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Apprehension by an Authorised Official at the Residence or Other Property of a Person: Current Theoretical and Practical Issues

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■ **Abstract.** The purpose of the article is to analyse the issues of criminal procedural procedure for apprehension in a person's residence or other property and, on this basis, to formulate scientifically sound recommendations for improving current legislation and practice of its application. The article uses a set of scientific methods, namely: terminological, system-structural, formal-logical, and comparative-legal. The theoretical framework of the study is based on the works of Ukrainian scientists, provisions of the Criminal Procedure Code of Ukraine, and the practice of its application. The scientific novelty of the study consists in highlighting the specific features of the apprehension of a suspect located in their home or other property, formulating recommendations for the application of the relevant provisions of the Criminal Procedure Code of Ukraine in practice, and identifying the ways to improve the criminal procedural legislation to increase the efficiency of this procedural action. Based on the results of the study, a set of proposals aimed at improving the provisions of the Criminal Procedure Code of Ukraine regulating the procedure for apprehension in one's home or other property, and the practice of their application was formulated: 1) to enter a residence or other property of a suspect to detain a person who has committed a criminal offence, there must be grounds for both entry and detention, since these are actually different procedural actions; 2) in the case of apprehension by an authorised officer without a ruling of an investigating judge or court, physical restraint or apprehension by order may be carried out by all police officers in accordance with the Law of Ukraine "On the National Police", and employees of other law enforcement agencies, but only the investigator, prosecutor has the right to procedurally formalize these actions by drawing up a detention protocol (in view of this provision of the Code, needs to be clarified by clearly delineating detention, which covers the whole range of measures from physical restraint to drawing up the relevant protocol and physical restraint); 3) Article 208 of the Criminal Procedure Code of Ukraine should provide that physical restraint or apprehension by order can be carried out by law enforcement officers if there are legal grounds specified in Part 1 of Article 208 of the Code, and only authorised officials - investigator, prosecutor – can procedurally formalise these actions; 4) at the legislative level, it is necessary to provide for the possibility of detention on suspicion of committing a criminal offence before entering data into the Unified Register of Pre-trial Investigations; 5) it is necessary to expand the exigent circumstances provided for in Part 3 of Art. 233 of the Criminal Procedure Code of Ukraine by granting the right to the investigator, investigator, or prosecutor to enter the home or other property of a person in exigent circumstances related to the detention of a suspect, or accused person in order to participate in the consideration of the application for a preventive measure in the form of detention before the decision of the investigating judge

■ **Keywords:** apprehension; authorised official; housing; other property of a person; penetration into housing or other property of a suspect; search; inspection; investigator

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■ Introduction

The Constitution of Ukraine stipulates that each individual has the right to freedom and personal inviolability. No one may be arrested or detained except by a reasoned court decision and only on the grounds and in the manner prescribed by law. The procedure and legal grounds for detaining a person in the event of committing a criminal offence are defined in the Criminal Procedure Code of Ukraine.

It is prohibited to impede movement, detain and restrain a person without the grounds established by law. Criminal liability is established for committing such actions since there is a violation of human and civil rights and freedoms provided for by the Constitution of Ukraine.

If a person is detained on legal grounds, such actions are a lawful temporary interference with human and civil rights and freedoms.

In view of the above, the legal grounds and procedure for detention, especially when apprehension takes place in a person's home or other property, is a rather topical issue in academic circles.

At the same time, numerous issues in this area remained unresolved. Given the above, it is relevant to study the criminal procedural grounds and procedural order of apprehension by an authorised official in the home or other property of a person.

The purpose of the study is to provide an analysis of the issues related to criminal procedural grounds and the procedural order of apprehension by an authorised official in a person's home or other property, and on this basis to formulate scientifically sound recommendations for improving current legislation and its application.

The scientific novelty of the study consists in highlighting the specific features of the apprehension of a suspect located in their home or other property, formulating recommendations for the application of the relevant provisions of the Criminal Procedure Code of Ukraine in practice, and also identifying the ways to improve the criminal procedural legislation in order to increase the efficiency of this procedural action.

