemption from criminal liability in general and in connection with the bail of the labour collective in particular.

Currently, in Ukraine, there are numerous cases of releasing persons from criminal liability on the bail of the individual entrepreneur's team, by the provisions of Art. 47 of the CPC of Ukraine.

For example:

1. Rulings of the courts of the first instance that were not appealed:

- The ruling of the Pustomyty District Court of Lviv region of March 1, 2019 (Case No. 450/819/18 Proceedings No. 1-kp/450/61/19) - the accused was released from criminal liability under Part 2 of Art. 15, Part 1 of Art. 185 of the Criminal Code of Ukraine and transferred to the bail of the individual entrepreneur.

- Resolution of the Zvenyhorod District Court of Cherkasy region of April 2, 2019 (case No. 694/37/19) - the accused was discharged from criminal liability under Part 1 of Art. 309 of the Criminal Code of Ukraine in connection with the transfer of the individual entrepreneur's team on bail.

- The ruling of the Zhovtnevyi District Court of Mariupol, Donetsk region, dated March 13, 2020 (case No. 263/13567/17) - the person was released from criminal liability under Part 2 Art. 345 of the Criminal Code of Ukraine based on Art. 47 of the Criminal Code of Ukraine in connection with the bail of the individual entrepreneur.

- Resolution of the Cherkasy District Court of Cherkasy region dated August 9, 2018 (case No. 1-kp/707/227/18) - a person was released from criminal liability for committing a criminal offence under Part 1 Art. 286 of the Criminal Code of Ukraine in connection with his bail to the collective of individual entrepreneurs, etc.

2. Rulings of the courts of appeal that were not disputed in the Supreme Court of Ukraine:

– The decision of the Court of Appeal of Kirovograd region of October 25, 2011 (case No. 11-867/11) upheld the decision of the Vilshany District Court of Kirovograd region of August 10, 2011, by which the accused was released from criminal liability under Part 1 of Art. 263 of the Criminal Code of Ukraine in connection with the bail of the individual entrepreneur.

– The decision of the Court of Appeal of Mykolaiv region as of July 22, 2015 (case No. 490/4611/15-к) upheld the decision of the Central District Court of Mykolaiv as of June 2, 2015, on the release of a person from criminal liability under Part 1 of Art. 396 of the Criminal Code of Ukraine in connection with the bail of the individual entrepreneur.

3. Decisions of the Supreme Court of Ukraine:

– In criminal cases, where the cassation instance resolved the issue of transferring a person to the bail of the labour collective of a specific individual entrepreneur (case No. 158/2745/19, Decision of the Supreme Court of Ukraine of December 22, 2020; case No. 127/31068/19,

– Ruling of the Supreme Court of Ukraine of August 12, 2020; case 5-5095km13,

– Ruling of the Supreme Court of Ukraine of December 12, 2013) in the courts of all instances none of the participants of the criminal proceedings challenged (and did not question at all) the possibility of releasing a person from criminal liability in connection with the bail of the individual entrepreneur.

Thus, the Supreme Court, by the panel of judges of the Second Trial Chamber of the Criminal Court of Cassation, by its Resolution of December 22, 2020 (case No. 158/2745/19), upheld the decisions of the courts of the first and appellate instances, which released the accused of committing a criminal offence under Part 2 of Art. 185 of the Criminal Code of Ukraine and transferred them to the bail of labour collectives (the sole proprietor's store and the labour collective of condominiums "Kravchuk 48" - respectively). The Supreme Court of Ukraine (and the courts of first and appellate instances) did not make any reservations regarding the impossibility of such release in connection with the bail of the individual entrepreneur.

In the ruling of August 12, 2020 (case No. 127/31068/19), the subject of the Supreme Court's research was the possibility of releasing a person from criminal liability in connection with the transfer of the sole proprietorship team on bail. Expressing its legal position, the Supreme Court noted the impossibility of releasing a person from criminal liability with bail in connection with the commission of two crimes. The Supreme Court of Ukraine (and the courts of first and appellate instances) did not have any reservations about the impossibility of such release in connection with the bail of the individual entrepreneur.

An indispensable condition for the release of a person from criminal liability in connection with the bail of the collective of an individual entrepreneur is compliance with the requirements established by Art. 47 of the Criminal Code of Ukraine and other provisions of the criminal and criminal procedural laws.

The analysis of this provision gives grounds to assert that these requirements should primarily include sincere repentance and the presence of a team of an enterprise, institution or organisation.

Both in theory and practice, a person's sincere remorse as a condition for exemption from criminal liability is strongly connected with the plea of guilty and consent to the closure of criminal proceedings on the specified non-rehabilitating ground. In the process of exemption from criminal liability, the state forgives the person who committed the crime. Accordingly, the latter must admit their guilt and sincerely repent of the act. If a person does not agree to release and does not admit their guilt, then in this case it cannot be applied. And from this moment the general rule of the principle of innocence begins to operate, according to which a person is presumed innocent until proven guilty in a court of law [1].

Some scholars insist that a person can be released from criminal liability only after being found guilty of a crime in a court verdict, as there can be no release of a person from criminal liability outside the sentence, as there is nothing to release a person from in this case [14].

The author supports the other position, as criminal legislation contains the institute of exemption from serving the sentence, which comes into force after the conviction. As noted, before the verdict, a person may be released from criminal liability, and after the verdict – from punishment.

An example of refusal to release from criminal liability in the absence of such grounds as sincere repentance and confession of guilt is the Ruling of the Synelnikivskiy City District Court of Dnipropetrovsk region on March 28, 2018. As stated in the document, the grounds for such dismissal is sincere repentance of the person, which indicates their desire to atone to the staff of the enterprise, institution or organisation and to correct their behaviour. A person who has not pleaded guilty to a crime cannot be released on bail. Although the accused did not object to the bail of the staff and supported the request, but did not plead guilty to the crime. Thus, the person was refused to be released from criminal liability in connection with the transfer on bail on the grounds of not pleading guilty to the crime, which indicates that the person did not repent of the crime, and therefore the state can not forgive them, perhaps, what they did not commit. It is a necessary condition for the application of this type of exemption from criminal liability [1].

Concerning the content of sincere remorse, the Resolution of the Supreme Court of Ukraine on

October 30, 2018 (case 559/1037/16-k), states: "The main form of manifestation of sincere remorse is a person's full confession of guilt and a truthful account of all the circumstances of the crime known to them. If a person conceals the essential circumstances of the crime, which greatly complicates its disclosure, pleads guilty only partially to avoid a fair punishment, their repentance cannot be considered sincere and genuine."

One significant conclusion follows from the above provision: before considering a petition for release from criminal liability in connection with the transfer of a person on bail on the merits, the court must interrogate the accused and examine other evidence to conclude whether they are concealing the essential circumstances of the committed criminal offence.

The resolution of the Supreme Court of Ukraine of March 22, 2018 (case No. 759/7784/15-k) states: "Repentance implies, in addition to the recognition by the person of the fact of committing a crime, an actual, frank, and not an imaginary confession of guilt in committing a particular crime, sincere regret about it and condemnation of their behaviour, which should primarily be expressed in the person's attempt to compensate for the damage caused by the crime, the desire to correct the consequences of the crime. The fact of sincere repentance of a person in committing a crime should be reflected in the materials of criminal proceedings."

Although this provision refers to the person's attempts to compensate for the damage caused by the crime, in practice, prosecutors and representatives of victims often associate sincere remorse with the full and unconditional recognition by the accused of the civil claim filed in criminal proceedings.

First, according to this logic, the accused does not have the right to sincerely repent if he does not have the means to satisfy a civil claim (in particular, an exorbitant one).

Secondly, the accused is not always a proper defendant in a civil action in criminal proceedings. Thus, in cases where the damage is caused by a crime under Part 1 of Art. 286 of the Criminal Code of Ukraine, and the vehicle does not belong to the accused, the latter cannot be a proper defendant, as, according to Part 2 of Art. 1187 of the Civil Code of Ukraine, damage caused by a source of increased danger is compensated by a person who, on the appropriate legal ground (ownership, another property right, contract, lease, etc.), owns a vehicle, mechanism, another object, the use, storage or maintenance of which causes increased danger.

The source of increased danger, which causes harm to the victim during the commission of a crime under Part 1 of Art. 286 of the Criminal Code of Ukraine, is a vehicle. And if this vehicle does not belong to the accused, the latter can be the subject of

compensation only in case of recourse of the vehicle owner, by the requirements of Art. 1191 of the Civil Code of Ukraine.

In addition, according to the Law of Ukraine of July 1, 2004, No. 1961-IV "On compulsory insurance of civil liability of owners of land vehicles" in the event of an insured event, it is the insurance company that must compensate the victim for the damage caused to health.

Therewith, the legislation of Ukraine does not prohibit the accused from compensating the victim for material and moral damages outside the civil action. Thus, the accused does not have to admit the civil claim in entirety or even in part. They can take independent steps to compensate for the damage, but they must be reflected in the case file.

Many discussions in the theory and practice of applying for the exemption from criminal liability in connection with the transfer of a person to collective bail arise due to the grounds, content, forms and processes of filing a petition for such release, as these issues are not sufficiently regulated in the Criminal Procedure Code.

First of all, it concerns the grounds for filing the petition. It refers to the fact of the general meeting of the staff, the discussion of the issue of bail, the results of such discussion and the decision taken by the staff.

Judicial practice is unified in matters of mandatory documentary confirmation that the decision of the collective to take a person on bail was taken at the general meeting of the collective in the presence of a quorum. Thus, by the decision of the Kyiv District Court of Odesa dated August 24, 2018 (case No. 520/8485/17), the request for the release of the accused from criminal liability in connection with the transfer on bail to the labour collective was denied. The reason for this decision was that the petition of the director of the enterprise was not accompanied by evidence of the fact of the meeting of the staff. Therefore, the court concluded that the staff meeting was not held.

Thus, in confirmation of the circumstances specified in the petition, at least a copy of the minutes of the general meeting of the collective of the relevant entity, evidence confirming that the accused belongs to the members of this collective, and a copy of the extract from the Unified Register of Legal Entities and Individual Entrepreneurs must be provided.

Therewith, the court's verification of the circumstances specified in the petition should not go to extremes. Thus, in case No. 127/12870/20, the Vinnytsia Court of Appeal dismissed the appeals of the victim and the prosecutor against the decision of the court of the first instance to release the person from criminal liability in connection with the transfer of the person to the bail of the individual entrepreneur. One of the grounds for these appeals was that the minutes of the general meeting of the PE's staff did not

contain the signatures of the persons present at the meeting, and there was no evidence that they were in an employment relationship with the PE. The court quite rightly considered the presence of the minutes signed by the chairman and secretary of the meeting, certified by the sole proprietor's seal, to be sufficient.

Therewith, it should be clearly understood from the content of the petition and the minutes of the general meeting of the collective: 1) the issue of releasing the accused from criminal liability was put on the agenda and discussed; 2) the conditions for releasing the accused from criminal liability and the obligation of the staff to control their behaviour were explained to those present; 3) the accused undertook to the staff to participate in educational activities and the legality of their behaviour; 4) those present at the meeting decided by voting to take the accused on the staff's bail and to apply to the court with a corresponding petition; 5) if the court satisfies the said petition, the staff is obliged to take educational measures against the accused and to monitor the legality of their behaviour.

Considering the above, it should be noted that, according to the decision of the Kyiv District Court of Odesa of August 24, 2018 (case No. 520/8485/17), the petition was denied since "specific educational measures were not specified, it was not indicated what measures of influence were planned to be applied to correct and re-educate the accused, and the responsible person was not indicated".

Notably, in some other cases, the prosecution and representatives of the victims insisted on the necessity to specify in the petition a clear, detailed and realistic list of educational measures to be taken against the accused in case of release from criminal liability.

But currently, in the legislation of Ukraine, there are no requirements to define in the petition for the release of a person from criminal liability with the transfer of the person to the bail of the staff of the enterprise, institution or organisation a list of educational measures that will be taken against the accused in case of release from criminal liability, and requirements for the clarity and detail of this list.

In addition, it is considered premature to talk about the list of such measures until the court decides on the release from criminal liability in connection with the transfer of the person on bail. The court may make another decision that excludes the application of such measures. Therefore, the specific list of educational measures and the person responsible for their implementation should be determined after the court decision.

Therefore, it is not surprising that in modern court decisions it is quite difficult to find a list of educational measures that should be applied to the accused in case of release from criminal liability in connection

with the transfer of a person to the collective bail.

In general, nowadays the educational role of collectives of enterprises, institutions, and organisations is not as relevant as it was in the Soviet Union. Accordingly, the educational measures that were used in those days have now lost their relevance. Moreover, in modern business entities, the administration is mostly not entrusted with educational functions, since ensuring labour discipline is usually performed through the implementation of control functions.

In addition, the Ministry of Social Policy of Ukraine has developed Methodological Recommendations on the introduction of mentoring, approved by Order No. 1611 of 11 October 2017, according to which mentoring involves on-the-job training by transferring the experience and knowledge gained by experienced employees to a person who requires professional training and the development of the necessary skills. The analysis of the above definition, and the content of the recommendations themselves, demonstrates that the institute of mentoring is devoid of an educational component.

Therewith, the organisation of educational work is entrusted to authorise senior officials in law enforcement agencies (National Police of Ukraine, Security Service of Ukraine, Armed Forces, etc.) Such work is implemented mainly within the framework of the professional training system and the mentoring institute. It is the mentoring system that provides individual educational influence on the trainee [15].

Considering the above, it can be concluded that in modern conditions it is inexpedient to determine a certain list of educational measures about a person released from criminal liability in connection with bail. It is advisable to define control measures with the appointment of a person (persons) responsible for their implementation (analogue of a mentor). Therewith, the application of educational measures to a person taken on bail should be regulated by law as a right (and not as an obligation) of the staff.

Control measures, for example, include: daily checks of the person at the workplace; systematic monitoring of their behaviour and compliance with labour discipline; personal reporting of the dismissed person about the work done, compliance with the rules of labour (official, transport, etc.) discipline; visiting the dismissed person at the place of residence (with interviews of relatives and neighbours about their behaviour at home), etc. It is quite natural that these and other control measures should be performed not by the entire team but by its authorised members.

Thus, it should be noted that it is impossible to determine the role of the entire staff of a certain business entity in ensuring the correction of a person transferred on bail. After all, the influence on such a person, except for specially authorised members of the team, can be exercised only by those persons

who, according to their functional duties, perform work that allows them to communicate with the person released from criminal liability, to observe them. Due to a large number of employees of a particular enterprise, members of a particular organisation, and all representatives of the team can not be familiar with the person transferred to bail at all. Therefore, the authority to apply to the court for the release of a person from criminal liability should be provided both for a specific business entity and for its subdivisions, regardless of the number of employees.

Regarding the number of members, an important issue in terms of release from criminal liability is the number of members of the team to which the accused is transferred on bail, and the period during which the accused is a member of this team. There is a definite position of the Supreme Court of Ukraine on this issue (case No. 158/2745/19). Thus, the court decision states: "As for the prosecutor's arguments about the impossibility of satisfying the said petition due to the short period of employment of the person and the small number of members of the labour collective that took them on bail, they are untenable, since the provisions of the law do not contain any requirements regarding the number of employees who have the right to take their employee on bail and the time during which this person must be employed."

Therewith, it should be noted that it is advisable to regulate in the law the minimum number of members of the staff of the entity or its subdivision that takes a person on bail (at least three).

It is considered that according to the logic of the legislator, applied in the Criminal Procedure Code of Ukraine, the circle of entities that can take the accused on bail can be expanded by persons who deserve particular trust.

Thus, Article 180 of the Criminal Procedure Code of Ukraine provides that personal guarantee (as a preventive measure) consists in the provision by persons whom the investigating judge, the court considers trustworthy, of a written undertaking that they vouch for the performance of the suspect, accused of the duties imposed on them by Article 194 of this Code and undertake, if necessary, to deliver them to the pre-trial investigation body or the court at the first request (part 1).

The number of guarantors is determined by the investigating judge, the court that chooses the measure of restraint. The presence of one guarantor may be considered sufficient only if it is a person who deserves particular trust (part 1).

The issues of bail in criminal proceedings are explained in the legal notice of the Ministry of Justice of April 24, 2017. In particular, it states that a personal guarantee is based on the court's trust in the guarantor based on the guarantor's specific moral qualities and authority.

The right of a person to act as a guarantor is not limited by law. It is guaranteed by the CPC, regardless of the position of the guarantor. The main thing is that the candidate meets the criteria established by the procedural legislation.

The number of possible guarantors is not limited. In each case, the investigating judge or court determines how many sureties will be sufficient to ensure the performance of duties by the suspect or accused.

Therewith, the CPC provides for the possibility of choosing one guarantor if he is a person who deserves "special trust", which may be dictated by their social status, character or occupation. In particular, such persons include people's deputies, deputies of local councils, statesmen, heads of central or local authorities, persons awarded with state awards, citizens who have outstanding sports awards, etc.

Thus, the criminal law of Ukraine may introduce an exemption from criminal liability in connection with the transfer of the accused on bail to individuals, and not to a particular collective. Such persons must be trustworthy and particularly credible. The content of their written commitment should be regulated and include a specific list of control measures.

Procedural issues of filing a petition for release from criminal liability in connection with the transfer of a person on bail to the court are important. Thus, in the already mentioned case No. 127/12870/20, the Vinnytsia Court of Appeal rejected the argument advanced in favour of reversing the decision of the court of the first instance to release a person from criminal liability that the minutes of the general meeting of the labour collective were not sent to the court by the labour collective itself (these documents are annexes to a separate motion of the defender), which raises doubts about the validity of the will of the labour collective about the accused.

The court quite rightly accepted the position of the defender, who noted that the procedure for submitting documents (petitions, applications, complaints, etc.) to the court and their consideration in court is regulated by the rules of procedural, not substantive law. The provisions of the Criminal Code of Ukraine belong to substantive law. Procedural are the provisions of the CPC of Ukraine.

According to Part 4 of Art. 286 of the CPC of Ukraine: "If during the court proceedings on the proceedings, which came to the court with an indictment, a party to the criminal proceedings applies to the court with a petition to release the accused from criminal liability, the court must immediately consider such a petition".

It means that the Court has to consider the motion of the party to the criminal proceedings. The labour collective is not a party to criminal proceedings and, therefore, is not endowed by the Criminal Procedure Code of Ukraine with the right to apply to the court

with a petition for exemption from criminal liability. However, such a right is provided for the defence, in particular, for the accused and their defence counsel. Thus, the team appealed to the court using the procedural powers of the defender.

■ Conclusions

In the new Criminal Code of Ukraine, which is currently under active development, the institute of exemption from criminal liability must find its place. One of the important components of this institute should be the release of a person from criminal liability in connection with the transfer of

the person on bail. The law should stipulate that the entity that takes a person on bail may be a collective of a legal entity or its separate subdivision, and a labour collective established by an individual entrepreneur (if the accused is a member of the relevant collective).

The list of surety subjects may be extended by the legislator with persons who are trustworthy and particularly trusted. Such persons, when applying to the court with a petition, they must undertake written obligations, the content of which is subject to explicit legislative regulation (with a mandatory list of specific control measures to monitor the behaviour of the person released from criminal liability).

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Проблеми звільнення особи від кримінальної відповідальності у зв'язку з передачею її на поруки

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■ **Анотація.** Мета дослідження – визначення можливості звільнення особи від кримінальної відповідальності у зв'язку з передачею на поруки іншому суб'єкту, крім колективу підприємства, установи, організації (зокрема, трудовому колективу, сформованому фізичною особою – підприємцем), а також висунення відповідних пропозицій щодо вдосконалення законодавства України. Методологія. Методологічною основою дослідження є діалектико-матеріалістичний метод наукового пізнання соціально-правових явищ, а також загальнонаукові та спеціальні методи юридичної науки, а саме: системно-структурний, порівняльно-правовий, логіко-юридичний (догматичний), статистичний. Наукова новизна здійсненого дослідження полягає в доведенні можливості в межах чинного законодавства звільнити особу від кримінальної відповідальності та передати на поруки трудового колективу, сформованого фізичною особою – підприємцем, а також в обґрунтуванні доцільності збереження інституту звільнення від кримінальної відповідальності. Цей інститут обов'язково має бути в новому Кримінальному кодексі України, що нині знаходиться на стадії активної розробки. Однією з його важливих складових має стати звільнення особи від кримінальної відповідальності у зв'язку з передачею її на поруки. Водночас у законі слід встановити, що суб'єктом, який бере особу на поруки, може бути колектив юридичної особи або її окремого підрозділу, а також трудовий колектив, сформований фізичною особою – підприємцем (якщо обвинувачений є членом відповідного колективу). Висновки. Перелік суб'єктів поручительства законодавець може розширити, зокрема особами, які заслуговують на довіру й особливу довіру. Звертаючись до суду з клопотанням, вони мають взяти на себе письмові зобов'язання, зміст яких підлягає чіткому законодавчому унормуванню (з обов'язковим переліком конкретних контрольних заходів зі спостереження за поведінкою звільненого від кримінальної відповідальності)

■ **Ключові слова:** звільнення; кримінальна відповідальність; поруки; гуманізація; колектив; суб'єкт господарювання; юридична особа; фізична особа; підприємець

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Improvement of the mechanism of responsibility for committing a corruption offence

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■ **Abstract.** The research presents proposals in the areas of legal and procedural regulation of the problem of criminal liability for crimes of corruption considering the necessity of preventing discrimination based on the committed socially dangerous act and guaranteeing constitutional rights and freedoms of a person. Changes in the legislation on liability for corruption crimes have demonstrated the attempts of the legislature to counteract the phenomenon of corruption in a particular way. Undoubtedly, this is the Law of Ukraine No. 1698-VII of October 14, 2014, according to which, to strengthen measures to combat corruption crimes, the following amendments were introduced to the Criminal Code of Ukraine, which restrict the possibility of applying for exemption from criminal liability, imposing a lighter sentence, exemption from punishment, replacement of the un-served part of the sentence with a lighter one to persons who have committed corruption crimes, etc. However, the question of whether it has achieved its purpose after six years of operation, in the author's opinion, remains rhetorical. The purpose of the research is to improve the specific features of criminal prosecution for corruption offences in Ukraine and, thus, to improve the prevention of such crimes. Methodology. To achieve this purpose, Aristotelian, system-structural, comparative legal and statistical methods were applied. Scientific originality. Having analysed the provisions of legislation and judicial practice, it was proposed to provide financial liability and punishment along with the current procedure of responsibility and punishment for corruption crimes, which allows committing a crime to become economically unprofitable. The proposals are based on the case law of the European Court of Human Rights. Conclusions. The particular result that the state will get from the such proposals is established: restoration of state interests, replenishment of the state budget and reduction of the burden on the penitentiary system

■ **Keywords:** corruption crime; responsibility; punishment; discrimination; European Court of Human Rights

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■ Introduction

Each change of political leadership and which mostly occurs after the next elections in the country, witnesses the next statements of senior officials on strengthening or improving the fight against corruption. There seem to be some processes in this area. But, strangely enough, it is becoming increasingly complicated to calculate the results of this struggle, in particular, due to insufficient statistical reporting on criminal corruption. If the criminal law in Article 45 [1] defines a group of crimes as corruption, it is extremely problematic to trace or at least summarise such information. It refers to the number of criminal offences registered in the Unified Register of Pre-trial Investigations, closed proceedings, persons prosecuted for their commission, and, most importantly, the availability of convictions for such crimes [2]. For the state, and for the average citizen, the issue of the inevitability of responsibility is essential.

Unfortunately, over the past few years, there have been a lot of high-profile PR campaigns regarding the detention of corrupt officials, registration of criminal proceedings, and even quoting of sanctions of the article, which provide for long-term imprisonment [3]. However, loud statements during the investigation are sprayed into procedural dust. And only in some cases, individual proceedings on corruption crimes are brought to court. Thus, the number of such verdicts is negligible, the calculation of these crimes is impossible, as it is non-transparent, and, as a result, according to the corruption perception index, over the past five years, there has been no significant progress. Ukraine is at the bottom of the list on the corruption perception index in the world. According to the international organisation "Transparency International" (2015 – 142nd place in the ranking, 2016 – 131, 2017 – 130, 2018 – 120, 2019 – 126, 2020 – 117th place).

The above review of the legislation and practical application of anti-corruption laws demonstrates that this legislative and scientific debate will not be resolved quickly. And the undying interest in this subject among legal scholars is now in an active phase [4-6]. In different periods, the issue of combating corruption was explored by many lawyers, in particular: L.I. Arkusha, L.V. Bagriy-Shakhmatov, A.M. Boyko, V.I. Borisov, O.Yu. Danshin, O.M. Dzhuzha, V.M. Dremin, O.O. Dudorov, Z.A. Zaginei, S.A. Zadorozhny, A.P. Zakalyuk, A.F. Zelinsky, O.G. Kalman, O.O. Kvasha, V.M. Kirichko, M.G. Kolodyazhny, O.M. Kostenko, O.G. Kulyk, I.V. Kushnarev, O.M. Lozynskyi, I.E. Mezentsseva, M.I. Melnyk, D.G. Mykhalenko, A.A. Muzyka, V.O. Navrotskyi, E.V. Nevmerzhytskyi, D.O. Oliynyk, A.V. Savchenko, E.D. Skulysh, E.L. Streltsov, V.Y. Tatsiy, V.O. Tulyakov, P.L. Fris, M.I. Havroniuk, V.I. Shakun, O.V. Shevchenko, O.Y. Shostko, N.M. Yarmysh etc. Translated with DeepL However, the issues of the

current state of investigation of corruption crimes, criminal liability and punishment for these offences remain insufficiently researched.

The purpose of the study - define a precise procedure for criminal prosecution and punishment for corruption crimes, and compensation for damages caused to the interests of the state. Thus, it will prevent other persons from committing such crimes in the future.

■ Outline of the Main Material

The Constitution of Ukraine [7] declares that the rule of law is acknowledged and operates in Ukraine. A person, their life and health, honour and dignity, inviolability and security are the highest social values. Human rights and freedoms and their guarantees determine the content and trend of state activity. Affirming and ensuring human rights and freedoms is the main duty of the state (Articles 1, 3, 8).

Therewith, Articles 21 and 24 of the Constitution of Ukraine state that all people are free and equal in dignity and rights. Human rights and freedoms are inalienable and inviolable.

Citizens have equal constitutional rights and freedoms and are equal before the law. There can be no privileges or restrictions on any grounds.

According to Article 2 of Section II of the Final Provisions of the Law of Ukraine No. 1698-VII dated October 14, 2014, the Criminal Code of Ukraine [8] was amended to strengthen measures to combat corruption crimes, limiting the possibility of applying for exemption from criminal liability, imposing a lighter sentence, exemption from punishment, replacement of the un-served part of the sentence with a lighter one to persons who have committed corruption crimes. The procedure of serving the sentence, application of amnesty, forgiveness and removal of a criminal record has changed.

Article 45 of the Criminal Code of Ukraine [1] stipulates that corruption criminal offences under this Code are criminal offences under Articles 191, 262, 308, 312, 313, 320, 357, 410 in case of their commission through abuse of office, and criminal offences under Articles 210, 354, 364, 364, 365, 368-369 of this Code.

The provisions of Art. 45 of the CC of Ukraine, which provides for exemption from criminal liability in connection with effective repentance, and Art. 69 of the CC of Ukraine, which provides for the imposition of a lighter penalty than provided by law for a criminal offence, cannot be applied to persons who have committed corruption crimes. Such provision concerns the imposition of both the main and additional punishment.

In addition, Part 4 of Article 74 of the CC of Ukraine "Exemption from punishment and its serving" excludes this possibility for such persons.

By changing the content of Part 1 of Art. 75 and Part 1 of Art. 79 of the Criminal Code of Ukraine, the

legislator explicitly stated that the court may decide to release from serving a sentence with probation, except in cases of conviction for a corruption crime, including those committed by a pregnant woman or a woman with children under the age of 7.

Therewith, Part 2 of Art. 75 of the CC of Ukraine, which defines the conditions for release from serving a sentence with probation, in case of approval of a reconciliation agreement or plea of guilty, does not provide for such a prohibition.

By the provisions of Part 1 of Art. 65 of the CC of Ukraine, the general principles of sentencing are established, according to which the court imposes punishment: 1) within the limits established in the sanction of the article of the Special Part of this Code, which provides for liability for the crime committed; 2) by the provisions of the General Part of this Code; 3) considering the severity of the crime, the personality of the perpetrator and the circumstances mitigating and aggravating the punishment.

The above demonstrates that according to the mentioned provision, there are no specific features of punishment for corruption crimes that would prevent the application of Part 2 of Art. 75 of the CC of Ukraine.

The prohibition of imposing a lighter sentence and exemption from punishment or its serving may prevent the court from observing the individualisation of punishment for persons who have committed corruption crimes guaranteed by Article 61 of the Constitution of Ukraine.

Demonstrating a particular humanism, the legislator, considering the gravity of the crime, provides the convicted person, after serving a specific period of punishment, with the right to apply incentive rules (Articles 81, 82, 86, 87 of the CC of Ukraine).

Therewith, persons serving a sentence for committing corruption crimes of medium gravity are equated to persons who have committed intentional grave or reckless particularly grave crimes (Articles 81, 82 of the CC of Ukraine).

For persons who have committed corruption crimes, there is a specific procedure for applying the act of amnesty and forgiveness.

Such a selective mechanism in practice results in the fact that the above-mentioned institutions of criminal law are applied to any category of persons guilty of committing crimes (murderers, rapists, drug addicts, etc.), except for those who belong to "corrupt officials". For example, for committing crimes under the following articles: 110-2 (financing of actions committed for violent change or overthrow of the constitutional order or takeover of state power, change of borders of the territory or state border of Ukraine), 113 (sabotage), 115 (premeditated murder), 150 (exploitation of children), 152 (rape), 187 (robbery), 258 (terrorist act), 2585 (financing of terrorism) of the CC of Ukraine – the law does not

prohibit the application of the provisions of Articles 69, 75 of the CC of Ukraine in the case of punishment.

Under Part 3 of Article 50 of the CC of Ukraine, punishment is not intended to cause physical suffering or humiliation of human dignity. The legislator has defined the following principles of serving a sentence: legality, justice, humanism, equality before the law, and respect for human rights and freedoms (Article 5 of the Penal Code of Ukraine [9]).

Under Article 3 of the CC of Ukraine and Article 1 of the CPC of Ukraine [10], the legislation of Ukraine on criminal liability and criminal procedural legislation consists of the relevant codes, which are based on the Constitution of Ukraine and generally acknowledged principles and provisions of international law.

The general principles of criminal proceedings include the rule of law, which is applied considering the practice of the ECHR (Article 8 of the CPC of Ukraine) and legality, which imposes an obligation on a specific range of subjects to strictly comply with the requirements of the Constitution of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, and the requirements of other legislations (Article 9 of the CPC of Ukraine).

The establishment of different rules for persons who have committed corruption crimes and those who have committed other crimes may indicate the application of discriminatory measures within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the Convention [11]).

In particular, Articles 6 and 14 of the Convention state that everyone is guaranteed the right to a fair trial and the enjoyment of their rights and freedoms without discrimination on any grounds. In addition, it is stated in Part 2 of Article 1 of Protocol No. 12 to the Convention: no one can be discriminated against by any public authority on any ground.

In paragraph 53 of the ECHR judgment in the case of "... Sejdić and Finci v. Bosnia and Herzegovina" the Court noted, "... that while Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms outlined in the Convention", Article 1 of Protocol No. 12 extends the guarantees of protection against discrimination to "any right provided for by law"". Thus, it establishes a general prohibition of discrimination" [12].

The requirement to observe justice and not to allow discrimination in the process of applying criminal punishment is enshrined in other international human rights documents.

Article 10 of the Universal Declaration of Human Rights of 1948 (adopted and proclaimed by Resolution 217 A (III) of the UN General Assembly of December 10, 1948) proclaims that everyone is entitled in full equality to a fair and public hearing in the determination of their rights and obligations and any

criminal charge against them by an independent and impartial tribunal [13].

The equality of all before the court is mentioned in Article 14 of the International Covenant on Civil and Political Rights of December 16, 1966 [14].

It corresponds to the recommendations contained in paragraphs 2.1, 2.2, and 2.3 of the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) adopted by UN General Assembly Resolution 45/110 of 14 December 1990 [15].

These rules apply to all persons subject to prosecution without any discrimination (paragraph 2.2).

Considering the provisions of Part 1 of Article 9 of the Constitution of Ukraine, these international acts are part of the national legislation of Ukraine.

The decision of the Constitutional Court of Ukraine No. 15-RP/2004 dated November 2, 2004 (case 1-33/2044) [16] states that a separate manifestation of justice is the issue of correspondence of the punishment to the crime committed; the category of justice provides that the punishment for a crime should be proportionate to the crime. Fair implementation of the law provides, first of all, a non-discriminatory approach and impartiality. It requires both that the offence and the penalty be consistent with each other, and that the penalty be fairly proportionate to the gravity and circumstances of the offence and the person of the perpetrator. The appropriate punishment for the gravity of the crime follows from the principle of the rule of law, from the essence of constitutional rights and freedoms of man and citizen, in particular the right to freedom, which can not be restricted, except as provided by the Constitution of Ukraine.

In addition, the Constitutional Court of Ukraine in its decision No. 9-RP/2012 dated April 12, 2012 (case No. 1-10/2012) [17] noted that equality and inadmissibility of discrimination are not only constitutional principles of the national legal system of Ukraine, and fundamental values of the international community, which is stressed in international legislation on the protection of human and civil rights and freedoms.

The equality of all people in their rights and freedoms guaranteed by the Constitution of Ukraine means the necessity to provide them with equal legal opportunities of both material and procedural nature for the implementation of the same rights and freedoms in content and scope.

Violation of international guarantees by the state can result in applications to the ECHR for violation of Articles 6 and 14 of the Convention and cause adverse consequences.

Thus, according to the Annual Report on the activities of the Commissioner for Human Rights of the European Court of Human Rights, 2020, as of 31 December 2020, a total of 62,000 cases against States Parties to the Convention were pending before the European Court, of which 10,400 cases were against Ukraine,

which is 16.8% of the total number of cases. In 86 cases against Ukraine, in which the European Court delivered judgments on the merits, the applicants claimed compensation in the total amount of about EUR 31,424,464.27. After reviewing the cases, and considering the positions of the Government, the European Court ordered Ukraine to pay 683,286.19 euros.

According to the annual reports on the results of the activities of the Commissioner for the European Court of Human Rights for 2008-2020 [18], the following amounts were paid from the state budget to execute the judgments of the European Court on the merits of complaints 1) 2008 – 20,434,375.53 UAH; 2) 2009 – 7,939,067.82 UAH; 3) 2010 – 29,174,853.54 UAH; 4) 2011 – 25,021,734.79 UAH; 5) 2012 – 39,002,553.75 UAH; 6) 2014 – 169817.7 UAH; 7) 2015 – 639,981,892.09 UAH; 8) 2016 – 612,294,315.54 UAH; 9) 2017 – 61,365.79 thousand UAH; 10) 2018 – 32 646 827,39 UAH; 11) 2019 – 44 987 585,14 UAH; 12) 2020 – 24 844,8 UAH.

Thus, over the past twelve years, Ukraine has paid about UAH 1 707 511492.

Notably, by paragraphs 2.3 and 2.4 of the recommendations adopted by the UN General Assembly Resolution 45/110 of 14 December 1990, the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules): “To provide greater flexibility, considering the nature and gravity of the offence, the personality and background of the offender, and to protect the interests of society and avoid the unnecessary use of imprisonment, the criminal justice system should provide for a wide range of non-custodial measures, from pre-trial to post-trial measures. The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated”.

Considering the obligation of the State to establish the prerequisites for reducing the number of applications to the ECHR, as defined by the Law of Ukraine “On the Execution of Judgments and Application of the ECHR Practice” [19], and replenishment of the State budget at the expense of the person who violated the law, it is proposed to consider this issue when drafting amendments to the legislation of Ukraine regulating this type of legal relationship.

In this context, the position on civil forfeiture outlined recently in the statement of the Prosecutor General's Office is interesting, which states that such an institution was introduced in Ukraine more than a year and a half ago, but its implementation is currently virtually absent. It should become not declarative but an efficient way to replenish the state budget [20].

Undoubtedly, the mentioned institution of recognition of unjustified assets and their recovery to the state revenue has a noble purpose – replenishment of the state budget. However, when applying it,

it should be noted that the requirements of the law should not contradict the provisions of the Constitution of Ukraine, as in this case the financial losses of the state in the process of applying to the court, including the ECHR, are possible again.

■ Conclusions

The particular result that the state will get from the proposed proposals is established: restoration of state interests, replenishment of the state budget and reduction of the burden on the penitentiary system.

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Удосконалення механізму відповідальності за вчинення корупційного правопорушення

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■ **Анотація.** У статті викладено пропозиції щодо напрямів правового та процесуального врегулювання проблеми кримінально-правової відповідальності за вчинення злочинів корупційної спрямованості з огляду на необхідність попередження дискримінації за ознакою вчиненого суспільно небезпечного діяння та гарантії конституційних прав і свобод особи. Зміни законодавства щодо відповідальності за корупційні злочини засвідчили намагання законодавчої влади в певний спосіб протидіяти такому явищу, як корупція. Це, безперечно, Закон України від 14 жовтня 2014 року № 1698-VII, відповідно до якого з метою посилення заходів протидії корупційним злочинам внесено такі зміни до Кримінального кодексу України, що обмежують можливість застосування звільнення від кримінальної відповідальності, призначення м'якшого покарання, звільнення від покарання, заміну невідбутої частини покарання більш м'яким до осіб, які вчинили корупційні злочини, тощо. Однак питання, чи досягнув він своєї мети через шість років дії, на нашу думку, залишається риторичним. Метою статті є вдосконалення особливостей притягнення до кримінальної відповідальності за вчинення корупційних правопорушень в Україні та, завдяки цьому, поліпшення стану профілактики таких злочинів. Методологія. Для досягнення поставленої мети застосовано формально-логічний, системно-структурний, порівняльно-правовий і статистичний методи. Наукова новизна. Проаналізувавши положення законодавства та судової практики, запропоновано поряд із чинним порядком відповідальності та покарання за корупційні злочини передбачити фінансову відповідальність і покарання, завдяки чому вчинювати злочин стане економічно невигідно. Пропозиції висунуто з огляду на судову практику Європейського суду з прав людини. Висновки. Встановлено конкретний результат, який отримає держава від таких пропозицій: поновлення інтересів держави, поповнення державного бюджету й зниження навантаження на пенітенціарну систему

■ **Ключові слова:** корупційний злочин; відповідальність; покарання; дискримінація; Європейський суд з прав людини

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Criminal and legal characteristics of violent crimes against sexual freedom and sexual inviolability of the child

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■ **Abstract.** The purpose of the study is to analyse the scientific opinions on the application of legislation on criminal liability for violent crimes against sexual freedom and sexual inviolability of the child in light of the implementation of the Council of Europe conventions. Methodology. The methodological tools were chosen by the purpose, specifics of the object and subject of the study. In the course of the study, the dialectical method of scientific knowledge of socio-legal phenomena in their contradictions, development and changes was used, which allows to objectively assess the distribution of sexual criminal offences against sexual freedom and sexual inviolability of the child; Aristotelian method, which identified the elements of the legal mechanism of sexual criminal offences against sexual freedom and sexual inviolability of the child; the comparative legal method was used in the analysis of current legislation and international regulations. The theoretical foundation of the publication was the works of domestic and foreign scientists devoted to the aspects of sexual criminal offences against sexual freedom and the sexual inviolability of the child. The scientific originality of the publication is that the distribution of sexual criminal offences against the sexual freedom and sexual inviolability of the child is performed and the criminal law characteristics of objective and subjective signs of violent crimes against the sexual freedom and sexual inviolability of the child (Articles 152, 153 of the CC of Ukraine) are provided. Conclusions. Established that the main object of the investigated crimes is the sexual inviolability of the child, that is, an absolute prohibition to have sexual contact with a person who is not a carrier of sexual freedom, contrary to the true will of such a person or ignoring it. The author establishes that “sexual freedom” and “sexual inviolability” are criminal law categories that have an independent character. Sexual inviolability – is the right of a person not to be subjected to sexual violence, the right to be protected from sexual abuse (passive right), while sexual freedom – is the right to choose sexual partners and not prohibited by law forms of sexual behaviour. From the subjective side, all crimes against the sexual inviolability of a child have a characteristic feature – explicit intent. Therewith, the mental attitude of the perpetrator to the age of the victim can acquire the form of careless guilt. The author emphasises the inconsistency between the qualified corpus delicti of crimes under Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine and the main corpus delicti of these crimes concerning the presence of voluntary consent of a minor and proposes criminal law ways to eliminate the identified legislative contradictions, in particular: abandonment of the sign of qualified corpus delicti under Part 4 of Art. 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine, defined as ‘regardless of their voluntary consent’, with the simultaneous transfer of

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liability for (voluntary) sexual intercourse with a minor to Art. 155 of the CC of Ukraine; elimination of the sign of violence in the criminal legal characteristics of sexual acts under Art. 153 of the CC of Ukraine

■ **Keywords:** child; sexual freedom; sexual inviolability; sexual violence; criminalisation; criminal-legal characteristics

■ Introduction

By the National Human Rights Strategy, the strategic purpose in the field of children's rights is to ensure that the rights of children in Ukraine are secured and protected by generally accepted international, in particular European, standards; the best interests and opinions of the child are considered in decision-making concerning them. One of the problems addressed by the strategic area is the insufficient efficiency of the system for preventing and combating violations of children's rights, in particular violence against children [1].

Criminal and legal characteristics are developed based on the analysis of the signs of crimes that are important for resolving the issue of the existence of a crime, its correct qualification, and clarification of other criminal and legal issues, in particular those that have to be resolved in the process of sentencing. Criminal and legal characteristics - a description of the features that distinguish a crime from another offence, classification of crimes by type, degree of danger, etc.

To understand the criminal-legal characteristics, note that it should reflect the features of a particular type of crime, which are significant for clarifying their social and legal nature (essence), social danger, the content of the signs, criminal liability, punishment, etc.

The purpose and objectives of the publication – perform the distribution of sexual criminal offences against the sexual freedom and sexual inviolability of the child and to provide a criminal law description of objective and subjective signs of violent crimes against sexual freedom and sexual inviolability of the child.

The scientific originality of the publication is that the distribution of sexual criminal offences against the sexual freedom and sexual inviolability of the child is performed and the criminal law characteristics of objective and subjective signs of violent crimes against the sexual freedom and sexual inviolability of the child (Articles 152, 153 of the CC of Ukraine) are provided.

■ Outline of the Main Material

Under Article 3 of the Constitution of Ukraine, a person, their life and health, honour and dignity, inviolability and security are considered to be the highest social value in Ukraine. According to Article 29 of the Basic Law, everyone has the right to the liberty and security of a person. The state of ensuring the implementation of the human right (of any age) to freedom and inviolability (in particular sexual) is rightly considered an indicator of the moral health of society, an indicator of its spirituality and attitude to universal human values [4].

In the structure of violent crime, one of its varieties is sexual criminal offences. Sexual criminal

offences – a complex of socially dangerous acts against sexual freedom and sexual inviolability of a person. They violate the procedure of free sexual relations between persons established by law and have a characteristic feature – significant adverse psychological consequences for victims of sexual violence. It should be considered that such crimes are designed to satisfy the sexual passion of a person both in natural and various forms of sexual perversion that go beyond the public principles of sexual morality regarding the “classical” nature and ways of satisfying sexual passion [5].

Criminal offences against sexual freedom and sexual inviolability of a person, the provisions on liability for which are united in Section IV of the Special Part of the Criminal Code of Ukraine, include:

1. rape (Article 152);
2. sexual violence (Article 153);
3. coercion to sexual intercourse (Article 154);
4. sexual intercourse with a person who has not reached sexual maturity (Article 155);
5. corruption of minors (Article 156).

Depending on whether physical and mental violence was used during the commission of such criminal offences, they can be divided into two groups:

1) crimes against sexual freedom and sexual inviolability of a person associated with using violence (Articles 152, 153, 154 of the CC of Ukraine), i. e. the so-called “violent sexual crimes”;

2) criminal offences against sexual freedom and sexual inviolability of a person, not related to using violence (Articles 155, 156 of the CC of Ukraine) – the so-called “non-violent sexual criminal offences”.

Thus, one of the factors that unite all these crimes is the generic object of encroachment. According to O.M. Ignatov and M.Y. Korzhansky, the object of sexual crimes is the relations in the sphere of sexual life that has developed in society [6; 7]. S.D. Shapchenko clarifies the object, referring to the rights, freedoms and interests of the individual in the field of sexual life [8]. Relations in the sphere of sexual life O.M. Yakovlev defines as “a set of forms of sexual communication between people that have developed at a particular stage of development of society, protected by both moral and legal provisions” [9]. As for the objects of specific sexual crimes, there are different opinions on this issue in science.

The generic object of crimes, the provisions on liability for which are united in Section IV of the Special Part of the CC of Ukraine, is sexual freedom and sexual inviolability of a person.

In the theory of criminal law, one can trace different opinions on the definition of “sexual freedom”.

Thus, P. Osipov understands the sexual freedom of a woman as the activity of a woman who is capable of self-determination in the field of sexual life to satisfy her sexual demands by the requirements of socialist morality [10]. L. Andreeva offers a similar definition. In her opinion, sexual freedom is the ability of an adult to dispose of himself in the sphere of sexual communication with other persons [11].

A completely different definition is offered by B. Blinder, who believes that sexual freedom is freedom from any coercion in the field of sexual relations [12]. Therewith, one cannot agree with B. Blinder and P. Osipov, who believe that only women have sexual freedom. Modern criminal legislation equally protects the sexual freedom of both women and men. Thus, a victim of rape under Art. 152 of the CC of Ukraine can be a person of any gender.

Sexual inviolability should be understood as social relations in the sphere of sexual life, which determine the absolute prohibition to have sexual relations with other persons. Sexually untouchable are both minors who, due to some physical or mental disabilities, are unable to exercise their sexual freedom, and minors under the age of 16 or before reaching puberty. In addition, the consent of such persons to sexual intercourse or other sexual relations has no legal force, as persons do not have the right to freely exercise their sexual urges [13; 14].

Sexual inviolability is the main object of such crimes as the rape of a minor (Article 152(3) and (4) of the CC of Ukraine), sexual violence (Article 153(2) and (3) of the CC of Ukraine), sexual assault with a person under the age of 16 (Article 155 of the CC of Ukraine), corruption of minors (Article 156 of the CC of Ukraine).

Based on the above provisions, consider some controversial criminal law aspects of violent crimes that infringe on the sexual freedom and sexual inviolability of the child. The implementation of the international conventions of the Council of Europe resulted in the adoption of the Laws of 6 December 2017 No. 2227-VIII [15] and of 14 March 2018 No. 2334-VIII [16], which amended Section IV of the Special Part of the CC of Ukraine.

First of all, it is necessary to explain what the corruption of minors means, as most people do not understand the meaning of this crime. Objectively, the crime consists in committing depraved acts of a sexual nature that can cause physical and moral corruption of minors. Depraved actions can be both physical and intellectual. Physical molestation - is, in particular, exposure of the genitals of the perpetrator or the victim, groping, or another indecent touching that causes sexual arousal, teaching onanism, committing sexual intercourse, or act of onanism in the presence of the victim. Intellectual molestation can consist, for example, of cynical conversations with the victim on sexual subjects, telling explicit, naturalistic sexual stories, photographing victims in various sexual positions, and demonstrating pornographic objects.

Using works, images or other objects of pornographic nature in the process of committing depraved acts, and coercion to participate in their establishment requires additional qualification under the relevant part of Article 301 of the CC of Ukraine [17].

Rape is the commission of sexual acts involving vaginal, anal or oral penetration of the body of another person using genitals or any other object without the voluntary consent of the victim (rape) [18]. Compared to the previous version of Art. 152 of the CC of Ukraine, this article, stated in the version of the Law of December 6, 2017 No. 2227-VIII, significantly expanded the boundaries of the objective side of the crime of "rape", in particular:

- sexual intercourse in terms of incrimination in the previous version of Article 152 of the CC of Ukraine was considered to be only natural (heterosexual) sexual intercourse (coitus) – the insertion of a man's penis into a woman's vagina, which can cause pregnancy. Currently, not only the above-mentioned act is defined as rape (the latter, considering the terminology used in Art. 152 of the CC of Ukraine should be interpreted as vaginal penetration into the body of a woman using the genitals of a man), but other types of penetration into the vagina (female vagina), and penetration into the anus or mouth of another person (i.e. into the openings of the human body, biologically not intended for this) with both the penis or other part of the human body, and any object [19];

- previously, sexual intercourse was considered rape, provided that it was combined with using physical violence, the threat of its use or using the helpless state of the victim. One of the three alternatively specified methods as a component of purposeful criminal behaviour and a criminogenic feature served the main criminal act (sexual intercourse), committed for the sake of the latter. Therewith, the list of ways, in the presence of at least one of which natural sexual intercourse between female and male persons was defined as rape, was exhaustive.

Considering the amendments to the CC of Ukraine in recent years, which have resulted in changes to the conventional definition of "rape", expansion of the forms of coercion to have sexual intercourse, change of the title and disposition of Article 153, which now establishes liability for sexual violence (considering the provisions of the Council of Europe Convention on preventing violence against women and domestic violence of 2011 or the Istanbul Convention), the introduction of liability for entering into voluntary sexual relations with a minor, there is a necessity for a more detailed analysis of legislative initiatives on amendments and additions to the CC of Ukraine concerning violent sexual crimes [20].

Article 152 of the Criminal Code of Ukraine, stated in the version of the Law of December 6, 2017, as a criminal feature indicates (except Part 4 of this Article) not a specific method, but involuntariness - the lack of free will of the victim to penetrate one of

its three natural openings. Vaginal, anal or oral penetration into the body of another person is defined as rape both when it is combined with using physical violence, the threat of its use or using the helpless state of the victim, and in other cases of absence of their voluntary consent to such penetration [19].

According to the Law of December 6, 2017 No. 2227-VIII, serious adjustments were introduced regarding the legal assessment of natural sexual intercourse with a minor and other sexual penetration into the body of such a person. Before the entry into force of this Law, the doctrine and judicial practice relied on the fact that only the minor age of a person (under the age of 14) does not always indicate the presence of a helpless state as a sign of rape (see below for the helpless state of a person). The question of the presence or absence of helplessness of the victim and, accordingly, the qualification of the perpetrator's actions (under Art. 152 or Art. 155 of the CC) was decided in each case, considering the individual characteristics of the development and upbringing of the minor. In particular, it was noted that in modern conditions of sexual liberation, the key importance in addressing this issue should be not a specific age as a kind of presumption of helplessness, but the degree of awareness and information of a particular minor on sexuality. A similar approach was used regarding the violent gratification of sexual desire in an unnatural way (previous version of Article 153 of the CC) if the victim of this crime was a minor [19].

The reference in part 4 of Art. 152 of the CC, as amended by Law No. 2227 of December 6, 2017, to "actions provided for in part 1 of this Article, committed against a person under the age of fourteen, regardless of their voluntary consent", allows asserting that sexual penetration into the body of a minor is considered rape regardless of whether such a person consented to it, whether the latter is voluntary (such consent is recognized by the legislator as a fiction) or forced, whether the minor understood the nature and significance of the actions committed against them, etc. Thus, the CC of Ukraine embodies the idea of legislative specification of the age, under which the law enforcement officer is obliged to unconditionally consider sexual penetration into the body of the person concerned as rape. Considering the informational and educational load of the analysed criminal law prohibition, the indication of a specific age of the victim, rather than the minor status of the victim, should be considered justified. The issue of criminal legal assessment of sexual violence committed against a minor (Part 4 of Art. 153 of the CC of Ukraine) is being resolved.

The concept of voluntary consent is defined in the note to Art. 152 of the CC of Ukraine. Consent is recognised voluntary if it is the result of the free will of the person, considering the accompanying circumstances. Therewith, the evaluative nature of the "accompanying circumstances" mentioned in the note is

evident. By the way, the latter does not contain a restrictive clause that the understanding of voluntary consent enshrined in it is acceptable in the process of applying only Article 152 of the CC of Ukraine.

However, as noted by K.V. Yurtayeva, in the practical guide to the qualification of sexual crimes O.O. Dudorov states that "in a broad sense, a person's consent to sexual penetration of their body cannot be considered voluntary if it was provided, in particular, under the influence of physical violence, threats of its use, threats of other content (e.g, threats of destruction or damage to the property of both the victim and another person, threats of restriction of the rights, freedoms or legitimate interests of the victim or another person), deception, use of a person's material or official dependence, helplessness or vulnerability" (Iurtaieva, 2020). In general, it can be agreed with the above position. According to the definition given in the Great Explanatory Dictionary of the Modern Ukrainian Language, the term "voluntary" means "such that is performed, acts, etc. of one's own free will, without violence, coercion; the opposite of forced" [21]. Therefore, voluntary, in the author's opinion, should be considered forms of sexual relations committed without using any form of physical or mental violence, without exploiting the helpless state of the victim, when their will (no voluntary consent) is ignored, or by deception, in which the consent of the victim appears to be voluntary, but such voluntariness is imaginary, as it is conditioned upon deception applied to the victim. Such a method of committing a crime is established for sexual violence provided for in Article 153 of the CC of Ukraine [19].

In contrast to the main corpus delicti, Part 4 of Article 152 and Part 4 of Article 153 of the CC of Ukraine establishes liability for rape and sexual violence committed against a person under the age of fourteen, regardless of their voluntary consent. According to this definition, sexual acts against minors may be violent, committed using the helpless state of the victim, using deception or even committed voluntarily, i. e. with the consent of the victim. Thus, the legislator has abandoned the practice of qualifying non-violent sexual relations with minors as rape only in cases where the person did not understand the nature and significance of the sexual acts performed with them through their mental retardation or young age, which was equated to the helpless state of the victim (para. 16 of the Resolution of the Plenum of the Supreme Court of Ukraine of 30 May 2008 No. 5 "On judicial practice in cases of crimes against sexual freedom and sexual inviolability of a person") [22]. It is by this criterion that rape in the form of non-violent sexual intercourse with minors was distinguished from the act provided for in the previous version of Art. 155 "Sexual intercourse with a person who has not reached sexual maturity". In the current version, under Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine, the presence of

consent to enter into sexual relations with a person under the age of fourteen does not affect the qualification of such actions, i. e. sexual intercourse can be both voluntary and violent, committed against the will of the victim - using their helpless state or, in some cases, deception. Considering the above, it is logical to conclude that rape and sexual violence in the form of a minor's voluntary consent to sexual relations not only loses its violent nature but, therewith, does not have signs of other forms of sexual relations without the consent of a sexual partner as a prerequisite for qualification under Part. 1 of Art. 152 and Part 1 of Art. 153 of the CC of Ukraine, and acquires the form of voluntary sexual relations between persons, one of whom (the victim, although such wording is absent in Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine) has not reached the age of fourteen. The above changes are unjustified neither from the standpoint of formal logic, since the qualified corpus delicti in the presence of the voluntary consent of the victim contradicts the main one, nor from the legal standpoint, since voluntary sexual relations with a minor are equated to the corpus delicti provided for in Article 155 of the CC of Ukraine "Sexual relations with a person under the age of sixteen", but with other age characteristics of the subject and victim of the crime [19].

Notably, the types of criminal violence are defined in the Resolution of the Plenum of the Supreme Court of Ukraine No. 2 "On judicial practice in cases of crimes against life and health of a person" dated February 7, 2003 (hereinafter – the Resolution). According to paragraph 23 of this Resolution, violence can be both physical (infliction of bodily harm or beatings, illegal deprivation of liberty, etc.) and mental (for example, threats to cause physical, moral or property damage). Thus, it allows concluding that there are two types of violence: physical and mental [23].

According to Article 153 of the CC of Ukraine, sexual violence is the commission of any violent acts of a sexual nature, not related to penetration into the body of another person, without the voluntary consent of the victim [18].

The new version of Art. 153 of the CC of Ukraine quite rightly does not use the phrase "gratification of sexual desire in an unnatural way", which is devoid of legal certainty and morally outdated. The indication of the "unnaturalness" of sexual intercourse appeared anachronistic in light of the achievements of modern sexology and sexopathology. Using the mentioned phrase in the previous wording of Article 153 of the CC caused a warning that the criminal punishability of the behaviour provided for in this Article of the CC of Ukraine is determined not by the so-called unnaturalness of the ways of satisfying sexual passion, possible homosexual orientation or immorality of actions, but by their violent nature. Thus, the Ukrainian legislator proceeds from the fact that homosexuality, which is performed on a voluntary foundation,

i.e. sexual attraction to persons of the same sex, should be considered not as an act prohibited under the threat of criminal liability, but as a special condition of the human body, atypical sexual behaviour.

Objective, subjective and qualifying (especially qualifying) signs of sexual violence coincide with the same signs of rape disclosed above, except that the objective side of the crime covers only such actions of a sexual nature that do not involve penetration into the body of another person. Thus, the disposition of Part 1 of Art. 153 of the CC of Ukraine is descriptive and referential.

Exploring the strengthening of criminal liability for sexual crimes against minors, L.I. Shekhovtsova provides the experience of individual countries in combating these crimes: in some civilized countries (USA, UK, Israel, Poland, Czech Republic) and CIS countries (Moldova, Russian Federation) for sexual crimes against minors introduced quite severe sanctions. For example, in the United States, life imprisonment or even the death penalty is imposed. In addition, some states have introduced chemical castration. In the UK, you can be imprisoned for up to 10 years just for viewing pictures of naked children. The state register of paedophiles who have undergone the procedure of chemical castration has been established. In addition, Poland has introduced chemical castration, which is compulsory for persons who raped children under the age of 15. In Israel, by court order, paedophiles are subjected to chemical castration, while providing them with psychological assistance [24].

Continuing the analysis of the state of protection of sexual inviolability of minors, noted that following the CC of Ukraine in Part 2 of Art. 22 provides for a reduced age of criminal liability – 14 years – for rape and sexual violence. Considering that in the current version of Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine provides for liability for acts of a sexual nature regardless of the voluntary consent of a person under the age of 14, i. e. both without their voluntary consent and in the form of voluntary sexual intercourse between the perpetrator and the victim, the conclusion is that the provisions of the CC of Ukraine unconditionally, according to an objective criterion, criminalise voluntary sexual relations between underage partners, one of whom has reached the age of 14 and the other – not. Therewith, according to the literal interpretation of the CC provisions, the difference in the age of the subject of the crime and the "victim" does not matter for the qualification. Considering the above, the position of O.O. Dudorov is not entirely consistent, who, on the one hand, supports the implementation of the CC of Ukraine of the idea of legislative specification of the age, the failure to achieve which should unconditionally regard sexual penetration into the body of the person concerned as rape [25], and, on the other hand, quite rightly, in the author's opinion, notes that, following Art. 18 of the Council of Europe Convention on the Protection

of Children against Sexual Exploitation and Sexual Abuse, the provisions of the criminal law should not apply to the regulation of sexual relations between minors that are performed by mutual consent [25]. Considering the definition of Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine, both of these positions are mutually contradictory, and they, in the author's opinion, sufficiently reflect the unsatisfactory state of regulation by the current provisions of the CC of responsibility for sexual relations between minors [19].

■ Conclusions

The amendments introduced (Laws of 6 December 2017 No. 2227-VIII [15] and of 14 March 2018 No. 2334-VIII [18]) to the CC of Ukraine are positive and designed to protect the rights of victims of violence, as the practice of bringing rapists to justice is still insignificant. This is at a time when, according to international data, on average, one of every five women has experienced sexual violence at least once in her life.

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Кримінально-правова характеристика насильницьких злочинів проти статевої свободи та статевої недоторканості дитини

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■ **Анотація.** Метою статті є аналіз наукових поглядів щодо застосування законодавства про кримінальну відповідальність за насильницькі злочини проти статевої свободи та статевої недоторканості дитини з огляду на імплементацію конвенцій Ради Європи. Методологія. Методологічний інструментарій обрано відповідно до поставленої мети, специфіки об'єкта та предмета дослідження. У процесі дослідження використано діалектичний метод наукового пізнання соціально-правових явищ в їхніх суперечностях, розвитку та змінах, що дає змогу об'єктивно оцінити розподіл статевих кримінальних правопорушень проти статевої свободи й статевої недоторканості дитини; формально-логічний метод, завдяки якому виявлено елементи правового механізму статевих кримінальних правопорушень проти статевої свободи та статевої недоторканості дитини; порівняльно-правовий метод застосовано під час аналізу чинного законодавства й міжнародних нормативних актів. Теоретичним підґрунтям публікації стали праці вітчизняних та іноземних учених, присвячені аспектам статевих кримінальних правопорушень проти статевої свободи і статевої недоторканості дитини. Наукова новизна публікації полягає в тому, що здійснено розподіл статевих кримінальних правопорушень проти статевої свободи та статевої недоторканості дитини й надано кримінально-правову характеристику об'єктивних і суб'єктивних ознак насильницьких злочинів проти статевої свободи та статевої недоторканості дитини (ст. 152, 153 КК України). Висновки. Встановлено, що головним безпосереднім об'єктом досліджуваних злочинів є статеві недоторканість дитини, тобто абсолютна заборона вступати в сексуальні контакти з особою, яка не є носієм статевої свободи, у супереччя справжньому волевиявленню такої особи або ігноруючи його. З'ясовано, що «статева свобода» та «статева недоторканість» – кримінально-правові категорії, що мають самостійний характер. Статева недоторканість – це право особи не зазнавати сексуального насильства, право на захищеність від сексуальних посягань (пасивне право), водночас статеві свобода – це право на вибір статевих партнерів і не заборонених законом форм сексуальної поведінки. Із суб'єктивної сторони всі злочини проти статевої недоторканості дитини мають характерну ознаку – прямий умисел. Водночас психічне ставлення винного до віку потерпілого може набувати вигляду необережної форми вини. Акцентовано на невідповідності кваліфікованих складів злочинів, передбачених ч. 4 ст. 152 та ч. 4 ст. 153 КК України, основних складах цих злочинів щодо наявності добровільної згоди малолітньої особи й запропоновано кримінально-правові шляхи усунення виявлених законодавчих суперечностей, зокрема: відмова від ознаки кваліфікованих складів злочинів, передбачених ч. 4 ст. 152 та ч. 4 ст. 153 КК України, сформульованої як «незалежно від її добровільної згоди» з одночасним перенесенням відповідальності за (добровільні) статеві зносини з малолітньою особою до ст. 155 КК України; усунення ознаки насильства в кримінально-правовій характеристиці дій сексуального характеру, передбачених ст. 153 КК України.

■ **Ключові слова:** дитина; статеві свобода; статеві недоторканість; сексуальне насильство; криміналізація; кримінально-правова характеристика

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Genesis of criminal legislation of Ukraine on liability for open theft of property (robbery)

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■ **Abstract.** The main features of the modern concept of “robbery” as an open theft of someone else's property were first defined in Soviet legislation in the Criminal Code of the Ukrainian SSR of 1922 (until January 30, 1937 – Ukrainian Socialist Soviet Republic). There were periods when the concept of “robbery” dissolved into such crimes as theft and robbery (decrees of the Presidium of the Supreme Soviet of the USSR of June 4, 1947 “On criminal liability for theft of state and public property”, “On strengthening the protection of personal property of citizens”). Therewith, the legislator, guided by the objective necessity of punishment humanisation in the post-Soviet countries, reduces the sanction for this type of crime and emphasises those persons who committed it for the first time without aggravating circumstances, for them to get on the path of correction and not to commit a relapse. However, the practice has demonstrated that robbery has always been considered one of the most serious crimes, as defined by the current legislation of Ukraine. The urgent problem requires a solution at the scientific level in particular. Considering the above, the purpose of the research is to provide a historical explanation of the doctrinal provisions of the crime of robbery in different state periods, starting from the legislative sources of the Criminal Code of the Ukrainian Socialist Soviet Republic of 1922 to the present day; to formulate the quantitative and qualitative features of the concept of “robbery” and its legal construction at different periods. The methodological foundation of scientific research is the modern postulates of the theory of cognition [1]. A complex of interrelated general scientific and historical-legal methods was used, namely: chronological – to update the historical conditions that contributed to the development of criminal legislation in general and a specific crime (robbery); comparative legal analysis - comparative approach to Soviet and modern legislation establishing liability for robbery; psychological and legal modelling – to develop proposals for improving Art. 186 of the Criminal Code of Ukraine and to develop a methodology for investigating robbery; structural and functional - psychological and legal assessment of the object and objective side of the robbery, and analysis of the psychological characteristics of the subject and subjective side of the robbery. The scientific originality of the research is that the research for the first time argues in detail the prerequisites for the origin and historical conditions for the development of such

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a socially dangerous crime as robbery, and traces the path of its development, starting with the inclusion in other types of crimes and the legislative development of each legal structure of robbery into a single entity, which provided grounds to separate robbery and structure it into independent research. Thus, in the course of this research initial conclusion about the high level of improvement of the national legislation on criminal liability for theft of property, in particular by open means, was confirmed. Thus, the experience gained can be successfully used in the process of improving national criminal legislation

■ **Keywords:** robbery; abduction; theft; other people's property; misappropriation; violence; repeat offender; embezzlement; state property; public property; possession; personal property of citizens

■ Introduction

Protection and security of property is a priority task of the rule of law. According to Article 41 of the Constitution of Ukraine, no one can be unlawfully deprived of property rights. Practical implementation of this prescription is impossible without efficient counteraction to any criminal encroachments on property, in particular robberies, which are one of the most dangerous groups of criminal acts in Ukraine. The implementation of such counteraction requires appropriate scientific and theoretical substantiation [2].

Currently, robbery is one of the most serious crimes against property. It poses a particular danger to society, as it encroaches on social relations in the field of property, and in the field of protection of human life or health. Therewith, the increased public danger and resonance of this crime arises from an open, illegal and violent attack on a person to possess their property [3].

Historical analysis of robbery, experience, analysis of the legal sources of this research and its changes, on which Article 186 of the Criminal Code of Ukraine [3] is based, will contribute to the understanding and improvement of criminal legislation.

Robbery is a socially dangerous crime, thus the law provides severe punishment for its commission. The social danger of robbery, and theft, is that by committing it, the guilty person deprives the owner of the opportunity to own, use and dispose of their property [4]. However, unlike theft, a specific feature of this kidnapping is its open nature – it is committed in advance obviously, and visible to others. The open method of stealing property significantly increases the public danger of theft (compared to theft), as the perpetrator does not hide his intention to illegally take possession of someone else's property against the will of the owner or the person in whose jurisdiction or under whose protection the property is, and ignores the opinion of witnesses. The openness of the kidnapping testifies to the exceptional audacity of the robber, who neglects the danger of being exposed (as deliberately takes the risk of being detained at the scene of the crime) and publicly ignores the legal and social prohibitions of the ordinary life of the state [3].

In recent years, the criminal law characteristics of robbery have been explored by such scientists as:

V.K. Veselskyi, V.I. Galagan, O.I. Motliakh, L.D. Udalova, V.G. Khakhanovskiy, P.V. Tsymbal, S.S. Cherniavskiy, Y.M. Chornous, V.Y. Shepitko and many other scientists. However, currently, there is no significant law-making path of development of liability for the open theft of other people's property, which dates back to 1922. The initial conclusion regarding the high level of improvement of national legislation on criminal liability for theft of property, in particular by open means, was confirmed in the course of this research.

The purpose of the research is to analyse the historical foundations related to the construction of criminal and legal provisions relating to the open theft of someone else's property in such legislative sources of the last century as the Criminal Code of the Ukrainian SSR of 1922, the Criminal Code of the Ukrainian SSR of 1927 and the Criminal Code of the Ukrainian SSR of 1960, and in the current Criminal Code of Ukraine, with due regard for recent regulatory changes and a detailed analysis of the provisions of the above sources for their systematisation.

The scientific originality of the results obtained is that for the first time the prerequisites for the origin and historical conditions for the development of such a socially dangerous crime as robbery are argued in detail, and the path of its development is traced, starting from its inclusion in other types of crimes to the legislative development of each legal structure of robbery into a single entity, which provided grounds to separate robbery and structure it into independent research.

■ Outline of the Main Material

According to the results of the analysis of the current national criminal legislation, the articles of the Criminal Code of Ukraine (hereinafter - the CC of Ukraine), which establish liability for theft of property, can be attributed to those that fully correspond to the requirements of law enforcement activities regarding the validity of differentiation of liability for committing specific criminal offences. As a result of the laborious and consistent work performed by the legislator to improve them, the analysed articles of the CC of Ukraine are now a subsystem that can provide an appropriate response to specific facts of theft

of other people's property, which is quite convincingly proved by the example of Art. 186 of the CC of Ukraine, which provides for liability for open theft of other people's property (robbery) [5].

It should be noted that in the domestic legislation the criminal law grounds for liability for the open theft of other people's property were enshrined in the resolution of the All-Ukrainian Central Executive Committee (hereinafter – the ARCEC) enacted on September 15, 1922, of 23 August 1922 to the Criminal Code of the Ukrainian Socialist Soviet Republic (hereinafter – the CC of the Ukrainian SSR of 1922). Considering the usual for the present time structuring of the articles of the CC of Ukraine (to ensure differentiation of liability, considering the severity of the committed criminal offence and the identity of the perpetrator), including those establishing liability for theft of another's property, it was somewhat unusual in the Criminal Code of the Ukrainian SSR of 1922 to establish separate (separate articles) grounds for liability for simple robbery (Article 182) and its commission under qualifying circumstances (Article 183).

Simple theft, according to Art. 182, was “the open theft of another's a property in the presence of a person who owns, uses or has custody of it, but without violence to the person” [6]. Thus, the above definition did not specify either the owner of the property (it could be both an individual and a legal entity, but the such property should not belong to the perpetrator) or the degree of violence (it should not be used at all). According to Art. 183, the following were qualified: a) robbery combined with violence that is not dangerous to the life and health of the victim; b) the same actions committed by a repeat offender or a group of persons (gang) [6]. It should be noted at once that based on the analysis of only the above information it is quite difficult to assess the state of criminal and legal counteraction to robberies of other people's property by the CC of the Ukrainian SSR of 1922. Therewith, the regulatory gaps observed in the structure and dispositions of Articles 182 and 183 are quite fully and manifested when comparing them with similar indicators of Article 180, which provided for liability for the secret theft of another's property, i.e. theft.

First, the very definition of theft was performed at the highest level – “the secret theft of property in the possession, use or custody of another person or institution” [6]. Thus, the legal foundations for separate liability for theft of property belonging to a natural or legal person were laid, which is embodied in the structure of the analysed research. According to paragraph “a” of Article 180, liability was provided for theft from a private person without using any technical means (simple theft) [6], while simple theft from state and public warehouses and

institutions was subject to qualification under paragraph “d” of Article 180 [6]. Accordingly, the theft of private property committed by using tools or instruments, other technical devices or techniques, or committed by a person who was engaged in theft as a profession, or when the stolen property was known to be a necessary means of subsistence for the victim, etc. (clause “b”), or theft of horses or cattle from the agricultural population (clause “c”) was considered qualified [6].

A simple theft from state or public institutions and warehouses, or wagons, steamships, barges and other vessels, and was committed by a person who had access to such places by their official position, was subject to qualification under paragraph “e” of Article 180, while the same theft committed by a person entrusted with the management or protection of such storages was qualified under paragraph “e” of the same article. Therewith, liability was envisaged for qualified theft (but without distinguishing its specific features), committed from state institutions, warehouses and other storages (paragraph “g” of Article 180), theft from state warehouses, wagons, ships and other storages, committed systematically or by responsible officials, or in particularly large amounts of stolen goods (paragraph “h” of Article 180) [6]. However, with a more perfect differentiation of liability for theft of property, there were no significant differences in the sanctions of the analysed articles and their parts. Simple theft of property from a private person (Article 180(a)) was punishable by forced labour for up to six months or imprisonment for six months, while simple theft from state or public warehouses and institutions (Article 180(d)) and simple robbery (Article 182) were punishable by the same penalties of forced labour or imprisonment for up to one year. The difference in sanctions for qualified theft and robbery was not very significant. For example, if for the theft of horses or cattle from the working agricultural population (paragraph “c” of Article 180) the punishment was defined in the form of imprisonment for a term of not less than two years, then for the qualified theft committed from state institutions, warehouses and other storage facilities (paragraph “g” of Article 180), the punishment was established in the form of imprisonment for at least two years in strict isolation, and for robbery combined with violence that is not dangerous to the life and health of the victim (Part 1 of Art. 183) – imprisonment for up to three years.

The establishment of the Union of Soviet Socialist Republics in December 1922, the adoption of the fundamental principles of the criminal legislation of the USSR and the Union republics in 1924, the onset of other transformations in the life of the country, which in a particular way limited the powers of the Union republics in the field of criminal law regulation

of social relations, necessitated the development and adoption of a new Criminal Code of the Ukrainian SSR.

According to the Resolution of the Central Executive Committee of June 8, 1927, the Criminal Code of the Ukrainian SSR as amended in 1927 was enacted on July 1, 1927 [7]. Criminal law provisions that established liability both for property crimes and for acts of theft of other people's property changed, in particular additions, and the inclusion of new *corpus delicti* [7]. Notably, there are differences in the content and significance for law enforcement activities of the amendments made to the articles of the CC of the Ukrainian SSR, which provide for liability for theft of property. If the liability for the secret theft of another's property (theft) was differentiated by eight paragraphs of Article 180 of the CC of the Ukrainian SSR of 1922, then according to the new CC of the Ukrainian SSR, liability for acts committed in this way was provided for by three separate articles (Articles 170-172). Article 170, which contained six parts, defined the legal grounds for liability for simple, qualified and specially qualified thefts of private property, state and public property. The smaller number of parts (in two parts) in the structure of Art. 170 of the CC of the Ukrainian SSR in the wording of 1927 was explained primarily by the separation into an independent Art. 171 of the legal grounds for liability for theft of horses, oxen or other cattle (according to part. 1 of this article, those guilty of theft of cattle owned by the state, a public organisation or non-agricultural workers were liable, according to part 2 – those guilty of theft of cattle from the agricultural worker, according to part 3 - those guilty of committing repeatedly or in collusion with other persons the crimes provided for in parts 1, 2 of this article) [7].

The changes made to the criminal law provisions providing for liability for open theft of another's property (robbery) were as follows 1) the previously mentioned Articles 182, and 183 of the Criminal Code of the Ukrainian SSR of 1922 were merged into one Article 173, which had three parts and, accordingly, differentiated liability for simple (Part 1), qualified (Part 2) and especially qualified (Part 3) elements of open theft of another's property; 2) the legislator refused to include in the dispositions of Part 1, 2 of Art. 173 indications that the violence used in the process of robbery should not have been dangerous to the life and health of the victim, limiting itself to mentioning only that a simple robbery (part 1) was performed without violence, and according to part 2, the relevant unlawful acts combined with violence were subject to qualification (the lack of reference to the nature of violence during the robbery was explained by the definition of robbery (part 1 of Art. 174) as open to obtain another person's property, an attack of an individual, combined

with violence threatening death or injury, or with the threat of committing such violence); 3) some editorial changes were made to the list of special qualifying features of robbery: committing a crime by special subjects ("repeat offenders") was replaced by committing it repeatedly; moreover, such a special qualifying feature of robbery as its commission by a group of persons was preserved, but without calling it a "gang"; 4) the punishment for the analysed acts was given a definite unification and consistency, i.e. signs of consistency (in all cases, punishment was provided only in the form of imprisonment with its terms increasing as the degree of public danger and gravity of the committed act increased, namely: a) simple robbery was punishable by imprisonment for up to one year; b) qualified robbery – imprisonment for up to three years; c) acts qualified under part 3 of Art. 73 of the Criminal Code – imprisonment for up to five years [7]. Translated with DeepL

It is essential to determine the role and significance in the development of national legislation on criminal liability for theft of other people's property, including by robbery, of the decrees of the Presidium of the Supreme Soviet of the USSR of June 4, 1947 "On strengthening the protection of personal property of citizens" (hereinafter – the first decree of June 4, 1947) [8] and "On criminal liability for theft of state and public property" (hereinafter – the second decree of June 4, 1947) [8]. Considering the purpose of the Decrees adopted by the Presidium of the Supreme Soviet of the USSR noted that the first of them was reflected in its title, and the purpose of the second Decree, as stated in the introductory part, along with the establishment of the unity of legislation on criminal liability for theft of state and public property equally emphasised on strengthening the fight against these crimes.

Thus, the legal principles of separate, depending on the form of ownership, the onset of liability for the secret theft of other people's property, established in the Criminal Code of the Ukrainian SSR in 1922, which were developed in the Criminal Code of the Ukrainian SSR in the wording of 1927, in these decrees received final legislative consolidation in relation both to theft and other ways of obtaining other people's property.

However, in the absence of significant comments on the general form of presentation of the listed legislative innovations, their presentation and content were not devoid of shortcomings [2]. First, considering the fact that the purpose of the first Decree of June 4, 1947, was to strengthen the protection of personal property of citizens, the methods of illegal appropriation of such property officially included only theft and robbery, although it was about responsibility for the open theft of private property, in particular with using violence that is not dangerous

to the life and health of the victim and without using such violence. Such legislative regulation was accomplished since open theft as a way of unlawful possession of personal property of citizens was classified as a type of theft (in Part 1 of Article 1 of the legislative act the crime was defined as theft, that is, secret or open (therefore, without using violence) theft of personal property of citizens) [9]. Recognising such a definition of the method of theft of personal property as sufficient, in Part 2 of this article the legislator identified the signs of the qualified composition of such a crime, defining it as a theft committed by a thieves' gang or repeatedly, i. e. again with a limited list of qualifying features [10]. These shortcomings were mainly compensated by measures to respond to the facts of committing such thefts: under Part 1 of the Article, the punishment was imprisonment in a labour camp for a term of five to six years, and under Part 2 of the Article – for a term of six to ten years [8].

Therewith, an attack with the purpose of possession of another person's property, combined with violence or threat of such violence, which was not dangerous to the life and health of the victim, was considered robbery, which was punishable under Part 1 of Article 2 of the Decree (punishment – imprisonment in a labour camp for a term of 10 to 15 years with confiscation of property). According to Part 2 of Art. 2 of the Decree, robbery, combined with violence dangerous to the life and health of the victim, or with the threat of death or grievous bodily harm, committed by a gang or repeatedly (punishment - imprisonment in a correctional labour camp for a term of 15 to 20 years with confiscation of property) was subject to qualification [8].

The provision contained in Art. 3 of the Decree, which established liability for failure to report to the authorities about a reliably known prepared or committed robbery (punishment – imprisonment for a term of one to two years or exile for a term of four to five years), was subordinated to the strengthening of the protection of personal property of citizens [8].

Starting the investigation of the regulatory provisions enshrined in the second Decree, note their more extensive content, which is evidenced, first of all, by the consideration of all possible ways of stealing state and public property in the construction of criminal law provisions. Following the previously enshrined in the CC of the Ukrainian SSR in 1922, and then in the CC of the Ukrainian SSR in the wording of 1927, the legal foundations of criminal liability separately for theft of state and public property, the legislator defined the grounds for imposing liability for simple and qualified theft of state property in Articles 1, 2 of the Decree, respectively, and for simple and qualified theft of collective, cooperative or other public property – in Articles 3, 4 of the Decree [8]. As for the

methods of illegal acquisition of the listed property, the simple *corpus delicti* of such crimes were defined as theft, misappropriation, embezzlement or other theft of state property (Article 1 of the Decree), theft, misappropriation, embezzlement or other theft of collective, cooperative or other public property (Article 3 of the Decree). Thus, the list of methods of illegal acquisition of property included both those known in practice at that time and those that could arise later. In Articles 2, and 4 of the Decree, which provides for liability for qualified *corpus delicti* of such crimes, the only qualified features were repeated commission of the relevant theft and its commission by an organised group (gang) or in large amounts. Notably, the theft of state property was punished more severely (such simple theft entailed imprisonment in a labour camp for a term of seven to ten years with or without confiscation of property, and qualified crime - imprisonment in a labour camp for a term of ten to twenty-five years with confiscation of property) than the theft of collective farm property, cooperative or other public property (for a simple crime, imprisonment in a labour camp for a term of only five to eight years with or without confiscation of property as possible, while for a qualified crime - imprisonment in a labour camp for a term of eight to twenty years with confiscation of property). In addition, criminal liability was envisaged for failure to report to the authorities about a reliably known prepared or otherwise committed (emphasized by the author, Volodymyr Zhenuntyy and Ruslana Zaporozhets) qualified fact of embezzlement of state and public property, which was punished more severely than provided for in Art.

3 of the first Decree – failure to report a reliably known prepared or committed fact of theft of personal property of citizens by robbery (punishable by imprisonment for a term of two to three years or exile for a term of five to seven years) [8].

The significance of the criminal provisions enshrined in parts 1-4 of the second Decree was that they provided the legal foundation for further symmetrical development in the national legislation of criminal liability for embezzlement of state or public property by robbery and open theft of personal property of citizens.

The changes that occurred after the end of the Great Patriotic War during the first 10-15 years in the Ukrainian SSR and throughout the country, namely, socioeconomic, political and other progressive transformations, determined and ensured by the end of the 50s of the 20th century the preparation of a new Criminal Code of the Ukrainian SSR, which was approved by the Law of the Ukrainian SSR of December 28, 1960, and enacted on April 1, 1961 (hereinafter – the CC of the Ukrainian SSR 1960) [7].

Considering the accumulated practice of systematisation of national criminal legislation, section two

of the Special Part “Crimes against socialist property” contained Article 82, which provided for liability for theft of state and public property [7], and section five (of the same Special Part) “Crimes against personal property of citizens” contained Article 141, according to which those guilty of open theft of personal property of citizens were liable [7].

The coincidences in the analysed articles concerned the following main provisions: a) the structure of the articles (contained three parts each); b) the very concept of the simple corpus delicti (parts one of the articles): open theft of the relevant property; c) the list of qualifying features: relevant acts associated with violence that is not dangerous to the life and health of the victim or with the threat of such violence, or committed by prior conspiracy by a group of persons or repeatedly; d) a specific qualifying feature – the commission of relevant actions by a particularly dangerous recidivist. The differences were as follows: a) under Part 3 of Art. 82, theft of state or public property by robbery committed on a large scale was to be qualified; b) under Part 2 of Art. 141, open theft of personal property of citizens, which caused significant damage to the victim, was qualified.

However, less than three months after it entered into force, by the Decree of the Presidium of the Supreme Soviet of the Ukrainian SSR of 27 June 1961 “On Amendments and Additions to the Criminal and Criminal Procedure Codes of the Ukrainian SSR”, the CC of the Ukrainian SSR of 1960 was supplemented with Art. 86-1, which established criminal liability for theft of state or public property committed on an especially large scale, regardless of the method of theft (Articles 81-84 and 86-1), thus, such acts committed by robbery were considered to be a crime under Art. 86-1 of the CC [7].

The following additions to the analysed article of the CC of the Ukrainian SSR of 1960 were made under the Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR “On Amendments and Additions to the Criminal Code of the Ukrainian SSR” of January 12, 1983: a) according to subparagraph “b” of paragraph 26 of the Decree, Article 82 of the CC of the Ukrainian SSR was supplemented after part 2 with a new part of the following content: “Robbery with breaking into premises or other storage shall be punishable by imprisonment for a term of four to ten years with or without confiscation of property”, considering the above, Part 3 of the said Article became Part 4; b) according to subpar. “b” of paragraph 45 of the Decree, Art. 141 of the CC of the Ukrainian SSR was supplemented after Part 2 with a new part of the following content: “Robbery with breaking into a dwelling shall be punishable by imprisonment for a term of three to eight years with or without confiscation of property”⁴, considering this addition, Part 3

of the said Article 141 was recognized as Part 4. The legislative additions made to Articles 82 and 141 of the Criminal Code of the Ukrainian SSR in 1960 once again confirmed the symmetry inherent in their structure and included in their legal provisions [11].

■ Conclusions

Considering the above, it should be concluded that, in general, the process of improving the criminal legal framework of liability for open theft of state or public property, and open theft of individual property of citizens, which lasted almost eighty years (since the adoption of the CC of the Ukrainian SSR in 1922 and until the end of the 90s of the 20th century and was marked by the preparation of the new Criminal Code of Ukraine, was quite successful.

The first evidence of such efficiency is the inclusion in Art. 186 of the CC of Ukraine of 2001, which provides for liability for the open theft of other people's property, previously enshrined in the fundamental during its development of Articles 82 and 141 of the Criminal Code of the USSR of 1960, the concept of theft of state or public property, and the open theft of personal property of citizens in an open way, the list of qualifying and, particularly, qualifying features of the analysed crime contained in these articles. Other amendments and additions made to Art. 186 at the stage of preparation of the CC of Ukraine in 2001 (for example, exclusion of such specific qualifying features as robbery committed by a particularly dangerous recidivist from the borrowed part 4 of Art. 82 and 141 of the CC of the USSR in 1960, and in addition to Art. 186 part 6, which provides for liability for a robbery committed on a particularly large scale or by an organised group, etc.) were conditioned upon objective reasons, but were not the result of subjective underestimation of the requirements of the practice of combating such thefts of other people's property.

No less convincing is the fact that despite the amendments and additions made to the CC of Ukraine in 2001, the dispositions of the criminal law provisions included in the analysed article remain unchanged since the adoption of the CC of Ukraine in 2001, which is generally specific for the articles included in Section VI “Criminal offences against property” of the Special Part of the CC, namely 185 (theft), 186 (robbery), 187 (robbery), 189 (extortion), 190 (fraud), 191 (misappropriation, embezzlement or possession of property by abuse of office), 192 (causing property damage by deception or breach of trust), as well as 193 (misappropriation by a person of found or other property that accidentally came into their possession). However, it should be clarified that by the Law of 15 April 2008 No. 270-VI “On Amendments to the Criminal Code and the Code of Criminal Procedure of Ukraine on the Humanization

of Criminal Liability”, the sanctions of the first parts (providing for liability for simple elements of the respective thefts) of Articles 185 (theft), 186 (robbery), 192 (causing property damage by deceit or breach of trust) and 193 (misappropriation of found or accidentally acquired the property by a person) have been supplemented by such alternative humane punishments as community service and arrest (sanction of part 1 Article 190, i.e. in case of simple fraud, is supplemented with only one such type of punishment – community service). The original

version of 2001 still contains articles that provide for liability for robbery (Art. 187), extortion (Art. 189) and misappropriation, embezzlement or possession of property by abuse of office (Art. 191) [12].

Thus, the conclusion about the high level of improvement of national legislation on criminal liability for theft of property, in particular, by open means, was confirmed in the course of the study [13]. The accumulated experience can be successfully used in the process of improving national criminal legislation.