■ Results and Discussion

There are cases in the practice of law enforcement agencies when it is necessary to enter a person's home or other property for the purpose of arresting a person who has committed a criminal offence. In fact, forced entry and apprehension are different procedural actions, and therefore there must be grounds for each of them.

The grounds for arresting a person who has committed a criminal offence vary depending on who carries out the apprehension. If it is an authorised official, the said procedural action is carried out on the basis of Art. 208 of the CPC of Ukraine, if it is other persons – on the basis of Part 2, 3 of Art. 207 of the CPC of Ukraine. When distinguishing between grounds, most of the practical issues are related to the interpretation of the term “authorised official”.

Who is an authorised official? Analysis of the provisions of Part 6 of Article 191 and Part 3 of Article 207 of the Criminal Procedure Code of Ukraine

gives grounds to assert that an authorised official is a person who is granted the right to carry out an apprehension by law. This raises the question: which law? Presumably, this refers to any law, not only the CPC of Ukraine. To confirm this thesis, it should be emphasised that if the legislator wants to refer to this Code in the articles of the CPC of Ukraine, the phrase “this Code” is used. An example of a law that gives law enforcement officers the right to apprehension is the Law of Ukraine “On the National Police” of 2 July 2015. According to Part 1 of Article 37 of this Law, the police are authorised to apprehend a person on the grounds, in the manner and for the periods specified by the Constitution of Ukraine, the Criminal Procedure Code of Ukraine and the Code of Ukraine on Administrative Offences, and other laws of Ukraine. Thus, this article refers to the provisions of other legal acts, in particular, the CPC of Ukraine. At the same time, an analysis of certain police powers shows that they may relate to detention. The police stop actions related to the commission of a criminal offence and take measures aimed at eliminating threats to the life and health of individuals and public safety that have arisen as a result of the commission of a criminal offence (paragraphs 3, 4 of Part 1 of Article 23 of the law of Ukraine “on the National Police”). In this regard, the report prepared by the police officer states that the apprehension was carried out on the basis of Articles 23, 37 of the Law of Ukraine “On the National Police” of July 2, 2015, and that all police officers, not just investigators, are authorised to carry out apprehensions. According to the letter of the Prosecutor General's Office “On compliance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Criminal Procedure Code of Ukraine during the apprehension of a person” No. 13/4-565 vykh-328 okv-20 of August 17, 2020, “authorised official” is defined as a generic term that covers both investigators and other law enforcement officers who are authorised by the relevant laws to carry out detention. Such employees, in particular, include all other police officers: patrol police, operational units, district police officers, and employees of other law enforcement agencies vested with the right to apprehend persons, which is determined by special legislation, which they use in their activities (laws of Ukraine “On the State Border Guard Service of Ukraine”, “On the National Guard of Ukraine”, “On the Security Service of Ukraine”, “On the National Anti-Corruption Bureau of Ukraine”, “On the State Bureau of Investigation”, etc.)

At the same time, the analysis of certain provisions of Art. 208 of the CPC of Ukraine suggests

a different interpretation of the concept of “authorised official”. For example, in certain cases, it becomes necessary to conduct a search of an arrested person. In accordance with Part 3 of Art. 208 of the CPC of Ukraine, an authorised official, investigator, or prosecutor may search a detainee in compliance with the rules provided for in Part 7 of Art. 223 and Art. 236 of the CPC of Ukraine. Instead, the analysis of the provisions of Part 7 of Art. 223 and Art. 236 of the CPC of Ukraine show that only the investigator and the prosecutor, and not any law enforcement officer, can search a detained person.

Other law enforcement officers, unlike an investigator or prosecutor, also do not have the right to draw up a detention report, and therefore they do not draw it up without an investigator or prosecutor.

Therefore, it is natural that the practice of recognising only employees of pre-trial investigation bodies and prosecutors as authorized officials who have the right to carry out procedural detention without the decision of the investigating judge has been formed.

To conclude, physical restraint or apprehension by order can be carried out by all police officers, in accordance with the Law of Ukraine “On the National Police”, and employees of other law enforcement agencies. However, only the investigator or prosecutor has the right to formalise these actions by drawing up a protocol of detention. This applies specifically to temporary detention without the decision of the investigating judge.

Detention by an authorised official in some cases takes place only on the basis of a ruling by an investigating judge, and in others - without such a ruling.