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Генезис кримінального законодавства України щодо відповідальності за відкрите викрадення чужого майна (грабіж)

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■ **Анотація.** Основні ознаки сучасного поняття «грабіж» як відкритого викрадення чужого майна було вперше сформульовано ще в радянському законодавстві в Кримінальному кодексі УСРР 1922 року (до 30 січня 1937 року – Українська Соціалістична Радянська Республіка). Існували періоди, коли поняття «грабіж» взагалі розчинилося в таких злочинах, як крадіжка та розбій (укази Президії Верховної Ради СРСР від 4 червня 1947 року «Про кримінальну відповідальність за розкрадання державного і громадського майна», «Про посилення охорони особистої власності громадян»). Водночас законодавець, керуючись об'єктивною необхідністю гуманізації покарання в пострадянських країнах, зменшує санкцію за цей вид злочину й акцентує саме на тих особах, які вперше вчинили його без обтяжуючих обставин, аби вони стали на шлях виправлення та не вчиняли рецидив. Проте практика засвідчила, що грабіж завжди вважали одним із найтяжчих злочинів, як це й визначено в чинному законодавстві України. Нагальна проблема потребує розв'язання також і на науковому рівні. З огляду на вищезазначене, мета статті полягає в історичному роз'ясненні доктринальних норм складу злочину грабежу за різних державних періодів, починаючи від законодавчих джерел Кримінального кодексу Української Соціалістичної Радянської Республіки 1922 року до сьогодення; формулювання кількісних і якісних ознак поняття «грабіж» та його юридичної конструкції в різні проміжки часу. Методологічну основу наукового дослідження становлять сучасні постулати теорії пізнання [1]. Використано комплекс взаємопов'язаних загальнонаукових й історико-правових методів, а саме: хронологічний – задля поновлення історичних умов, які сприяли розвитку кримінального законодавства загалом і конкретного складу злочину (грабіж); порівняльно-правовий аналіз – компаративістський підхід до радянського та сучасного законодавства, що встановлює відповідальність за грабіж; психолого-правове моделювання – щодо формулювання пропозицій з удосконалення ст. 186 КК України й опрацювання методики розслідування грабежів; структурно-функціональний – здійснення психолого-правової оцінки об'єкта й об'єктивної сторони грабежу, а також аналізу психологічних особливостей суб'єкта й суб'єктивної сторони грабежу. Наукова новизна полягає в тому, що в опрацьованій статті вперше детально аргументовано передумови походження та історичні умови розвитку такого суспільно небезпечного злочину, як грабіж, а також прослідковано шлях його розвитку, починаючи з входження до інших видів складів злочинів і до законодавчого формування кожної юридичної структури грабежу в єдине ціле, що дало підставу виокремити грабіж і структурувати його в самостійну статтю. Отже, наш первинний висновок щодо високого рівня вдосконалення національного законодавства про кримінальну відповідальність за викрадення чужого майна, зокрема відкритим способом, у процесі нашого дослідження підтвердився. Таким чином, накопичений досвід можна успішно використати в процесі вдосконалення національного кримінального законодавства

■ **Ключові слова:** грабіж; викрадення; крадіжка; чуже майно; привласнення; насильство; рецидивіст; розкрадання; державне майно; суспільне майно; заволодіння; особиста власність громадян

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Prevention of criminal offences in the field of insurance in Ukraine

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■ **Abstract.** The purpose of the study is to explore the most common criminal offences in the field of insurance in Ukraine and to identify efficient measures to prevent criminal offences of this category to implement them in the legal reality of the country. Methodology. The methodological tools were chosen by the purpose, specifics of the object and subject of the study. In the course of the study, the results were generalised, processed and analysed. The specific research method used in the study is the method of system analysis. The scientific originality of the research is that based on the analysis of quantitative and qualitative characteristics of criminal offences in the field of insurance, the system of criminal offences that encroach on various objects of criminal law protection is determined. A particular place in it is occupied by various types of illegal possession of the property of the insurance company by professional participants of the insurance market and insurers. Conclusions. Considering the scale of criminal offences in the insurance sector, insurance companies should cooperate to prevent them. It requires the establishment of associations, and tandems of insurers, within which databases contain information about the insured, "black lists" of unscrupulous insurers, cooperative regional databases of potential fraudsters, etc. In addition, the priority area of preventing criminal offences in this segment is the established interaction of law enforcement agencies with the security services of insurance companies in detecting fraud and other illegal acts designed to illegally obtain insurance compensation. Thus, the implementation of the above measures will contribute to the development of the domestic insurance market and increase the efficiency of the insurance institution in general

■ **Keywords:** insurance; insurance risk; criminalisation; criminal offences; prevention; fraud

■ Introduction

The domestic insurance industry as an important part of the country's financial industry is developing inseparably from the national and global context. The international financial and, consequently, the insurance market is currently experiencing the impact of diverse trends. On the one hand, the explosive growth of new technologies contributes to the strengthening of financial interconnections and the

availability of services between countries, enterprises, and individuals. On the other hand, political interference results in the establishment of new trade barriers and financial protectionism [1].

The design of the insurance market – is a significant factor in the development of the national economy. Therewith, the growth of the shadow sector of the economy and criminalisation of almost

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all spheres of economic activity hinders the development of market relations in Ukraine, threatening the national interests and national security of the state, undermining the trust of citizens in democratic institutions and values, causing concern in society and critical assessments of international experts. Affordable insurance conditions establish the grounds for committing criminal offences to illegally obtain insurance payments, as a result of which this segment of the financial market has recently become one of the most attractive for fraudsters.

The purpose and objective of the research are to explore efficient measures to prevent criminal offences in the field of insurance in Ukraine.

The author, for the first time, attempted to solve the problem of implementing an integrated approach, which includes the development of collective tools and methods of counteracting illegal actions in insurance, maintaining a constant dialogue with public authorities, strengthening cooperation with law enforcement agencies, active outreach work with the population.

■ Outline of the Main Material

Criminal offences in the field of insurance are determined by several criminal acts that encroach on various objects of criminal law protection. Along with criminal offences in the field of economic activity, a particular place in this system is occupied by various types of misappropriation of other people's property, and primary fraud by professional participants of the insurance market (insurers) and insureds.

The insurance market in Ukraine is at the stage of establishment. Since independence, several stages have already passed, during which the legal, organisational and economic foundation of insurance relations has changed. Historically, the insurance industry in the former USSR was strictly centralised in a single insurance body - the State Insurance. In the minds of people, insurance was not fixed as a mandatory component of life organisation, and the way of life was that citizens did not even think about the necessity of life or property insurance against accidents and natural disasters. The profession of insurance agents was not attractive and profitable.

The situation has changed significantly due to the demonopolisation of the insurance industry, and legalisation of enterprises, which resulted in an increase in the number of alternative non-state commercial insurance organisations, whose activities covered, in addition to conventional types of insurance, insurance of commercial, financial, economic risks, risks of liability for damage in other countries, export credits and foreign investments, which have become an everyday reality for tens of thousands of people.

According to experts, a new insurance industry has been established in Ukraine, designed to provide a wide range of services to both legal entities of various forms of ownership and citizens individually [2].

The potential possibility of natural disasters and accidents is the essence of insurance risk. The term "risk" has several meanings. It is identified with the danger that threatens a particular subject or object. In fact, not every danger is a risk from the insurance standpoint. Insurance risks include only such cases of danger, the occurrence of which can be predicted and evaluated based on historical experience and using mathematical and statistical methods.

Insurance as an economic category is in a subordinate relationship with the category of finance and is a complex of specific redistributive relations between its participants regarding the development of a target insurance fund, which is intended to compensate for possible damage [3; 4].

From a legal standpoint, insurance is a legal relationship (insurance relationship) between the insurer and the insured, which consists of the obligation of the first to pay the latter an insurance payment in the event of an insured event. The legal essence of insurance is defined in Art. 1 of the Law of Ukraine "On Insurance" – a type of civil law relations to protect the property interests of citizens and legal entities in the event of specific events (insured events) defined by the insurance contract or current legislation, at the expense of funds developed by paying insurance premiums by citizens and legal entities [5]. This Law covers the rights and obligations of insurance market participants: insurers and insureds, other individuals and legal entities: recipients of insurance compensation, insurance intermediaries, state regulators, etc.

The insurance market is a system of economic relations regarding the purchase and sale of a specific product – insurance coverage due to the occurrence of specific events (insured events) defined by the insurance contract or applicable law. In the territorial aspect, there are local (regional), national (internal) and world (external) insurance markets. By industry – personal and property insurance markets. Each of these units has its structure (segmentation) [3; 4].

Insurance can be voluntary and compulsory. Voluntary insurance - is insurance performed based on the contract between the insured and the insurer. The general conditions and procedure for voluntary insurance are determined by the insurance rules established by the insurer independently of the requirements of the legislation.

Varieties of voluntary insurance are: personal insurance (life, accident, health); insurance of vehicles (land, air, water); cargo and luggage insurance; insurance of other property; insurance of loans, investments, financial risks, etc. The subject of the insurance contract (Article 980 of the Civil Code of Ukraine) is property interests that do not contradict the law and are related to life, health, ability to work and pension (personal insurance); possession, use and disposal of property (property insurance); compensation for damage caused by the insured (liability insurance) [6].

Currently, the main segment of the insurance market of Ukraine is occupied by property insurance – a branch of insurance in which the object of insurance is property interests related to the possession, disposal and use of property, and cases where the risk is associated with the loss of property (90.5% of the total gross income from paid insurance premiums) [7].

The most popular motives for committing insurance fraud are: the desire to take advantage of the case to obtain the maximum compensation; the desire to return the money spent on insurance premiums; the benefit when obtaining compensation is the only source of income; an additional source of profit for the insurers themselves; other reasons of a material or moral nature [1].

The structure of criminal offences in the field of insurance is determined by several criminal acts that encroach on various objects of criminal law protection. A particular place in this system is occupied by various types of illegal appropriation of other people's property, and primary fraud by professional participants of the insurance market (insurers) and insureds.

The issue of financial fraud is highly relevant to the domestic insurance market. In Ukraine, insurance fraud accounts for 21% or UAH 1.5 billion of gross payments, in particular: 25 % for voluntary health insurance, 23 % for CASCO insurance, 18 % for MTPL insurance, 16 % for liability insurance, 14 % for travel insurance, 12 % for property insurance and 10 % for accident insurance [8].

In the current conditions in different countries, motor insurance premiums have the largest share in the structure of insurance premiums of general insurance. Considering the above, motor insurance is one of the most popular types of insurance in the European insurance market and the world in general [9].

Thus, the vast majority of frauds in the insurance market are committed in the field of motor vehicle insurance. According to expert estimates, up to 70% - falls on car insurance, and some large companies say that up to 10% of all car fees are spent on payments to fraudsters. The share of fraud in the motor insurance market in the overall structure of the insurance market, according to experts, is at least 60% [7; 10].

A definite decrease in the number of detected frauds in the field of auto insurance is explained primarily by the high level of their latency. Cases to receive insurance payments are registered only in single cases (24%) or not registered at all (69%). The high level of latency of criminal offences is influenced by objective factors, primarily general criminalisation of particular objects of the insurance business, in particular, the automotive market (19 %); negligence or personal interest of representatives of insurance companies (24 %); lack of proper interaction between insurers and law enforcement agencies (12 %); inadequate criminal prosecution for committing criminal offences (7 %); attempts of insurance organisations that have detected signs of fraud to resolve the issue

in pre-trial proceedings without applying to law enforcement agencies (20 %); availability of insurance terms and conditions and ease of obtaining insurance coverage (20 %).

According to the research, car insurance has become the most popular among fraudsters due to several factors. First, is accessibility. To conclude an insurance contract, it is necessary to purchase a car and have a relatively small amount of money (up to 10% of the cost of insurance) to pay the first instalment. Instead, insurance, for example, of means of production is performed only by large enterprises. Another aspect is mobility and ease of sale of the insured car. After staging an insurance case, it is much easier to hide or sell it than, for example, a railway train with cargo. Secondly, the general criminalisation of the motor vehicle market. A significant share of sales of new and used cars is under the “roof” of organised criminal groups, which involve law enforcement officers. They control the markets where stolen vehicles are sold. There are clandestine workshops that prepare for the sale of vehicles. There is a well-established industry of legalisation of cars obtained by criminal means (change of identification numbers, appearance, forgery of documents, etc.). These conditions are most favourable for criminals who have the opportunity to prepare a staged insurance case and rapidly sell the insured car. Indeed, according to the materials of operational and investigative cases, most fraudsters - are representatives of the “criminal car business”. Thirdly, negligence and self-interest of the insurer or third parties. At various stages of insurance relations, the possibility of criminal collusion of fraudsters with representatives of the insurance company to assess the value of the property, the degree of risk and other circumstances affecting the terms of the contract are not excluded. Illegal assistance to fraudsters is possible on the part of police officers, appraisal organisations, expert services, service stations, etc. Fourth, the absence of proper interaction and information exchange between the insurance companies and insurers with law enforcement agencies and banks.

The high profitability of fraud in the field of auto insurance contributed to the high pace of its development, which forced insurance companies to revise the general terms and conditions of vehicle insurance against illegal possession. Most insurers started to insure the risk of theft only in combination with other risks. In addition, the cost of such insurance has increased significantly, large unconditional deductibles have been introduced, and requirements for mandatory installation of protective devices on insured vehicles. The insurer reserved the right to periodically check the technical condition of the vehicle [11].

The term “insurance fraud” in the legal literature is understood ambiguously. Supporters of a broad interpretation include all types of illegal acts in the field of insurance fraud. The term “insurance fraud”,

according to N.A. Lopashenko is conditional and cannot be considered successful. It is more correct to refer to fraud committed in the field of insurance or the field of insurance activities [12]. Insurance fraud is defined as the unlawful behaviour of subjects of insurance relations designed to obtain insurance indemnity by the insured by deception or breach of trust; payment of insurance premium (insurance premium) less than necessary for a correct risk assessment; concealment of essential information during the conclusion or the term of the insurance contract; the refusal of the insurer to pay insurance indemnity without sufficient grounds [13; 14].

Thus, insurance fraud includes all types of illegal actions in the field of insurance regardless of their subjects, the presence of a criminal offence, etc. The main shortcoming of this position, in the authors' opinion, is the attempt of the authors to cover all possible offences despite their legal assessment. Consider this approach is not entirely justified, at least in the criminal law aspect. In addition, the study demonstrates that it is impossible to list in one definition the ways of committing insurance fraud due to the diversity of their manifestations and levels of distribution.

Other scientists consider insurance fraud to be an intentional crime designed to deceive the insurance company, which is committed by the insured for illegal enrichment at the expense of the insurer by misrepresenting information about the object of insurance, staging an insured event, artificially increasing the amount of insurance compensation, and committing other illegal actions [15]. The definition, in the author's opinion, is more successful.

In legal science, a third approach has been developed, according to which insurance fraud includes any fraud related to the insurance business [13]. In addition, the author's opinion, is not entirely correct, since this way, fictitious entrepreneurship and cases of establishing financial pyramids, which have no close connection with insurance legal relations, are unreasonably attributed to insurance fraud.

Based on the research sources of foreign countries, which have already accumulated considerable experience in determining the legal content, qualification and counteraction to offences in the field of insurance, consider it appropriate to propose to define "fraud in the field of insurance" as illegal behaviour of the subjects of the insurance contract, designed to obtain insurance compensation by the subject of insurance relations by deception or abuse of trust [16].

Therewith, scammers try to insure the cargo in containers in case of its transportation, by organising damage or breaking of seals from containers during the tracing, thus imitating the theft of cargo. The insurance company is forced to pay the sum insured for the loss of property that was not actually in the container. To counteract such fraud, insurance companies send their representatives who must control the correct loading of goods and sealing

of containers. But the salaries of such representatives are small, which simplifies their bribery for fraudsters. In addition, criminals falsify documents on the loss, and damage of products, overstate the value of cargo and resort to other types of fraud. Similarly, fraud is committed in the case of insurance of houses, valuable collections, paintings by famous artists, antiques and other properties [17].

The features of insurance fraud, in comparison with fraud in other areas of financial relations, are as follows: the object of insurance fraud is the funds of the insurance fund under the jurisdiction of the insurer; insurance fraud is associated with using the specifics of the insurance business (the perpetrator acts within the legal field regulated by civil and economic legislation); the perpetrator of insurance fraud violates relations to protect the property interests of individuals and legal entities in the event of specific events (insured events), which are artificially established (staged, provoked) or illegally used; as a rule, insurance fraud contains several other (subordinate) criminal offences.

Due to the classification of fraudulent actions in the field of insurance, the entire set of criminal attacks is divided into interconnected chains that are in hierarchical subordination. Consider the main classification series:

1. Depending on the purpose of fraudulent actions: committed for illegal receipt of insurance payments; to obtain insurance payments in a larger amount than is required for the specified insured event; designed to obtain insurance payments for damage caused to the object of insurance, which was not under insurance coverage.

2. Depending on the subject of fraud (according to the degree of participation of interested employees of insurance companies): committed by insurers; insurers together with employees of insurance companies; representatives of insurance organisations: heads of insurance companies or insurance intermediaries.

3. Depending on the stage of insurance legal relations: at the stage of concluding an insurance contract; during the validity of the insurance contract; at the stage of applying for insurance payment.

In the criminal law aspect, insurance fraud is a separate case of misappropriation of someone else's property. However, the mechanism of embezzlement (compared to the Soviet practice) has undergone significant changes. In the conditions of market relations, the main element of its originality was using for criminal purposes the organisational and legal status of business entities, and institutions of economic and financial law.

Fraud in the field of insurance as a criminal technology combines several criminal offences provided for in different sections of the Criminal Code of Ukraine [18] but is connected by a single purpose of illegal receipt of insurance compensation. It provides grounds to consider fraud as a system-forming com-

ponent of the relevant technology of criminal activity. A detailed criminal and legal classification are important for considering all the elements of the forensic characteristics of the relevant crimes. Three interrelated elements can be identified in fraud technology:

1. Criminal offences intended for obtaining insurance indemnity are the following: fraud (Art. 190 of the CC of Ukraine); misappropriation, embezzlement or possession of property by abuse of office (Art. 191 of the CC of Ukraine); causing property damage by deception or breach of trust (Art. 192 of the CC of Ukraine).

2. Actions that are a way or a necessary condition for committing insurance fraud: destruction, forgery or replacement of vehicle unit numbers (Article 290 of the CC of Ukraine); forgery of documents, seals, stamps and forms, their sale, use of forged documents (Article 358 of the CC of Ukraine); knowingly false report of a criminal offence (Article 383 of the CC of Ukraine); misleading a court or other authorised body (Article 384 of the CC of Ukraine), etc.

3. Actions designed to conceal the traces of criminal proceeds, the persons who received them, establishing the appearance of the legal origin of these proceeds: legalisation (laundering) of the proceeds of crime (Article 209 of the CC of Ukraine); theft, misappropriation, extortion of documents, stamps, seals, their acquisition by fraud or abuse of office or their damage (Article 357 of the CC of Ukraine).

4. Actions connected with illegal activities of officials: official criminal offences under Art. 364, 366-370 of the CC of Ukraine.

However, the necessity of efficient state regulation of the design of the national economy and the development of governance institutions in a market environment requires the establishment of an effective control system, the strategic purpose of which is to ensure the stability of economic growth by preventing crimes in the provision of financial services and inefficient use of financial resources. Solving the issues of fraud prevention in the insurance market requires the definition of specific actions at the legislative level and the use by law enforcement agencies of the entire arsenal of powers granted to them by law. The study of investigative and judicial practice proves that usually the employees of the security services of insurance companies are involved in the detection and prevention of criminal violations in the field of insurance, even though their activities to identify and document criminal acts (independently and in cooperation with law enforcement agencies) are exclusively organisational and are not regulated by law (only the obligation of financial institutions to protect the safety of customer funds is fixed), which, in the author's opinion, requires regulation both at the legislative level through the adoption of the long-awaited Law of Ukraine "On Private Detective Activity" [19], and at the subordinate level through the development and adoption, with the participation of the Ministry of Internal Affairs of Ukraine,

the Office of the Prosecutor General of Ukraine, the Bureau of Economic Security of Ukraine and other interested agencies, of interagency instructions on cooperation in the field of ensuring the security of insurance activities.

Thus, most of the tasks related to the prevention of criminal offences that infringe on the interests of insurance companies are the responsibility of non-state security services. Legislative prohibitions on the detection of these signs were not identified during this research, but there are no explicit provisions in the legislation that would acknowledge the authorised units of financial institutions of banks as subjects of the prevention of criminal offences.

The study of the "internal" instructions of some insurance companies demonstrates that most of them establish the following regulatory obligations of security services: detection of signs of insurance fraud and implementation of measures to prevent and stop them; preparation of materials for law enforcement agencies to resolve the issue of initiating criminal proceedings; participation in the pre-trial investigation of criminal offences; sending information related to the investigation to law enforcement agencies; implementation of measures within the competence to compensate for the damages caused.

Therefore, the obligations of employees of the security services of insurance companies are: the implementation of investigative activities; participation in scheduled and unscheduled internal inspections of the activities of insurance companies, conducted using administrative and financial control; conducting internal (official) investigations into the facts of damage to property and the order of the company; organisation and implementation of interaction with law enforcement agencies, assistance to them in performing investigative, search and organisational measures provided by law.

The efficiency of activities to prevent insurance fraud significantly depends on the interaction at the level of law enforcement and other state-controlling authorities and insurance organisations. Combining the efforts of the above-mentioned services and organisations in the fight against offences and crimes in the insurance market allows concentrating their forces, means, and technical capabilities, to cover the majority of objects, to better use the capabilities of each of the subjects to identify and expose criminals.

■ Conclusions

Thus, it should be noted that despite the established system of state regulation of the financial services market, the definition and distribution of powers to regulate, supervise and control the activities of financial services, state regulation of the financial sector of the economy at the current stage is not sufficiently effective, behind the current trends and requirements of market development, insufficiently considers international experience. The key problem of

regulating the financial services market is insufficient coordination of actions between financial regulators, which in the process of supervisory activities is manifested in the inconsistency of their actions in the adoption of regulations, insufficient coordination of actions in the conditions of systemic financial

crises, insufficient exchange of information and lack of interaction mechanisms in the supervision of financial conglomerates or related parties. In addition, Ukraine's further integration into the global structures that determine international policy in the field of financial services regulation is of great significance.

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Запобігання кримінальним правопорушенням у сфері страхування в Україні

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■ **Анотація.** Метою статті є дослідження найпоширеніших кримінальних правопорушень у сфері страхування в Україні та виявлення ефективних заходів запобігання кримінальним правопорушенням зазначеної категорії з метою імплементації їх у правову дійсність країни. Методологія. Методологічний інструментарій обрано відповідно до поставленої мети, специфіки об'єкта та предмета дослідження. У процесі дослідження здійснено узагальнення, обробку й аналіз отриманих результатів. Спеціальним методом дослідження, використаним у статті, є метод системного аналізу. Наукова новизна публікації полягає в тому, що на підставі аналізу кількісних і якісних характеристик кримінальних правопорушень у сфері страхування визначено систему кримінально караних діянь, які посягають на різні об'єкти кримінально-правової охорони. Окреме місце в ній посідають різні види незаконного заволодіння майном страхової компанії з боку професійних учасників страхового ринку та страхувальників. Висновки. Ураховуючи масштаби кримінальних правопорушень у сфері страхування, страховим компаніям слід об'єднувати зусилля з метою їх уникнення. Для цього необхідно створювати асоціації, тандеми страховиків, у межах яких об'єднувати бази даних, що містять відомості щодо застрахованих, «чорні списки» недобросовісних страхувальників, спільні регіональні банки даних потенційних шахраїв тощо. Крім того, пріоритетним напрямом запобігання кримінальним правопорушенням у цьому сегменті є налагоджена взаємодія правоохоронних органів зі службами безпеки страхових компаній у виявленні шахрайства, інших протиправних діянь, спрямованих на незаконне одержання страхового відшкодування. Вважаємо, що застосування на практиці перелічених вище заходів сприятиме розвитку вітчизняного ринку страхування та підвищенню ефективності інституту страхування загалом

■ **Ключові слова:** страхування; страховий ризик; криміналізація; кримінальні правопорушення; запобігання; шахрайство

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Some types of procedural violations during the inspection in the process of investigating the illegal appropriation of a vehicle, which resulted in the recognition of evidence inadmissible

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■ **Abstract.** The purpose of the research – based on the study of the verdicts of the Unified State Register of Court Decisions, analysis of the materials of investigative practice and scientific and theoretical opinions of scientists to examine the most common procedural violations during the investigative (search) action of inspection in the process of investigation of illegal seizure of a vehicle, which resulted in the recognition of evidence inadmissible. The methodological foundation of scientific research is an integral and coherent system of methods that allowed proper analysis of the subject of research, in particular, scientific methods of analysis, synthesis, induction and deduction were used. The theoretical foundation of this publication is the works of domestic scientists on the criteria for recognition or non-recognition of evidence as inadmissible. The scientific originality of the publication is the systematic analysis of the most common procedural violations during the inspection in the investigation of illegal seizure of vehicles. Based on the analysis, the most common procedural violations of the provisions and procedures established by the Criminal Procedure Code of Ukraine during the investigative (search) inspection were identified, which resulted in the inadmissibility of evidence. Conclusions. Exploring the issue of the types of procedural violations committed during the investigative (search) action of inspection in the process of investigating the illegal seizure of a vehicle, which the court recognises as inadmissible, contributes to the identification of the most common, characteristic of this investigative action. To avoid the recognition of evidence as inadmissible, it is advisable to follow the case law on the most common procedural violations that most often occur during the relevant procedural actions. Full compliance with the provisions of the Criminal Procedure Code of Ukraine, the procedure for conducting, recording the investigative (search) action of the inspection by a law enforcement officer is an extremely significant circumstance for further court decision on the admissibility of the evidence obtained

■ **Keywords:** inadmissible evidence; investigative (search) action; inspection; procedure; provisions; Criminal Procedure Code; illegal seizure of a vehicle; investigation; procedural violations

■ Introduction

The success and speed of the pre-trial investigation of the illegal seizure of a vehicle mainly depend on the timely and skilful organisation of work on the inspection of the scene, organisation, consistency, and efficiency of using scientific and technical means and methods, since it is the qualified analysis and synthesis of information about the objects involved in the crime,

obtained from various sources, its interpretation and skilful use that is the foundation for solving crimes [1].

Notably, according to the analysis of the materials of the investigative practice, the quality of detection, research and fixation of these traces during the investigative inspection in the process of investigation of illegal seizure of vehicles is affected by the c0

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This fact is extremely significant for the court's further decision on the admissibility of the evidence. According to Part 1 of Art. 84 of the CPC of Ukraine, evidence in criminal proceedings is the factual data obtained in the manner prescribed by this Code, based on which the investigator, prosecutor, investigating judge, and court establish the presence or absence of facts and circumstances relevant to criminal proceedings and subject to proof. Thus, the factual data obtained in a manner not provided for by the CPC of Ukraine, in principle, cannot be evidence [2].

Criminal procedural activity is related to the evidentiary activity of the subjects of criminal proceedings. Determining the grounds for declaring information inadmissible facilitate law enforcement and contributes to the implementation of the tasks of criminal proceedings [3]. Despite the legal definition of the concept of admissibility of evidence and the list of cases of recognition of evidence obtained as a result of a significant violation of human rights and freedoms as inadmissible, it should be noted that the rules of admissibility (inadmissibility) of evidence are not systematised in the CPC of Ukraine [4; 5].

The issue of admissibility of evidence in criminal proceedings was explored by such domestic scientists as: N.M. Basay, V.V. Vapnyarchuk, M.A. Vereshchagina, A.S. Gumenyuk, Y.P. Zeikan, V.A. Ishchenko, N.M. Kipnis, A.A. Kozlenko, A.M. Lazebny, P.A. Lupinska, V.O. Malyarova, O.S. Osetrova, N.S. Rohatynska, V.V. Rozhnova, D.B. Sergeeva, D.O. Synytsyna, O.V. Smirnov, M.M. Stoyanov, M.S. Strohovych, O.S. Tkachuk, V.V. Tiutiunyk, I.L. Chuprikova, S.A. Shafer, N.V. Yurikian etc.

Scientists explored this issue in general, defining the essence, and properties of evidence, and developing scientific criteria and grounds for recognising them as inadmissible. There was no emphasis on the specific grounds for declaring evidence inadmissible during a separate investigative (search) action in the process of investigating the relevant crime, thus such problematic issues require further investigation.

The list of grounds for declaring evidence inadmissible is indicative, as it does not fully consider such grounds as the inappropriate subject of proof, violation of procedural form, etc. The criteria for inadmissibility of evidence are developed by judicial practice [7].

To successfully implement the proceedings on the investigation of the illegal seizure of vehicles based on the investigation of the verdicts of the Unified State Register of Court Decisions in the commission of a criminal offence under Art. 289 of the Criminal Code of Ukraine, the most common grounds for declaring evidence inadmissible during the primary investigative (search) inspection were analysed and specified.

Thus, in the course of the investigation of a criminal offence under Article 289 of the Criminal Code of Ukraine, to prevent legal consequences of recognising

evidence as inadmissible (closure of criminal proceedings; change of qualification of the act; acquittal; change or reversal of the verdict in cassation) [6], it is advisable to rely on the case law on the most common procedural violations that most often occur during the relevant procedural actions.

The purpose of the research – based on the study of the verdicts of the Unified State Register of Court Decisions, analysis of the materials of investigative practice and scientific and theoretical opinions of scientists to examine the most common procedural violations during the investigative (search) action of inspection in the process of investigation of illegal seizure of a vehicle, which resulted in the recognition of evidence inadmissible.

To implement this purpose, the following tasks have been identified:

- to consider procedural violations of the investigative inspection in the process of investigation of illegal seizure of vehicles, which resulted in the recognition of evidence inadmissible;
- to identify the most common violations of the provisions of the Criminal Procedure Code of Ukraine during the investigation of the illegal seizure of vehicles, which resulted in the recognition of evidence inadmissible;
- to determine the provisions of criminal law that were not fully observed by the law enforcement officer during the public investigative (search) inspection during the investigation of the illegal seizure of vehicles.

■ Outline of the Main Material

At the initial stage of investigation regarding investigative (search) actions, it is advisable to distinguish different types of inspections. Thus, S.E. Petrov outlines the following types of inspection: inspection of the place of illegal seizure of the vehicle (hereinafter – the vehicle) (parking, garage, open area); inspection of the found vehicle or its parts; inspection of objects and documents left at the scene [8].

According to the authors, it is advisable to distinguish the such type of inspection as the detection of hiding places, the so-called places of “stowage” of illegally seized vehicles. These include: personal or rented garages; “blind spots”, where access of unauthorised persons is limited (parking lots, closed areas of various organisations and institutions, yards of private houses), abandoned enterprises, separate sections of county roads, forests, etc.

To identify and record information about the circumstances of the criminal offence, the investigator, and prosecutor inspect the area, premises, things and documents (Part 1 of Art. 237 of the CPC of Ukraine). According to Art. 223 of the CPC of Ukraine, inspection is an investigative action designed to obtain (collect) evidence or verify evidence already obtained in a particular criminal proceeding, which is

conducted within the framework of pre-trial investigation of criminal proceedings.

The grounds for inspection of the scene is the information about the illegal seizure of the vehicle, recorded in a specific procedural form. Without such information, the inspection of the scene is not allowed. This position is reflected in the decision of the Criminal Court of Cassation of the Supreme Court of June 7, 2018, in case No. 740/5066/15-к, case No. 51-3331km18. The urgency of the inspection of the scene is caused by the necessity to promptly obtain information to organise the search for criminals and to conduct other investigative (search) actions designed to solve the crime. The purpose of such a review is: to identify traces and material evidence, to clarify the circumstances of the incident, to propose versions of the crime and its participants, to obtain data on persons who could have seen the crime, to organise further investigative (search) actions and covert investigative (search) actions [10].

Inspection of the place of illegal seizure of the vehicle (the place of parking of the vehicle; ways of approaching the criminals to the object of the encroachment; ambush, where the criminals observed the vehicle and the actions of the driver; ways of leaving the vehicle from the parking place; other premises or areas that can serve as carriers of traces of illegal seizure of the vehicle) was performed in 75% of cases [11].

Inspection of the scene has its specific features. Depending on the place of illegal seizure of the vehicle (garage, guarded parking lot, adjacent territory, a yard of the household, parking lot of shopping malls, cinemas, cafes, etc), it may establish the method of penetration into the vehicle and the place of its storage, which, in particular, describes the method of committing a criminal offence and determines the professional abilities, skills, and features of the actions of the offenders, which are manifested in the material environment of the scene. Thus, considering the fact of the illegal seizure of the vehicle in the appropriate place, various specific search tasks are determined.

Having analysed the verdicts of the Unified State Register of Court Decisions on Illegal Seizure of Vehicles, it is possible to identify procedural violations of the pre-trial investigation during the inspection, which resulted in the recognition of evidence as inadmissible, namely:

- in the process of assessing the admissibility of evidence obtained during the inspection of the scene, it is considered that in each case there is a possibility of eventually losing such an opportunity and not fixing the traces of the crime on time [12];

- inspection of the detected places of hiding vehicles that were illegally seized (rented garages, private garages, boxes, hangars) without the decision of the investigating judge [13];

- appeal to the investigating judge after a long period has elapsed after the investigative action, which was performed as urgent, results in the inadmissibility of evidence obtained during such an investigative action [14].

According to Part 1, 2 of Art. 233 of the CPC of Ukraine, no one has the right to enter the home or other property of a person for any purpose other than with the voluntary consent of the person who owns it or based on the decision of the investigating judge, except as provided for in Part 3 of this Article. Other possessions of a person – a vehicle, land plot, garage, other buildings or premises for domestic, official, economic, industrial and other purposes, etc. A search of a person's home or other property may be performed with the voluntary consent of the person who owns it, provided that procedural safeguards have been in place to protect the person's ability to express their true opinion in the event of such consent.

The absence of the accused's objections to the inspection of his possessions does not indicate voluntary consent to the conduct of the said investigative action and is not a procedural guarantee of the accused's right to defence, which determines the inadmissibility of evidence obtained during the investigative action [15].

Art. 13 of the Criminal Procedure Code of Ukraine (hereinafter – the CPC) states that it is not allowed entering a dwelling or other property of a person, conduct an inspection or search therein except for cases provided for by the CPC of Ukraine. The investigator and prosecutor have the right to enter the home or other property of a person only in urgent cases related to saving lives and property or immediate prosecution of persons suspected of committing a crime before the decision of the investigating judge. In this case, the prosecutor, the investigator in agreement with the prosecutor is obliged to immediately after such actions apply for a search to the investigating judge.

The investigator should not apply to the court for permission to inspect the garage as a crime scene if they have the consent of at least one of the co-owners of the household [16; 17].

The consent of another or all is not necessary. In the materials of the proceedings, there is a written consent of one of the co-owners for such an inspection and the inspection itself was performed in the presence of this co-owner, although at night. Thus, the evidence obtained - the report of the inspection of the scene and the derived conclusions of the examination of the seized materials of biological origin and physical evidence are admissible. Calling the police and notifying other persons about a crime committed on the territory of a person's household indicates voluntary consent to enter the household and excludes the recognition of the evidence obtained as inadmissible on the grounds of lack of such consent.

By Part 2 of Art. 237 of the CPC of Ukraine, the inspection of a person's home or other property is performed according to the rules of the CPC of Ukraine provided for the search of a person's home or other property.

Thus, according to Part 2 of Art. 234 of the CPC of Ukraine, the search is conducted based on the decision of the investigating judge.

According to Part 1 of Art. 107, para. 10 of Art. 236 of the CPC of Ukraine, a search of a person's home or other property based on the decision of the investigating judge must be recorded by audio and video recording.

The absence of an appendix, in particular in the protocol of video recording of the inspection of the scene, as required by Part 2 of Art. 104, Art. 105 of the CPC of Ukraine, prevents immediate investigation in the manner prescribed by Art. 23 of the CPC of Ukraine and gives the court reasonable grounds to believe that such recording was not performed.

According to Part 6 of Art. 107 of the CPC of Ukraine, failure to use technical means of recording criminal proceedings in cases where it is mandatory entails the invalidity of the relevant procedural action and the results obtained as a result of its commission. By Art. 105 of the CPC of Ukraine, the person who conducted the procedural action attaches annexes to the protocol, such annexes may be photo tables. Appendices to the protocols must be duly prepared and certified by the signatures of the investigator, prosecutor, specialist, and other persons who participated in the preparation of such appendices: the protocol of inspection of the scene does not contain the signature of the investigator who conducted the procedural action, which prevents the identification of the person who prepared this protocol, or there is a signature without specifying the name of the person.

The introductory part of the protocol should contain information about the place, time and name of the procedural action; the person conducting the procedural action (surname, name, patronymic, position), and all persons present during the procedural action (surnames, names, patronymics, dates of birth, places of residence). Violation of paragraph 1 of Part 3 of Article 104 of the CPC of Ukraine is the lack of information about all persons present during the procedural action.

In practice, the investigator and prosecutor use the general rule, which provides for their right to entrust the investigative action to the operational units.

There are cases when in criminal proceedings there are no written orders from the investigator (prosecutor) to conduct investigative actions [18]:

- the inspection of the detected hiding places for illegally seized vehicles (rented garages, private garages, boxes, hangars) was performed by operational officers, but they were not provided with orders (unauthorised persons, Part 2 of Art. 234);

- a violation of Part 2 of Art. 234 of the CPC of Ukraine is the inspection of other property of a person (vehicle, land, garage, other buildings or premises for household, office, economic, industrial and other purposes, etc.

According to Part 2 of Art. 237 of the CPC of Ukraine, the inspection of a person's home or other property is performed by the rules of the CPC of Ukraine provided for the search of a person's home or other property. Employees of operational units do not belong, by paragraph 25 of Part 1 of Article 3 of the CPC of Ukraine, to the participants of criminal proceedings, and therefore cannot be invited by the investigator to search for a person's home or other property, by Part 1 of Article 236 of the CPC of Ukraine. The materials of the criminal proceedings should include a written order of the investigator, the investigator for their involvement in the relevant investigative action, as required by Articles 40, 40, and 41 of the CPC of Ukraine.

During the inspection at the enterprise, institution or organisation, the second copy of the protocol is handed to the head or representative of the enterprise, institution or organisation. The violation of Part 9 of Art. 236 of the CPC of Ukraine during the inspection at the enterprise, institution or organisation is the failure to deliver the second copy of the protocol to the head or representative of the enterprise, institution or organisation.

Such inspection is performed with the mandatory participation of at least two witnesses regardless of using technical means of recording the relevant investigative (detective) action. It is a violation of Part 7 of Art. 223 of the CPC of Ukraine to inspect with the participation of fewer than two witnesses.

Witnesses cannot be the victim, relatives of the suspect, accused and victim, law enforcement officers, and persons interested in the results of criminal proceedings [19]. These persons may be interrogated during the trial as witnesses of the relevant investigative (search) action.

The violation is: the witnesses did not check their identity documents (Law of Ukraine "On the Unified State Demographic Register and documents confirming the citizenship of Ukraine, identity or special status").

The investigative (search) action includes actions for the proper packaging of things and documents and other actions that are important for verifying the results of the procedural action.

According to Part 3 of Art. 105 of the CPC of Ukraine, the annexes to the protocols must be properly made, packed for reliable storage, and certified by the signatures of the investigator, prosecutor, specialist, and other persons who participated in the preparation and/or seizure of such annexes.

Violation of Part 3 of Art. 105 of the CPC of Ukraine is the production, and packaging of annexes

to the protocols in an improper manner, and failure to certify the signatures of all persons who participated in the investigation: investigator, prosecutor, specialist, and other persons who participated in the production and/or seizure of such annexes.

Evidence is admissible if it is obtained by the procedure established by the CPC of Ukraine (Part 1 of Article 86 of the CPC of Ukraine). The criterion for general inadmissibility of evidence that may be declared inadmissible is a violation of the procedure for obtaining it.

The criterion that the court is guided by in the case of recognition or non-recognition of evidence inadmissible at the stage of the trial is the criterion of obvious inadmissibility, which is the absence of doubt that the CPC of Ukraine has been violated, and such a violation can be established by the court immediately during the examination of evidence and does not require additional actions, in particular the examination of all evidence [20]. Any doubts about factual findings and evidence and the interpretation and application of legal provisions should be resolved in favour of the suspect. It is an absolute rule according to the directive, i.e. all exceptions are omitted [21].

Thus, having considered the issue of procedural violations during the inspection in the process of investigating the illegal seizure of the vehicle, which the court generally recognizes as inadmissible, is a violation of the rules and procedures established by the CPC of Ukraine regarding their receipt.

A systematic analysis of the most common procedural violations during the investigative (search) inspection in the process of investigating the illegal seizure of vehicles was performed. Based on the analysis, the most frequent procedural violations of the provisions and procedures enshrined in the CPC of Ukraine during the investigative (search) action of the inspection, which resulted in the recognition of evidence inadmissible, were identified, namely:

- untimely recorded traces of the crime [12];
- inspection of the detected places of hiding illegally seized vehicles (rented garages, private garages, boxes, hangars) without the decision of the investigating judge [13];
- appeal to the investigating judge after a long period of time has elapsed after the investigative action, which was performed as urgent, as a result, the evidence obtained in the course of such an investigative action is inadmissible [14];
- the investigator should not apply to the court for permission to inspect the garage as a crime scene if they have the consent of at least one of the co-owners of the household;
- The absence of an appendix, in particular in the protocol of video recording of the inspection of the scene, as required by Part 2 of Art. 104, Art. 105 of the CPC of Ukraine, prevents immediate investigation in the manner prescribed by Art. 23 of the CPC

of Ukraine and gives the court reasonable grounds to believe that such recording was not performed.

- the report of the inspection of the scene does not contain the signature of the investigator who conducted the specified procedural action, which prevents the identification of the person who compiled this report, or there is a signature without specifying the name of the person;

- violation of paragraph 1 of Part 3 of Article 104 of the CPC of Ukraine – absence in the inspection report of information about all persons present during the procedural action;

- inspection of the detected places of hiding of illegally seized vehicles (rented garages, private garages, boxes, hangars) by operational officers, without authorisation (unauthorised persons, Part 2 of Art. 234);

- violation of Part 2 of Art. 234 of the CPC of Ukraine – inspection of other property of a person (vehicle, land, garage, buildings or premises for household, office, economic, industrial and other purposes, etc);

- violation of Part 9 of Art. 236 of the CPC of Ukraine – failure to deliver the second copy of the protocol during the inspection at the enterprise, institution or organisation to the head or representative of the enterprise, institution or organisation;

- violation of Part 7 of Art. 223 of the CPC of Ukraine – less than two witnesses were present during the inspection;

- The witnesses did not check their identity documents (Law of Ukraine “On the Unified State Demographic Register and documents confirming the citizenship of Ukraine, identity or special status”);

- violation of Part 3 of Art. 105 of the CPC of Ukraine – the annexes to the protocols were improperly made, packed, and not certified by the signatures of all persons who participated in the investigation: investigator, prosecutor, specialist, other persons who participated in the production and/or seizure of such annexes.

Notably, according to the analysis of the materials of the investigative practice, the quality of detection, examination and recording of these traces during the investigative inspection in the process of investigation of illegal seizure of vehicles is affected by the complete non-compliance with the provisions of the criminal procedural law by a law enforcement officer. This circumstance is extremely important for the court's further decision on the admissibility of the evidence [22]. Legal rule I. D. P.R. (“In case of doubt for the accused”) is a rule of modern criminal law, according to which in case of doubt the judges' assessment of the evidence should be interpreted in favour of the accused, or a less serious punishment should be imposed, or there should be an acquittal as a central principle of the rule of law. In criminal proceedings, the quotation is of fundamental significance as the highest principle of criminal law and criminal procedure law [23].

■ Conclusions

Having considered the issue of the types of procedural violations committed during the investigative (search) action of the inspection in the process of investigating the illegal seizure of the vehicle, which were declared inadmissible by the court, it allows identifying the most common of them, which are characteristic of this investigative action. To avoid the recognition of evidence as inadmissible, it is advisable

to follow the case law on the most common procedural violations that most often occur during the relevant procedural actions. Full compliance with the provisions of the Criminal Procedure Code of Ukraine, the procedure for conducting, recording the investigative (search) action of the inspection by a law enforcement officer is an extremely significant circumstance for further court decision on the admissibility of the evidence obtained.

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Окремі види процесуальних порушень під час проведення огляду в процесі розслідування незаконного заволодіння транспортним засобом, що призвели до визнання доказів недопустимими

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■ **Анотація.** Мета статті – на підставі вивчення вироків Єдиного державного реєстру судових рішень, аналізу матеріалів слідчої практики та науково-теоретичних поглядів учених проаналізувати питання щодо найпоширеніших процесуальних порушень під час проведення слідчої (розшукової) дії огляду в процесі розслідування незаконного заволодіння транспортним засобом, що призвели до визнання доказів недопустимими. Методологічне підґрунтя наукової статті становить цілісна й узгоджена система методів, що дала змогу належно проаналізувати предмет дослідження, зокрема використано наукові методи аналізу, синтезу, індукції та дедукції. Теоретичним підґрунтям цієї публікації стали праці вітчизняних учених щодо критеріїв у разі визнання чи невизнання доказу недопустимим. Наукова новизна публікації полягає в системному аналізі найпоширеніших процесуальних порушень під час проведення огляду в процесі розслідування незаконних заволодінь транспортними засобами. На підставі здійсненого аналізу визначено найпоширеніші процесуальні порушення норм і порядку, що встановлено Кримінальним процесуальним кодексом України під час проведення слідчої (розшукової) дії огляду, що призвели до визнання доказів недопустимими. Висновки. Вивчення питання щодо видів процесуальних порушень, допущених під час проведення слідчої (розшукової) дії огляду в процесі розслідування незаконного заволодіння транспортним засобом, які суд визнає недопустимими, сприяє виокремленню найпоширеніших, характерних для цієї слідчої дії. Для уникнення визнання доказів недопустимими, доцільно орієнтуватися на судову практику щодо найпоширеніших процесуальних порушень, які найчастіше трапляються під час проведення відповідних процесуальних дій. Цілковите дотримання норм, положень Кримінального процесуального кодексу України, порядку проведення, фіксації слідчої (розшукової) дії огляду працівником правоохоронного органу є надзвичайно важливою обставиною для подальшого вирішення судом питання щодо допустимості отриманих доказів

■ **Ключові слова:** недопустимий доказ; слідча (розшукова) дія; огляд; порядок; норми; положення; Кримінальний процесуальний кодекс; незаконне заволодіння транспортним засобом; розслідування; процесуальні порушення

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Criminological characteristics of victims of threats or violence against a law enforcement officer

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■ **Abstract.** The purpose of the study – based on the available empirical base, and research of scientists to summarise the criminological characteristics of victims of threats or violence against a law enforcement officer. The study uses a set of scientific methods, namely: terminological, system-structural, Aristotelian, and comparative legal. The theoretical foundation of the study is the works of Ukrainian and foreign scholars, the provisions of the Criminal Code of Ukraine, and the practice of its application. The scientific originality of the research consists in the fact that it: 1) characterises the victims of crimes under Art. 345 of the Criminal Code of Ukraine, based on gender, age, citizenship, marital status, information about the relationship with the criminal offender, about the service, position, and duties; 2) the categories of law enforcement officers who become victims of threats or violence are determined; 3) the positive and adverse features and characteristics of these persons are outlined; 4) the classification of the victims of law enforcement officers by the type of their behaviour that preceded the criminally unlawful encroachments on them in the form of threats or violence is developed. Based on the results of the study, the following conclusions were made: 1) among law enforcement officers who became victims of threats or violence, young men (from 25 to 45 years old) with insignificant work experience prevail; 2) crimes under Art. 345 of the Criminal Code of Ukraine, are most often committed against police officers, much less often – against employees of other law enforcement agencies (border service, penitentiary bodies and institutions, state forest protection bodies, etc. 345 of the Criminal Code of Ukraine, which prevail in practice, can be divided into the following groups a) adverse character traits; b) lack of the necessary level of knowledge, skills and abilities; c) lack of confidence in the effective protection of law enforcement officers; d) condition (alcohol intoxication or fatigue); e) regional mentality, worldview developed in a particular area; f) low level of income, life and material security; 5) not always specific character traits of a law enforcement officer, their social status, demographic characteristics, other features are directly or indirectly related to the commission of a crime under Art. 345 of the Criminal Code of Ukraine; 6) the victims of law enforcement officers can be conditionally grouped into the following groups: a) persons whose actions are socially useful (lawful, positive) behaviour; b) reckless (frivolous); c) persons who acted illegally; d) persons with asocial (immoral) behaviour

■ **Keywords:** threat; violence; law enforcement officer; victim; a victim of a crime; victimisation; victimology

■ Introduction

Ukraine as a legal state of European quality cannot function without an efficient system of protection of the interests of the individual, society and the state. The system of law enforcement agencies established

for this purpose requires the legal protection of its representatives, as law enforcement officers often become targets of criminal encroachments. Analysis of the number of recorded facts of criminal offences against

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the authority of law enforcement agencies for the period 2016-2020 demonstrates that threats or violence against a law enforcement officer prevail in their structure (Article 345 of the Criminal Code of Ukraine).

The proportion of threats or violence against a law enforcement officer (Article 345 of the Criminal Code of Ukraine) among criminal offences under the articles that establish the grounds for criminal liability for encroachment on the authority of law enforcement agencies in 2013 was 55.3%, 2014 – 20.2%, 2015 – 26.5%, 2016 – 53.5%, 2017 – 62.1%, 2018 – 58.8%, 2019 – 60%, 2020 – 65%. On average, during 2014-2020, the crime under Art. 345 of the Criminal Code of Ukraine amounted to 50.2%.

The establishment of an efficient system of prevention of these criminal offences is impossible without studying the identity of the victim (victim of a criminal offence).

Individual criminal law, criminological and forensic features of persons who have committed threats or violence against law enforcement officers have been explored in the works of A.V. Boyko, L.P. Brych, O.O. Kirbyatiev, V.A. Klymenko, I.D. Metelskyi, V.I. Osadchyi, M.V. Syiploki, A.M. Udod and other scientists. Therewith, many issues of criminological characteristics of victims of threats or violence against a law enforcement officer remain understudied.

The purpose of the study – based on the available empirical base, and research of scientists to summarise the criminological characteristics of victims of threats or violence against a law enforcement officer.

The scientific originality of the research consists in the fact that it: 1) characterised the victims of crimes under Art. 345 of the Criminal Code of Ukraine, based on gender, age, citizenship, marital status, information about the relationship with the criminal offender, about the service, position, and duties; 2) the categories of law enforcement officers who become victims of threats or violence are determined; 3) the positive and adverse signs and features of these persons are identified; 4) the classification of the victims of law enforcement officers by the type of their behaviour that preceded the criminally unlawful encroachment on them in the form of threats or violence is developed.

■ Outline of the Main Material

The criminal legal status of a crime victim in criminal law is quite ambiguous. Criminal legislation does not contain a definition of a victim, but in criminal law, a person becomes a victim of a crime from the moment the crime is committed, regardless of whether it was registered. It is from this point that his rights under the Criminal Code of Ukraine arise, in particular to

compensation for damages or elimination of the damage caused, and reconciliation with the perpetrator [1].

The identification of the victim is of great criminological significance in the process of preventing crimes under Art. 345 of the Criminal Code of Ukraine. This process has a three-part structure and includes:

1) prevention – elimination of causes and conditions of their commission;

2) averting – prevention of socially dangerous acts by persons who have intent, but have not committed any preparatory actions;

3) termination – stopping (interruption) of those socially dangerous acts that have already begun but have not yet been completed (applies to preparation, attempt, and ongoing and continuing crimes) [2]. At each of these stages of the development of criminal activity against law enforcement officers, the victimological aspects of socially dangerous acts under Art. 345 of the Criminal Code of Ukraine should be considered.

Victimology as the study (science) of the victim of crime provides the necessary arsenal for: 1) determining the traits, properties and personality characteristics of law enforcement officers, which increase the probability of committing attacks on them in the form of threats or violence; 2) identifying the relevant types of their behaviour; 3) identifying the main risk groups among law enforcement officers; 4) expanding the understanding of the determinants of crimes under Art. 345 of the Criminal Code of Ukraine. Thus, the investigation of the victimisation aspects of threats or violence against law enforcement officers allows the development of an efficient system of measures to prevent such attacks, which contains the necessary tools for preventive influence on these representatives of state power to prevent or at least minimise the facts of threats or violence against them.

First of all, notably, the victimisation of law enforcement officers, i. e. the socio-psychological set of traits of a person, which causes a high probability of becoming the object of a criminal encroachment [3].

Among the characteristics of law enforcement officers who have been victims of threats or violence, including those that have some victimological significance, it is necessary to highlight information about the gender, age, citizenship, marital status of these victims, relationship with the criminal offender, and information about the service, position, duties.

Gender.

Characterising the gender of the victims of the crimes under study, it should be noted that males predominate among them. However, it is conditioned upon the fact that the share of men in law enforcement agencies significantly exceeds the share of women, i.e. there is a definite gender imbalance. Therewith,

male law enforcement officers are generally more resilient, trained, and stronger, and, therefore, can actively counteract primarily physical violence. In addition, if there is a man and a woman among the partners, it is usually the man who performs the most active actions (for example, trying to resolve the conflict between citizens, stop the offence, and detain the person who committed it). It is another argument in favour of why men are much more often victims of crimes under Art. 345 of the Criminal Code of Ukraine than women. Describing the features of the victims, the interviewed officers of the Department of Internal Security of the National Police of Ukraine (hereinafter – the DIS of the NPU) emphasise the insufficient level of training of women.

Age.

The age characteristics of victims of these crimes cannot be fully disclosed, as there is no necessary information in the materials of official statistical reporting and materials from the Unified State Register of Court Decisions, which are open to the public. Despite this, it should be noted that the age of the victim is usually closely related to the experience of the law enforcement officer. Among the victims of law enforcement officers, there are both young people with little experience and a low level of professionalism, and older people who, on the contrary, have considerable experience and are quite experienced professionally. When describing the victims of these crimes, the interviewed employees of the DIS of the National Police of Ukraine identify two age categories of victims (under 30 and from 25 to 45 years) and emphasise a short work experience. The objective factor of the age limit for victims of 45 years is that it is at this age that the vast majority of law enforcement officers retire due to reaching the retirement age, ceasing to perform law enforcement functions.

Citizenship.

The study of judicial practice demonstrates that the victims are exclusively citizens of Ukraine. It is conditioned upon the fact that one of the requirements for the position of law enforcement officer is the citizenship of Ukraine. For example, by Part 1 of Article 17 of the Law of Ukraine “On the National Police”, a police officer is a citizen of Ukraine who has adopted the oath of a police officer, serves in the relevant positions in the police and has been awarded a specific police rank.

Family status.

Among the victims of crimes under Art. 345 of the Criminal Code of Ukraine, there are both married or divorced persons. No specific patterns or characteristics of this feature could be established since there is no such information in the verdicts under Art. 345 of the Criminal Code of Ukraine.

Relationship with a criminal offender.

Mostly, the injured law enforcement officer and the person who committed the crime under Art. 345 of the Criminal Code of Ukraine do not know each other. In fact, until the day of its commission, there is usually no conflict situation between these persons, which usually arises shortly before the commission of a criminal offence under Art. 345 of the Criminal Code of Ukraine, and usually lasts no more than an hour. It is mostly preceded by the administrative or criminal behaviour of a person who subsequently resorts to threats or violence against law enforcement officers.

Service, position, duties.

The study of practice demonstrates that indeed specific victimisation characteristics increase the probability of law enforcement officers who possess them becoming victims of threats or violence in the future. However, such a tendency is not always present. In some cases, individual victimisation characteristics hardly play any role. In such circumstances, a law enforcement officer is a hostage of the situation and has no option to become a victim of the crime simply by being a representative of a law enforcement agency and having to perform their duties. Scientists are right that the law enforcement function as a field of activity of the state is designed to solve the main tasks related to ensuring the protection of the constitutional order, rights and freedoms of citizens, law and order, which is proclaimed by the Constitution of Ukraine [4].

The actions of law enforcement officers in the performance of their duties in many cases became the conditions that contributed to the commission of a crime under Art. 345 of the Criminal Code of Ukraine.

The level of victimisation among law enforcement officers depends on the type of law enforcement agency and the category of officers (their affiliation to a particular service). Among all law enforcement agencies, police officers are the most frequent victims of threats or violence. It is caused, obviously, by the fact that the National Police of Ukraine, on the one hand, is the largest law enforcement agency, and on the other hand, its employees are most often in contact with offenders and ordinary citizens. They bear the main burden in combating administrative and criminal offences.

Based on the results of the study of judicial practice, it was established that the crimes under Art. 345 of the Criminal Code of Ukraine are committed against employees of the Border Guard Service, penitentiary bodies and institutions, and state forest protection bodies.

The largest number of victims is typical for patrol police officers. Less often, the victims are

investigators, operatives, district police officers, inspectors of the juvenile prevention sector, and employees of other services.

The most vulnerable to threats or violence are the police officers who have the most contact with the public (patrol police, PSCs, DPOs, community police officers) and police officers who perform investigative and operational activities (investigators, frontline officers, inquirers).

Uniform. Threats or violence of criminal offenders is in some way provoked by the uniform of police officers. As scientists rightly note, for the perpetrators it is a particular irritant and establishes an impulse that affects decision-making [5]. For example, ATO participant Person_1, being intoxicated, saw police officer Person_4 returning home from a day shift in uniform. According to Person_1, the policeman had untidy clothes. Thus, he called the police officer Person_4 to him and began to insult him with coarse obscene language, mock and humiliate him, pulled out a gas can, and deliberately sprayed its contents in the face of the victim Person_1, which caused the latter bodily injuries that belong to light bodily injuries as such that have minor short-term consequences [6].

Describing the victims of crimes under Art. 345 of the Criminal Code of Ukraine, the interviewed officers of the State Department of Internal Affairs of Ukraine distinguish their various features and traits, which can be divided into positive (those that should be possessed by a law enforcement officer) and adverse (those that should be absent).

Notably, in theory, and practice there is no common understanding of the concept of "law enforcement agency" [7]. Positive traits include conscientiousness, responsibility and perseverance in the performance of official duties, a keen sense of justice, specific skills, integrity in decision-making by the current legislation, and the fact that law enforcement officers did not agree to receive an undue advantage.

Instead, the vast majority of features named by respondents are adverse. The following groups can be distinguished among them:

1) adverse character traits (insufficient level of stress resistance, excessive gullibility, impulsiveness, recklessness, easy predictability, emotional (excessive) intemperance, insufficient moral stability, low social responsibility, aggressiveness, inattention, carelessness, carelessness, ill-mannered, low self-esteem, excessive softness in critical situations);

2) lack of the necessary level of knowledge, skills and abilities¹ (insufficient level of physical fitness, lack of experience and skills in communicating with offenders, lack of awareness, poor orientation in the situation, inability to make prompt decisions on taking

efficient measures to stop unlawful acts, insufficient knowledge of the regulations governing law enforcement, their rights and duties, unprofessionalism, inability to objectively assess the situation and take control of the offender's behaviour, tactical unpreparedness, psychological unpreparedness to counter provocations in conflict situations);

3) lack of confidence in the efficient protection of law enforcement officers (law enforcement officers do not experience proper legislative protection, some officers do not believe that proceedings against persons committing threats or violence will be brought to court, they are afraid to use physical force, special means and firearms if there are necessary grounds due to possible adverse consequences from the controlling authorities 2).

4) condition (intoxication or fatigue);

The lack of the necessary level of knowledge, skills and abilities concerns primarily measures to detain the offender, using specific means, much less often – firearms (inability or fear to use them in necessary cases).

Despite this, in practice using physical force and specific means in necessary cases is quite common. Instead, the study of judicial practice demonstrates that using firearms is extremely rare (for example, it was used to stop a vehicle [8]).

5) regional mentality, worldview developed in a particular area over the years regarding tolerance to the generally accepted adverse attitude and appropriate response to any actions of law enforcement officers, given the rejection/ignoring of the institution of public administration as such (inherent in law enforcement officers who work and permanently reside in areas of compact residence of ethnic nationalities or places of resettlement of persons who have previously served criminal sentences related to imprisonment, the so-called "deportations" (widespread during the Soviet era);

6) low income, low living standards and material security. It should be agreed with V. Plekan that "the state cannot provide opportunities for representatives of the authorities to live decently in material terms. As a consequence, there is degeneration, deterioration of moral principles in the performance of official duties, and high moral principles and ethical provisions are mostly not implemented and remain declarative" [9]. Some of the interviewed employees of the Internal Security Department of the National Police of Ukraine among the victims of threats or violence against law enforcement officers call people with a weak character – these are employees who try to choose a simple and easily accessible way to solve the problem without establishing unnecessary obstacles, they try not to overcome difficulties, but

to avoid them, are insecure, unable to defend their position, easily influenced by law violators.

It is the presence of adverse traits that most provokes the commission of a crime under Art. 345 of the Criminal Code of Ukraine, and they should be primarily considered in the victimological prevention of these criminal offences.

To some extent, the respondents can be agreed that it is impossible to define the victims by their character traits, social status or demographic characteristics, since each event is individual and occurs under circumstances not related to the law enforcement officer, but depends on the personality of the offender, their low social responsibility and moral qualities.

In addition, one respondent noted that it is not possible to give a definite answer regarding the characteristics of victims of threats or violence. In his opinion, these are usually citizens who have mainly legal education and specific skills related to the type of duties performed, who have a keen sense of justice (a principled investigator who, being aware of the risks, still honestly performs his duty) or vice versa, believe that the nature of things in society is unchanging and constant (a passive patrol officer who, despite the defendant's audacity, on the contrary, tries to avoid the aggravation of the conflict, thereby causing unimpeded violence against him). However, the vast majority of such victims are persons who, despite the potential risks and threats, continue to consistently and systematically perform their specific functions as law enforcement officers to prevent more significant harm, ensure public safety and order, and the normal existence and functioning of all social relations without exception. Thus, law enforcement officers are under specific, separately provided, criminal legal protection of the state.

The respondents highlighted some features of victimisation traits of some categories of police officers. For example, when describing patrol police officers who suffered from threats or violence, respondents noted their insufficient level of physical and psychological training, inability to communicate with detainees, and the presence of female representatives among them. The victims-investigators have a principled position during the investigation of criminal proceedings, insufficient level of professional training, unwillingness to work, negligence, insufficient level of verbal training, a tendency to obtain an undue advantage, failure to comply with agreements with the accused, from whom they have already received undue advantage, falsification of evidence.

Victim behaviour of law enforcement officers, which causes threats or violence against them, includes failure to use physical force, special means

and firearms in necessary cases; non-compliance with safety rules; excessive risk (quite often law enforcement officers act independently, without waiting for backup, in situations where the assistance of colleagues is required); overestimation of their ability to understand the danger from the offender; loss of vigilance; committing ill-considered, uncoordinated, unprofessional, illegal actions.

The tendency of individual law enforcement officers to become a victim of threats or violence is mainly associated with their professional and psychological deformation, the manifestation of which is such adverse characteristics of law enforcement officers as rudeness, arrogance, ambition towards citizens who seek their assistance, and towards detainees for committing law violations [10].

According to V.V. Korolev, the objective determinants of professional deformation are shortcomings in the selection of personnel for positions related to the performance of public order duties; their training to perform these duties; organisation of this work and its material and technical support. Subjective determinants are divided into those developed outside the service and those developed in the conditions of work in law enforcement agencies. The first includes features of innate and acquired personal qualities that impede the proper performance of public order duties. The second is the loss of business qualities caused by the adverse impact of the service environment or the lack of practice in extreme situations [11]. Instead, O.O. Kirbyatiev mentions a low level of professional knowledge; lack of appropriate value orientations; insufficient professional motivation; lack of appropriate conditions for professional activity; the discrepancy between the official functions and duties of the employee and their powers and rights; tension caused by conflicts with management, employees, citizens as subjective causes of professional deformation of law enforcement officers [12].

One of the factors of threats or violence against a law enforcement officer is the victim behaviour of law enforcement officers, which can be classified as socially useful (lawful, positive), reckless (frivolous), illegal, and antisocial (immoral).

Considering the specifics of the victims of crimes under Art. 345 of the Criminal Code of Ukraine, threats or violence against a law enforcement officer are most often caused by the socially useful (lawful, positive) behaviour of the victim. It occurs most frequently as, on the one hand, it is within the competence of law enforcement (e.g. detection and suppression of offences, bringing perpetrators to legal responsibility, ensuring public order and public safety, etc. M.B. Mokhovyi rightly notes that the

perpetrators expressed their adverse attitude to the authorities in response to the presentation of legal requirements to stop the offence, to present identification documents, and to the attempt to detain and deliver the offenders [13]. For example, according to the defendant's explanations, the reason for the death threat to the patrolman was the handcuffing of the defendant [14].

Quite often such behaviour is in the form of repressions against citizens, rather than assisting society and the state (as an example – the events of 2013-2014 that occurred in Kyiv, during the “Revolution of Dignity”). Therefore, it is not surprising that a significant number of citizens are convinced that violence against offenders is widespread among the police (in some cases, it does happen).

Reckless (frivolous) behaviour occurs in cases of non-compliance by law enforcement officers with basic rules of personal safety, performing excessively risky actions, failure to take appropriate measures (for example, not handcuffing the detainee when required by circumstances, loss of vigilance when communicating with the offender).

In some cases, threats or violence against a law enforcement officer may be caused by the victim's misconduct, which consists in committing an offence – abuse of power, extortion of undue advantage, being intoxicated while performing official duties, non-performance or improper performance of duties, etc.

The reason for committing a crime under Art. 345 of the Criminal Code of Ukraine, in some cases, is the asocial (immoral) behaviour of law enforcement officers, which consists of humiliation and insulting citizens, disrespectful attitude to them, excessive aggression, etc.

Illegal and antisocial (immoral) behaviour of law enforcement officers can be called provocative, as these types of behaviour provoke people to commit a crime under Art. 345 of the Criminal Code of Ukraine.

In the activities of law enforcement, these types of behaviour may overlap, i. e. exist in, as it were, a mixed form. In practice, there are manifestations of both individual types of such victim behaviour and their combination. For example, antisocial (immoral) and illegal or socially useful (lawful, positive) and reckless (frivolous) behaviour of the victim can be combined.

Each of these types of behaviour has specific characteristics related to the specific features of both the law enforcement agency, its unit and the individual position of a law enforcement officer.

These types of behaviour can become the foundation for the development of a typology of victims

of the crimes under study. Considering the above, the victims of law enforcement officers can be divided into: 1) persons in whose actions it is socially useful (lawful, positive) behaviour; 2) reckless (frivolous); 3) persons who acted illegally; 4) persons with antisocial (immoral) behaviour.

The theoretical significance of the typology of victims of crime is to determine the role of the victim of crime in the mechanism of criminal behaviour and the nature of the causes and conditions that contribute to the emergence and increase of victimisation. Questions require answers as to why some people are more frequent victims of crime than others and what role the relationship between victim and perpetrator plays in the genesis of criminological mechanisms. In practice, the typology of crime victims is necessary for the development and implementation of anti-victimisation measures for potential victims of crime, and to protect actual victims of crime from secondary victimisation [15].

■ Conclusions

1. Among law enforcement officers who became victims of threats or violence, young men (25 to 45 years old) with short work experience prevail. In most cases, the victim law enforcement officer and the person who committed the crime under Art. 345 of the Criminal Code of Ukraine do not know each other.

2. The level of victimisation among law enforcement officers depends on the type of law enforcement agency and the category of officers (their affiliation to a particular service). Based on the results of the study of judicial practice, it was established that the crimes under Art. 345 of the Criminal Code of Ukraine are most often committed against police officers, and much less often - against employees of other law enforcement agencies (border guard service, penitentiary institutions, state forest protection bodies, etc.) The largest number of victims is common for the patrol police service. Less often, the victims are investigators, operatives, district police officers, inspectors of the juvenile prevention sector, and employees of other services.

3. Signs and features of victims of crimes under Art. 345 of the Criminal Code of Ukraine can be divided into positive (those that a law enforcement officer should have) and adverse (those that they should not have). In practice, adverse attributes and traits prevail, which can be divided into the following groups: 1) adverse character traits; 2) lack of the necessary level of knowledge, skills and abilities; 3) lack of confidence in the effective protection of law enforcement officers; 4) condition (alcohol intoxication or fatigue); 5) low income, low standard of living and material security; 6) regional mentality,

worldview formed in a specific area over the years regarding tolerance of generally accepted adverse attitudes and appropriate response to any actions of law enforcement officers, due to rejection/ignoring of the institution of public administration as such;

4. In many cases, some victimological features of law enforcement officers are essential in determining threats or violence against them, as they provoke such socially dangerous acts and facilitate their commission. However, some character traits of law enforcement officers, their social status, demographic characteristics, and other features are not always in direct or indirect causal connection with the commission of a crime under Art. 345 of the Criminal Code

of Ukraine. Thus, a law enforcement officer who is ideal from the standpoint of victimisation prevention (for example, a well-trained police officer who acts lawfully at a high professional level) can become a victim. Thus, the victimology approach to preventing threats or violence against law enforcement officers should not be idealised, although it is crucial, and in some cases decisive, in preventing these criminal acts.

5. Victims of law enforcement can be divided into: 1) persons in whose actions there is socially useful (lawful, positive) behaviour; 2) reckless (frivolous); 3) persons who acted illegally; 4) persons with asocial (immoral) behaviour.

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Кримінологічна характеристика потерпілих від погрози або насильства щодо працівника правоохоронного органу

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■ **Анотація.** Мета статті – на підставі наявної емпіричної бази, а також досліджень учених узагальнити кримінологічні ознаки потерпілих від погроз або насильства щодо працівника правоохоронного органу. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських й іноземних учених, положення Кримінального кодексу України, а також практика його застосування. Наукова новизна статті полягає в тому, що в ній: 1) схарактеризовано потерпілих від злочинів, передбачених ст. 345 Кримінального кодексу України, за ознаками статі, віку, громадянства, сімейного стану, відомостями про взаємини з кримінальним правопорушником, про службу, посаду, обов'язки; 2) визначено категорії правоохоронців, які стають жертвами погроз або насильства; 3) окреслено позитивні й негативні ознаки та риси цих осіб; 4) розроблено класифікацію потерпілих правоохоронців за видом їх поведінки, що передувала кримінально противним посяганням на них у формі погроз або насильства. За результатами здійсненого дослідження сформульовано такі висновки: 1) серед правоохоронців, які стали потерпілими від погроз або насильства, переважають особи чоловічої статі молодого віку (від 25-ти до 45 років) з незначним стажем роботи; 2) злочини, передбачені ст. 345 Кримінального кодексу України, найчастіше вчиняють стосовно поліцейських, значно рідше – щодо працівників інших правоохоронних органів (прикордонної служби, органів й установ виконання покарань, органів державної лісової охорони тощо); 3) найбільшою є кількість жертв серед працівників патрульної поліції (рідше потерпілими стають слідчі, оперативні працівники, дільничні офіцери поліції, інспектори сектору ювенальної превенції, працівники інших служб); 4) негативні ознаки та риси потерпілих від злочинів, передбачених ст. 345 Кримінального кодексу України, які переважають на практиці, можна поділити на такі групи: а) негативні риси характеру; б) брак необхідного рівня знань, умінь і навичок; в) зневіра в ефективному захисті працівників правоохоронних органів; г) стан (алкогольного сп'яніння або перевтоми); д) регіональний менталітет, світогляд, сформований у певній місцевості; е) низький рівень доходу, життя та матеріального забезпечення; 5) не завжди певні риси характеру правоохоронця, його соціальний статус, демографічні ознаки, інші особливості безпосередньо чи опосередковано пов'язані з учиненням злочину, передбаченого ст. 345 Кримінального кодексу України; 6) потерпілих правоохоронців можна умовно об'єднати в такі групи: а) особи, у діях яких наявна суспільно корисна (правомірна, позитивна) поведінка; б) необачні (легковажні); в) особи, які діяли неправомірно; г) особи з асоціальною (аморальною) поведінкою

■ **Ключові слова:** погроза; насильство; працівник правоохоронного органу; потерпілий; жертва злочину; віктимність; віктимологія

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The procedure for entering a person's home or other property: Current problems of theory and practice

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■ **Abstract.** The purpose of the research is to analyse the problematic issues of the criminal procedural procedure for trespassing into a person's home or other property and, based on this, to develop scientifically sound recommendations for improving the current legislation and practice of its application. Methodology. The study uses a set of scientific methods, namely: terminological, system-structural, Aristotelian, and comparative legal. The theoretical foundation of the study is the works of Ukrainian and foreign scholars, the provisions of the Criminal Procedure Code of Ukraine, and the practice of its application. The scientific originality of the research is that it: 1) highlights the specific features of the procedures provided for in the Criminal Procedure Code of Ukraine for breaking into a dwelling or other property of a person (with the voluntary consent of the person who owns or uses it; based on a decision of an investigating judge; without a decision of an investigating judge in urgent cases with further obtaining such a decision after breaking into a dwelling or other property of a person); 2) it develops recommendations for their application in practice and identifies areas for improvement. Based on the results of the study, the author developed a set of proposals designed to improve the provisions of the CPC of Ukraine regulating the procedures for entering a person's home or other property and the practice of their application, in particular: 1) recommendations on obtaining and procedural registration of voluntary consent for such penetration are developed; 2) it is established that penetration by voluntary consent is possible during detention by an authorised official and inspection of the scene; 3) it is argued that the recognition of the protocol of the inspection of the

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scene of the incident, conducted with the voluntary consent of the person who owns the dwelling or other property, as admissible evidence depends on the results of the court's interpretation of the relevant provisions of the CPC of Ukraine (such a situation is a favorable environment for the implementation of corruption practices); 4) the position of the Supreme Court, according to which if the investigating judge issues a ruling on granting a specific investigator permission to conduct a search, then the search should be conducted only by this investigator, who has no right to entrust the said investigative (search) action to operational officers, is considered unreasonable; 5) it is proposed to expand the list of urgent cases for conducting an inspection or search in a dwelling or other possession of a person or to clearly regulate in the CPC of Ukraine the possibility of conducting an inspection or search in a dwelling or other possession of a person with the voluntary consent of the owner or user and without further application to the court for obtaining the relevant decision; 6) a proposal was proposed to supplement the CPC of Ukraine with provisions that would provide the possibility of conducting other investigative (search) actions in a person's home or other property (for example, an investigative experiment in a person's home or other property)

■ **Keywords:** breaking into a dwelling or other property of a person; search; inspection; detention of a person; investigative (search) actions; investigator

■ Introduction

Performance of such task of criminal proceedings as protection of the rights, freedoms and legitimate interests of its participants is impossible without observance of the general principles of criminal proceedings, which are a guarantee of the administration of lawful justice. One of such principles is the inviolability of a person's home or other property: "it is not allowed entering a home or other property of a person, conducting an inspection or search therein except for a reasoned court decision, except as provided for by the CPC of Ukraine" (Part 1 of Article 13 of the CPC of Ukraine). This principle follows from Article 30 of the Constitution of Ukraine, which states that "everyone is guaranteed the inviolability of their home. No one may enter a home or other property, inspect or search it except by a reasoned court decision. In urgent cases related to the rescue of human life and property or the immediate prosecution of persons suspected of committing a crime, another procedure established by law for entering a home or other property of a person, conducting an inspection and search therein is possible".

During the pre-trial investigation of criminal offences, and the implementation of measures to stop and further respond to such torts, law enforcement officers frequently require interference with human and civil rights and freedoms, in particular by entering a person's home or other property to inspect, search, detain a person who has committed a criminal offence. When performing penetration, law enforcement officers must comply with the requirements established by law, otherwise, the evidence obtained in this way may be declared inadmissible, and the person who committed the criminal offence will avoid criminal liability. Instead, law enforcement officers may be prosecuted.

Therefore, there is a necessity to ensure an optimal balance of private and public interests in criminal proceedings during investigative (search) and other procedural actions related to penetration into a person's home or other property. However, in practice, such a balance is not always achieved, in particular, due to the overly complicated procedure for entering a person's home or other property, the contradictory nature of certain provisions of the CPC of Ukraine that regulate it, and the ambiguous interpretation of the relevant criminal procedural rules. As a result, law enforcement officers become hostage to the situation: on the one hand, the necessity to perform their powers to counter criminal law violations, and on the other hand, the rules of penetration are not entirely clear, which each subject (investigator, prosecutor, judge, defence counsel) can interpret differently. The decisions of the Supreme Court bring some clarity to this situation, but they do not provide an opportunity to form a well-established judicial practice on penetration into the home or other property of a person, and in some cases contradict the literal interpretation of the provisions of the CPC of Ukraine. Thus, sometimes the attempt to respond as quickly as possible to a committed criminal offence prompts law enforcement agencies to interpret the provisions of the CPC of Ukraine, which regulate the procedure for entering a person's home or other property, in their favour or to ignore them altogether.

The problems of criminal procedural regulation of the grounds and procedure for entering a person's home or other property have been repeatedly explored by scientists, in particular: O.M. Atamanov, V.I. Galagan, V.Y. Kalugin, O.V. Kaplina, L.M. Lohoyko, O.P. Kuchinska, V.V. Porodko, S.M. Tarasyuk,

V.A. Tashmatov, L.D. Udalova, S.S. Chernyavsky and others. Despite this, many problems in this area remained unresolved. Considering the above, it is relevant to explore the issues of criminal procedural grounds and procedures for entering a person's home or other property.

The purpose of the research is to analyse the problematic issues of the criminal procedural procedure for trespassing into a person's home or other property and, based on this, to develop scientifically sound recommendations for improving the current legislation and practice of its application.

The scientific originality of the research is that it: 1) highlights the specific features of the procedures provided for in the CPC of Ukraine for breaking into a dwelling or other property of a person (with the voluntary consent of the person who owns or uses it; based on a decision of an investigating judge; without a decision of an investigating judge in urgent cases with further obtaining such a decision after breaking into a dwelling or other property of a person); 2) it develops recommendations for their application in practice and identifies areas for improvement.

■ Outline of the Main Material

The penetration of law enforcement officers into the home or other property of a person should be considered the entrance to these objects. In the context of applying the provisions of the CPC of Ukraine, penetration mainly concerns the conduct of investigative (search) actions - inspection and search, and detention of a person who has committed a criminal offence. Therewith, entry into a dwelling or other property may not be related to specific criminal proceedings (for example, to obtain some information, compile a report on an administrative offence, provide assistance to citizens, etc.)

The CPC of Ukraine provides three ways (procedures) to enter a person's home or other property:

- 1) by the voluntary consent of the person who owns or uses them (voluntary extrajudicial);
- 2) based on the decision of the investigating judge (court);
- 3) without the decision of the investigating judge in urgent cases with the subsequent receipt of such a decision after entering the home or other property of the person (urgent).

Entering a person's home or other property with the voluntary consent of the person who owns or uses it. By this procedure, before entering, a law enforcement officer shall apply to the person who owns (uses) the dwelling or other property for consent (permission) to enter and further perform some procedural actions.

Voluntary consent to penetration. The right to perform such actions arises only after obtaining the consent of the person who owns the housing or other property of the person. The legislation does not specify in what shape this consent should be obtained (oral or written). In case of a patrol police call, they can enter a person's home or other property to assist, obtain the necessary information, and compile a report on an administrative offence. In such cases, voluntary consent in writing is mostly not obtained. However, for conducting investigative (search) and other procedural actions, the consent must be recorded in writing. It is executed by the owner (user) in writing, it is proof of their voluntary will. Handwritten writing of such consent fixes the fact that a person of their own free will permit to perform some actions in their home or other property. The permit is issued in any form, in particular, in the form of consent/application addressed to the head of a specific body or subdivision of a law enforcement agency with the obligatory indication of the date of this document, information about the owner (user), type of housing or other possession, exact address or location. It is advisable to indicate the exact time of giving such consent. It will allow further assessing the legitimacy of law enforcement actions and avoid some difficulties (for example, if the owner (user) does not provide voluntary consent during the pre-trial investigation or court proceedings).

The court practice developed specific recommendations regarding the voluntariness of consent:

1) does not indicate voluntary consent to enter the home and conduct an inspection, the absence of objections from the person to conduct the specified investigative (search) action [1];

2) the fact that a person first gives voluntary permission to enter and conduct an inspection, and later denies it in the court of the first instance, does not give reasons to state the absence of voluntary consent of the owner [2];

3) to determine the admissibility of evidence obtained during an inspection in a person's home or other possession, if the existence and/or voluntariness of the owner's consent is questioned by a party, the court must be guided by the totality of all circumstances that accompanied this investigative action, including, but not limited to, the availability of written confirmation of such consent [3];

4) it cannot be stated that a person gave voluntary and informed consent to the search of their home, if the person gave it after being detained, was not explained their rights as a suspect, and was not provided with legal assistance [3; 4];

5) calling the police and notifying other persons about a crime committed on the territory of a

person's household indicates voluntary consent to enter the household and excludes the recognition of the evidence obtained as inadmissible on the grounds of lack of such consent.

What procedural actions can be applied to penetration by voluntary consent? This procedure does not apply to the search, since Part 2 of Article 234 of the CPC of Ukraine expressly states that it is performed based on the decision of the investigating judge. Using a voluntary procedure for entering a person's home or other property during detention by an authorised official does not raise any particular objections [5]. Therewith, the most controversial is the issue of conducting a voluntary inspection of a person's home or other property. According to Part 2 of Art. 237 of the CPC of Ukraine, such inspection is performed according to the rules of this Code, provided for the search of housing or other property of a person. Instead, one of the rules of the search is to conduct it based on the decision of the investigating judge, unless there are urgent cases provided for in Part 3 of Article 233 of the CPC of Ukraine. Thus, the inspection of a person's home or other property should be performed based on the decision of the investigating judge, unless, of course, there are grounds for its performance in urgent cases. In some cases, such an inspection cannot be performed even based on the decision of the investigating judge. For example, an inspection of housing or other property that is the scene of the incident, if it should be performed in urgent cases before entering information into the Unified Register of Pre-Trial Investigations (hereinafter – the URPTI). Such conclusions can be reached based on a literal and systematic interpretation of criminal procedural provisions.

Considering the above, it is natural that in the case of inspection of the scene in the home or other property of a person with their voluntary consent without the decision of the investigating judge and the absence of urgent cases, law enforcement agencies interpret the CPC of Ukraine in different ways: in some cases they consider such inspection to be legal, in others – not.

Despite such significant shortcomings of the criminal procedural procedure for conducting investigative (search) actions in the home or other property of a person, in practice, investigators, prosecutors and judges consider it permissible to conduct a voluntary inspection of the scene of the incident in such places. But not always. This method of penetration into a dwelling or other property of a person is used mainly in the case of an appeal of the owner (user) of a dwelling or other property of a person, and other persons to law enforcement officers in connection with the commission of a criminal

offence and the necessity to inspect the scene. The voluntary procedure for entering a person's home or other property, given the literal interpretation of Part 1 of Art. 233 of the CPC of Ukraine, does not require a court order, since this part of the article uses the conjunction “or”, which indicates the alternative options. Despite this, investigators in some cases (in particular, if there is a “recommendation” of the prosecutor) apply to the court for permission to conduct the inspection.

Considering the above, investigators often take risks and inspect a person's home or other property if there is their voluntary consent without the decision of the investigating judge and in the absence of urgent cases. However, the voluntary consent of the person who owns the dwelling or other property is not an unconditional ground for satisfying the request of the investigator (prosecutor) for permission to conduct the inspection and does not affect the decision of the investigating judge. In an attempt to legalise the evidence, investigators are applying to the investigating judge for a relevant ruling. As a result of such a ruling, all evidence collected during the investigative (search) action is admissible, and, thus, they are included in the evidence base (collected evidence based on which a lawful decision is made in criminal proceedings), and the actions of the investigator are considered lawful. Thus, the interference with human and civil rights and freedoms occurred without violations of the law.

Therewith, such legalisation according to the law is allowed in case of urgent cases for inspection provided for by Part 3 of Article 233 of the CPC of Ukraine. Therefore, in the absence of urgent cases, investigators are denied the request for inspection. For example, the investigator, with the voluntary consent of the homeowner, conducted an inspection of the house, during which some items were discovered and confiscated, which were later declared as material evidence and attached to criminal proceedings. Then, the investigator appealed to the court with a request for a ruling on the inspection under Part 3 of Art. 233 of the CPC of Ukraine, but did not indicate the existence of urgent cases provided for by this criminal procedural provision. In the court's opinion, the grounds stated in the petition as “the necessity of obtaining admissible evidence and urgent investigative action to identify and record information about the circumstances of the criminal offence, obtaining and confiscating items used in criminal activities, the risk of destruction or concealment of items used in criminal activities” is not a legal reason for breaking into a person's home or other property under Part 3 of Article 233 of the CPC of Ukraine. Thus, the court dismissed the investigator's petition [6].

Therefore, in the case of inspection of the scene in the dwelling or other property of a person with or without their voluntary consent, if there are no urgent cases, law enforcement agencies interpret the CPC of Ukraine differently:

1) defenders in appeals and cassation complaints often refer to the fact that the inspection of the scene in the dwelling or other possession of a person by voluntary consent and without further legalisation (appeal to the investigating judge for a ruling) is illegal;

2) prosecutors "recommend" the investigator, who conducted such an inspection with the voluntary consent of the person who owns the housing or other property, to perform further legalisation;

3) judges, in some cases, support investigators with their legalisation, and in others – defenders with their complaints. Instead, the Supreme Court is forced to justify in every possible way the admissibility of conducting a voluntary inspection of the scene without further legalisation.

Example 1.

The court of the first instance, substantiating the admissibility of the crime scene inspection report, noted that such inspection was performed considering the urgency in solving the crime and the possibility of harm to the person who reported a serious crime. In addition, witnesses reported that they were invited to the apartment by the convicted Person_1, who was present during the inspection. The Court of Appeal agrees with the conclusion of the court of the first instance and emphasises that when deciding on the admissibility of evidence obtained during the inspection of the scene, it is considered that in each case there is a possibility of eventually losing such an opportunity and not fixing the traces of the crime promptly, thus the panel of judges correctly concluded that the decision of the investigating judge to obtain permission to inspect the apartment of the convicted Person_1, in this case, was unnecessary [7].

Example 2.

The Supreme Court concluded that the courts had correctly established that the grounds for the inspection of the scene (home) was the notification of the death of Person_2. To verify this information and clarify the incident, the inspection of the house was performed, during which they discovered the corpse of the victim with signs of violent death. The place of discovery of the corpse is always considered the place of the incident, regardless of where the death of a person occurred. Thus, the said investigative action was urgent, it was performed to verify the information received, and it did not require prior permission of the court, as rightly stated in the court decisions [8].

In practice, there are situations when law enforcement officers, trying to efficiently detect and investigate a criminal offence, instead of inspecting the scene in a person's home or other property, actually search. The necessity to search may arise from the beginning of the investigative (search) action or arise during its conduct. In such situations, the search is disguised as an inspection of the scene. In this case, the inspection of the scene should be legalised (legitimised) by applying to the investigating judge for a ruling on permission to inspect the scene. The voluntary procedure does not apply to such an inspection. Inspection of the scene in such cases becomes a search in urgent cases, but the name of the investigative (search) action does not change.

The Supreme Court has repeatedly acknowledged the inadmissibility of searching under the guise of inspecting the scene, as this levelled the requirements of judicial control provided for in Article 233, Part 2 of Article 234 of the CPC of Ukraine.

It is explained by the fact that inspection of the scene and search are similar investigative (search) actions.

In the context of the distinction between inspection and search, an interesting decision is the one which states that the inspection of the home did not have the nature of a search since the items discovered were openly on the floor under the table in the bedroom [9]. During the inspection, unlike a search, active coercive search actions cannot be used [10]. For example, the Supreme Court, having assessed the inspection of the scene in the household of Person_3 (case No. 266/4000/14-к), noted that during this investigative action the panels placed on the ceiling were opened, the built-in cabinets and other furniture were inspected, which is a sign of a search. Thus, in the circumstances of this case, the inspection of the scene conducted by the pre-trial investigation authorities is a search [4].

Considering that in practice, the voluntary procedure for entering a person's home or other property does not apply to searches, the work of investigators, in some cases, is paralysed. They can not enter the home or other property of a person for searching if there is voluntary consent of the person who owns the home or other property without the decision of the investigating judge or in the absence of urgent cases related to saving lives and property or the immediate prosecution of persons suspected of committing a criminal offence.

Penetration into the dwelling or other property of a person based on the decision of the investigating judge. It is performed mainly when the person concerned does not give voluntary consent to the entry or there is a high probability that they will

not, and when there are no grounds for entry into the home in urgent cases, or when the investigative (search) action must or can be performed based on the decision of the investigating judge, regardless of the owner's consent to its conduct in their home or other property (search, inspection).

In this case, before entering, it is necessary to obtain a decision from the investigating judge to inspect or search the home or other property of the person. To obtain such a ruling, the investigator (investigator) in agreement with the prosecutor or the prosecutor prepares a request for inspection or search. The petition substantiates the necessity of the said investigative (search) action. The petition must be accompanied by the originals or copies of documents and other materials by which the prosecutor or investigator substantiates the arguments of the petition and an extract from the Unified Register of Pre-trial Investigations about the criminal proceedings within which the petition is submitted (Article 234 of the CPC of Ukraine).

If it is necessary to conduct an urgent search and circumstances allow, the investigator may issue a decision to conduct it in the manner prescribed by Articles 100, 233 of the CPC of Ukraine. Such a decision must specify the purpose of the search and the urgent case that prompted this investigative (search) action without the decision of the investigating judge. This resolution is presented to the person, whose premises or possessions are to be searched. After the search, a protocol is compiled, and a petition for its legalisation is prepared.

If the decision of the investigating judge to inspect the scene has been obtained, but there is a necessity to search the scene, the investigator must prepare a petition and obtain a search warrant to legalise (legitimise) such actions related to the entry into a home or other property of a person. In the petition, the investigator must necessarily indicate what urgent case prompted them to conduct the investigative (search) action in this way.

Therewith, if the inspection of a person's property does not involve breaking, neither the decision of the investigating judge nor the voluntary consent of the person is required. For example, as can be seen from the materials of the criminal proceedings, in particular, the report of the inspection of the scene of the accident, the investigator inspected the cars, as a result of which external damage to these cars was established. During the inspection of the cars, nothing was confiscated from them. It indicates that the purpose of this inspection was to record traces of the criminal offence by visual inspection of both vehicles as objects that retained traces of it, without breaking into them or removing any items from

these vehicles. In such circumstances, these inspections did not have signs of coercive investigative action, were not associated with penetration into another person's property, did not violate the inviolability of another person's property (in this case – vehicles), and therefore obtaining a decision of the investigating judge, and the consent of the owners of vehicles to conduct them was not required [11].

Based on the decision of the investigating judge, issued in the manner prescribed by Articles 246, 248, 249 of the CPC of Ukraine, it allows conducting such covert investigative (detective) action as inspection of publicly inaccessible places, housing or other property of a person by secretly entering them, in particular with using technical means (Article 267 of the CPC of Ukraine).

Entering a person's home or other property without an investigating judge's ruling in urgent cases, followed by obtaining such a ruling after the entry. The third way of penetration is allowed in the presence of urgent cases related to: saving lives and property (for example, in the case of a confirmed fact of hostage-taking, imprisonment or abduction of a person, death threats, threats of destruction of property that may be an object, instrument or means of committing a criminal offence, etc;) with the immediate prosecution of persons suspected of committing a criminal offence (for example, the prosecution of a criminal who has just committed a crime (Articles 207- 208 of the Criminal Procedure Code of Ukraine) or during the execution of a decision to detain a person to bring them to court for the election of a preventive measure (Article 188 of the Criminal Procedure Code of Ukraine).

In the case of using the third method of penetration into a person's home or other property, the prosecutor, detective, and investigator, in agreement with the prosecutor, are obliged to immediately, after such actions, apply to the investigating judge with a request to conduct a search or inspection, but not other procedural actions². The investigating judge considers such a petition by the requirements of Article 234 of the CPC of Ukraine, checking, among other things, whether there were real grounds for entering a person's home or other property without the decision of the investigating judge. If the prosecutor refuses to approve the request of the investigator or the investigating judge to search or the investigating judge refuses to satisfy the request for a search, the evidence established as a result of such a search is inadmissible, and the information obtained is subject to destruction by the procedure provided for in Article 255 of the CPC of Ukraine (Part 3 of Article 233 of the CPC of Ukraine).

First, a protocol for the inspection or search is compiled, to which a petition and a decision on permission to conduct this investigative (search) action must be attached. These procedural documents are attached to the criminal proceedings.

One of the mistakes that result in the court's non-acceptance of the search results as evidence in the proceedings due to shortcomings and errors in the execution and preparation of the protocol of this investigative action is the lack of an indication of the specific grounds that give the right to search without the decision of the investigating judge (by Part 3 of Article 233 of the CPC of Ukraine) [12].

The admissibility of extrajudicial entry into the home is conditioned upon its urgent nature, i.e. the condition of extreme necessity, under which the harm to be averted is greater or proportionate to the harm caused by the entry. If a positive result can be obtained in another way, not related to the application of restriction of the constitutional human right, then the latter is implemented [13].

Only the existence of established and verified facts indicating the urgency of such cases, and confidence that by conducting appropriate procedural actions in a particular dwelling or other possession of a person, the necessary result will undoubtedly be obtained, is a signal that an urgent inspection or search can be initiated. For example, the Shepetivka Police Department in the Khmelnytskyi region received a report that on the premises at the address: ADDRESS_4, a gambling hall with slot machines was identified. Based on Part 3 of Art. 233 of the CPC of Ukraine, to preserve the property that is an instrument, means and object of the crime and which could be destroyed, the investigator, who was conducting criminal proceedings on the fact of gambling business, entered the premises at the specified address, where computers, gaming tables, playing cards, cash and other property, with which gambling business was illegally operated, were identified and conducted an inspection. After that, the investigator applied to the court with a request to search for Part 3 of Art. 233 of the CPC of Ukraine, which was satisfied by the investigating judge [14].

However, quite frequently there are cases when investigators ignore these requirements, and, thus, after the inspection or search cannot obtain a decision from the investigating judge. As a result, the obtained evidence will be declared inadmissible, and the perpetrators can be brought to criminal responsibility.

In this sense, the opinion of V.V. Porodko seems quite fair that it is obligatory to establish and substantiate the conclusion that there is a threat to human life or property or that a person who is being

persecuted on suspicion of committing a crime is in this dwelling in the absence of a court decision. In each case of actions related to the penetration, such a foundation must be established, substantiated and reflected in the documents of fixation, which in criminal proceedings are the protocol of search (or inspection) and the subsequent petition to the court for its conduct [13].

In general, the legislation does not provide precise explanations for the definition of "urgent cases" referred to in Part 3 of Article 233 of the CPC of Ukraine.

One of the urgent cases is associated with the salvage of property. Its interpretation in practice is ambiguous. In one case, the investigator referred to the necessity of "preserving the property that is an instrument, means and object of the crime and which could be destroyed", and his request was granted by the investigating judge [14], and in the second case, the investigator, among other things, noted the "risk of destruction of things used in criminal activity" and such a request was denied [5]. In this regard, the question arises whether the risk of destruction of things used in criminal activity is covered by the emergency. Considering the fact that persons committing criminal offences frequently try to destroy things that were the object, instrument or means of committing a criminal offence and can be considered as material evidence in the future, such a threat certainly exists.

Another urgent case is related "to the immediate prosecution of persons suspected of committing a crime". The position of O.M. Atamanov seems doubtful, according to which, when determining the purpose for entering a person's home or other property in the form of "with the purpose of immediate prosecution of persons suspected of committing a crime", there are often facts of ignoring the legal requirement of "immediacy". Searches under Part 3 of Article 233 of the CPC of Ukraine are conducted a day, a week and even months after the crime. It occurs although "immediate" prosecution can be performed only immediately after the person has committed the crime, and the person pursuing the person encounters obstacles in the process of arresting them, as the suspect is hiding in the respective dwelling or other property of the person [15]. Such a position is not shared by the author considering the following. Part 3 of Article 233 of the CPC of Ukraine refers to the "immediate prosecution of persons suspected of committing a criminal offence". In this case, immediacy refers to the persecution of the person, not the time that has passed since the commission of the criminal offence. A person can be prosecuted both immediately after com-

mitting a criminal offence and much later – in a few days, weeks or even months, for example, if it is necessary to detain them to participate in the consideration of a request for a preventive measure in the form of detention. In such cases, the detention is based on the decision on permission to detain the suspect to bring. Regarding the detention of persons suspected of committing a criminal offence without a warrant, it should indeed be “immediately after the commission of a criminal offence or during the continuous prosecution of a person suspected of committing a criminal offence” (clause 2, part 2, Article 207 of the Criminal Procedure Code of Ukraine), or “if this person was caught during the commission of a crime or attempt to commit it” (clause 1, part 1, Article 208 of the Criminal Procedure Code of Ukraine), or “if immediately after the commission of the crime, an eyewitness, in particular the victim, or a set of obvious signs on the body, clothing or place of the event indicate that this person has just committed a crime” (clause 2, part 1, Article 208 of the Criminal Procedure Code of Ukraine). It all depends on whether there is a decision to detain the person.

Detention of a person suspected of committing a criminal offence without a warrant is allowed in any place, including housing, but only immediately after the commission of the crime or during its continuous prosecution. Therewith, if there is a court order for detention in the form of a ruling, such detention may be performed at any time regardless of the time that has passed since the commission of the criminal offence. Thus, after a specific period (a week, a month), law enforcement officers could identify a person suspected of committing a criminal offence and begin their pursuit, during which they hid in the person's home or other property. Having no time to obtain permission to enter the home, as the person may escape, law enforcement officers under Part 3 of Article 233 of the CPC of Ukraine may enter the home, detain the person and conduct a search.

A search in urgent cases can be performed both with and without the voluntary consent of the owner or user of the dwelling or other property of the person. Therewith, even in the absence of the voluntary consent of the homeowner, the court may grant a search warrant for a search that has already been performed, if it considers that the materials provided by the investigator sufficiently substantiate the urgency of the investigative (search) action.

In practice, when applying these procedures for entering a person's home or other property, other problems arise due to ambiguous interpretations of criminal procedural provisions.

The moment of obtaining the voluntary consent of the owner of housing or other property. A literal interpretation of Part 1 of Article 233 of the CPC of Ukraine demonstrates that the legislator does not explicitly define the moment of obtaining voluntary consent: before or after penetration. However, a logical interpretation of this research provides evidence that such consent must be obtained before penetration.

Entry into a dwelling or other property of a person in urgent cases with the voluntary consent of the owner or user of the dwelling or other property of the person does not turn the urgent procedure into a voluntary one. Therefore, it is unacceptable when an investigator enters a person's home or other property in urgent cases and then tries to obtain or receive the voluntary consent of the person concerned to enter. In fact, in this case, it can only be about penetration in urgent cases. If there were no such cases, then obtaining voluntary consent to penetration after penetration is illegal, as are all procedural actions performed in a person's home or other property. To confirm the fact that there were no violations of the procedure for entering a person's home or other property, it is necessary to question the persons who were present during the inspection.

Who has the right to enter a person's home or other property? Regarding the first two variants of penetration, it should be noted that there is no indication of the subject of penetration, since the legislator in Part 1 of Article 233 of the CPC of Ukraine uses the term “no one”. According to the requirements of Article 235 of the CPC of Ukraine, the prosecutor and investigator have the right to file a petition for a search. Considering the third option of entering a person's home or other property, it should be noted that the literal interpretation of Part 3 of Article 233 of the CPC of Ukraine gives grounds to assert that only investigators, detectives, and prosecutors have the right to enter a person's home or other property in urgent cases.

However, in some cases, there is a necessity to enter the dwelling or other property of a person, other persons, for example, members of the investigative team, special forces, witnesses, experts, witnesses, victims, etc. To detain a group of armed persons who have committed a criminal offence, special forces officers can generally enter a person's home or other property even before the investigator. In this regard, this rule should be interpreted broadly, i. e. other persons may enter the dwelling or other property of a person together with the investigator, detective, or prosecutor. It is necessary to distinguish between the person who is authorised to perform specific procedural actions in a person's

home or other property and the person who can assist or be present during such actions. Therewith, to prevent different interpretations of this provision, appropriate amendments should be introduced to the CPC of Ukraine, providing for the possibility of penetration into the home or other property of a person or other persons.

The Supreme Court in its ruling of January 29, 2019 (case No. 466/896/17) upholds the position that if the investigating judge issues a decision to grant a specific investigator permission to search, then the search should be performed only by this investigator, who has no right to entrust this investigative (search) action to operatives.

As a justification for this position, the Supreme Court provided the following arguments. According to Articles 234-236 of the CPC of Ukraine, a search within criminal proceedings is performed based on the decision of the investigating judge. The investigating judge's decision on permission to search a person's home or other property is executed by the investigator or prosecutor. To obtain assistance on issues requiring special knowledge, investigators and prosecutors have the right to invite specialists to participate in the search, but this does not relieve them of the obligation to personally search.

As can be seen from the materials of the criminal proceedings, by the decision of the investigating judge of the Galician District Court of Lviv dated November 10, 2016, permission to search for the apartment of ADDRESS_1 was granted to the investigator of the Special Investigation Unit of the Galician Police Department of the Main Department of the National Police in Lviv region, Person_1. Thus, according to the terms of the permit, it was Person_1 who was authorised to conduct this investigative action. Despite this, the search in the dwelling of Person_2 on November 23, 2016, was performed by the operational unit of the Carpathian Cyber Police Department of the Main Office of the National Police in the Lviv region without the participation of investigator Person_1.

Assessing these circumstances, the Court of Appeal referred to the presence in the criminal proceedings of the search warrant issued by the investigator based on paragraph 3 of Part 2 of Article 40 of the CPC of Ukraine to the relevant operational unit, and, therefore, indicated the legality of the investigative action.

Therewith, according to the panel of judges of the Supreme Court, such a conclusion is inconsistent with the provisions of Part 1 of Article 236 of the CPC of Ukraine, which does not provide for the possibility of executing the search warrant by anyone other than the investigator or prosecutor. In

addition, according to the terms of the decision of the investigating judge of November 10, 2016, the permission to search was granted to the investigator Person_1, and not to the operational units.

According to the court of cassation, the provisions of paragraph 3 of Part 2 of Article 40 of the CPC of Ukraine on the investigator's right to entrust investigative actions to operational units, in this case, are not applicable, as they explicitly contradict the requirements of the law on the procedure for searching [16].

Such position of the Supreme Court seems to be insufficiently justified, since:

1. The investigator acted lawfully, according to paragraph 3 of Part 2 of Article 40 of the CPC of Ukraine, had the right to entrust investigative (search) activities to operational units.

2. According to Part 2 of Article 41 of the CPC of Ukraine, during the execution of orders of an investigator, detective, prosecutor, an officer of the operational unit shall have the powers of an investigator, and searching shall be within the powers of an investigator. Thus, the officer of the operational unit acted lawfully and performed the role of an investigator during the search.

3. The analysis of the provisions of Chapter 20 "Investigative (search) actions" demonstrates that there is no mention of employees of operational units. The same cannot be stated about Chapter 21 "Covert Investigative (Detective) Actions", in particular, Part 6 of Article 246 of the CPC of Ukraine explicitly states that "the investigator conducting the pre-trial investigation of a criminal offence or, on their behalf, authorised operational units to have the right to conduct covert investigative (detective) actions..."

According to the logic of the above-mentioned decision of the Supreme Court (i.e. by analogy), an operative officer cannot conduct any investigative (search) action on behalf of the assignment, if the conditions of this investigative (search) action provided for by the CPC of Ukraine refer to its conduct by the investigator. Therewith, Chapter 20 "Investigative (search) actions" mainly refers to the right to conduct investigative (search) actions by investigators and prosecutors. For example, "the investigator, the prosecutor has the right to conduct simultaneous interrogation of two or more already interrogated persons..." (part 9 of Article 224 of the CPC of Ukraine), "before presenting a person for identification, the investigator, the prosecutor shall first determine..." (part 1 of Art. 228 of the CPC of Ukraine), "to identify and record information about the circumstances of the criminal offence, the investigator, prosecutor inspects the area, premises,

things and documents” (Part 1 of Article 237 of the CPC of Ukraine). The words “investigator, prosecutor” are used constantly. Part 1 of Article 236 of the CPC of Ukraine (the decision on permission to search a person's home or other property can be executed by an investigator or prosecutor), which is under discussion, is no exception. The CPC of Ukraine does not contain explicit prohibitions on inspection or search by officers of operational units.

It is difficult to understand what determined the adoption of such a court decision (unprofessionalism of judges, corruption of the judicial system or simply excessive subjectivity of the servants of Themis), but such precedents are extremely dangerous, as due to them persons committing criminal offences to avoid criminal liability, and the work of law enforcement officers to protect the interests of the victim of a criminal offence, society and the state is reduced to nothing.

S.M. Tarasiuk rightly notes that such practice in some cases prevents the achievement of a fair result of criminal proceedings, and does not contribute to the protection of the constitutional rights of persons who own housing or those who live in it [17].

Can a person's home or other property be entered for other investigative (search) actions, except for inspection and search?

In investigative practice, there are often cases when there is a necessity to conduct an investigative (search) action in the home or other property of a person, but the legislation does not provide clear guidance on this issue. Thus, it is not clear how the investigator should act when this investigative (search) action is not related to either inspection or search. For example, there is a necessity to conduct an investigative experiment in a person's home or other property. Admittedly, nothing prevents in this case to obtain the free consent of the owner to conduct such procedural actions. However, if the owner does not agree, it would probably be advisable to supplement the CPC of Ukraine with provisions that would allow such investigative (search) actions to be performed by the decision of the investigating judge, by analogy with a search.

Who is authorised to give voluntary consent to enter a person's home or other property?

According to Part 1 of Article 233 of the CPC of Ukraine, voluntary consent to enter a person's home or other property can be provided by the person who owns a such home or other property. What does “person who owns” mean? The term “own” in the dictionary has several meanings: 1) to have something in one's ownership // to have a specific talent, to be distinguished by something (voice, etc.); 2) the same as to possess; 3) to be able to

subdue someone to one's influence, one's will // to master, to encompass someone (about thoughts, feelings); 4) to be able to act, to use something // to know something well; 5) to be able to move parts of one's body [18]. Thus, “to possess” means “to own, to use”. The owner has the right to own, use and dispose of their property (Article 317 of the Civil Code of Ukraine).

The right of ownership of property is considered to be a legally secured possibility of actual domination of the owner over the property, which is not related to using its properties (letter of the High Specialized Court of Ukraine for Civil and Criminal Cases “On the practice of application of legislation by the courts in civil cases on the protection of property rights and other proprietary rights” dated January 28, 2013 No. 24-150/0/4-13). Considering that possession is not associated with using the features of the property, it would be more logical to refer to using a housing or other property. However, one user is not enough, as a person may own a dwelling but not live there. In practice, there are various cases, in particular, when the owner both owns and uses the housing, or has provided it for use to other persons. It is no coincidence that the decision of the investigating judge to permit the search of a person's home or other property must contain information about the person who owns the home or other property and the person in actual possession of it (paragraph 5 of Part 2 of Article 235 of the CPC of Ukraine). The consent to enter a person's home or other property must be given by the person who uses the home or other property, i. e. the user. It usually occurs in practice, as law enforcement officers are mostly called to the scene by users who provide the appropriate permission.

The court practice developed some recommendations on the issue under study, in particular:

1. Inspection of housing or other property of a person can be performed with the voluntary consent of the person who owns it (owns it or uses it on the right of the lease, another right of paid or free transfer for use and possession), provided that there were procedural guarantees that protected the person's ability to express their opinion [19].

2. The law in Part 1 of Article 233 of the CPC of Ukraine requires the voluntary consent of the person who owns the housing, not the owner [20].

3. The inspection of the scene is lawful if it is performed with the voluntary consent of the legal user, not the deceased owner [21]. There are no grounds for declaring inadmissible the evidence obtained based on the inspection of the scene if the permission for access to the household of the deceased person was granted by the victim, who acted

as the legal successor of the property rights of the deceased mother and the potential owner of this property [22].

4. The owner of the dwelling does not have the right to permit to inspect of the part of the dwelling that is rented by another person and used by him [20; 23]. Conducting an inspection of a part of the rented housing with the consent of its owner, but in the absence of the consent of the user, is an unconditional violation of the right of this person to inviolability of housing, which entails the inadmissibility of evidence obtained during this investigative action [23]. Failure to comply with the requirements of Articles 233, and 237 of the CPC of Ukraine during the inspection of a personal wardrobe equipped with a personal lock, which is transferred by the employer for use by the employee, results in the inadmissibility of evidence obtained during the inspection since such a wardrobe corresponds to the criteria of other possession of a person, which is not associated by law with the presence of this person's ownership of such possession [24].

■ Conclusions

Based on the results of the study, the author developed a set of proposals designed to improve the provisions of the CPC of Ukraine regulating the procedures for entering a person's home or other property and the practice of their application, in particular: 1) recommendations on obtaining and procedural registration of voluntary consent for such penetra-

tion are developed; 2) it is established that penetration by voluntary consent is possible during detention by an authorised official and inspection of the scene; 3) it is argued that the recognition of the protocol of the inspection of the scene of the incident, conducted with the voluntary consent of the person who owns the dwelling or other property, as admissible evidence depends on the results of the court's interpretation of the relevant provisions of the CPC of Ukraine (such a situation is a favorable environment for the implementation of corruption practices); 4) the position of the Supreme Court, according to which if the investigating judge issues a ruling on granting a specific investigator permission to conduct a search, then the search should be conducted only by this investigator, who has no right to entrust the said investigative (search) action to operational officers, is considered unreasonable; 5) it is proposed to expand the list of urgent cases for conducting an inspection or search in a dwelling or other possession of a person or to clearly regulate in the CPC of Ukraine the possibility of conducting an inspection or search in a dwelling or other possession of a person with the voluntary consent of the owner or user and without further application to the court for obtaining the relevant decision; 6) a proposal was suggested to supplement the CPC of Ukraine with provisions that would allow conducting other investigative (search) actions in a person's home or other property (for example, an investigative experiment in a person's home or other property).

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Порядок проникнення до житла або іншого володіння особи: актуальні проблеми теорії та практики

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■ **Анотація.** Метою статті є аналіз проблемних питань кримінального процесуального порядку проникнення до житла чи іншого володіння особи та формування на цій підставі науково обґрунтованих рекомендацій з удосконалення чинного законодавства і практики його застосування. Методологія. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, положення Кримінального процесуального кодексу України, а також практика його застосування. Наукова новизна статті полягає в тому, що в ній: 1) висвітлено особливості передбачених у Кримінальному процесуальному кодексі України порядків проникнення до житла чи іншого володіння особи (за добровільною згодою особи, яка ними володіє чи користується; на підставі ухвали слідчого судді; без ухвали слідчого судді в невідкладних випадках із подальшим отриманням такої ухвали після проникнення до житла чи іншого володіння особи); 2) сформульовано рекомендації щодо їх застосування на практиці, а також визначено напрями вдосконалення. За результатами дослідження сформульовано комплекс пропозицій, спрямованих на вдосконалення положень КПК України, що регламентують порядки проникнення до житла або іншого володіння особи, і практики їх застосування, зокрема: 1) сформульовано рекомендації щодо одержання та процесуального оформлення добровільної згоди на таке проникнення; 2) встановлено, що проникнення за добровільною згодою можливе під час затримання уповноваженою службовою особою та огляду місця події; 3) аргументовано, що визнання протоколу огляду місця події, проведеного за наявності добровільної згоди особи, яка володіє житлом чи іншим володінням, допустимим доказом залежить від результатів тлумачення судом відповідних положень КПК України (така ситуація є сприятливим середовищем для реалізації корупційних практик); 4) визнано необґрунтованою позицію Верховного Суду, відповідно до якої, якщо слідчий суддя видає ухвалу про надання певному слідчому дозволу на проведення обшуку, то обшук має проводити лише цей слідчий, який не має права доручати проведення зазначеної слідчої (розшукової) дії оперативним працівникам; 5) запропоновано розширити перелік невідкладних випадків для проведення огляду чи обшуку в житлі або іншому володінні особи або ж чітко регламентувати в КПК України можливість проведення огляду чи обшуку в житлі чи іншому володінні особи за наявності добровільної згоди власника чи користувача та без подальшого звернення до суду за одержанням відповідної ухвали; 6) висловлено пропозицію стосовно доповнення КПК України положеннями, які надади б можливість проведення не лише огляду та обшуку, а й інших слідчих (розшукових) дій у житлі чи іншому володінні особи (наприклад, слідчого експерименту в житлі чи іншому володінні особи)

■ **Ключові слова:** проникнення до житла або іншого володіння особи; обшук; огляд; затримання особи; слідчі (розшукові) дії; слідчий

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Human health issues in the draft Criminal Code of Ukraine

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■ **Abstract.** The purpose of the study – highlight the problematic issues related to criminal law protection of human health and propose appropriate changes to the current criminal legislation of Ukraine. To achieve this purpose, the following objectives were identified: to analyse the draft Criminal Code of Ukraine on causing harm to a human fetus, causing harm during sports, serious harm to health, suffering, violence, and domestic violence; to compare some provisions of the draft Criminal Code of Ukraine with the current criminal legislation. Methodology. The problems of human health care are the object of scientific research that has been ongoing since the emergence of the first states, thus they require a correct methodology. The choice of research methodology should ensure a systematic study of current trends in rulemaking in the field of criminal law protection of human health. Considering the purpose, the specifics of the object and the subject of the study, the appropriate methodological tools were developed, analysed and summarised the results of the study. In the process of analysing the current criminal legislation and the draft Criminal Code of Ukraine, the comparative legal method was applied, and a specific research method – the method of system analysis. The scientific originality of the study is that, based on the analysis of current criminal legislation and the draft Criminal Code of Ukraine, the possibility and expediency of improving criminal legislation in the field of human health is substantiated. Conclusions. The terminology of Ukrainian legislation on criminal liability should be accurate, consistent with the content and not contain unnecessary detail. Changing some provisions of the Criminal Code of Ukraine would ensure accurate and full compliance with the content of some terminology and its purpose; exhaustive scope of legal regulation, clarity and accessibility

■ **Keywords:** draft; Criminal Code of Ukraine; criminal offence; grievous harm; human health; human fetus; bodily injury; domestic violence

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■ Introduction

Currently, the criminal legislation is being actively redefined, resulting in the discussion of the draft Criminal Code of Ukraine (hereinafter - the Draft). Individual provisions of the Draft relate to the following issues: harm to a human fetus; harm during sports; serious harm to health; suffering; violence; domestic violence, etc. As for the mentioned terminology, its features and definitions contained in the Draft, they require clarification and explanation.

The purpose of this study is to assess the legislation in the field of human health and to provide proposals for improving the criminal law protection of human health in Ukraine.

To accomplish this purpose, the following objectives should be implemented: 1) to analyse the Draft Criminal Code of Ukraine on causing harm to a human fetus; causing harm during sports; grievous harm to health; suffering; violence; domestic violence; 2) to compare some provisions of the Draft with the current criminal legislation.

According to the results of the study, conceptual provisions that have scientific originality in the field of human health were developed. The necessity to improve the current criminal legislation of Ukraine is substantiated. The shortcomings of the Draft CC of Ukraine that require elimination are outlined.

■ Outline of the Main Material

Among the developers of the Project (P.P. Andrushko, Y.V. Baulin, V.M. Burdin, O.P. Gorokh, N.O. Gutrova, V.O. Navrotskyi, Y.A. Ponomarenko, E.L. Streltsov, M.I. Khavroniuk) and other scholars in the theory of criminal law, discussions on updated terminology [1-3], criminal law institutions and other issues continue. It is not the first time [2] that the attention of the scientific community is drawn to the fact that relevant specialists with specific knowledge should be involved in the development of individual provisions of the Draft.

For example, it would be quite appropriate to involve forensic experts in the work on the sections of the Draft on crimes against life (4.1) and human health (4.2).

In case of infliction of any bodily injury resulting in termination of pregnancy, criminal liability arises under Article 121 of the Criminal Code of Ukraine (hereinafter – the CC of Ukraine). Thus, the injury that caused the excessive pregnancy does not depend on the gestational age. However, it is necessary to establish a causal connection between the injury and the termination of pregnancy through a forensic medical examination. According to paragraph 2.7.4 of the Rules for conducting forensic medical examinations (examinations) on sexual conditions, the Bureau of Forensic Medicine notes that in cases of determining a causal connection between the trauma and the termination of pregnancy (rupture of the fetal bladder,

placental abruption followed by miscarriage or premature birth), serious bodily harm is established.

In the presence of objective symptoms of the threat of miscarriage (bloody discharge, uterine irritability), which appeared shortly after the medical measures, and the pregnancy was preserved, the severity is determined by the duration of the treatment.

The Draft Criminal Code of Ukraine defines the harm that may be caused to a human fetus as the death of a human fetus (Articles 4.1.10, 4.1.11), grievous injury to a human fetus (injury caused during intrauterine development, which caused serious harm to health, which is established after the birth of the child (Article 4.2.1).

Firstly, the definition of “grave harm” (Article 2.1.9 of the Draft) refers to its main components: it is grave harm to human health (clause “d” of Part 1 of Article 1.3.4 of the CC of Ukraine) or human fetus, in particular, infection with a particularly dangerous infectious disease. Thus, the concepts of “grave harm to human health” and “grave harm to the health of the human fetus” are proposed. While the first terminology is obvious, the second one raises many questions.

Secondly, the definition of “grave injury to a human foetus” (Article 4.2.1) raises questions. What should be considered the object of encroachment - the ordinary development of the human fetus or the health of the human fetus? Is the human fetus endowed with health? Is criminal liability for minor injury to a human fetus excluded? Regarding the “specific features” of this definition, the authors of the Draft are trying to make positive adjustments to the CC of Ukraine, changing the terminology “bodily harm” to “harm to human health”, but currently use the incomprehensible term “grievous bodily harm”, which does not exist in jurisprudence or medicine; secondly, “intrauterine development” begins from the moment of conception (fertilisation) and ends with the removal or expulsion of the human fetus from the woman's body. Thus, development begins from the moment of fusion of the male germ cell with the female and the establishment of a new cell – the zygote, from which the organism begins to develop (Zavalniuk, 2016). However, the Instruction on determining the criteria for the perinatal period, live birth and stillbirth (hereinafter – the Instruction) defines that the fetus is an intrauterine product of conception, starting from the full 12th week of pregnancy (from 84 days from the first day of the last regular menstrual cycle) until expulsion/removal from the mother's body [4]. Thus, there is an inconsistency between the terminology in the Draft Criminal Code of Ukraine “grievous bodily harm to a human foetus” and the definition of this term, and it contradicts the provisions of medical science regarding the period (term) from which criminal legal protection is provided.

Thirdly, how can one cause serious harm to the health of a human fetus without causing serious harm to the health of a human mother?

Based on the above, everything is clear in the current Criminal Code of Ukraine (as regards the signs of bodily injuries and criminal law protection at the beginning of human life), since the theory and practice of criminal law have already been developed over the years and has a logical foundation. As for the provisions of the Draft, there are some ambiguities in the terminology, which will cause problems in its application in practice. In the Draft, it is proposed to clarify the term “termination of pregnancy” as one of the signs of grave harm before 22 weeks of pregnancy, and other terms: “grave harm to human health”, “grave harm to the health of the human fetus” should be clarified and detailed.

The definition of the term “pregnant woman” – a woman from the moment of internal or in vitro fertilisation until the end of childbirth, is provided in Draft clause 5 part 2 of Article 1.3.1. (Definition of the terms of the Criminal Code of Ukraine). Firstly, as noted above, it is appropriate to use the terminology “expulsion” or “removal” of the fetus, not the end of childbirth; secondly, “in vitro fertilisation” is fertilisation outside the human (female) body and is the way by which internal fertilisation is performed. In this case, pregnancy begins from the moment of “implantation” of a fertilised egg to a woman, from this moment a woman can theoretically be considered pregnant. The term of pregnancy is determined from the first day of the last regular menstrual cycle. The Guidelines for the definition of the perinatal period, live birth and stillbirth criteria define the gestational age in full days or full weeks (e.g., the period between the 280th and 286th day from the first day of the last regular menstrual period and corresponds to 40 weeks of pregnancy).

In summary, it should be noted that positive reform of legislation in any area requires the involvement of specialists with relevant knowledge, which will be a reliable guarantee of its proper quality and efficiency.

The authors of the Draft are trying to unify the provisions of the future Law on Criminal Liability, however, the text of the Draft, along with the term “harm to human health”, again contains “bodily injury” in clause 58, part 2, Article 1.3.1 and in clause “b”, part 6, Article 3.5.1.

In addition, the Draft contains terminology identical in its content, namely: “particular physical, mental or moral suffering” (clause “a” of part 35 of Art. 1.3.1); “particular mental or moral suffering” (clause “b” of part 35 of Art. 1.3.1); “physical suffering” (Art. 3.7; para. 3 of Art. 1.2.6); “psychological suffering” (para. 5 of para. 1 of Art. 4.7.1); “physical or psychological suffering” (para. “a” of para. 1 of Art. 4.7.3); “unbearable physical suffering” (para. “a” of para. 1 of Art. 4.1.1).

As for the proposed terminology in the Draft, there is a substitution of “mental” for “psychological”, or there is no precise distinction between the terms “mental suffering” and “moral suffering”. It would be appropriate to define this terminology to eliminate controversial issues, but this is not done in the Draft, except for the terminology “psychological suffering” – emotional maladjustment and disorientation, in which the victim of violence feels chronic guilt, depression, high anxiety, pessimism, decreased self-esteem and concentration, adverse feelings and disappearance of positive emotions, or psychosomatic disorders such as weight changes, allergic reactions, ulcers, unexplained pains, neuropsychiatric diseases (stuttering, tics, enuresis, encopresis, etc.) (clause 5, part 1, Article 4.7.1. Explanation of the terms used in this section).

Thus, some of the terminology used by the authors in the Draft is debatable and does not have precisely defined and established scientific features. First of all, it is “emotional maladjustment”, “disorientation”, and “neuropsychiatric diseases”, which are not provided by the International Classification of Diseases of the Tenth Revision (hereinafter – ICD-10) – Mental disorders and behavioural disorders.

Thus, using the concept of “maladaptation” is quite controversial and ambiguous, which can be traced mainly in the assessment of the place and role of maladaptive states with such categories as “norm” or “pathology”, since the parameters of “norm” and “pathology” in psychology are not sufficiently developed [5]. Thus, it is a debatable terminology that has no clearly defined and established scientific features. In addition, the combination of the terms “emotional maladjustment” is slightly incorrect, it would be more appropriate to use the term “emotional sphere maladjustment”. The next term is “disorientation”, the feature of which is that its types are not specified, it is not established whether it is disorientation in time, in space or disorientation in personality. These three “states” in psychiatry have different codes of diseases and conditions in class V: Mental disorders and behavioural disorders of ICD-10. Thus, the further list of diseases and conditions, in the definition of “psychological suffering”: chronic guilt, high anxiety, psychosomatic disorders; weight changes, allergic reactions, ulcers, unexplained pain; neurotic, stress-related and somatoform disorders (F40-F48) – the specified list of mental disorders placed in one subsection. Another list: depression, pessimism, decreased self-esteem and concentration, negative feelings and disappearance of positive emotions; mood disorders (affective disorders) (F30-F39). The term “neuropsychiatric diseases” is not used in psychiatry, as in ICD-10 diseases of the nervous system (G00-G99) and mental disorders and behavioural disorders (F00-F99) are contained in different sections.

The proposed list: stuttering, tics, enuresis, encopresis, etc. – are mental disorders and behavioural disorders. Therefore, the terminology proposed by the authors of the Draft requires clarification. The analysis of the legislation (Procedure for psychological support of service activities in the State Service for Special Communications and Information Protection of Ukraine and the Instruction on the procedure for organising and conducting psychoprophylactic work with the personnel of the State Border Guard Service of Ukraine) and special literature confirms the above opinion regarding the impossibility of using the terminology “nervous and mental illness”. For the most part, other concepts are used: neuropsychic stability - a complex of innate (biologically determined) and acquired personal qualities, mobilisation resources and reserve psychophysiological capabilities of the body, which ensure optimal functioning of the individual in adverse conditions of the professional environment; neuropsychic (emotional and volitional) instability - a tendency to breakdowns of the nervous system in case of significant mental and physical stress [6; 7].

Thus, the authors of the Draft in the definition of “psychological suffering” give too limited a list of possible diseases and conditions of the V class “Mental disorders and behavioural disorders” of ICD-10, without specifying the main features and signs of this concept. Thus, consider it necessary to refine this terminology with the subsequent exclusion of a limited list of possible mental disorders and the definition of the main features of the term “psychological suffering”.

One of the signs of grievous bodily harm (current CC of Ukraine) or grievous harm to health (Draft CC of Ukraine) - mutilation of the genital organ - remains controversial. This feature can be interchanged with other ones - “loss of any organ or its functions” or “health disorder combined with permanent disability of at least one-third”. The Rules of forensic medical determination of the severity of bodily injuries (paragraph 2.1.4) determine that non-life-threatening injuries, which are severe in terms of the final result and consequences, should include the loss of reproductive capacity - loss of ability to copulate or loss of ability to fertilise, conceive and give birth (child-birth). In some cases, genital mutilation can result in the loss of reproductive capacity [8].

In paragraph “c” of part 1 of Art. 1.3. 4 of the Draft contains the definition of “grave harm to health” – harm to health, which is characterised by: loss of any organ or its function; mutilation of a sexual organ; persistent mental disorder; health disorder combined with persistent loss of general working capacity (more than 33%) or complete loss of professional capacity; termination of pregnancy; irreparable disfigurement of the face or body or other consequences, the presence of which poses a danger to the life of a person. Thus, attempts to “regulate” the

signs of grievous bodily harm (current terminology) in the Draft will result in even greater inconsistency, as one of the signs “irreparable disfigurement of the face or body” fully covers another sign - “mutilation of the genital organ”, if it does not result in loss of reproductive capacity.

The current CC of Ukraine does not include causing harm during sports activities to the circumstances excluding the unlawfulness of the act, which is a precondition for scientific discussions. In Art. 2.7.8. Causing harm during sports activities of the Draft states: 1. It is lawful to cause harm to the life or health of a person during a sports competition or training, if: a) the relevant sport is duly recognised in Ukraine; b) the competition or training is officially organised; c) the person to whom the harm is caused has voluntarily and in advance agreed to engage in this sport; d) the person causing the harm adheres to the rules of this sport. 2. Causing harm during sport with violation of the provisions of part 1 of this article shall entail criminal liability on the general grounds provided by this Code. The conditions of lawful infliction of harm during sports listed in the Draft Law include the fact that “the person to whom the harm is inflicted has voluntarily and in advance agreed to engage in this sport”. Thus, it refers only to the consent to engage in a particular sport without mentioning the harm to the life and health of the person, in contrast to the title of the article (Causing harm during sports). In addition, the authors of the Draft did not specify the amount of damage - substantial, significant, or severe (Article 1.3.4 Amount of damage to health).

In the author's opinion, the consent of a person to cause harm to their health during sports activities should be assessed on general grounds.

Considering the crucial social necessity of criminalisation of domestic violence, and in the context of Ukraine's ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, a new Article 1261 “Domestic Violence” was introduced to the CC of Ukraine - intentional systematic commission of physical, psychological or economic violence against a spouse or former spouse or another person with whom the perpetrator is (was) in a family or close relationship, which results in physical or psychological suffering, health disorders, disability, emotional dependence or deterioration of the quality of life of the victim. In addition, a new aggravating circumstance has been introduced – “committing a criminal offence against a spouse or former spouse or another person with whom the perpetrator is (was) in the family or close relations” (paragraph 61, Part 1 of Article 67 of the CC of Ukraine).

In the General Part of the Draft (as of May 31, 2021) in Art. 1.3.1. The meaning of the terms of

the Criminal Code of Ukraine, the authors defined violence – as physical impact on another person, in particular by striking, beating, using acoustic, light, thermal or chemical factors or restricting his freedom (clause 27). The Special Part provides for liability for using domestic violence (Article 4.7.3. Domestic violence). A person who has systematically used physical, psychological or economic violence against a spouse or other close person, including a ex-spouse, resulting in: a) physical or psychological suffering; b) health disorders; c) disability; d) emotional dependence; e) deterioration of the victim's quality of life.

Thus, the consequences of domestic violence provided for in the Draft are debatable and require clarification and explanation. Thus, for example, the term “suffering” is fully covered by the definition of “special torture” provided in the Draft (infliction of harm to life or health), which: a) was accompanied by special physical, mental or moral suffering of the victim or b) was committed in the presence of a person close to the victim, who was thus subjected to special mental or moral suffering (paragraph 35 part 2 of Article 1.3.1). In addition, these two articles contain inconsistent terminology, namely: “psychological suffering” is occasionally substituted by another term – “mental suffering”.

Secondly, health disorders and disability are signs of harm to a person's health (now these are bodily injuries), which are defined in Art. 1.3.4, thus it is inappropriate to distinguish them in the article as different signs (consequences) of domestic violence.

Regarding the explanation provided in the Draft of the term “emotional dependence” (dependence on the relationship with the aggressor, which is characterised by the inability to choose in a destructive relationship, combined with an unbearable, desperate fear of loneliness (clause 2, part 1, Article 4.7.1), this definition can be fully explained by the following feature of domestic violence: “psychological suffering” - emotional maladjustment and disorientation, in which the victim of violence experiences chronic feelings of guilt, depression, high anxiety, pessimism,

reduced self-esteem and concentration, the occurrence of adverse feelings and disappearance of positive emotions or occurrence of psychosomatic disorders - weight changes, allergic reactions, ulcers, unexplained pains, neuropsychiatric diseases (stuttering, tics, enuresis, encopresis, etc. 5 part 1 Article 4.7.1). In addition, the criteria of “deterioration of the quality of life” – physical condition, intellectual dysfunctions, and social maladjustment and disorientation (clause 4, part 1, Article 4.7.1) completely duplicate the definition of mental suffering.

Thus, it is recommended that the signs of domestic violence – health disorders and disability – be stated as “harm to the health of a person”; “emotional dependence” be excluded from the list of signs; in the definition of the term “deterioration of the quality of life” only one of the criteria – economic insufficiency as a consequence of economic violence – should be preserved.

■ Conclusions

Summarising the above, it can be concluded that:

1. The terminology of the current legislation of Ukraine on criminal liability should be accurate, consistent with the content and not contain unnecessary detail. Changing some provisions of the CC of Ukraine would ensure precise and full compliance with the content of some terminology and its purpose, exhaustive scope of legal regulation, clarity and accessibility.

2. For the positive reform of legislation in any sphere, it is necessary to involve relevant specialists, which will be the key to its proper quality and efficiency. Thus, it would be appropriate to involve forensic experts in the work on the sections of the Project “Crimes against human life” (4.1) and “Crimes against human health” (4.2). In the current conditions, the terminology contained in the Draft contradicts the provisions of medical science, has inaccuracies, which will cause particular problems of application in practice, and it is debatable and requires clarification.

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Проблеми охорони здоров'я людини в проєкті Кримінального кодексу України

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■ **Анотація.** Мета дослідження – висвітлити проблемні питання, пов'язані з кримінально-правовою охороною здоров'я людини, і запропонувати відповідні зміни до чинного кримінального законодавства України. Задля її досягнення було поставлено такі завдання: проаналізувати проєкт Кримінального кодексу України щодо заподіяння шкоди плоду людини, заподіяння шкоди під час заняття спортом, тяжкої шкоди здоров'ю, страждання, насильства, домашнього насильства; здійснити порівняльну характеристику деяких положень проєкту Кримінального кодексу України з чинним кримінальним законодавством. Методологія. Проблеми охорони здоров'я людини є об'єктом наукових пошуків, які тривають з часу виникнення перших держав, тому вони потребують коректної методології. Вибір методології дослідження має забезпечити системне вивчення сучасних тенденцій нормотворення у сфері кримінально-правової охорони здоров'я людини. З огляду на поставлену мету, специфіку об'єкта й предмета дослідження обрано відповідний методологічний інструментарій, здійснено опрацювання, аналіз й узагальнення результатів дослідження. У процесі аналізу чинного кримінального законодавства та проєкту Кримінального кодексу України застосовано порівняльно-правовий метод, а також спеціальний метод дослідження – метод системного аналізу. Наукова новизна дослідження полягає в тому, що на підставі аналізу чинного кримінального законодавства та проєкту Кримінального кодексу України обґрунтовано можливість і доцільність удосконалення кримінального законодавства у сфері охорони здоров'я людини. Висновки. Термінологія законодавства України про кримінальну відповідальність має бути точною, відповідати змісту й не містити зайвої деталізації. Зміна певних положень Кримінального кодексу України забезпечили б точну та повну відповідність змісту деякої термінології та її призначення; вичерпний обсяг правового регулювання, ясність і доступність

■ **Ключові слова:** проєкт; Кримінальний кодекс України; кримінальне правопорушення; тяжка шкода; здоров'я людини; плід людини; тілесне ушкодження; домашнє насильство

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Artificial intelligence as a tool for legal reform: Potential, trends and prospects

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■ **Abstract.** The purpose of the scientific research is to summarise and develop theoretical knowledge about the potential, trends and possible areas of artificial intelligence technologies use as an instrument of legal reform, a means of improving the efficiency of its implementation. The methodological foundation of scientific research is a complex of principles of scientific cognition (historicism, scientificity, comprehensiveness, pluralism), methodological approaches (activity, systematic, comparative, axiological), general methods of thinking (analysis, synthesis, abstraction, generalisation), philosophical (dialectical, metaphysical, hermeneutical, epistemological), general scientific (historical, synergetic, functional, structural) and specific scientific (formal-legal, comparative legal) methods, the application of which ensured the validity and reliability of the results of the study of the nature of artificial intelligence as the latest tools of technology for legal reform in modern conditions. The scientific originality of the research is that for the first time the potential of artificial intelligence technologies is highlighted as an important tool for legal reform, the latest means of improving the efficiency of its implementation due to the ability of artificial intelligence to make rational legal decisions that are most appropriate to the circumstances of legal development, in fact in real-time, in particular through the expansion of the prospects of legislative activity, improvement of the legislative process and diversification of legislative technique through the digitalisation of law; the characteristics of the current state, trends and main vectors of the introduction of artificial intelligence in the legal sphere and legal practice have been improved; scientific ideas about doctrinal and regulatory approaches to understanding the nature of artificial intelligence, controversial issues and possible threats and challenges related to the legal regulation of the establishment, implementation and use of artificial intelligence technologies have been further developed. The conclusions of the scientific research are as follows: the spread of artificial intelligence technologies in the modern world is gaining momentum. Pretty soon, people will not be able to imagine life without artificial intelligence systems, which are expected to become the largest innovative project in the history of human civilisation. There is still no unified approach to understanding the nature of artificial intelligence in the technical sphere, which causes some uncertainty in the legal, social and moral and ethical spheres. There is a discussion between different groups of legal experts on the legal aspects of the development of artificial intelligence, the possible recognition of the legal personality of robots with artificial intelligence, the necessity to develop new mechanisms for the implementation of legal liability and compensation for damage in the context of using artificial intelligence. In recent years, examples of the implementation of artificial intelligence systems in various spheres and segments of social activity have been appearing intensively, and most of them are positively impressive. Using artificial intelligence technologies in the legal sphere and legal practice is an important factor in the development of the legal system, ensuring the rights and freedoms of men and citizens. The potential of artificial intelligence technologies can contribute to the solution of complex, priority legal

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tasks, and the implementation of significant and progressive legal transformations (innovations in the legal system, the system of law, the system of legislation, etc.) Using artificial intelligence in legal reform allows for significantly expanding the horizons of legislative activity, improving the legislative process and diversifying the legislative technique

■ **Keywords:** information technology; artificial intelligence; artificial intelligence technologies; digitalisation; legal regulation; legal development; reform; legal reform; legislative activity

■ Introduction

The current stage of development of social relations is distinguished by the rapid intensification of digital (information) technologies. Intensive advancement of science and technological progress has become the main features of modern society. Using digital technologies has given impetus to the processes of transformation in society – the information transformation of social relations, which is expressed in using modern digital technologies in various spheres of human activity. The digital revolution as a factor of dynamic development has resulted in the establishment of a digital economy, the development of the foundations of digital law, and a new configuration of social relations based on using the Internet, social networks, and other information and communication technologies. Modern digital technologies develop a new way of production and establish prerequisites for the transition to a new development, digitalisation of social relations and the law itself that regulates these relations [1].

One of the advanced information technologies of modern times is artificial intelligence, it is already among the people, but it did not appear as everyone expected. It is the silent backbone of financial systems, electricity and supply networks to retail stores. It is the invisible infrastructure that guides through the streets, tells drivers the destination on the navigation maps, finds the right meaning in the words misspelt and determines what to buy, watch, listen and read based on the analysis of the requirements, preferences and previous orders. This technology is the foundation of the future as it intersects with all aspects of human life: health and medicine, housing, agriculture, transportation, sports, and even love, sex and death. Artificial intelligence - is not a technological trend, a catchphrase or a temporary fun, but the third computer era. However, today the world is in the midst of fundamental changes different from those experienced by the generation of the first industrial revolution [2]. Artificial intelligence technologies are of particular importance in countering and containing the coronavirus (COVID-19) pandemic - from analysing data to diagnosing people who only suffer from this disease and identifying the effects of its treatment and vaccination [3].

The fourth industrial revolution, or Industry 4.0, is a modern era of innovation based on advanced technologies that are radically transforming all areas, sectors and industries of the economy. A new type of industrial production is emerging, based on the so-called Big Data and its analysis, full automation of production, virtual and augmented reality technologies, etc. Google has already announced that artificial intelligence will do more for humanity than the discovery of fire or electricity. Crowdsourcing, sharing economy, biotechnology, robotics, cloud infrastructure, Internet of Things and artificial intelligence are not the future, but the present. Describing the industrial revolution in his book "The Fourth Industrial Revolution", Swiss economist Dr K.M. Schwab, founder and chairman of the World Economic Forum in Davos, notes that it blurs the boundaries between the physical, digital and biological spheres. Our world of the 21st century is changing too fast [4].

Modern computer and software technologies are developing intensively every day. The most promising but no less controversial technology, which is already used in many spheres of social reality, is artificial intelligence, which is metaphorically called "the most important product of human intelligence" or "the last invention of mankind". Artificial intelligence systems are potentially applicable in the legal field, and their implementation is already occurring in legal practice when it is necessary to automate routine actions to support lawyers in providing quality services and simplify access to justice for the general public. Artificial intelligence can provide a correct and efficient solution to various legal problems, which will contribute to improving the efficiency of legal regulation. Therewith, the rapid development of the latest technologies, in particular artificial intelligence systems, the Internet of Things, cloud technologies, etc. necessitates changes in international and national legislation. Currently, the leading countries with developed legal orders have already thought about the issues of determining the legal status of artificial intelligence and legal regulation of its development and use. Thus far, these are only the first timid steps, but in the future, all this can cause global changes in the legal system up to the development of

full-fledged complex institutions of law and legislation, possibly branches and sub-branches of law [5].

By the beginning of the third millennium, humanity has accumulated a significant number of various social, economic, environmental, industrial, military, educational, medical and other problems that are either of a planetary nature or are important for most countries. The reason for these problems is mainly the natural limitation of a person in the ability to make rationally balanced decisions in a multifactorial and nonlinear world. The introduction of information technologies, including artificial intelligence technologies, is an integral part of the development of socio-economic, scientific, technical, defence, legal and other activities in areas of national importance. Artificial intelligence technologies are designed to contribute to the transformation of the economy, labour market, government institutions and society in general [6]. According to the right statement of Y.N. Harari, perhaps the most important thing is that artificial intelligence and biotechnology offer humanity the power to reform and redesign life [7]. Considering the above, the study of theoretical, methodological and applied aspects of the relationship and interaction of legal reform and artificial intelligence, its nature, potential and prospective vectors of application in the process of implementing significant, progressive legal changes, restructuring of law (legal system, system of law, system of legislation) is of particular importance [8].

The purpose of this research is to summarise and develop theoretical knowledge about the potential, trends and possible areas of artificial intelligence technologies as a tool for legal reform and a means of improving the efficiency of its implementation. To achieve this purpose, the following tasks are defined: first, to analyse doctrinal and regulatory approaches to understanding the nature of artificial intelligence, controversial issues and possible threats and challenges associated with the legal regulation of the establishment, implementation and use of artificial intelligence technologies; secondly, to describe the current state, trends and main vectors of artificial intelligence application in the legal sphere and legal practice; thirdly, to expose the potential of artificial intelligence technologies in the implementation of significant, progressive legal changes, the transformation of law as a special socio-cultural phenomenon.

According to the results of the study, the potential of artificial intelligence technologies as an essential tool of legal reform, the newest means of improving the efficiency of its implementation due to its ability to make rational legal decisions that are most appropriate to the circumstances of legal development, in

fact, in real-time, in particular through expanding the legislative horizons, improving the legislative process and diversifying the legislative technique through the digitalisation of legal information, was first identified; the characteristics of the current state, trends and main vectors of the introduction of artificial intelligence in the legal sphere and legal practice have been improved; scientific ideas about doctrinal and regulatory approaches to understanding the nature of artificial intelligence, controversial issues and possible threats and challenges associated with the legal regulation of the establishment, implementation and use of artificial intelligence technologies have been further developed.

■ Outline of the Main Material

The definition of “artificial intelligence” is multifaceted and is used as a narrative that describes the intellectual capabilities of computers in their decision-making [9]. Historically, the first definition of “artificial intelligence” is the definition proposed by J. McCarthy in 1956 within the framework of the Dartmouth Conference, namely: artificial intelligence is the science and technology of developing intelligent machines, particularly intelligent computer programmes [10]. Currently, scientific and analytical works present a fairly wide palette of definitions of the concept of “artificial intelligence” and approaches to understanding its essence - from identification with robotics to the perception of artificial intelligence as an innovative development of science and technology to design intelligent machines and intelligent computer programmes [3].

The national professional literature states that artificial intelligence studies intelligent behaviour (in humans, animals and machines) and tries to find ways to model such behaviour in any type of artificially designed mechanism. Even though the term is more than half a century old, there is no single interpretation of it currently. Scientists define artificial intelligence in different ways, depending on their perspective, working to design systems that: think like people; think rationally; act like people; act rationally. As a working definition, scientists propose the following: artificial intelligence is one of the areas of computer science, the purpose of which is to develop hardware and software tools that allow a non-programmer user to set and solve their, conventionally considered intellectual, tasks by communicating with a computer in a limited subset of natural language. Therewith, artificial intelligence has always been an interdisciplinary field, being both science and art, technology and psychology [11]. The ability to self-learn, self-improve and self-develop, and autonomy from

humans in decision-making is the core of the entire architecture of artificial intelligence.

According to the Concept for the Development of Artificial Intelligence in Ukraine, approved by the Order of the Cabinet of Ministers of Ukraine dated December 2, 2020 No. 1556-r, artificial intelligence is an organised set of information technologies, with the help of which complex tasks can be performed by using a system of scientific research methods and algorithms for processing information received or independently established during work, and developing and using own knowledge bases, decision-making models, algorithms for working with information and determine methods of achieving the identified objectives; the field of artificial intelligence is an area of activity in the field of information technology that provides the establishment, implementation and use of artificial intelligence technologies [6].

The existing variety of opinions on the nature of artificial intelligence can be reduced to the following types: 1) “weak artificial intelligence” (“narrow artificial intelligence”, “limited artificial intelligence”) is an artificial intelligence designed to solve one or more tasks that humans perform or can perform. Recently, “weak artificial intelligence” has been mostly referred to as “applied artificial intelligence”; 2) “strong artificial intelligence” (“general artificial intelligence”) is artificial intelligence designed to solve all tasks that humans do or can do; 3) “artificial superintelligence” is an intelligence that is significantly smarter than the best human intelligence in almost every area, including scientific creativity, general wisdom and social skills, which can have consciousness and subjective experiences [12]. In addition, general artificial intelligence should have such cognitive functions as the ability to independently define the purpose of its functioning, even not just a purpose, but a set of purposes, both interrelated and interdependent, and completely autonomous. And in the process of achieving the purpose(s), the general artificial intelligence, like a human, should be able to dynamically change the content of the purpose(s) due to changes in both internal and external circumstances. For example, these changes may be associated with restricted access to the necessary resources: computing, energy, raw materials, financial, or with changes in the parameters of component products, a sharp change in weather conditions, the occurrence of a natural disaster, refusal to cooperate, etc. In addition, general artificial intelligence should have such cognitive functions as self-learning, self-organisation and self-transformation to the extent of approximation to the corresponding cognitive functions of humans, which will be necessary to achieve the purpose. Essentially, the implementation of cognitive

functions by general artificial intelligence should occur in the same way as it happens in humans in similar circumstances [10]. Artificial intelligence is characterised by the following features: 1) perception of the environment and the complexity of the real world; 2) information processing: collecting and interpreting initial data; 3) decision-making, including reasoning, learning and taking action; 4) achieving defined purposes [13].

Highlighting the nature and potential of artificial intelligence technologies, it is necessary to emphasise the discussion on the legal status (or regime) of robots and artificial intelligence in general. Thus, in the present conditions, there are already several legal issues regarding:

- recognition (or non-recognition) of robots as subjects of legal relations, and, accordingly, granting (or not granting) them legal personality (indicative is the fact that at the end of 2017, the human-like robot Sophia, developed by the Hong Kong company Hanson Robotics, was granted the citizenship of the Kingdom of Saudi Arabia);

- recognition of copyright works (for example, in 2016, the book “The Day a Computer Writes a Novel”, written by artificial intelligence, was short-listed for the Japanese literary prize named after Hoshi Shinichi);

- compensation for damage caused by robots (for example, damage caused by an error in the operation performed by a robot or a traffic accident caused by an autonomous vehicle) [14].

The above is only an indicative list of legal issues that may arise in connection with the recognition of the legal status of artificial intelligence. Therewith, the solution to this issue is already urgent for Ukraine. One of the first comprehensive attempts to regulate the status of artificial intelligence was made by the European Union, which adopted the agreed text of the European Parliament Resolution “Civil law rules on robotics” (2015/2013 (INL)) of February 16, 2017. The main issues raised in this Resolution are the issues of ethical provisions on robotics and artificial intelligence, granting rights to robots and artificial intelligence, the establishment of the European Agency for Robotics and Artificial Intelligence, resolving the issue of liability for damage caused by robots and artificial intelligence, and the proposal among the already known categories of subjects of legal relations (individuals and legal entities) to establish a new one - “electronic person (personality)”, which will have its specific rights and obligations [15; 16].

According to O.E. Radutnyi, granting artificial intelligence with the legal status of “electronic person (personality)” should not be objected to and rejected

in the field of criminal law and other relations. After all, it is common to assign to a legal entity (which is a virtual entity) the legal status of a subject of numerous legal relations, and, in addition, the possibility of applying criminal law measures to it [15; 16]. The opposite position on this issue is expressed by N.S. Martsenko believes that the understanding of artificial intelligence and robot as a subject of civil relations seems inappropriate and can cause uncertainty in the law. Using the term “electronic person” in the regulations of the European Union is premature since the spread of this concept in the field of law does not provide a holistic legal understanding of their legal status, civil liability, protection of users' rights, data protection, etc. In addition, the recognition of artificial intelligence and robots as a subject of legal relations means the extension of provisions on ensuring their rights (since all subjects to participate in civil and legal relations must have their own will and free choice of ways to implement their behaviour from the standpoint of the principle of dispositive and have rights and obligations equal to other participants in legal relations – through the prism of the requirements of the principle of equality). It is more appropriate to understand robots and artificial intelligence as an object of civil legal relations. In addition, the regulation of civil liability at the level of consumer relations gives grounds to understand artificial intelligence as a product (commodity). Using artificial intelligence technologies in such areas as medicine or public administration prompts reflection on the extension of the legal regime of the source of increased danger to this object of civil rights. It will contribute to better protection of the rights of users of artificial intelligence technologies [17]. Similar opinions on artificial intelligence as an object of legal regulation or an object of law are shared by other legal scholars.

Thus, the general prospects for reforming the legal regulation of using artificial intelligence and its liability for actions can be grouped around three main approaches (hypotheses): firstly, the positioning of robots with artificial intelligence only as objects of legal relations; secondly, the consideration of robots with artificial intelligence exclusively as separate subjects of legal relations, with this approach, robots with artificial intelligence are perceived as independent subjects of legal relations with the ability to independently and sufficiently realise and assess the significance of their actions and the actions of others; thirdly, the characteristics of robots with artificial intelligence as individual subjects of legal relations and their possible objects [18; 19]. Therewith, it is necessary to distinguish between the concepts of “robot” and “artificial intelligence”, as the first one

is perceived as an object of the material world with the corresponding appearance and several external features that can identify it. Artificial intelligence, considering its most common definition as an ability, is an abstract concept that cannot be recognised by the senses. Therewith, it is artificial intelligence that provides the robot with the properties that are usually used to describe it, namely: intelligence, the ability to analyse and process information and to perform the tasks for which it is programmed [12]. The main task of domestic national policy in the field of legal regulation of artificial intelligence is to ensure the rights and freedoms of participants in relations in the field of artificial intelligence, and the development and implementation of artificial intelligence technologies in compliance with ethical standards [6].

Artificial intelligence technologies are widely used in the legal sphere and legal practice. Thus, in early 2017, JPMorgan announced using Contract Intelligence software, which is designed to analyse legal documents in a few seconds, which previously required 360 thousand hours of working time. Law firm Baker & Hostetler has announced that it is hiring artificial intelligence ROSS to handle bankruptcy cases, which were previously handled by almost 50 lawyers. The artificial intelligence ROSS, developed on IBM's Watson cognitive computer, will monitor the legislation and legal situation around the clock, can read and understand language, make hypotheses, research and then generate answers with proper references and citations, learn from its own experience, etc. Scientists from the University College London and the University of Sheffield have created a “computer judge” that predicts the decisions of the European Court of Human Rights with an accuracy of 79% [15; 16].

Currently, there are hundreds of robot lawyers in the world – programs that perform routine actions, and template operations for drafting applications, lawsuits, letters, contracts, etc. However, algorithms cannot completely replace people yet - they can only help them by providing more information for decision-making. In all areas where regular actions are required, artificial intelligence is actively replacing human lawyers, saving their time and energy to perform more creative tasks [4].

Artificial intelligence is expected to help improve judicial practice: identify typical legal situations, develop algorithms of actions (e.g., determine the warranty period or limitation period, establish the type of violation of subjective rights and freedoms, choose a method of protection, etc, are not covered by the subject matter of the dispute or do not reflect the method of protection chosen by the plaintiff, or are not provided for by the relevant rule of substantive

law to which the plaintiff refers, to identify atypical court behaviour under normal circumstances, the so-called “anomalous” court decisions, to process a significant amount of information, to prepare draft court decisions, etc; [16]. Legally and possible and relevant areas and forms of involvement of artificial intelligence technologies in legal practice, in particular in judicial proceedings, are as follows: information and documentary support of the legal practice, including automated intellectual classification of legal documents, development and documentary management of cases, development of projects for solving various legal problems through using artificial intelligence technologies by attracting and analysing databases; intellectual expert and analytical support of legal practice by comparing the provisions of law by artificial intelligence technologies, comparing regulations to determine their hierarchy, establishing the provisions and acts of higher legal force from those that are compared; generation and issuance of expert opinions within the framework of forensic examination or expert opinion (use of knowledge bases, electronic expert systems, automated systems for supporting legal decisions based on artificial intelligence); facilitating decision-making within large volumes of heterogeneous tasks under complex conditions of uncertainty, based on inaccurate, insufficient or ill-structured information [5].

According to M.V. Selivanov, modern information technologies can significantly improve the predictability of court decisions and their reliability, assist the judge in the trial, reduce the workload of an individual judge and reduce the risk of judicial errors. An e-court – is a court where logical algorithms will resolve the case quickly, in fact, will eliminate corruption risks and human errors [20]. More restrained considering possible threats assess the trends and prospects of using artificial intelligence in advocacy S.O. Ivanitsky, who believes that technology affects, but is unlikely to change human nature. The possibilities of Legal Tech – a new branch of legal business, established at the intersection of law and technology – will reduce the demand for low- and medium-qualified legal professionals, and in some areas will completely replace them. Some areas of legal practice will disappear, but new horizons will inevitably appear, as all aspects of life become more complex. The legal landscape of the future will retain the place of deeply specialised law firms and bureaus with a distinct concept and recognition among competitors, and lawyers who can provide unique, specific services and solve problems, related to the exceptional complexity of the factual circumstances of the case (a large amount of data, their confusion, etc.) or its legal assessment (difficulties

of legal qualification, conflicts and gaps in legislation, etc.), or require special trust or individual communication skills (compassion, understanding and anticipation of the client's requirements, etc.). It is rather difficult to automate functions that require creative thinking, emotional intelligence and social sensitivity. Considering this, the beginning of the era of artificial intelligence in the legal sphere will not be fast, and human potential will be at the forefront of advocacy for a long time [21].

The emergence of artificial intelligence should contribute to the solution of complex, priority legal tasks, for example, the implementation of significant and progressive legal changes (transformations of the legal system, the system of law, the system of legislation, etc.) It is rather promising to use artificial intelligence technologies as a tool for legal reform to increase the efficiency of its implementation. In this context, M. Tegmark's judgments that humans are social animals that have conquered all other species and conquered the Earth due to their ability to cooperate are correct. Authors have developed laws to encourage and facilitate cooperation, thus, if artificial intelligence can improve the legal and governmental systems, it will allow cooperation more successfully than ever before and perform at its best [22]. Artificial intelligence can make the legal system fairer and more efficient if they learn how to design transparent and impartial robot judges. Therewith, the laws require rapid updating to remain abreast of artificial intelligence, which raises difficult legal questions regarding privacy, liability, and regulation [22].

According to Zh.O. Pavlenko, transformations (social and legal reforms) in society require revision of legislation. In turn, the latter requires a change in attitude to law-making and law enforcement activities, and this requires reliable and efficient tools. It is essential to develop a systematic approach to setting and solving the tasks of transforming the national legislation, which would not be limited to the adoption of particular legislative acts, amendments or additions to the existing ones. The eclectic approach that developed in Ukraine proved to be unacceptable. As a result, the instability of legislation is growing, and political, economic and legal conditions of legislative activity are becoming more complicated. One of the ways to improve the legislative process may be the active application of the achievements of modern science and technology within the framework of knowledge engineering in jurisprudence. The legislation of Ukraine contains a lot of contradictions, which concern public authorities at all levels, specialists involved in the legislative process, and legal practitioners. It is urgent to establish a system that would determine at an early stage of drafting a regulation

whether it complies with the Constitution of Ukraine and current legislation, and identify internal contradictions of the regulation itself. There is a demand for a technology that would provide, firstly, a semantic search of regulation in the database; secondly, automatically generate different versions of the same regulation, and the text of the document according to the template and details; thirdly, identify contradictions in the texts of regulations. The development of the terminology of the legislative system is not an easy task, as it is due to the complexity of a precise definition due to the combination of features of obvious categories and concepts. In addition, many people are involved in the development of regulations. By applying the experience of developing large software products in the field of legislative activity, it is expected to improve the quality of draft laws. However, Zh.O. Pavlenko stresses that currently, it is about improving the quality, not about generating the draft law by software, since the legislative process is a task of the highest level of complexity, in the process of which the highest creative functions of human thinking are implemented. Using artificial intelligence methods in jurisprudence is not limited to lawmaking. In legislative activity it is necessary to use not only ready-made information (data), a professional lawyer requires knowledge, i. e. the laws of the subject area, which will allow them to successfully solve their professional tasks. Obtaining the knowledge of specialists and providing it to all users of intelligent systems is one of the tasks of the field of artificial intelligence and jurisprudence [23].

O.E. Radutnyi's opinion on a different approach to lawmaking in the context of legal reform deserves attention. In particular, if the development of regulations is not entrusted to specialists (legal scholars and legal practitioners), the solution to the problem may be in using the capabilities of artificial intelligence. Currently, no human can track all system connections the way artificial intelligence can. In the process of law-making, this ability will allow for avoiding systemic mistakes within the industry and in cross-sectoral areas. To entrust artificial intelligence with the development of new regulations and/or verification of existing ones and preparation of amendments to them, the latter must be capable of complex processing of significant amounts of information obtained from various sources, to identify systemic correlations both within one industry and to establish interdisciplinary links, to have the ability to self-learn, in particular, to accumulate experience, generalise, find non-obvious logical chains, draw specific conclusions, and to plan. Artificial intelligence is already endowed or will soon have such properties that in total exceed the mental abilities of any person: the

ability to abstract thinking; perception, and recognition of all signals of the external world (in contrast, a person, for example, does not perceive ultrasound and infrasound, in general, what they perceive with their eyes is only about 2% of the full electromagnetic range); a powerful theoretical base, knowledge of all provisions of the current legislation and awareness of decisions on any court cases regardless of industry; ability to spread and self-preservation; solving a problem by brainstorming with the involvement of many copies of oneself; strategic thinking, the ability to develop and predict various options in advance; ability to deduction and induction, analysis and synthesis; ability to model; ability to work efficiently under conditions of uncertainty and probability; use of available information in the most appropriate and optimal way; awareness of the principles of one's work and thus the ability to improve oneself (the first version establishes an improved version of itself and so rewrites the programme indefinitely), etc. Providing the person ("electronic person (personality)"), who prepares the draft law, with such cognitive abilities and properties with the simultaneous programming of the function of vetoing unacceptable proposals, will allow reformatting the current legislation, in particular, to harmonise it with other legal systems, to avoid mistakes [15; 16].

To use artificial intelligence in legislative activity, it will be necessary to teach it to substantiate the social conditionality of a specific provision, to consider logical rules (identity, non-contradiction, excluded third, sufficient reason, etc, techniques and rules of rule-making technique to objectify a provision of law as a text, the content of which should be coordinated at the level of systemic links of the structural parts of the provision of law, within the institution of law, a branch of law, system of law in general in inseparable unity with the fundamental constitutional principles and international obligations of Ukraine. Based on the results of the work of artificial intelligence, the deputy corps will be provided with a draft law of the best form and content, which will already be agreed upon the law enforcement (depending on the subject of the future application of a specific rule of law) and scientific (compliance with fundamental doctrinal knowledge) levels. Legislators will be considered only the everyday aspect of the bill, which exists at the level of legal consciousness of an ordinary citizen and representative of the people and corresponds to the political situation in society [15; 16].

One of the areas of artificial intelligence use in the process of legal reform is digitalisation ("digitalisation" – transition to digital technologies, conversion of any information or information processes into digital format) of legal information. According

to Y.V. Baulin and V.Y. Tatsiy, a wide range of scientific problems is in the plane of digitalisation of the legal system in Ukraine. Obviously, in the context of reforming the national criminal legislation, the digitalisation of the three codes on liability for public offences (Criminal Code, Code of Misdemeanors, Code of Administrative Offenses) is only part of the national program of digitalisation of the entirely legal system. Therewith, the purpose of digitalisation of the codes is to help, first of all, the subjects of law application (detective, investigator, prosecutor, judge, defence counsel, probation officer, colony and executive service employee, etc) to decide when solving a problem with using artificial intelligence. A prerequisite for this is the construction of codes on a unified methodological foundation, which includes: a unified structure (for example, books, sections, sub-sections, articles, paragraphs, subparagraphs), terminology, typification (classification) of violations and their legal consequences, unification of various registers and other materials wherever possible, etc. Due to digitalisation, all the necessary legal information (laws, international and European acts, national and foreign practice, scientific achievements, the state of law and order, etc.) is systematised, processed and analysed to solve the problem, recommendations on possible solutions with a forecast of the consequences of each proposed solution, monitoring of the implementation of the decision and adjustments based on the consequences of its implementation, etc. Digitalisation provides wide opportunities for the establishment of automated workplaces for investigators, prosecutors, lawyers, judges, other stakeholders and public officials, for the deployment of relevant scientific research on a new information base, political decision-making, etc.

■ Conclusions

Based on the above, the following conclusions can be made:

1. The spread of artificial intelligence technologies in the modern world is gaining momentum. Pretty soon, people will not be able to imagine life without artificial intelligence systems, which are probable to become the largest innovative project in the history of human civilisation. Currently, there is no unified approach to understanding the nature of artificial intelligence in the technical sphere, which causes some uncertainty in the legal, social and moral and ethical spheres. There is a discussion between different groups of legal experts on the legal aspects of the advantages, benefits, threats and risks of artificial intelligence development; possible recognition of the legal personality of robots with artificial intelligence; the necessity to develop

new mechanisms for the implementation of legal responsibility and compensation for damage in the context of artificial intelligence. Evidently, it is difficult or almost impossible to stop the development of artificial intelligence. However, the establishment, implementation and use of artificial intelligence should undoubtedly be socially oriented and be in the interests of human security, preservation of personal space, will and self-awareness. Therewith, the development and use of artificial intelligence systems should be performed only subject to the rule of law, fundamental human and civil rights and freedoms, democratic values, and ensuring appropriate safeguards during the implementation of such technologies.

2. In recent years, examples of the implementation of artificial intelligence systems in various spheres and segments of social activity have been appearing intensively, and most of them are positively impressive. The fundamental and indisputable advantage of artificial intelligence technologies is that decisions are made and implemented in real-time based on the collection and processing of a huge amount of data; identification of all subjects and objects involved in the processes; application of special mathematical algorithms and robots. Using artificial intelligence technologies in the legal sphere and legal practice is an important factor in the development of the legal system, ensuring the rights and freedoms of men and citizens. The main areas of implementation of artificial intelligence systems in the legal sphere are using various software (e.g., databases, registers, smart contracts) that support lawyers by relieving them of routine operations; application of advisory programs based on artificial intelligence (e.g., chatbots, online services), which provide access to legal advice to the general public by providing legal services in an automated manner; prevention of socially dangerous phenomena by analysing available data using artificial intelligence, in particular electronic expert systems - programmes that simulate the intellectual activity of lawyers in a particular field based on information about the subject area and algorithmic principles of solving standard professional situations; introduction of artificial intelligence technologies into the judicial system (e-justice, e-court), etc.

3. Artificial intelligence is an important tool of legal reform, the newest component of its implementation technology, and a means of improving the efficiency of implementing qualitative legal changes in the modern conditions of the information society. The potential of artificial intelligence technologies contributes to the solution of complex, priority legal tasks, and the implementation of significant and progressive legal

transformations (innovations in the legal system, the system of law, the system of legislation, etc) due to its ability to make rational legal decisions, as appropriate to the circumstances of legal development, in real-time. Using artificial intelligence in legal reform allows for significantly expanding the horizons of legislative activity, improving the legislative process and diversifying the legislative technique. Legal reform should be implemented using the latest information technologies and with consideration for the future application of the amended (transformed) law in the context of digitalisation, which, for

example, will allow unifying legal terminology, making references to “related” other provisions of a particular regulation, etc. There is a necessity to introduce digitalisation in legislative activity, to codify the legislation of Ukraine at a higher level than it was before. New domestic legislation should be developed using modern achievements of legislative technique, which will increase its accessibility for perception and understanding by the population and significantly reduce the possibility of errors or abuses in the process of its implementation by various subjects of law.

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Штучний інтелект як інструмент правової реформи: потенціал, тенденції та перспективи

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■ **Анотація.** Метою наукової статті є узагальнення та розвиток теоретичних знань щодо потенціалу, тенденцій і можливих напрямів використання технологій штучного інтелекту як інструменту правової реформи, засобу підвищення ефективності її реалізації. Методологічну основу наукового пошуку становить сукупність принципів наукового пізнання (історизм, науковість, усебічність, плюралізм), методологічних підходів (діяльнісний, системний, компаративний, аксіологічний), загальних методів мислення (аналіз, синтез, абстрагування, узагальнення), філософських (діалектичний, метафізичний, герменевтичний, гносеологічний), загальнонаукових (історичний, синергетичний, функціональний, структурний) і конкретно-наукових (формально-юридичний, порівняльно-правовий) методів, застосування яких забезпечило обґрунтованість і вірогідність результатів дослідження природи штучного інтелекту як новітнього інструментарію технології здійснення правової реформи в сучасних умовах. Наукова новизна публікації полягає в тому, що вперше висвітлено потенціал технологій штучного інтелекту як важливого інструмента правової реформи, новітнього засобу підвищення ефективності її реалізації завдяки можливості штучного інтелекту приймати раціональні правові рішення, максимально адекватні обставинам правового розвитку, фактично в режимі реального часу, зокрема через розширення горизонтів законодавчої діяльності, удосконалення законодавчого процесу й урізноманітнення законодавчої техніки шляхом діджиталізації (цифровізації) правової інформації; удосконалено характеристики сучасного стану, тенденцій та основних векторів упровадження штучного інтелекту в правову сферу та юридичну практичну діяльність; набули подальшого розвитку наукові уявлення про доктринальні й нормативні підходи до розуміння природи штучного інтелекту, а також дискусійні питання та ймовірні загрози й виклики, пов'язані з правовим регулюванням створення, упровадження та використання технологій штучного інтелекту. Висновки наукової статті зводяться до таких положень: поширення технологій штучного інтелекту в сучасному світі набирає дедалі більших обертів. Доволі швидко людина не зможе уявити життя без систем штучного інтелекту, що, найімовірніше, можуть стати наймасштабнішим інноваційним проєктом за всю історію людської цивілізації. Досі не сформовано єдиного підходу до розуміння природи штучного інтелекту в технічній сфері, що зумовлює певну невизначеність у правовій, соціальній і морально-етичній галузях. Існує дискусія між різними групами експертів-юристів з приводу правових аспектів розвитку штучного інтелекту, можливого визнання правосуб'єктності роботів зі штучним інтелектом, необхідності розроблення нових механізмів реалізації юридичної відповідальності та відшкодування шкоди в умовах використання штучного інтелекту. Останніми роками інтенсивно з'являються приклади реалізації систем зі штучним інтелектом у різних сферах і сегментах соціальної активності, що здебільшого позитивно вражають своїми результатами. Використання технологій штучного інтелекту в правовій сфері та юридичній практичній діяльності є важливим чинником розвитку правової системи, забезпечення прав і свобод людини та громадянина. Потенціал технологій штучного інтелекту може сприяти розв'язанню складних, першочергових правових завдань, здійсненню істотних і прогресивних правових перетворень (нововведень у правовій системі, системі права, системі законодавства тощо). Застосування штучного інтелекту під час правової реформи дає змогу суттєво розширити горизонти законодавчої діяльності, удосконалити законодавчий процес й урізноманітнити законодавчу техніку

■ **Ключові слова:** інформаційні технології; штучний інтелект; технології штучного інтелекту; діджиталізація; правове регулювання; правовий розвиток; реформа; правова реформа; законодавча діяльність

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The concept, essence and significance of the activities of inquiry units

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■ **Abstract.** The purpose of the study – provides an analysis of historical, theoretical and regulatory aspects that form the concept, essence and significance of inquiry as a simplified form of pre-trial investigation. The attention was emphasised on the insufficiently explored aspects of the subject, and the importance of the relevant institution in the functioning of the mechanism of protection of human and civil rights and freedoms in Ukraine. The scientific originality of the study is that the research substantiates the importance of the functioning of the institute of inquiry, based on statistical data provided by public authorities, it is established that this institute performs the main objective – to unload the investigative units, and to restore the violated rights and freedoms of human and citizen. The author analyses the achievements of foreign researchers of law enforcement systems of the world, and the field of criminology, which connect the efficiency of state institutions with the mechanism of protection of human rights and freedoms. It is determined that the shortcoming in the functioning of the relevant institution is the shortage of institutional and administrative interdepartmental regulations to simplify a wider range of procedures in the pre-trial investigation of criminal offences and to improve existing forms of interaction. Conclusions. The historical, theoretical and regulatory aspects that define the concept, essence and significance of inquiry as a simplified form of pre-trial investigation are analysed. Several alternative positions of scientists interpreting the main categories are considered, and the author's opinion on the definition of the concept of inquiry, which is the procedure of actions of a specifically authorised entity, is substantiated. The essence of inquiry as a pre-trial investigation form and organisational and analytical process is argued. The positions of researchers are consolidated as a justification of the significance of the understudied institution in the functioning of the state in general and the criminal procedure system in particular

■ **Keywords:** organisational and legal principles; pre-trial investigation; genesis; interpretation of the concept; human and civil rights

■ Introduction

Ensuring human and civil rights and freedoms in the world is one of the highest priorities. The modern world community intensifies the processes of strengthening the rights and freedoms of man and citizen, which in turn significantly affects the problem of violation of human and civil rights and bringing the perpetrators to justice.

Currently, there are many institutions in Ukraine whose activities are designed to protect and defend the rights and freedoms of humans and citizens. One such institution is the National Police of Ukraine a

body authorised to perform a pre-trial investigation of criminal offences. The organisation of the work of the relevant units, their structural features, and managerial and procedural powers is the subject of a separate study, but within the framework of this subject, it is proposed to consider its main conceptual aspects. The pre-trial investigation, according to the Criminal Procedure Code of Ukraine, is reflected in two forms – pre-trial investigation and inquiry.

After amendments were adopted to the legislation of Ukraine, the institute of criminal misdemeanours

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was introduced, and the work of the National Police of Ukraine inquiry units was launched, the activities of which are governed by several regulations. However, the issues of organising the work of the relevant units, regulations of their organisational and legal framework and fundamental aspects of the functioning of the relevant institution, in general, remain open. Thus, the issue of scientific interpretation of the concept, essence and significance of the activities of inquiry units as an organisational and legal form of functioning of pre-trial investigation authorities was chosen for the study.

The problems of the functioning of inquiry units in law enforcement agencies have repeatedly been the subject of scientific research by both Ukrainian and foreign lawyers.

The purpose of the research is to analyse the concept, essence and significance of the activities of inquiry units as a simplified form of investigation of criminal offences. Based on the current regulations of national and international jurisdiction, the opinions of scientists, and empirical materials, conclusions on optimising the functioning of this institution in Ukraine should be argued. The purpose determined the necessity of performing several research tasks, including: analysis of approaches to the definition of the concept of inquiry; outlining the essence of inquiry and its significance for the institution of pre-trial investigation; development of recommendations for possible improvement of the relevant institution and the legal system of Ukraine in general. The scientific originality of the research is based on the fact that it analyses the main conceptual and categorical issues of establishing the essence and significance of the institute of inquiry as a simplified form of pre-trial investigation of criminal offences. Further steps to optimise its functioning are proposed, and the areas of promising scientific research are outlined.

■ Outline of the Main Material

The issue of the scientific study of the concept, essence and meaning of inquiry from the standpoint of administrative law is rarely considered in scientific sources from the standpoint of criminal procedural law. Therewith, in the context of the study of the institutional and legal framework for the functioning of the National Police of Ukraine's inquiry units in particular and all pre-trial investigation bodies in the law enforcement institutions of Ukraine in general, the efficiency of the latter's functioning could be improved. Along with this, inquiries as a form of the pre-trial investigation were considered in the works of scientists in the last century.

For example, V. Cherney and S. Chernyavsky argue that the genesis and modern experience of applying the institute of simplified proceedings both in Ukraine and in foreign countries demonstrate the necessity of further improvement of this procedural form [1].

For example, in the dictionary of the Russian language of S. Ozhegov, the concept of inquiry is interpreted as a preliminary administrative investigation [2], while in the dictionary of V. Dahl "to inquire" means "to interrogate, learn, inquire, reconnoitre, inquire, search, find by search, know ("become aware")", "to be sure of something" [3]. Thus, notably, the concept of inquiry in 1950-1990 was associated with the administrative process and was distinguished from the investigation based on this feature.

The Criminal Code of Ukraine of 2018 was amended following the procedure established by law to introduce the concept of "criminal offence", which covers crimes and criminal violations [4]. It is criminal offences, which are more serious than administrative offences and less serious than crimes, that are investigated by detectives in a simplified manner, as defined by the relevant amendments.

Significant in the context of the interpretation of the concept of inquiry, in the authors' opinion, is the assertion that the investigators perform the investigation of criminal offences under an abbreviated procedure, the duration of which should not exceed one month from the date of serving a person with a notice of suspicion [5], since it is the period during which the investigator is obliged to perform all procedural actions that essentially distinguishes the inquiry as an institutional process from the pre-trial investigation. In the author's opinion, the issue of the organisation (the necessity of planning, strategic thinking, the ability to efficiently distribute tasks and give instructions) of the pre-trial investigation in a short time, ensuring the rights and freedoms of a person and a citizen in this process during the characterisation of the inquiry from the standpoint of administrative law is key.

The conventional interpretation of the inquiry in criminal proceedings, according to O. Boyko and V. Boyko, was a combination of operational and investigative functions and administrative powers [6], which is emphasised by V. Litvinov, since, in his opinion, the inquiry was interpreted as a procedural activity to investigate the category of crimes provided for by law in full at the stage of pre-trial investigation or as a procedural activity of state authorities (officials) defined in the law, which, given the specifics of their specific activities, performed priority procedural actions to record the crime committed [7].

Such positions, in the author's opinion, are (and were before the amendments to the legislation of Ukraine) of conceptual importance, since by establishing specific criteria for the subject of the inquiry process, and the nature of the necessary actions, they established the essence and affirmed the importance of the relevant institution. However, the legislation of Ukraine now interprets the concept of inquiry in a different way. From the definition of the concept of

“investigator”, in the author's opinion, the interpretation of the concept of inquiry as a form of organisation of the pre-trial investigation process becomes completely understandable.

In particular, an investigator, according to the Criminal Procedure Code of Ukraine, is an official of the investigation unit of the National Police, a security body, a body exercising control over compliance with tax legislation, the body of the State Bureau of Investigation, in cases established by this Code, an authorised person of another unit of the said bodies, which are authorised within the competence provided by this Code, to perform a pre-trial investigation of criminal offences.

Thus, the inquiry from the standpoint of the organisation of work is a set of actions and decisions determined by the current legislation, performed and taken by an authorised person, they are designed to achieve the objectives of criminal proceedings within the time limit provided by law.

One of the tasks of this research is to study the essence of inquiry as a process of organising the functioning of one of the elements of the institution of protection of human and civil rights and freedoms. The relevance of this area in the study is conditioned, in particular, upon the fact that the main purpose of the inquiry (i.e. pre-trial investigation of criminal offences) is to ensure the restoration of human and civil rights and freedoms that have been violated.

The relevance of this area in the study is conditioned, in particular, upon the fact that the main purpose of the inquiry (i.e. pre-trial investigation of criminal offences) is to ensure the restoration of human and civil rights and freedoms that have been violated.

According to A. Sakovskyi and A. Zhyzhyn, the interaction of criminal police units with pre-trial investigation bodies is a recognised and widespread institution in the civilized world, which allows achieving the highest results by combining the efforts of stakeholders, as such cooperation is enhanced both quantitatively through human resources and qualitatively through the narrow specialisation and professional skills of each participant in a particular field of activity [8].

In the author's opinion, the essence of the inquiry is to use the institution of pre-trial investigation as quickly as possible, involving all organisational and procedural resources within the limits defined by the legislation of Ukraine to restore the rights and freedoms of humans and citizens. All this is primarily organisational, but the actions performed by the investigator in the pre-trial investigation are procedural. Such definition of the concept and essence of inquiry forms the content of this process in the context of administrative law.

Therewith, analysing the positions on the definition of the importance of the activities of the investigation units, to be noted that they have some specific

features, thus, a summary and further justification of the relevant doctrines will be provided.

According to S. Edwards, crime has always been in society and probably always will be, although the forms of crime have changed significantly, as violent crimes have transformed, as people have always been characterised by forms of antisocial behaviour [9]. Such a position is supported by D. Govender, who emphasises the interconnectedness of the development of society and crime as two mutual processes [10].

The most common types of criminal offences are theft, infliction of minor bodily harm, etc. These types, according to the CC of Ukraine, belong to the category of criminal offences that are investigated under a simplified procedure. It is the increase in the number of such offences and the necessity to provide a rapid response to their commission that contributed to the development of the institute of investigators and partially determine its importance.

Exploring the aspects of using global information technologies in the activities of law enforcement agencies, M. Linares notes that the necessity of introducing such technologies is primarily conditioned upon the incessant growth of crime rates and changes in their nature. In his opinion, “IT will become a panacea for decision-making, and using this technology will improve police work by statistically predicting where, when and who is most probably to commit a crime, as there is too much crime to hope for objective, unbiased forecasting of events” [11]. Sharing the position of M. Linares, in the author's opinion, the simultaneous reorientation of the institute of inquiry to electronic document management would significantly improve its work and significantly affect its efficiency.

According to the positions of foreign and domestic researchers, A. Melnyk notes that the necessity of inquiry as a form of pre-trial investigation is due to the excessive workload of investigators (primarily the National Police of Ukraine) with criminal proceedings for crimes of minor gravity, which are currently considered criminal offences. To relieve investigators and effectively organise a pre-trial investigation of minor crimes, the institution of inquiry and criminal misconduct was introduced [12].

The Unified Report on Criminal Offenses for January-July 2021, published on the official website of the Office of the Prosecutor General, established that out of the total number of recorded criminal offences (221,403), the share of criminal offences is 75,103, which indicates the position on the establishment of an institution of inquiry, which relieves the investigative units and provides an opportunity to devote time to the investigation of serious and particularly serious crimes [13]. Such results of the functioning of inquiry units fully reflect the importance of it as an institution in the system of law enforcement agencies of Ukraine. Although the shortcomings of its functioning

are systematically highlighted by scientists, in the author's opinion, its activity plays a key role in the functioning of the mechanism for the protection of human and civil rights and freedoms in Ukraine, which is confirmed by the positions of domestic and foreign scientists, statistical data and legal framework, and therefore author proposes to consider the issue of organising the work of the relevant body from an administrative and legal standpoint in the future.

■ Conclusions

Based on the analysed opinions of scientists of the domestic space, and foreign colleagues, the study of statistical information on the efficiency of the functioning of the inquiry units, the analysis of organisational, administrative and regulatory sources, allowed substantiating several important conclusions, including the following:

1. From the standpoint of the form of organisation of work, the inquiry is a set of actions and decisions determined by the legislation of Ukraine, which are made (taken) by an authorised person, they are designed to achieve the objectives of criminal proceedings within the time limit established by law.

2. The essence of the inquiry as a form of organisation of pre-trial investigation in a short time is that a designated official should develop a pre-trial investigation plan as quickly as possible, distribute tasks among all participants of the prosecution for the fastest, full and comprehensive examination of available evidence to present the results of such activities to the procedural supervisor and send the criminal proceedings to the court.

3. In the author's opinion, the importance of inquiry as a form of simplified pre-trial investigation used for criminal offences is that this institution allows establishing quickly, impartially and objectively the involvement of a person in violation of human and civil rights, and then sends the relevant criminal proceedings to the court for its consideration. It is the most important factor in the case of violation of the rights and freedoms of a particular person since the desire to restore the violated rights arises immediately after they have been violated, and the relevant institution allows compliance with the principle of the reasonableness of terms in criminal proceedings and prevents adverse manifestations of individuals regarding the inaction of public authorities.

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Поняття, сутність і значення діяльності підрозділів дізнання М. Ю. Романов

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■ **Анотація.** Мета публікації – здійснити аналіз історичних, теоретичних і нормативних аспектів, що формують поняття, сутність та значення дізнання як спрощеної форми досудового розслідування. Акцентовано увагу на недостатньо досліджених аспектах теми, значенні відповідного інституту у функціонуванні механізму захисту прав і свобод людини та громадянина в Україні. Наукова новизна дослідження полягає в тому, що в статті обґрунтовано значення функціонування інституту дізнання, на підставі статистичних даних, висвітлених органами державної влади, встановлено, що цей інститут виконує основне завдання – щодо розвантаження слідчих підрозділів, а також відновлення порушених прав і свобод людини й громадянина. Проаналізовано напрацювання іноземних дослідників правоохоронних систем світу, а також галузі кримінології, що пов'язують ефективність функціонування державних інституцій з механізмом захисту прав і свобод людини. Визначено, що недоліком у функціонуванні відповідного інституту є брак організаційно-розпорядчих міжвідомчих нормативно-правових актів щодо спрощення ширшого обсягу процедур у досудовому розслідуванні кримінальних проступків, а також удосконалення вже наявних форм взаємодії. Висновки. Проаналізовано історичні, теоретичні та нормативні аспекти, що формують поняття, сутність і значення дізнання як спрощеної форми досудового розслідування. Розглянуто декілька альтернативних позицій вчених, що тлумачать основні категорії, обґрунтовано авторську позицію щодо визначення поняття дізнання, що є порядком дій конкретного уповноваженого суб'єкта. Аргументовано сутність дізнання як форми досудового розслідування та організаційно-аналітичний процес. Консолідовано позиції дослідників як обґрунтування значення досліджуваного інституту у функціонуванні держави загалом і системі кримінального процесу зокрема.

■ **Ключові слова:** організаційно-правові засади; досудове розслідування; генеза; тлумачення поняття; права людини і громадянина

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Does “gender equality” sound like a utopia?

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■ **Abstract.** The situation with gender equality in Ukraine is explored. The reasons for the discrepancy between the formal and actual situation of gender equality are identified, and possible areas of improvement of regulations and their implementation are proposed. Gender stereotypes and gender attitudes that exist in Ukrainian society are described in detail. It is emphasised that they are gradually transforming the influence of the active introduction of femininity. The issues of gender equality in the spheres of national security and defence and economic activity were analysed. The purpose of the research - identify the features of the ideology of gender equality in Ukraine and the role of the state and members of society in the development of a new, fair attitude towards women. The methodology of the research is based on the dialectical-materialistic method of scientific cognition of social phenomena, general scientific methods of formal logic (deduction, induction, analogy, analysis, synthesis, abstraction and specification, modelling), specific methods of legal science (search and processing, monitoring). Scientific originality. In the publication, the doctrine of women's rights in modern society and the state was further developed; theoretical material on gender equality in Ukrainian society (causes and consequences of the existing gender ideology) was systematised; the necessity of developing a new ideology of gender equality was confirmed. Conclusions. The state has a powerful influence on a woman's awareness of her purpose in life, and her role in the state and society. However, the actual implementation of the principles of gender equality, and the implementation of “positive actions” designed to eliminate the imbalance between the opportunities of women and men, depends closely on the activity of the rights holders

■ **Keywords:** women's rights; ideology; gender equality; gender stereotypes; gender attitudes; state

■ Introduction

The historical significance of the proclamation of Ukraine's independence is that the period of class assessment of a person, and the lack of rights of non-citizens of the state has ended. Transformations were expected regarding the legal status of women, their actual, not declared equality with men. However, radical changes in the socio-political system still require updating legislation, in particular, the ideology of attitude toward women in society.

It is widely assumed that women in Ukraine have equal opportunities with men, but not everyone intends to implement them. However, experts and statistics prove that it is false. Ukrainian women continue to be discriminated against based on their gender [1-4].

The issues of gender equality were considered by scientists, state and public figures (the publication uses materials from the works of the following authors: T. Zhurzhenko, O. Perunova, N. Kaminska, L. Kasyniuk, O. Kremleva, E. Melnyk, I. Prus, S. Cherniavsky etc.) Their developments have a significant scientific value for the improvement of legal regulation of gender issues (mostly it is about the role of women in the context of gender equality), raising the level of legal awareness and culture. Considering the importance of the discussion in the process of state building, and the development of civil society, the author considers it appropriate to analyse the situation in this area.

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The purpose of the research – identify the features of the ideology of gender equality in Ukraine, and the role of the state and members of society in the development of a new, fair, status for women.

In the publication, the doctrine of women's rights in modern society and the state was further developed; theoretical material on gender equality in Ukrainian society (on the causes and consequences of the existing gender ideology) was systematised; the necessity of developing a new ideology of gender equality was substantiated.

■ Outline of the Main Material

For the rule of law, both the fact of fixing the right in the law and its enforcement are crucial. Recognition and guarantee of fundamental human and civil rights are one of the most important features of the rule of law. "All human beings are born free and equal in dignity and rights" – this crucial thesis is reflected in the Universal Declaration of Human Rights [5; 6]. However, freedom is not possible if it is not guaranteed by the state [7].

The introduction of gender equality is a prerequisite for positive changes in the life of society, the implementation of human rights, a guarantee of effective solutions to existing state-legal problems and strengthening national security. The process of developing the social orientation of the state and society, the relevant regulations, the implementation of international obligations, and, consequently, the entry of Ukraine as an equal member of the world and European community requires a conceptual definition, development and implementation of gender policy as a foundation for the development of gender culture, the design of gender activity of men and women, adaptation to the world conditions of gender democracy - a component of social democracy [8].

The adoption of the Law of Ukraine "On Ensuring Equal Rights and Opportunities for Men and Women" provided an opportunity to consolidate the definition of gender equality - equal legal status of women and men, and equal opportunities for its implementation, and this allows persons of both sexes to participate on an equal foundation in all spheres of society (Article 1 of this Law) [9]. Thus, it is officially acknowledged that gender equality applies to both women and men, but granting privileges or advantages to one gender immediately affects the position of the other, and ultimately – the development of society. Achieving gender equality is not about restricting the power of men and transferring it to women but about equal participation in decision-making and resource allocation regardless of gender, cooperation and partnership between women and men [10].

90% of Ukrainian citizens who suffer from violence in any form – economic, psychological, physical, or sexual – are women. Even despite the global scale

of violence in Ukraine, the problem is mostly "in the shadows". The principle of "it's your fault" is widespread, which means that victims try to hide their suffering, experts say. Significantly, 68% of Ukrainian women do not consider humiliation to be a manifestation of violence. Such are the results of the survey of the Ukrainian Institute of Sociological Research [1].

The underlying cause of the ideology of gender inequality is the transmission of gender stereotypes from one generation to the next – internal attitudes about the place, role, and importance of men and women in society and family. Several groups of such standards are defined. The first includes stereotypes of masculinity (male qualities) – femininity (female qualities). The stereotypical representation of masculinity is endowed with "actively creative" characteristics, and instrumental traits, including: activity, dominance, self-confidence, aggressiveness, logical thinking, and leadership ability. Femininity, on the contrary, is considered as a "passive-reproductive principle", which is manifested in expressive personal characteristics: dependence, caring, low self-esteem, emotionality.

The second group of gender stereotypes is the idea of the distribution of family and professional roles between men and women. A woman is limited to staying in the private sphere of life (household chores, childbirth), she is responsible for family relationships. Men are endowed with the following features: activity in public life, professional success, and responsibility for the financial support of the family.

The researchers determined that housework and family care takes 23 years in a woman's life. Therefore, she chooses a job with more flexible conditions, as there are still several activities that are considered to be women's only, such as childbirth (although it is a benefit for the entire society)[1]. The vast majority of men (almost 90%) are satisfied with the division of responsibilities in their own families, and more than half (62%) consider that their partners do not object to the defined division of labour. The disparity in the average time spent by women on housework (twice as much as men – respectively 29 as opposed to 15 hours per week) does not alarm them [11].

The third group of gender stereotypes is determined by the specifics of the content of work. According to conventional notions, women's work should be performing, i. e. servicing, have an element of expressive activity. Therefore, women mostly work in trade, healthcare, education. For men, creative and managerial crafts are possible, and employment prevails in the instrumental sphere [12].

Such stereotypes are confirmed by the relatively small number of women in higher positions with higher salaries. Statistics demonstrate that women in Ukraine earn, on average 28%, less than men, although wages are one of the main economic criteria

that unite the interests of employees, entrepreneurs, and the state and significantly affect the living standards of the population. Thus, it is an indicator of the achievements and failures of society.

When determining the number of wages, the owner or authorised body, by Art. 94 of the Labour Code of Ukraine [13] and Art. 1 of the Law of Ukraine "On Remuneration of Labour" [14], must consider the complexity and conditions of work, professional and business qualities of the employee, the results of their work and the economic activity of the enterprise where the person works, but in no case gender.

When applying for high-paying jobs, preference is preferred to men (sometimes when placing a vacancy, the requirements for the applicant immediately indicate the male gender, which is discrimination and contrary to the Constitution of Ukraine and several other provisions). Perhaps that is why Art. 17 of the Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men" prohibits employers from offering jobs only to women or men in vacancy announcements (advertisements), except for specific work that can be performed exclusively by persons of a particular gender, to make demands giving preference to one of the genders, to demand from applicants information about their personal life, plans for having children, etc. Thus, gender policy is being actively implemented in Ukraine, although it has a declarative connotation [15; 16].

Ukraine belongs to the group of countries with the lowest representation of women in power. There is a definite trend: the higher the authority, the fewer positions are held by women. According to the results of the last national elections, 46% of women were elected to village and town councils; only 28% - to regional councils; 15% - to the councils of large cities and regional centres. There are even fewer of them in the Parliament - 12% and only 6% of women in Ukraine hold the positions of ministers and deputy ministers [1].

In addition to gender stereotypes, there is another reason for gender inequality - gender attitudes. All of them are connected and complement each other, are part of life, affect behaviour, developing worldviews.

Gender perceptions are the primary knowledge that is the foundation of gender identity. They reproduce a generalised image of masculinity, femininity, androgyny, and sexual undifferentiation, which is developed in the process of gender socialisation. Under the influence of gender ideas, the personality acquires individual gender experience, which can be observed in the behavioural, emotional, and motivational manifestations of the personality [12].

The child's gender ideas are developed within the framework of gender stereotypes, attitudes, knowledge, judgments, and values that every society, nation, and people have and consciously or unconsciously instils in their descendants.

There are two main types of gender attitudes - patriarchal and feminist. Patriarchal systems have the following features: 1) the approach according to which a man has a leading, active role in the family and society, and a woman has a subordinate, passive role; 2) the belief that the life values of women and men are different: family and love - the main values for women; business, work, self-realisation outside the family - the values of men; 3) preference for family relationships in which the man is the head of the family, makes the main contribution to the family budget; 4) condemnation of the behaviour of women who are dominated by orientations towards self-realisation outside the family, career, professional achievements; 5) the idea that the patriarchal model of society is natural, as it is caused by biological gender differences.

Feminist attitudes of consciousness cover the following aspects: 1) condemnation of using biological gender differences to introduce a rigidly fixed, subordinate position of women in the family and society; 2) rejection of the existence of strictly fixed male and female roles in the family and society; 3) the belief that women and men in modern society have unequal opportunities for self-realisation in various spheres, and this situation is considered unfair; 4) the approach according to which professional achievements, career, implementation of one's capabilities and abilities, and the desire for self-realisation in various spheres of public life are of high value for women; 5) the opinion that society should strive for equal participation of fathers and mothers in the life of the child; 6) condemnation of the attitude towards women as an object of sexual oppression.

Admittedly, a person has to overcome stereotypes imposed from birth to be self-sufficient and implement themselves in various spheres of life, as they interfere with their comprehensive development and limit their choice of the profession [12]. The thought of modern society is being transformed under the influence of the active introduction of femininity. Currently, men and women in Ukraine want to see changes in their conventional roles. 77% of Ukrainians say that equality between men and women is essential for them, and 61% of Ukrainians want more balanced representation in political and public life. However, when asked about the quantitative representation of different genders at all levels of political and public life, women are more inclined than men to demand an increase in their representation. Therewith, a significant number of men share the opinion that the situation should be changed and the percentage of women's representation should be increased. And only 36% believe that men should dominate [11].

Since the independence of the state, the second type of woman's identity - "business" - has been actively developed. A woman entrepreneur inevitably faces the necessity of double resistance, as she

is forced to implement her initiatives in conditions of risk, lack of legal guarantees, and political and economic instability. Therewith, she has to confront both the bureaucratic system that blocks her initiative as an entrepreneur and patriarchal stereotypes and gender discrimination in the male business environment. Thus, the "identity of a businesswoman" in modern Ukrainian society can be considered a form of "identity of resistance", and it is a problem [17].

There are problems with the implementation of the policy of equal rights and opportunities for women and men in the security and defence sector. War has remained a purely male affair for thousands of years, but due to military aggression, stereotypes about the purpose and capabilities of women inherent in a patriarchal society are deepening, as women have become armed. In leadership positions in law enforcement agencies, and military trenches, they cause some irritation, and sometimes openly aggressive rejection by men [18].

Implementation of NATO standards and recommendations should minimise such adverse phenomena. In particular, all positions of privates, sergeants and petty officers are open in the State Border Guard Service of Ukraine; all areas of educational training in the National Academy of the State Border Guard Service of Ukraine are named after B. Khmelnytsky for women and men. More than 11 thousand women work and serve in the ranks of the border guard agency. The agency ensures equal access to positions and military ranks and equal responsibilities during service.

To ensure the efficient provision of equal rights and opportunities for women and men, a specific list of measures covering all aspects of implementation within the competence of the tasks of the National Action Plan for the implementation of UN Security Council Resolution 1325 "Women, Peace, Security", and the National Program under the auspices of NATO-Ukraine was established. In particular, it is the establishment of conditions for the military service

of women, their training, and professional development, and informing society about the gender processes that occur in the department.

Positive examples of qualitative integration of the gender component into the activities of the State Border Guard Service of Ukraine are the declaration of the implementation by the Service of Article 12 of the Law of Ukraine "On Ensuring Equal Opportunities for Women and Men".

In addition, in the bodies of the State Border Guard Service of Ukraine, there are freelance assistants to the heads of gender issues. Transparent conditions for the professional development and career growth of the staff have been established. In particular, servicemen, regardless of gender, have equal rights and opportunities to participate in the project "New Face of Leadership". Decision-making on the appointment of servicemen to leadership positions under this project is based on a rating assessment of their professional abilities [19].

■ Conclusions

The state has a powerful influence on a woman's awareness of her purpose in life, and her role in the state and society. However, the actual implementation of the principles of gender equality, and the implementation of "positive actions" designed to eliminate the imbalance between the opportunities of women and men, depends closely on the activity of the rights holders.

Unfortunately, many Ukrainian women remain silent about violations of their rights, discrimination, harassment and even violence due to distrust in the national law enforcement and judicial system. Most often, such passivity is associated with a low level of awareness of legal issues [15; 16]. Without high motivation, it is too difficult to successfully overcome the existence of "natural" gender roles, and therefore the phenomenon of gender equality may remain a utopia for a long time.

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«Гендерна рівність» звучить як утопія?

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■ **Анотація.** Досліджено ситуацію, пов'язану з гендерною рівністю в Україні. Визначено причини невідповідності формальної та реальної ситуації щодо гендерної рівності, запропоновано можливі напрями покращення нормативного регулювання та його виконання. Детально схарактеризовано гендерні стереотипи й гендерні установки, що побутують в українському суспільстві. Акцентовано, що вони поступово зазнають трансформації під впливом активного впровадження фемінітивів. Проаналізовано проблематику гендерної рівності у сферах національної безпеки й оборони, економічної діяльності. Мета статті – з'ясувати особливості ідеології гендерної рівності в Україні та роль держави й членів суспільства у формуванні нового, справедливого ставлення до жінок. Методологію дослідження формують діалектико-матеріалістичний метод наукового пізнання суспільних явищ, а також загальнонаукові методи формальної логіки (дедукції, індукції, аналогії, аналізу, синтезу, абстрагування й конкретизації, моделювання), спеціальні методи юридичної науки (пошуку й обробки, моніторингу). Наукова новизна. У публікації отримала подальший науковий розвиток доктрина прав жінок у сучасному суспільстві й державі; систематизовано теоретичний матеріал із проблематики гендерної рівності в українському суспільстві (причини та наслідки наявної гендерної ідеології); засвідчено необхідність формування нової ідеології гендерної рівності. Висновки. Держава здійснює потужний вплив на усвідомлення жінкою свого призначення в житті, її ролі в державі й суспільстві. Проте фактичне впровадження принципів гендерної рівності, а також реалізація «позитивних дій», спрямованих на усунення дисбалансу між можливостями жінок і чоловіків, безпосередньо залежить від активності носіїв прав

■ **Ключові слова:** права жінок; ідеологія; гендерна рівність; гендерні стереотипи; гендерні установки; держава

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Signs of the subject of bribery provocation: Some issues of qualification and law enforcement

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■ **Abstract.** The purpose of the scientific research is to critically analyse the features of the subject of bribery provocation in the context of legal assessment and practical application of Article 370 of the Criminal Code of Ukraine. Methodology. The research comprehensively uses the following methods of scientific knowledge: historical, terminological, system-structural, and Aristotelian. Scientific originality. Based on a comprehensive legal analysis of the content of the features of the subject of the crime under Art. 370 of the Criminal Code of Ukraine, in particular by exploring the history of regulation and analysis of developments in the relevant area of law enforcement practice, the author improved the position outlined in the legal literature that in the current version of the provision on the provocation of bribery should be abandoned the features of the specific subject of this crime (official) in favour of including the features of the general subject. Conclusions. It is proposed to provide in part 1 of the updated construction of the criminal law prohibition on the provocation of bribery the signs of the general subject of provocation of bribery, and in part 2 of the relevant article to include a reference to a specific subject – a law enforcement official. From a *de lege ferenda* point of view, it has been substantiated that in Part 2 of Article 370 of the Criminal Code of Ukraine the term “law enforcement official” should be substituted with the more appropriate term “employee of a law enforcement agency”. In addition, based on the results of the study of the relevant area of law enforcement practice, a proposal was made to develop improved material and procedural criteria for identifying signs of unacceptable provocation in the actions of authorised employees of law enforcement agencies

■ **Keywords:** provocation of bribery; specific subject of crime; employee of law enforcement agency; law enforcement practice; judicial practice

■ Introduction

Manifestations of corruption have varying degrees of adverse impact on society [1]. Therewith, provocation of actions intended for corruption abuse is a manifestation of no less adverse, or rather socially dangerous behaviour.

The definition of the socio-legal nature of corruption, its essential features, the definition of the scientific definition of the concept of “corruption”, and the establishment of relationships with other legal phenomena is fundamental both for the study of the legal nature of corruption and for practical activities in the field of combating this phenomenon [2].

Provocation of bribery is a deliberate unilateral activity (actions) of an official intended to simulate the behaviour of a person to offer, promise or provide an unlawful benefit or accept an offer, promise or receive such a benefit to exposing the person who offered, promised, provided an unlawful benefit or accepted an offer, promise or received such a benefit if the provoked person is not guilty [3].

Historically, liability for provoking corrupt behaviour was provided only for public officials. Such an approach can be explained by the fact that the criminal law issues under consideration were aggravated,

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and therefore discussed in the context of the adverse reaction of society to the activities of employees of the bodies engaged in operational and investigative (intelligence) activities. Currently, unlike the Criminal Code of Ukraine, the legislators of some states – former Soviet republics associate provocation of bribery (bribery) with the actions of a private person, understanding it as an attempt to provide money, securities, or other property or an attempt to provide property services to an official without their consent to establish artificial evidence of a crime or blackmail (for example, Article 350 of the Criminal Code of the Republic of Armenia). Moreover, some sources quite rightly outline the conclusion that by using such a description of the crime, the legislator simply postpones the moment of its completion to an earlier stage, thus not linking the elements of bribery provocation with a particular reaction of the provoked person.

In modern conditions, the problem of the provocative behaviour of individuals acquires universal content and additional relevance due to the activation of civil society on the issue of combating corruption. Therewith, it is no secret that under the guise of active anti-corruption slogans, they can be easily used for provocative purposes, to “settle scores” with competitors, for personal or professional revenge, etc. Therefore, the responsibility for the provocation of bribery should be universal in terms of the interpretation of the signs of the subject of this crime. The specifics of the qualification of provocation should fully cover the behaviour of both law enforcement officers who provoke officials to further expose them, and private individuals who resort to such methods of “reprisal” against their “enemies”.

Currently, the issue of liability of the so-called agent provocateur used by an official to provoke bribery has not been unanimously resolved in the literature. Such a person is not considered a specific subject of the crime under Art. 370 of the Criminal Code of Ukraine, and therefore they are subject to criminal liability only for incitement to give or receive an undue advantage in the presence of other elements of these crimes and, admittedly, a sign of complicity. Thus, the author concludes, if such a person only established the conditions, but did not induce the giving - receiving of unlawful benefit, then their criminal liability should be excluded due to the lack of signs of *corpus delicti* [4].

In the national criminal law science, the following scholars considered the problematic issues related to the definition of the subjective composition of bribery provocation: O. Alyoshyna, P. Andrushko, S. Babych, Y. Baulin, Y. Grodetskyi, O. Grudzura, O. Dudorov, N. Yegorov, P. Zagodirenko, K. Zadoya, V. Kyrychko, V. Komar, O. Lemeshko, M. Melnyk, V. Navrotskyi, V. Osadchyi, O. Okhotnikova, A. Panova, V. Trepak, O. Us, M. Khavroniuk and other authors.

Based on a comprehensive legal analysis of the content of the features of the subject of the crime under Art. 370 of the Criminal Code of Ukraine, in particular by referring to the history of regulation and analysis of developments in the relevant area of law enforcement practice, the author improved the position expressed in the legal literature that in the current version of the provision on the provocation of bribery should be abandoned the features of the specific subject of this crime (official) in favour of including the features of the general subject.

■ Outline of the Main Material

Some modern corruption crimes require new approaches to their detection, investigation and suppression [5]. Bribery provocation is no exception.

It is well-known that the subject of the crime under Art. 370 of the Criminal Code of Ukraine has specific features - this provision refers to an official in the field of public or private law.

According to the actual (not legal) subject composition, provocative actions can be divided into those committed by: 1) immediate officials of operational and investigative bodies in the process of conducting operational and investigative activities; 2) persons who assist operational and investigative bodies on a confidential basis (secret agents) [6].

Therewith, there are proposals in the scientific literature to provide for criminal liability for the general subject for committing this crime. In particular, O. Grudzur notes that a general subject *de facto* can commit the crime in question, as it is not necessary to use official or authoritative powers, the authority of the position held or official position, causing damage to both the main and additional object of the crime in question.

According to the scientist, the acts committed by such a subject are not characterised by a lower degree of public danger than those committed by an official. It is explained by the fact that in both cases the giving or receiving of undue advantage is due to artificially established circumstances that do not differ in their content [7].

According to O. Kvasha, a person who establishes external circumstances for committing a corruption offence is not an official but only performs in the interests of the latter. Accordingly, such a person cannot be held liable under Art. 370 of the Criminal Code of Ukraine, which establishes the grounds for liability for an official as a specific entity. In this case, the provocateur is not subject to criminal liability at all, as their actions are not incitement to a corruption offence in the absence of immediate influence (connection) on the person [8]. This statement seems somewhat radical and insufficiently substantiated, especially given the explicit reference of the legislator to the actions of the official. Instead, the

actions of other persons who do not have the features of a specific entity should be legally assessed by reference to the provisions on the types of complicity (Article 27 of the Criminal Code of Ukraine).

In a conditionally secondary, technical and legal context, notably, in Art. 365 of the Criminal Code of Ukraine the legislator uses the term “law enforcement officer” to describe the subject of the crime, and in Part 2 of Art. 370 of the Criminal Code of Ukraine – “law enforcement officer”. It seems that K. Zadoya rightly notes that both concepts have the same meaning, as all law enforcement officers are officials, at least by performing the functions of a representative of the authorities. Thus, *de lege ferenda* in Part 2 of Article 370 of the Criminal Code of Ukraine the sign “law enforcement officer” should be replaced by the sign “employee of law enforcement agency” [9]. Such an approach seems to be in line with a logical and systematic interpretation of criminal law.

O. Us develops this thesis, noting that in several articles of the Special Part of the Criminal Code of Ukraine, a law enforcement officer is either the subject of the relevant crime (for example, Article 365) or the victim of a crime (for example, Article 342). In addition, in the articles of the Criminal Code of Ukraine that contain references to “law enforcement agencies”, except for part 2 of Article 370 of the Criminal Code of Ukraine, only the term “law enforcement officer” is used (part 2 of Article 22, p. 2 of Article 57, Articles 342, 343, 345, 347-349, part 2 of Article 353, Articles 365, 380 of the Criminal Code of Ukraine). Based on this, the author raises a reasonable question: can a law enforcement officer not be an official? And further, referring to the relevant provisions of Part 3 of Art. 18 of the Criminal Code, subpar. 2, par. 1 of the Resolution of the Plenum of the Supreme Court of Ukraine “On judicial practice in cases of bribery” of April 26, 2002, No. 5, and the provisions of regulations governing the activities of individual law enforcement agencies, O. Us concludes that it is unlikely that a law enforcement officer may not be recognised as an official [10].

If a private person induces another person to bribe, they can be prosecuted for incitement to commit a crime under Part 4 of Article 27 and Article 368 of the Criminal Code of Ukraine or Article 369 of the Criminal Code of Ukraine. If the person who establishes the circumstances or conditions for the provision - receipt of the unlawful benefit is not an official, but only acts in the interests of the latter, then, as already mentioned above, they cannot be held liable under Art. 370 of the Criminal Code of Ukraine, the subject of which is a specific one, namely an official.

In the relevant comparative legal context, the following should be noted. If, by Art. 370 of the Criminal Code of Ukraine, the subject of provocation of bribery is exclusively an official, then according to

the legislation of most foreign countries, the subject of the crime under study is a general, that is, a natural sane person who has reached the age of criminal responsibility. O. Hrydzur positively perceives this position, as in fact, he writes, provocative actions can be committed by any person and it does not necessarily have to be officials. Thus, this researcher is convinced that the domestic Criminal Code should consider the legislative provisions of foreign countries regarding the recognition of the general subject of the crime as the subject of provocation of bribery. It is explained primarily by the fact that Art. 370 of the Criminal Code of Ukraine does not cover the cases of establishment of circumstances and conditions by the general subject of the crime, which causes the offer or receipt of undue advantage. Therefore, this results in a fundamentally different legal assessment of virtually identical acts [7].

In modern conditions, from the standpoint of *de lege lata*, if the incitement of a person to offer, promise or provide an undue benefit or acceptance of an offer, promise or receipt of such a benefit is committed to exposing another person by an individual who is not an official (it applies to a person who performs professional activities related to the provision of public services), or even an official, but without using their official position, the act can be regarded as incitement to commit a crime under Art. 354, 368, 368-3, 368-4, 369 or Art. 369-2 of the Criminal Code of Ukraine and qualified concerning Part 4 of Art. 27 of the Criminal Code of Ukraine. After all, this criminal law provision implies that the instigator can act, guided by different motives and, therewith, pursuing different purposes, one of which may be to expose the offender.

Such unequal qualification causes some contradictions, as when qualifying such an action as complicity, there are no subjective signs of complicity in these crimes, there is no single intent, and there is no desired consequence for all accomplices. Therefore, such actions cannot be qualified as incitement to the relevant crimes [11]. The analysis of law enforcement practice, especially regarding the involvement of “prepared” persons in provocative actions by law enforcement officers, indicates the objective necessity to provide for liability for provocation of bribery for such persons. The following example highlights this demand.

Thus, the Prydniprovskyi District Court of Cherkasy found the Head of the State Architectural and Construction Control Inspectorate in Cherkasy region (hereinafter – the Inspectorate) M. not guilty of committing a criminal offence under Part 4 of Art. 368 of the Criminal Code of Ukraine. M. was charged with the fact that working as the head of the Inspectorate, being an official in a responsible position, having the power and authority granted to him, contrary to the interests of the service, acting intentionally, for selfish motives, for personal enrichment, he demanded

from the director of "Budgarant-2000" LLC R. money for 80 thousand hryvnias for the adoption of a positive decision on the commissioning of the building used for office space.

The accused M. pleaded not guilty and explained in court that the Inspectorate had been repeatedly approached by developer R. with documents for commissioning the building. These documents were not accepted due to certain deficiencies. On 18 June 2013, M. came to work to say goodbye to the employees, as he was dismissed. On the street, he met V., who invited him to sit in the car, but M. did not agree and went into the building, going up the stairs to the Inspectorate. The SSU officers grabbed him on the stairs, pressed his face to the wall and handcuffed him. About 10-15 minutes later, he was turned away from the wall and saw a package under his feet, but immediately told the investigator and witnesses who arrived there that he had nothing to do with the package and its contents. Subsequently, all the participants moved to the office of M., where the investigator found the money in the package.

In court, M. insisted that he was the victim of provocative actions by the SSU officers, who used his hostile relationship with the developer R., and used V., who was instructed to hand him a package with money under some pretext. In this regard, V. insisted that they both sit down in the car. Since he disagreed and moved away from V. inside the building, he thus disrupted the planned operation. Due to this, the SSU officers detained him and kept him for some time on the stairs, during which time they took a bag with money from V. and threw it under his feet. The court concluded that since the accused M. claimed that a provocation had been committed against him with the involvement of the "intermediary" V., who was assigned the role of transferring the funds to him, the pre-trial investigation body was obliged to prove the absence of provocation, and the court, accordingly, was obliged to verify the accused's allegations.

The court noted that the facts and circumstances indicate that the version of the prosecution is not the only one, and the arguments of the defence about the provocation of the crime are not perceived as completely incredible, as a result of which the court believes that according to Part 4 of Article 17 of the CPC of Ukraine, all doubts about the proof of the person's guilt are interpreted in favour of such a person. In addition, it was noted that the rest of the evidence (witness testimony, inspection reports and delivery of funds) in their totality were insufficient, in the court's opinion, to convict. Accordingly, the court delivered an acquittal due to the lack of proof that M. had committed a criminal offence under Part 4 of Article 368 of the Criminal Code of Ukraine [12].

It should be noted that the actions of law enforcement officers who use an instigator in the process of

bribery provocation can be assessed as the organisation of a provoked crime, since such persons at least supervise the preparation of the instigator.

Therewith, many domestic authors, who develop the problem of provocation of crimes, raise the question of the expediency of amending Article 370 of the Criminal Code of Ukraine to recognise as the subject of a crime an official, and other persons who have reached the age of criminal responsibility.

For this purpose, it is proposed, for example, a situation, which is quite real in practice, when a driver deliberately violates traffic rules to expose a patrol police officer, thus establishing a situation that causes the driver to offer and further transfer an illegal benefit to a police officer. In this way, the circumstance established by the driver in its content is not essentially different from the circumstance that would have been established by an official. Notably, the acts committed by such an entity are not characterised by a lower degree of public danger than those committed by an official, as in both cases, the giving or receiving of undue advantage is due to artificially constructed circumstances that do not differ in their content.

From the standpoint of *de lege lata*, a private person who acted as a provocateur may be liable as an accomplice of an official who, with the provocative purpose, organised the provision or receipt of an undue advantage. In the legal literature, the question of whether the elements of provocation should be linked exclusively to the unlawful conduct of an official or, on the contrary, to the conduct of any private person is generally debated. By the way, the non-prosecution of private persons for provocation of bribery in the 20s of the last century was justified by the fact that the legislation of those times (and, incidentally, the current criminal legislation of Ukraine) did not provide for a special provision on liability for provocation committed by private persons, although they knew the rules on liability for incitement to commit a crime.

Notably, if incitement of a person to offer, promise or give an undue advantage or acceptance of an offer, promise or receipt of such an advantage is committed to exposing another person by a person who is not an official (the above applies to a person who performs professional activities related to the provision of public services), or even by an official, but without using their official position, the act may qualify as incitement to commit a crime under Art. 354, 368, 368-3, 368-4, 369 or 369-2 of the Criminal Code of Ukraine, and be qualified concerning Part 4 of Article 27 of the Criminal Code of Ukraine. After all, as O. Dudorov rightly notes, it follows from this criminal law provides that the instigator can act, guided by different motivations and pursuing different purposes [13].

The analysis of the materials of law enforcement practice, and the positions expressed in the criminal law doctrine on this issue indicates that the signs that

allow qualifying the actions of the prosecutor, investigator or employees of operational units as a provocation of a crime should include 1) the purpose of encouraging a person to commit a crime; 2) an active form of behaviour of these persons, which consists in influencing a person, persuading, inducing them to commit a crime; 3) the absence of a person's inclination and desire to commit a crime in the presence of a real opportunity to commit it; 4) the availability of sufficient evidence that in the absence of the initiative of the above persons, the crime would not have been committed [14].

In proceedings on crimes related to the provision or receipt of undue benefits from the defence, there are often statements about provocative actions against the accused by law enforcement agencies, which are seen as signs of provocation of bribery. Sometimes the court is critical of these statements, believing that they may be based on assumptions and form a defence tactic due to attempts to evade responsibility.

Thus, for example, the court found no signs of provocation in the actions of N., who, acting under the control of law enforcement agencies, handed over USD 1,500 to S., allegedly to further transfer this amount to the chief doctor of the district hospital for N.'s employment as a paramedic.

The court established that there were no reasons to conclude that N., since the beginning of her contact with the accused, had been acting as an agent of the state on the instructions of the police or prosecutor's office, or otherwise under their control, or that she had any ulterior motives. Thus, this case, the court noted, does not concern undercover police agents, but rather relates to the actions of a private person acting under the supervision of the police, duly registered.

In addition, as noted by the court, from the materials examined by the court, provided by the defence, namely printouts of telephone connections between C. and N., it is not seen that N. went beyond passive behaviour and persuaded the accused S. to commit a crime. Moreover, there is no evidence in the case file that law enforcement officers did not limit themselves to a passive investigation solely to establish the crime, but influenced S., persuading her to commit the crime [15]. In other cases, the courts, on the contrary, react to the statements of provocation and make reasonable decisions on them. Therewith, even in such cases, the practice of courts is not sustainable.

Thus, for example, P. and S. were accused of incitement to give an undue advantage to an official who holds a responsible position (Part 4 of Article 27, Part 3 of Article 369 of the Criminal Code of Ukraine). According to the verdict of the Smila City District Court of Cherkasy region, they were declared not guilty of committing the crimes. However, their defender's request for a separate court ruling to conduct an inspection and possible prosecution under

Art. 199, 370 of the Criminal Code of Ukraine against S. (police agent) and employees of the Ministry of Internal Affairs of Ukraine in the Cherkasy region, who were involved in the provocation of illegal benefits and counterfeiting of currency, was dismissed by the court. The court noted that the possibility of adopting the relevant resolution was regulated in Article 278 of the CPC of Ukraine (1960), which is now invalid. Therewith, the court stated that the testimony of witness S. and other evidence in this proceeding were obtained as a result of provocation [16].

Such a somewhat inconsistent practice of domestic courts of lower instances should encourage experts in the field of substantive and procedural law to think about the unified detailed criteria for identifying signs of inadmissible provocation in the actions of authorised law enforcement officers.

The national literature highlights the lack of mechanisms in the current CPC of Ukraine to respond to using methods of provocative behaviour by law enforcement officers, similar to those provided for in the CPC of Ukraine of 1960. Therewith, as noted, the actions of the court in the latter example are in line with the requirements of the ECHR practice of thoroughly checking allegations of provocation by law enforcement officers, ensuring the accused the right to a full and objective examination of the circumstances of the case that may indicate the existence of provocation (Hladun, 2019). In the context of improving the relevant area of law enforcement, it should be emphasised that in each acquittal, in which signs of provocation were established, the courts must properly substantiate their decisions with the relevant case law of the ECHR [17].

Finally, the following point should be emphasised: by Part 5 of Art. 354 of the Criminal Code of Ukraine, a person is exempted from liability for providing undue advantage if they then voluntarily reported their actions to law enforcement agencies. This provision exempts from criminal prosecution a "provoker" who may not be an official but on their initiative gives a bribe to an official to inform the competent authorities. Therewith, Art. 370 of the Criminal Code of Ukraine provides for the liability of officials for provoking bribery. Here again, the gap in criminal law regulation, admitted by the legislator, can be traced.

If the provoker "caused" the crime and by their actions "established" the criminal, then the elimination of their participation in the crime should be the neutralisation of the criminal factors that they caused. On the one hand, it should be the prevention of crime, and on the other – timely establishment of grounds for the release of the provoked person from criminal liability. The combination of these factors can be achieved only in one way – by persuading the person provoked by them to stop voluntarily preparing for a crime or attempted crime. Only in this way,

the adverse criminal consequences of participation in the commission of a crime can be eliminated for the said person. For different types of accomplices who were provoked to participate in a crime, specific forms of voluntary refusal will have their specifics. For example, for the perpetrator of the crime - it is the immediate suspension of acts of preparation for a crime or attempted crime. For the provoked organiser, instigator or abettor, this should be the elimination of their participation in the crime provided for by law, which will result in the suspension of the crime.

At present, the current provisions of the Criminal Code of Ukraine on the voluntary refusal of accomplices in a crime do not properly address the issue of voluntary refusal of the provocateur and therefore require appropriate improvement. Some suggestions have already been made in the literature. For example, O. Alyoshina proposes to supplement Article 31 of the Criminal Code of Ukraine with Part 4 as follows: "It is not recognised as a voluntary refusal of the organiser or instigator to prevent the commission of a crime or timely notification by them of the relevant state authorities of a crime being prepared or committed if by such means these persons tried to achieve the provocative purpose of exposing another accomplice or causing them material or non-material damage" [18]. In general, the justified desire of the scientist to solve the problem under study requires some clarification. The above provision emphasises the cases when the actions of the provoker cannot be considered a voluntary refusal. Therewith, the question arises: can the provoker voluntarily abandon the crime at all? It seems that it is inappropriate to deprive them of such an opportunity. Admittedly, the domestic author does not propose this, as the proposed rule implies that in case of prevention of a crime or timely notification of the relevant authorities about a crime being prepared or committed without a provocative purpose, the provoker's actions should be considered a voluntary refusal.

In addition, the position on the expediency of improving the provisions of the criminal law in terms of regulating the rules on the voluntary refusal

of the provocateur from unlawful behavior was reasonably supported.

■ Conclusions

Among all manifestations of corruption, corruption criminal offences are the most dangerous, therefore, ensuring criminal law protection of public relations from corruption criminal offences is a priority of modern criminal law policy in Ukraine [19].

Summarising the provisions considered in this research, the idea of expanding the circle of subjects of provocation of bribery by excluding the indication of an official as a specific subject under Part 1 of Article 370 of the Criminal Code of Ukraine should be supported. Therewith, considering that the provocation is performed mainly by law enforcement officers, the first part of the updated construction of the criminal law prohibition on provocation should provide for the signs of the general subject of provocation of bribery, and Part 2 should indicate the law enforcement official.

Such an approach will not exclude possible situations of the complicity of a provocateur - an individual and a provocateur - a law enforcement officer (for example, provocative actions of co-perpetrators by prior agreement between them).

In general, the position expressed in the legal literature should be supported that provocative activity is possible in any intentional crime, and the circle of subjects of provocation is unjustifiably narrowed by the legislator only to officials. Considering the above, the idea of the necessity to supplement the text of the Criminal Code of Ukraine with a provision that would provide for criminal liability of any person (general subject of the crime) for provoking any other (not only official) person to commit any crime was supported.

In addition, based on the results of a critical study of the relevant area of law enforcement practice, a proposal was made to develop detailed material and procedural criteria for identifying signs of unacceptable provocation in the actions of authorised law enforcement officers.

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Ознаки суб'єкта провокації підкупу: деякі питання кваліфікації та правозастосування

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■ **Анотація.** Метою наукової статті є здійснення критичного аналізу ознак суб'єкта провокації підкупу в контексті юридичної оцінки та практичного застосування ст. 370 Кримінального кодексу України. Методологія. У статті комплексно використано такі методи наукового пізнання: історичний, термінологічний, системно-структурний, формально-логічний. Наукова новизна. На підставі комплексного юридичного аналізу змісту ознак суб'єкта складу злочину, передбаченого ст. 370 Кримінального кодексу України, зокрема шляхом вивчення історії нормативного регулювання й аналізу напрацювань у відповідному напрямі правозастосовної практики, автор удосконалив окреслену в юридичній літературі позицію щодо того, що в чинній редакції норми про провокацію підкупу варто відмовитися від ознак спеціального суб'єкта цього злочину (службової особи) на користь включення ознак загального суб'єкта. Висновки. Запропоновано в ч. 1 оновленої конструкції кримінально-правової заборони щодо провокації підкупу передбачити ознаки загального суб'єкта провокації підкупу, а в ч. 2 відповідної статті включити посилання на спеціального суб'єкта – службову особу правоохоронних органів. Із позицій *de lege ferenda* обґрунтовано, що в тексті ч. 2 ст. 370 КК України ознаку «службова особа правоохоронного органу» варто замінити більш прийнятною – «працівник правоохоронного органу». Також за результатами опрацювання відповідного напрямку правозастосовної практики висловлено пропозицію розробити вдосконалені матеріально-процесуальні критерії виявлення ознак недопустимої провокації в діях уповноважених працівників правоохоронних органів

■ **Ключові слова:** провокація підкупу; спеціальний суб'єкт злочину; працівник правоохоронного органу; правозастосовна практика; судова практика

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Prospects for the introduction of foreign experience in using DNA-accounts in the practice of Ukraine

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■ **Abstract.** The purpose of the research – analyse foreign experience in using DNA records in the investigation of criminal offences and justification of the possibility and feasibility of its use in Ukraine. Methodology. To achieve this purpose, specific research methods were used, namely: system analysis method, comparative legal, system-structural and forecasting method. The scientific originality of the study is that based on the analysis of international legal acts, regulations of some foreign countries, and scientific works of domestic and foreign scientists, the main controversial issues related to the content, functioning and use of human genetic traits registers in Ukraine are identified. Based on the results of the analysis, proposals were developed to eliminate the identified problematic issues and to reform the legislation in the context of the issue under study. Conclusions. The scientific position is substantiated that an effective way to solve the problematic issues related to the functioning and use of human genetic registries in Ukraine is to explore and implement best foreign practices since most countries began to develop registries at the end of the previous century. It is proved that the reforming and improvement of the practice of filling, functioning and authorised use of human genetic records should be performed by adopting a specific law. It was emphasised that in the process of determining the DNA profiles of categories of persons subject to registration in the register of human genetic traits, attention should be devoted to missing persons and those who, due to mental disorders or senile dementia, have been repeatedly searched by the National Police for missing persons. It was stated that the development and implementation of the draft law should be fully consistent with the strategy of development of law enforcement agencies, and the costs for the implementation of all legislative initiatives should be included in the state budget of the respective year

■ **Keywords:** accounting; genetic traits; DNA analysis; molecular genetic research; foreign experience; criminal offence

■ Introduction

The development of science and technology is a significant guarantee of improvement of technical and forensic support of the pre-trial investigation of criminal offences. An important place in ensuring the efficiency of the investigation is occupied by information systems, in particular forensic records, as noted in their monographic researches by such scientists as: D.V. Dabiza [1], K.V. Dubonos [2], V.O. Prikhodko [3]

and others. They emphasise the importance of forensic records in the investigation of criminal offences.

The necessity to use forensic records in the investigation of criminal offences is conditioned upon the necessity to solve several tactical tasks that arise at a particular stage of the investigation. One of the most crucial objectives is to identify the perpetrator. According to the analysis of investigative practice,

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using the records of human genetic traits, the functioning of which in Ukraine is regulated by the Instruction on the organisation of the functioning of forensic records of the expert service of the Ministry of Internal Affairs, is quite tested in its solution.

The emergence of accounting of human genetic traits and the possibility of its use in the investigation of criminal offences is conditioned upon the development of science and technology, in particular the improvement of the methodology of molecular genetic research. The specific features of the appointment and conduct of these researches in the investigation of criminal offences are devoted to the works of V.V. Ionova [4], O.Y. Kanava [5], R.L. Stepaniuk [6; 7], V.V. Topchii [8] etc.

Therewith, the process of filling, functioning and use of the human genetic trait registry belongs to the circle of scientific interests of many domestic scientists who have conducted many studies designed to address the problematic issues related to the functioning of the human genetic trait registry in Ukraine, the possibilities of its use in the investigation, etc. Among them, in particular, the study of I.O. Yeprintseva, who analysed some issues of the functioning of the registry of human genetic traits [9], S.M. Lozova and O.V. Matarykina, who investigated the possibility of using the said registry during the pre-trial investigation [10]. The analysis of international standards for the accumulation and use of DNA samples was conducted by O.P. Horpyniuk [11]. Despite the significant contribution of scientists, several issues in the context of the studied problems remain unresolved.

One of the efficient ways of solving the problems existing in law enforcement practice should be considered the introduction of international experience. As for using registers of human genetic traits, this approach can be applied, as in many countries, they have been functioning for a longer time than in Ukraine. Great Britain, for example, in 1995 established the DNA database of the National Criminal Intelligence. In Ukraine, the decision to develop a forensic database of DNA analysis results at the State Scientific Research Forensic Centre of the Ministry of Internal Affairs of Ukraine was made in 2000, and initially only for unsolved sexual crimes: murder with rape [3].

The foreign experience study and its implementation in the activities of the relevant entities are substantiated by the European path of development chosen by Ukraine, which provides for the harmonisation of national legislation with the legislation of the European Union and other international regulations. In this context, it should be mentioned that according to the Law of Ukraine of June 20, 2012, № 4988-VI ratified the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. According to paragraph 1 of Article 37 of the Convention “to prevent the commission

of offences established by this Convention and to ensure their prosecution, each Party should take the necessary legislative or other measures to accumulate and store, subject to the relevant provisions on the protection and safeguarding of personal data and other relevant rules and guarantees provided for by national legislation, information on the identification data and genetic code (DNA) of persons convicted of offences established by this Convention” [12]. Probably, considering the necessity to bring the national legislation in line with the European one, the ratification of the Prüm Treaty will be the next step.

The Treaty of Prüm, known as the Prüm Convention or “Schengen III”, was signed on 27 May 2005 in Prüm (Germany) by seven states on data exchange: Germany, Spain, France, Luxembourg, the Netherlands, Austria and Belgium. Currently, automatic DNA data exchange is performed between Portugal, Czech Republic, Hungary, Romania, Sweden, Cyprus, Estonia, Lithuania, Latvia, Malta, Poland, Slovakia, Finland, Croatia and Slovenia. The provisions of this treaty enable the member states of the European Union to provide each other with automatic access to genetic databases, fingerprints and information on crimes connected with drug trafficking.

Therewith, despite the Prüm Convention, Portugal, for example, is prohibited from exchanging all categories of genetic profiles. If requested, the search is performed only among genetic profiles belonging to persons sentenced to 3 years or more and individual profiles of samples confiscated at the crime scene or persons under investigation [13].

The above highlights the necessity of exploring the experience of foreign countries on the functioning of human genetic traits registries to implement only the best practices and reform national legislation in this area.

The purpose of the study is to assess the foreign experience of using the records of human genetic traits in the investigation of criminal offences and to substantiate the possibility and feasibility of its use in Ukraine.

To achieve this purpose, the following tasks have been identified:

- 1) to define the basic principles of functioning of the registry of human genetic traits in Ukraine;
- 2) based on the analysis of the works of domestic scientists to identify the main problematic issues that arise during the filling, functioning and use of human genetic traits in Ukraine;
- 3) based on foreign experience, to develop recommendations for solving identified problematic issues that exist in the domestic practice of functioning and use of human genetic traits registration.

The scientific originality of the research is that based on the analysis of international legislation, and legislation of individual countries of the world, scientific research of domestic and foreign scientists,

the features of filling, functioning, financing and use of human genetic traits registers during the investigation of criminal proceedings in Ukraine and some countries of the world are determined.

■ Outline of the Main Material

The register of human genetic traits consists of operational search collections maintained by the State Research Forensic Centre (central level) and research forensic centres (regional level). Operational search collections are developed from DNA profiles:

- 1) persons suspected or accused of committing crimes, detained, convicted in case of their voluntary consent;
- 2) biological traces confiscated during the inspection of the scene, in particular on the facts of missing persons, other investigative actions and operational search activities;
- 3) unidentified corpses [14].

DNA profiles obtained using genetic analysers and determined by several standard marker systems (STR loci), which are common for expert laboratories by the recommendations of the European Network of Forensic Science Institutions (ENFSI), are subject to registration. After the establishment of DNA profiles within three days, a registration card of DNA profile (biological trace confiscated during the examination of the crime scene or other investigative actions and operational search activities; unidentified corpse; the biological trace of a missing person, a sample of a suspect, accused, victim) is filled in and sent to the collections [14].

The records are filled in by investigators of the National Police during the pre-trial investigation. In particular, the Law of Ukraine "On the National Police" defines that the police fills and maintains up-to-date databases (banks), which are part of the unified information system of the Ministry of Internal Affairs of Ukraine, regarding persons detained on suspicion of committing offences (administrative detention, detention on orders of law enforcement agencies, detention of persons by pre-trial investigation bodies, administrative arrest, house arrest) (clause 7, part 1, Article 26). In addition, part 2 of the mentioned article provides that during the filling of databases (banks) of data specified in paragraph 7 of part 1 of the relevant article, the police shall ensure the collection, and accumulation of biometric data (DNA samples) [15].

The analysis of the above legislative provisions gives grounds to assert that the provisions of the Law of Ukraine "On the National Police" do not comply with the provisions of the departmental instruction, which regulates the functioning of the registration of human genetic traits. In addition, none of the above-mentioned regulations does not provide sufficiently important issues regarding the storage periods of DNA profiles, responsibility for the safety of

the obtained samples, etc., which indicates the urgent necessity to revise and update the provisions of the current legislation.

Notably, not all scientists support the idea of improving the mechanisms of registration of human genetic traits in Ukraine and expanding the categories of persons whose DNA profiles would be subject to mandatory placement in the operational search collections. Thus, scientists V.O. Komakha, G.F. Kryvda, Yu. Syvolap explains this position by the fact that its establishment threatens citizens with the loss of personal freedom, independence and privacy [16]. Therewith, the supporters of the concept of further development of human genetic traits emphasise the necessity to solve several controversial issues, including:

- 1) insufficient level of material and technical support and insufficient laboratories, which excludes the possibility of meeting the requirements of the Ministry of Internal Affairs of Ukraine in the detection and investigation of criminal offences;
- 2) insufficient level of protection of personal information obtained by DNA analysis [11];
- 3) the necessity to expand the category of persons whose DNA profiles will be subject to mandatory registration [10];
- 4) establishing communication between the world's forensic genetic databases to exchange genetic profiles of criminals suspected or accused of committing serious and extremely serious crimes [9];
- 5) slow filling of databases;
- 6) absence of a specific law that would regulate the issues of filling and functioning of criminal records;
- 7) ignoring the opinion of the public, specialists in the process of solving the issue of keeping records of human genetic traits, expanded genomic identification of the population and the category of institution that should be the manager of the records, etc. Based on the above, considering the examples of some foreign countries, it is proposed to determine whether these problematic issues existed in their practice and how they were resolved.

Categories of persons whose DNA profiles are subject to registration. The Instruction on the organisation of the functioning of criminal records of the expert service of the Ministry of Internal Affairs defines which DNA profiles are subject to registration. Domestic scientists note the expansion of the categories of persons subject to mandatory registration. Thus, S.M. Lozova and O.V. Matarykina note the expediency of mandatory registration of persons who: 1) are drafted for military service and are in military service; 2) employees of internal affairs bodies (investigators, operatives, criminal investigators) who participate in investigative (search) actions; 3) forensic experts (forensic and other) who participate in investigative actions and examinations [10]. The

necessity of mandatory genetic registration of military servicemen, persons liable for military service and conscripts are emphasised by L.T. Kotliarenko and A.V. Kofanov, arguing that it is necessary to conduct the Joint Forces Operation in the East of Ukraine and the necessity of molecular genetic identification in case of their death [17].

Proposals for mandatory registration of law enforcement officers are expressed both by domestic and foreign scholars [18]. It is caused by the fact that investigators, operatives, and forensic inspectors are members of the investigative team. Due to non-compliance of the latter with specific rules of stay at the scene, contamination, i.e. contamination of objects of biological origin with foreign DNA can be allowed.

The problem of contamination was first highlighted during the discussion of the “German phantom”: in Europe, for 15 years, investigators were unable to track a serial offender whose DNA profile was constantly being established while investigating various crimes. The “offender” was found in 2008. It was an elderly woman who worked in the production of the packaging of gauze swabs for DNA sampling. Putting the swabs, she accidentally contaminated some of them with her DNA, and, thus, her genetic features were established on the objects from the scene [19].

Notably, contamination can occur as a result of the presence of civilians at the scene, for example, the person who found the corpse or the owner or user of the premises where the theft was committed, etc. In addition, it is possible in DNA laboratories. In case of its detection, molecular genetic research is stopped. The employee who has detected contamination must immediately notify the quality manager, and the quality manager – the relevant head of the department (laboratory). Results obtained with contaminated samples are considered invalid and all samples should be re-examined [20].

Thus, emphasising the necessity of taking biological samples from police officers, the question arises about the registration of human genetic features and DNA profiles of laboratory workers. Therewith, it should be noted that due to the efforts of genetic scientists, currently there are technologies for the study of contaminated samples. Considering this, the author believes that there is no necessity for mandatory registration of law enforcement officers, however, if there is voluntary consent of the latter, their DNA profiles should be registered to ensure quick identification of contaminated samples.

In the author's opinion, DNA profiles of missing persons obtained as a result of molecular genetic research on the personal belongings of the latter are subject to mandatory registration. In the future, this can help to establish the whereabouts of the missing person in the process of comparison with samples found at crime scenes or in comparison with samples

of unidentified corpses. In addition, the author believes that DNA profiles of persons who have mental disorders or senile dementia and frequently leave their place of residence can be registered, which is why pre-trial investigation bodies have repeatedly registered criminal proceedings due to the missing persons. According to the analysis of investigative and judicial practice, quite frequently the bodies of persons with postmortem changes, who were previously considered missing, are found outside settlements or in forests or reservoirs. Considering the above, there is a necessity to perform a set of identification tasks to establish the identity of the found corpse, which are successfully solved through molecular genetic research.

Analysing the experience of foreign countries, it should be noted that they are characterised by the approach according to which DNA profiles of persons sentenced to imprisonment are subject to mandatory registration. In Thailand, since 2004, a joint project of the Central Institute of Forensic Science and the Department of Correctional Affairs of the Ministry of Justice was launched, which introduced the registration of biological samples of prisoners for any category of crimes to be released in the period from four months to one year. As of December 2019, 187,464 profiles, consisting of 16,521 DNA profiles from samples recovered from crime scenes, 49,210 people associated with the crime, and 121,733 prisoners, have been placed in the human genetic trait registry of the Central Institute of Forensic Sciences of Thailand [21].

Brazilian legislation stipulates that, since 2012, individuals must be mandatorily included in DNA databases if they are convicted of serious crimes or intentional violent crimes. The project to identify the genetic profile of convicts began in 2018. As of August 28, 2019, about 79% of the DNA profiles of convicts were collected [22].

Inextricably connected with the issue of filling and mandatory registration of DNA profiles of individual categories of persons is the issue of financing additional costs for filling and maintaining records of human genetic traits.

The DNA profiles of individual categories of the population or unidentified persons, whose biological samples were found at the scenes of crimes, are included in the register of human genetic traits. During the investigation of criminal proceedings, most forensic molecular genetic examinations are appointed by the prosecution. According to the Criminal Procedure Code of Ukraine, the involvement of specialists, experts of specialised state institutions by the prosecution, conducting examinations (examinations and studies) on behalf of the investigating judge or court is performed at the expense of funds allocated to such institutions from the state budget of Ukraine for the intended purpose [23].

The cost of molecular genetic examination for one object is approximately 80 USD, and together with value-added tax – 95 USD. In the event of a guilty verdict, the court shall recover from the accused in favour of the state the documented costs of engaging an expert [23]. Therewith, in criminal proceedings that remain unsolved, the funds spent by the state remain unreimbursed.

No fewer expenses for molecular genetic examinations are performed abroad. In Belarus, the cost of complex examinations of biological kinship, during which it is necessary to examine histological specimens of the deceased, and samples of relatives, in particular using markers of X- and Y-chromosomal, mitochondrial DNA, is usually calculated individually for each case and can range from 120 to 280 USD [24].

In Delhi (India), the starting price of molecular genetic examination is approximately 10 USD, and the maximum price is 942 USD [25].

Keeping records of human genetic traits is quite valuable. Thus, the UK spends approximately 3.5 million US dollars a year on this, while individual police forces cover the costs of inspecting the scene and conducting molecular genetic examinations of confiscated biological samples. Due to this, there are ongoing discussions among UK scientists about the rationality of collecting half a million DNA profiles annually and the need to store more than 6 million profiles. In addition, scientists argue this with the conclusions contained in the annual reports of the UK Commissioner for Biometrics, according to which it is almost impossible to determine the efficiency of such measures [26].

Notably, MP O. Bakumov submitted to the Verkhovna Rada of Ukraine the draft Law “On State Registration of Human Genomic Information”, which is currently in the first reading. According to the expert opinion of the Ministry of Finance of Ukraine, conducted on the mentioned draft law, the implementation of its provisions, if adopted in 2021 (enters into force one year after the date of publication), will require additional expenditures from the state budget for UAH 276,962.0 thousand for the Ministry of Internal Affairs and other state bodies for 2022-2024, including UAH 225,560.7 thousand in 2022 and UAH 25,700.7 thousand annually in 2023-2024. In addition, as noted in this conclusion, the provisions of the draft law are not consistent with the provisions of the Budget Code of Ukraine on the submission of proposals and amendments to the legislation of Ukraine to reduce budget expenditures and/or sources of additional budget revenues to achieve a balanced budget, and the draft law itself requires the provision of detailed financial and economic calculations together with proposals for sources of additional expenditures [27].

Notably, it is not the first draft law that should regulate the genetic identification of Ukraine and

the procedure for the registration of human genetic traits, but none of them has been adopted yet. The author of the research believes that the primary reason is the necessity to increase the budget of the Ministry of Internal Affairs and other state authorities. Undoubtedly, this is quite a weighty argument, but, notably, when addressing the issue of expanding the categories of persons subject to mandatory registration, there is another problem – public opinion is not considered in any way.

Considering the public opinion when deciding on the issue of keeping records of human genetic traits, expanded genomic identification of the population and the category of institution that should be the manager of the records. In many countries of the world, before reforming legislation, the attitude of the population to such legislative initiatives is analysed. Spanish scholars Álvaro del Real, María Sáenz-Aldea, Ana Santurtún, María T. Zarrabeitia, for example, conducted surveys among prisoners and prison staff. Scientists have established that 40% of the participants would support the integration of profiles of the entire population into the accounting of human genetic traits, and 64% consider it ethical to use DNA profiles of the database as a tool for family search. Therewith, half of the respondents are concerned about the future use of the DNA database [28].

Therewith, the Spanish are confused by the category of persons that will be subject to mandatory registration, and the category of the institution that will manage the register. At one time, 59.7% of respondents surveyed by Spanish scientists explained that the National Agency for DNA Analysis, an autonomous state institution supported by the court, should remain the manager of human genetic data [29]. Such a position is due to citizens' concerns about the powers of the police or other institutions, ensuring confidentiality and proper use of the database.

In Ukraine, no open sociological surveys have been conducted on the expansion of the categories of persons subject to mandatory registration or the determination of the institution that should be the administrator of the record of human genetic traits. According to the author, the entry into force of the draft law, which is currently under consideration in the Verkhovna Rada of Ukraine, may cause outrage among the population and criticism among lawyers. Therewith, discussions among legal practitioners and scholars, of course, are provoked by the manager of the register, as they have been proposing for a long time ideas about the belonging of this register to the Ministry of Justice of Ukraine or another independent institution.

Inappropriate use of databases. Concerns among the public and lawyers are raised by the issue of the police powers in using the data of human genetic traits, ensuring confidentiality and preventing unauthorised access to the mentioned records. In this

context, it is appropriate to cite the theses of Italian researchers V. Marchese, N. Cerri, L. Caenazzo, who note that although DNA databases are of great value for the investigation and society, the task of the state is to determine the balance between the public interest in the fight against crime and personal rights such as personal freedom, dignity and privacy – which can be a problem [30].

The solution to this problem is achieved by enshrining the principles of the functioning of the registration of human genetic traits in regulations. In Brazil, for example, it is defined at the legislative level that DNA databases are confidential with limited and controlled access. The genetic information contained in DNA databases should not identify somatic or behavioural traits of individuals other than genetic gender identification [22].

The legislation of the European Union, in particular the Council of Europe Convention of January 28, 1981 “For the Protection of Individuals about Automatic Processing of Personal Data”, which has been ratified by Ukraine, should be considered a positive example of protection of citizens from unauthorised access to the records of human genetic traits. To clarify the provisions of the Convention, the Council of Europe issued several recommendations on the processing of the most vulnerable personal data. In particular, these include the Recommendation of the Committee of Ministers of 17 September 1987 No. R (87) to 15 Member States on the regulation of using personal data in the police sector. Quite important is Directive 95/46/EC of the European Parliament and of the Council “On the protection of individuals about the processing of personal data and on the free movement of such data” of October 24, 1995, the provisions of which are the foundation of the Law of Ukraine “On Personal Data Protection [31]. In addition, the provisions of Recommendation R (92)1 of 10 February 1992 on using deoxyribonucleic acid (DNA) analysis in criminal proceedings should be considered.

These recommendatory international documents, as noted by O.P. Horpyniuk, outline several requirements relating to both the quality of national legislation that should regulate the relevant area and the behaviour of law enforcement officers who obtain biometric data from suspects, and accused and enter them into automated information resources. The most important requirements are the following: data retention should be strictly limited, particularly in the police sector; data collection is possible only to prevent a real danger or to stop a specific crime; the processing of the most sensitive data should be limited to what is necessary for a specific investigation; the necessity to notify the data subject, which was collected without their knowledge, about the collection, if such disclosure will not hinder the investigation; the obligation to ensure the timely destruction of person-

al data if they are no longer required for the purposes for which they were stored [11]. The author believes that all these requirements are a guarantee of respect for human rights in law enforcement, and therefore they should be enshrined in national legislation.

Absence of a specific law. The absence of a proper legal framework that would regulate the procedure for the registration of human genetic traits, as can be seen, is a significant obstacle to eliminating the problematic issues that currently exist in law enforcement. Admittedly, it concerns not only Ukraine.

The Ibero-American Working Group on DNA Analysis (GITAD), part of the Ibero-American Academy of Criminalistics and Forensic Sciences (AICEF), which has existed since 1998, has several working committees to perform actions in specific areas of its activities. Among them – the Commission on Databases, which oversaw the development of DNA databases in Latin America, Portugal and Spain. Members of this commission prepared a survey and sent it to institutions that integrate or collaborate with the Ibero-American Working Group on DNA Analysis to get an overview of DNA databases in these countries. Among the representatives of 15 countries that responded to the survey, 13 have some kind of database - criminal or related to the search for missing persons, but only 11 reported that their functioning is regulated by relevant regulations. Thus, some countries do not have legislation but have already implemented their DNA databases [32]. Such practice, in the author's opinion, is an adverse example, as it does not correspond to the idea of the rule of law, thus, it should be eradicated.

Thus, the realities of the current situation necessitate an immediate sociological survey to determine the attitude of the public to the mandatory registration of specific categories of citizens and the institution that will be the administrator of the record. An indispensable step in this context should be the investigation and consideration of foreign experience, international regulations and practices of the European Court of Human Rights. Considering the results obtained, the needs of law enforcement agencies, scientific developments of scientists and specialists of the relevant categories, it is necessary to develop a draft law that would regulate several controversial issues that currently exist in the issues of genomic identification of the population, the functioning and use of human genetic traits, and to define the principles of functioning and use of the registry to prevent the disclosure of confidential information. Therewith, it should be noted that the adoption of the draft law should be accompanied by appropriate changes in criminal procedural legislation to prevent the development of legal conflicts.

It is proved that the most efficient way to solve some problems that exist currently, given the European

path of development chosen by Ukraine, is to use international experience, in particular, the experience of the European Union.

Based on the results of the analysis, the most typical problems existing in the practice of Ukraine and requiring immediate solutions were identified. Among them, in particular:

1) insufficient level of material and technical support and insufficient laboratories, which excludes the possibility of meeting the demands of the Ministry of Internal Affairs of Ukraine in the detection and investigation of criminal offences;

2) the absence of a specific law that would regulate the content and functioning of the record of human genetic traits;

3) the necessity to expand the category of persons whose DNA profiles will be subject to mandatory registration;

4) establishing communication between the world's forensic genetic databases to exchange genetic profiles of criminals suspected or accused of committing serious and extremely serious crimes;

5) the necessity to counteract the inappropriate use of databases;

6) ignoring the opinion of the public, specialists in the process of solving the issue of keeping records of human genetic traits, expanded genomic identification of the population and the category of institution that should be the manager of the records.

7) slow filling of databases, etc.

The analysis of these problems is conducted, based on which the author's vision of the possibility of their settlement is highlighted, and positive examples of foreign countries that can be used as an alternative solution to some problematic issues are given.

■ Conclusions

Based on the results of the research, the following conclusions can be reached:

1. The European path of development, the necessity of combating transnational crime and ensuring

efficient detection of crimes urges the necessity of rapid filling of the register of human genetic traits. An efficient way to solve the problematic issues related to the functioning and use of human genetic traits in Ukraine is to study and implement best foreign practices, as most countries have established these registers at the end of the previous century.

2. Reforming and improving the practice of filling, functioning and authorised use of registers of human genetic traits should be performed by adopting a specific law. The development of the draft law on state registration of genomic information of the population should be preceded by a thorough analysis of domestic and foreign legislation and experience, scientific developments of scientists, and public and expert opinion surveys. The issues of the number of genetic laboratories, the level of material and technical support of the relevant institutions and organisations, and the category of the institution that should be the record keeper require particular attention. The development and implementation of the draft law should be fully consistent with the strategy for the development of law enforcement agencies, and the costs of implementing the provisions of this draft law should be included in the State Budget of the respective year.

3. When determining the category of persons whose DNA profiles will be subject to mandatory registration, it is necessary to consider the actual capabilities of existing laboratories. The analysis of investigative practice in the investigation of criminal offences demonstrates that persons, who have been declared missing and who, due to mental disorders or senile dementia, have been repeatedly searched by the National Police for missing persons, are subject to registration. The genetic profiles of the latter should be registered after taking all possible measures to establish their whereabouts.

The mentioned problem is quite an urgent subject in the current realities and therefore requires further scientific research.

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Перспективи впровадження зарубіжного досвіду використання ДНК-обліків у практику України

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■ **Анотація.** Мета дослідження – аналіз зарубіжного досвіду використання ДНК-обліків під час розслідування кримінальних правопорушень й обґрунтування можливості та доцільності його застосування в Україні. Методологія. Для досягнення поставленої мети використано спеціальні методи дослідження, а саме: метод системного аналізу, порівняльно-правовий, системно-структурний і метод прогнозування. Наукова новизна дослідження полягає в тому, що на підставі аналізу міжнародних правових актів, нормативно-правових актів деяких зарубіжних країн, а також наукових праць вітчизняних та іноземних вчених визначено основні дискусійні питання, що стосуються наповнення, функціонування та використання обліків генетичних ознак людини в Україні. За результатами аналізу сформульовано пропозиції щодо усунення визначених проблемних питань, а також реформування законодавства в контексті досліджуваного питання. Висновки. Обґрунтовано наукову позицію стосовно того, що ефективним способом розв'язання проблемних питань, пов'язаних із функціонуванням і використанням генетичних обліків людини в Україні є вивчення та впровадження передового іноземного досвіду, адже більшість країн почали формувати обліки ще наприкінці попереднього століття. Доведено, що реформування й удосконалення практики наповнення, функціонування та санкціонованого використання обліків генетичних ознак людини має здійснюватися шляхом прийняття спеціального закону. Акцентовано, що в процесі визначення ДНК-профілів категорій осіб, які підлягають реєстрації в обліку генетичних ознак людини, слід спрямувати увагу на безвісно відсутніх особах, а також на тих, кого внаслідок наявності психічних розладів чи старечої деменції неодноразово розшукували органи Національної поліції за фактом їх безвісного зникнення. Констатовано, що розроблення та впровадження законопроекту мають цілком узгоджуватися зі стратегією розвитку правоохоронних органів, а витрати на реалізацію всіх законодавчих ініціатив повинні закладатися в державний бюджет відповідного року

■ **Ключові слова:** облік; генетичні ознаки; ДНК-аналіз; молекулярно-генетичне дослідження; зарубіжний досвід; кримінальне правопорушення

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Theoretical and applied principles of control and supervisory activities within the pre-trial investigation

Review of the book: Mirkovets D. M. Control and supervisory activity in the pre-trial investigation: theory and practice: monograph. Odesa : Helvetica, 2021. 432 p.

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The monograph of D.M. Mirkovets investigates a modern theoretically and practically significant problem – the implementation of control and supervisory activities in the pre-trial investigation.

The author rightly notes that ensuring, observing and protecting human rights is extremely relevant for criminal proceedings at the stage of pre-trial investigation, the characteristic features of which are specific tasks and ways of solving them, and its procedural nature involves using restrictive measures and means, in particular covert ones.

The importance of control and supervisory activity as an effective means of ensuring the observance of human rights and the legality of pre-trial investigation is beyond doubt, but unsystematic legislative changes resulting in duplication of powers of subjects of control and supervisory activity, legal uncertainty of such concepts as “supervision” and “control”, contradictory regulation of the mechanism of implementation of control and supervisory powers are the reasons that significantly complicate the functioning of the system of control and supervisory activity in the pre-trial investigation.

Therefore, the scientific and practical recommendations developed in the monograph based on the results of a comprehensive and systematic study of control and supervisory activities in the pre-trial investigation will contribute to its improvement both in regulatory and law enforcement aspects. The monograph includes five chapters, which, considering the current state of legislation and law enforcement

practice, comprehensively investigate the problems of control and supervisory activities in the pre-trial investigation within the author's concept and identify areas for improving this activity.

The first section, “Theoretical, methodological and legal foundations of control and supervisory activity in the pre-trial investigation”, are devoted to the analysis of scientific literature in the relevant area, substantiation of the author's concept of control and supervisory activity in the pre-trial investigation, development of research methodology and definition of the concept and essential characteristics of control and supervisory activity in the pre-trial investigation.

The concept of this activity in the pre-trial investigation, developed by the author, is a holistic theoretical model, a system built based on the defined purpose, concept, tasks, principles and other essential characteristics of control and supervisory activity in the pre-trial investigation as an institution, and through the prism of a common understanding, the features of each of its types are outlined with the definition of its place in the system of control and supervisory activity, its relationship with other types.

The concept and purpose of control and supervisory activity in the pre-trial investigation are defined, which is the foundation for its systematic study as a legal institution and its types as relatively independent but related elements of this system, the subject, object, boundaries, principles and other essential characteristics are outlined.

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The mentioned activity is presented as a system, in which the following elements are distinguished: the subject of control and supervision activity, which exercises influence; the object of control and supervision activity – investigator, detective, prosecutor, inquirer, who are influenced; means and methods of control and supervision activity, due to which the influence is exercised (necessary changes); the result of control and supervision activity – the response of the authorised body, which was subject to control and supervision influence.

The second section, “Head of the pre-trial investigation body in the system of control and supervision of pre-trial investigation”, covers the concept of organisation of pre-trial investigation as a procedural function of the head of the pre-trial investigation body and describes the procedural and organisational ways of exercising powers by the head of the pre-trial investigation authority.

The organisation of this activity as a procedural function and process is designed to perform the tasks of criminal proceedings and to respect the rights and freedoms of individuals, which is ensured through its legal instruments and means. It defines the specifics of this type of control and supervision activity and, therefore, describes it as a component of the relevant system.

Based on the analysis of regulations and materials of practice, the author substantiated that the procedural and organisational powers of the head of the pre-trial investigation body are incompletely embodied in the Criminal Procedure Code of Ukraine, which causes problems in practice.

Recommendations for improving legislation and law enforcement practice were developed, and significant attention was devoted to the issues of the covert component of the pre-trial investigation.

Section 3, “Organisation and procedural guidance of the pre-trial investigation as the main functions of the prosecutor's office”, contains the issues of correlation of supervision and procedural guidance in the activities of the prosecutor in the pre-trial investigation, the definition of the concept, purpose, objectives, principles of procedural guidance in the pre-trial investigation and the methodology of procedural guidance.

The author substantiates the position that the prosecutor's supervision should be designed to verify the legality and validity of the actions and decisions already performed, and the management of the pre-trial investigation - to verify the actions and decisions that are being performed (taken) or planned for implementation. It will facilitate the effective distribution of powers of the subjects of control and supervision activities and allow them to perform their functions transparently to achieve a common purpose.

The purpose of procedural guidance is defined on three related levels: 1) determined by the purpose of the pre-trial investigation (the pre-trial investigation

is considered as the sphere of activity of the prosecutor, the purpose of the pre-trial investigation here is the starting point for determining and specifying the way to achieve the purpose of procedural guidance, it is further structuring); 2) corresponds to the general purpose of control and supervisory activities in the pre-trial investigation; 3) is specified by the tasks of criminal proceedings (as a substantive component).

In the development of the methodology of procedural guidance, the emphasis is placed on its active, dynamic characteristic, rather than the perception of procedural guidance as a “static” set of specific elements with a simultaneous definition as an activity.

Section 4, “Judicial control in the pre-trial investigation”, defines the place of judicial control in the system of control and supervisory activities in the pre-trial investigation, and discloses the content of preliminary and subsequent judicial control.

Judicial control over the pre-trial investigation as a field of control and supervisory activity is defined as the activity of the investigating judge to observe the rights, freedoms and interests of persons in pre-trial proceedings. The subject of judicial control is defined at two levels: 1) the legality of the action or decision of the pre-trial investigation body (whether these actions and decisions are provided for by law, compliance with the procedural form); 2) the content (factual data), which justifies these actions and decisions.

In addition, the author substantiates the position that the actions and measures requiring judicial control constitute a particular group, which is based on the law-restrictive nature of such actions and measures, and the mandatory nature of judicial control is a legal guarantee of respect for the rule of law, rights and freedoms of individuals.

Section 5, “Prospects for improving the organisational foundations of control and supervisory activities in the pre-trial investigation”, contains recommendations for optimising the structural and functional support of the pre-trial investigation, positions on the delimitation of procedural guidance and organisation of the pre-trial investigation, the author's opinion on the correlation of the institute of control and supervisory activities with the autonomy and independence of the investigator (detective).

Considering the significant experience of the activity of the investigative units of the National Police of Ukraine (until 2015 – internal affairs bodies) and the material, organisational and legal foundation for the activity of the investigative units of the State Bureau of Investigation, the necessity of establishing a single investigative apparatus based on the relevant agencies – the State Pre-trial Investigation Service – is substantiated. It will allow maintaining the established interaction of investigators and operational units during the investigation of criminal offences and over-

come the departmental dependence of investigators on the heads of territorial law enforcement agencies.

The purpose of the function of organising the pre-trial investigation is defined as: ensuring the comprehensiveness, completeness and impartiality of the investigation of the circumstances of criminal proceedings, and the adoption of lawful and impartial procedural decisions by actively influencing the course of the pre-trial investigation; providing a correct and objective assessment of the actions of the investigator and correction of investigative errors; making effective decisions to improve the activities of the investigator, and in case of detection of misconduct – taking measures to eliminate violations of the law.

The necessity of empowering the investigator to independently perform the following actions were confirmed: to resolve the issue of combining or providing materials of pre-trial investigations; to

suspend the pre-trial investigation; to decide on the examination; to apply to the investigating judge with a petition for the application of such measures to ensure criminal proceedings as a summons, removal from office, temporary access to things and documents, property arrest, preventive measures (personal commitment and personal guarantees), covert investigative (search) actions; to open the materials of the pre-trial investigation; to send to the court a petition for release from criminal liability; to request international legal assistance.

Thus, the monograph is completed scientific research on current subjects and has significant scientific and practical significance.

Implementation of the results of the study and recommendations developed by D.M. Mirkovets into practice and the rule-making process will contribute to the improvement of control and supervisory activities in the pre-trial investigation.

Теоретичні та прикладні засади контрольно-наглядової діяльності в межах досудового розслідування

Рец. на кн.: Мірковець Д. М. Контрольно-наглядова діяльність на досудовому розслідуванні: теорія та практика : монографія. Одеса : Гельветика, 2021. 432 с.

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Relevant aspects of operational and investigative documentation

Review of the book: Sakovskyi A. Operative-search documentation: theory and practice : monograph. Kyiv : INFOTEKH, 2021. 589 p.

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According to Article 3 of the Constitution of Ukraine, the main duty of the state is to establish and ensure human rights and freedoms. In addition, her life and health, honour and dignity, inviolability and security are declared the highest social value. Perhaps the greatest weight in the performance of this obligation by the state is that of law enforcement agencies. They are entrusted with the task of protecting individuals and society from criminal encroachments.

One of the most effective levers of combating crime is the operational search and criminal procedural activities of operational units. These subjects, according to the legislation, are endowed with specific covert tools that allow them to expose the activities of well-concealed criminal groups and organisations, to stop the commission of grave and particularly grave crimes at the stages of preparation and attempt, to prevent manifestations of professional crime.

The monograph of A.A. Sakovskyi is perhaps the first one, which at the conceptual level, defines the main areas of improvement of operational and investigative activities. In this aspect, the work of A.A. Sakovskyi "Operational and Investigative Documentation: Theory and Practice" is extremely relevant, and given the realities of the present – timely. Thus, the author of the monograph managed to solve

an important scientific problem, obtain new theoretical positions and scientifically sound conclusions, to develop valuable hypotheses, concepts and proposals. Notably, it was done due to the study of numerous doctrinal sources, works of domestic and foreign scholars, international practice of states, acts of international intergovernmental organisations, decisions and advisory opinions of international judicial bodies, resolutions of international conferences, etc.

First of all, the complex, conceptual nature of the work should be noted. It covers a wide range of issues, as the structure of the work consists of 4 main sections, 13 subsections, a preface and conclusions, which are meaningfully and logically interconnected. Each of the sections is complete, theoretically rich, deepening the state and legal phenomena, balanced and optimally reproduces the nature of the problem under study.

The chapters of the monograph outline the genesis of legal support based on the study and systematisation of existing scientific and theoretical approaches, and analysis of the current criminal procedural and operational-search legislation of Ukraine and the practice of its implementation.

The undoubted importance of the monograph is the properly established and developed conceptual

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and categorical apparatus, which significantly deepens and promotes scientific originality. Notably, are the provisions and recommendations in the conclusions of this work.

The methodological approach to the study of the outlined problems should be considered appropriate. It indicates a sufficient level of mastery of modern methods of scientific knowledge. The monograph is written in professional scientific language, at a high scientific and methodological level. The monographic material will contribute to the development of such qualities in cadets, students, adjuncts, doctoral students of educational institutions of the Ministry of Internal Affairs of Ukraine and practical law enforcement officers as independence in decision-making during the detection and detection of crimes, the ability to be innovative in the process of applying various methods and ways of detecting crimes, the

search and the necessity of making the right decision in time constraints, the ability to perform various activities simultaneously.

While positively assessing the author's research, it should be noted that it contains provisions that establish the foundation for further scientific discussion.

Consider that the monograph of A.A. Sakovskyi "Operational and Investigative Documentation: Theory and Practice" solve the complex scientific problem posed by the author, has scientific, theoretical and practical significance, stimulates further scientific research, contains several new structural and substantive elements and is a significant contribution to the national operational and investigative and criminal procedural activities, and can be used in the educational process of educational institutions of Ukraine.

The monograph will undoubtedly be useful for both scholars and practitioners.

Актуальні аспекти оперативно-розшукового документування

Рец. на кн.: Саковський А. А. Оперативно-розшукове документування: теорія і практика :
монографія. Київ : ІНФОТЕХ, 2021. 589 с.

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Current publication on using means of criminal procedural evidence in pre-trial investigation

Review of the book: Means of criminal procedural evidence in the pre-trial investigation: theory and practice: monograph. Kyiv: INFOTECH, 2021. 684 p.

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In the context of the development of Ukraine as a legal, democratic and independent state, unfortunately, the level of crime remains high, which infiltrates all spheres of public life, causing significant losses, and adversely affecting the development of all social and state institutions. Recently, crime in Ukraine has been increasing. Society is particularly concerned about the number of crimes committed in the banking, credit and financial, privatisation spheres, the energy market, the sphere of drug trafficking, weapons, human trafficking, etc. These crimes, as a rule, are committed by organised criminal groups that have the latest forms and methods of counteracting law enforcement and judicial bodies and have close corruption ties in various authorities. Thus, their disclosure and investigation, and adoption of lawful and fair procedural decisions are possible only if appropriate and efficient means of criminal procedural evidence are used in the pre-trial investigation.

The comprehensive monographic research of O.S. Starenkiy is a logical continuation of the further development of scientific ideas initiated in this field by such domestic scientists as: V.V. Vapnyarchuk, V.G. Goncharenko, Y.M. Groshevyi, E.G. Kovalenko, S.O. Kovalchuk, E.D. Lukianchykov, M.M. Mikheenko, V.T. Nor, M.A. Pogoretskyi, S.M. Stakhivskyi, L.D. Udalova, M.E. Shumylo and others, whose works the author comprehensively and critically analysed.

Considering the content of the monograph, note that its author intended to design a theoretical development of the scientific concept of means of criminal procedural evidence in the pre-trial investigation based on the substantiation of proposals and recommendations for improving the provisions of the current criminal procedural legislation of Ukraine and the practice of their application in the activities of pre-trial investigation bodies, prosecutors, lawyers and judges. To achieve this purpose, the author has analysed the modern concepts of criminal procedural evidence which are currently presented in the theory of criminal procedural evidence, national and foreign criminal procedural legislation, law application practice, in particular, the practice of the High Specialised Court of Ukraine for Civil and Criminal Cases, the High Anti-Corruption Court, the Supreme Court of Ukraine, the European Court of Human Rights, and surveyed practitioners (investigators, prosecutors, judges, judicial officers, etc.).

The monograph consists of five subsections, each of which logically and consistently outlines the concept of criminal procedural evidence in the pre-trial investigation.

The first section, "Theory of criminal procedural evidence as a scientific and methodological foundation for the establishment and development of means of criminal procedural evidence in the pre-trial investigation",

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defines the scientific and methodological foundation of the concept of means of criminal procedural evidence in the pre-trial investigation, develops the concept of means of criminal procedural evidence in the pre-trial investigation and defines their forms, and identifies the types and classification of means of criminal procedural evidence in the pre-trial investigation.

The second section, "Evidence as a means of criminal procedural proof in the pre-trial investigation", is devoted to the disclosure of the concept of evidence in criminal proceedings, establishing their place in the system of means of criminal procedural proof, determining the types of evidence in criminal proceedings and highlighting their essence as means of criminal procedural proof, clarifying the place of the materials of the original investigative detection in the system of means of criminal procedural proof in the pre-trial investigation.

In the third section, "Investigative (search) actions as means of criminal procedural evidence in the pre-trial investigation", the concept of investigative (search) actions as means of criminal procedural evidence in the pre-trial investigation is developed, and the criteria for their classification are identified, ways to optimise using investigative (search) actions as means of criminal procedural evidence in the pre-trial investigation are established.

The fourth section "Covert investigative (search) actions as means of criminal procedural evidence in the pre-trial investigation". It provides the concept of covert investigative (detective) actions as means of criminal procedural evidence in the pre-trial investigation and suggests criteria for their classification, outlines ways to optimise using covert investigative (detective) actions as means of criminal procedural evidence in the pre-trial investigation.

The fifth section, "Other Procedural Actions as Means of Criminal Procedural Evidence in Pre-trial Investigation", defines the place of requesting and ob-

taining things and documents in the system of means of criminal procedural evidence in the pre-trial investigation, covers the legal nature of temporary access to things and documents as a means of criminal procedural evidence in the pre-trial investigation and identifies the criteria for its classification, the place of familiarisation with the materials of criminal proceedings in the system of means of criminal procedural evidence in the pre-trial investigation was established, and the essence of unscheduled audits and unscheduled inspections as means of criminal procedural evidence in the pre-trial investigation was determined.

The material is presented logically, simply and interestingly, which contributes to its perception and accessibility for a wide audience. The work is characterised by creative originality and general methodological culture, as it substantiates the theoretical provisions that correspond to the new concept of criminal procedural law, which determines the degree of civilisation of the procedural system, its compliance with the ideas and fundamental principles of the rule of law, and develops proposals for improving the provisions of the current criminal procedural legislation of Ukraine regulating the application of criminal procedural evidence in the pre-trial investigation.

Considering the above, the monograph "Means of Criminal Procedural Evidence in Pre-trial Investigation: Theory and Practice" can be objectively considered a successful comprehensive and systematic study of the problems of using means of criminal procedural evidence in the pre-trial investigation, which corresponds to the requirements for this type of work. The reviewed monograph is of considerable scientific interest and deserves the attention of researchers, teachers and students of higher educational institutions of the legal profile, lawyers, investigators, prosecutors, judges, and everyone interested in the problems of using criminal procedural evidence in the pre-trial investigation.

Актуальне видання з питань застосування засобів кримінального процесуального доказування в досудовому розслідуванні

Рец. на кн.: Старенький О. С. Засоби кримінального процесуального доказування у досудовому розслідуванні: теорія та практика : монографія. Київ : ІНФОТЕХ, 2021. 684 с.

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