Detention by the ruling of the investigating judge can be carried out not only by investigators, and prosecutors but also by other law enforcement officers who execute such a ruling. In this case, the latter also does not carry out the procedural registration of the specified action, but actually carry out the decision taken by an authorised person (investigating judge), that is, again, they carry out apprehension by order or physical restraint. An investigator or prosecutor may request such detention as part of a criminal investigation. But the decision on detention is made by the investigating judge, the court.

Apprehension without the ruling of the investigating judge. In accordance with Part 1 of Art. 208 of the CPC of Ukraine, an authorised official has the right to apprehend a person suspected of committing a crime punishable by imprisonment without the ruling of an investigating judge or court only in the following cases:

- if this person was caught during the commission or attempt to commit a crime;

- 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 scene points to the person who has just committed the crime;

- if there are reasonable grounds to believe that a person suspected of committing a grave or especially grave corruption crime under the jurisdiction of the National Anti-Corruption Bureau of Ukraine may escape with the aim of evading criminal liability;

- if there are reasonable grounds to believe that a person suspected of committing a crime under Art. 255, 255-1, 255-2 of the Criminal Code of Ukraine may escape with the aim of evading criminal liability.

The legislator does not specify who caught the offender during the commission of the crime. Therefore, it can be any person, not only an authorised official, who informed the latter that they had witnessed the crime. To catch a person in the act of committing a crime means to see them in any period of time from the beginning of the crime or attempted crime to its completion. Therefore, this does not include, for example, being near the victim of a crime after its completion.

The following options are possible: 1) immediately after the commission of the crime, an eyewitness, including the victim, points to the person who has just committed the crime; 2) immediately after the commission of the crime, a set of obvious signs on the body, clothing or place of the incident indicate that this person has just committed a crime, which is punishable by a fine of more than three thousand tax-free minimum incomes, only if the suspect has not fulfilled the duties imposed on him during the imposition of a preventive measure, or has not fulfilled the requirements for depositing funds as bail and providing a document confirming this in the prescribed manner.

Despite the clear indication of an exhaustive list of legal grounds for detention, cases of violation of the procedure specified in the legislation are common in practice, obviously due to an attempt to detain a person without appropriate grounds. For example, the local court correctly found that the head of the investigative department committed actions that led to the knowingly illegal detention of a person: in accordance with Article 40 of the CPC of Ukraine, he instructed the operational unit to establish the location of the person, to bring him to the office of the Ministry of Internal Affairs of Ukraine in one of the regions. There were no grounds for detention under Art. 208 of the CPC of Ukraine. When giving instructions to deliver a person to the office premises, the head of the department could not but realise that it could be executed only in one of the ways specified in the mentioned norm of the

law, which actually happened later. Later, confirming this illegal detention, the law enforcement officer drew up a protocol in the absence of any of the grounds provided for in Art. 208 of the CPC of Ukraine (as a result of the above, the actions of the police officer are qualified under Part 1 of Art. 371 of the Criminal Code of Ukraine) [1].

Often, detention does not occur immediately after the crime is committed, but much later. Therefore, law enforcement officers, seeking to detain persons who allegedly committed a criminal offence, in some cases become subjects of a criminal offence themselves. For example, the head of one of the departments of the local prosecutor's office in the Kirovohrad oblast and the senior investigator of the Prymorskyi Police Department of the Central Office of the National Police in Odesa oblast are accused of knowingly unlawful detention (Part 1 of Article 371 of the Criminal Code of Ukraine). The investigation established that the senior investigator received from the prosecutor a written order to apprehend a person in accordance with Art. 208 of the CPC of Ukraine. A police officer who was not part of the investigation team, reliably knowing about the illegality of this order, apprehended a citizen without legal grounds a week after the possible commission of a crime by him. The prosecutor then placed the citizen in a temporary detention facility on the basis of a detention report drawn up by the investigator [2].

The apprehension of a person who is in a dwelling or other possession of a person, and therefore the penetration into such a dwelling for the purpose of detention, is possible in the following cases:

- with the voluntary consent of the person who owns the dwelling or other property of the person to enter the said premises;
- on the basis of the investigating judge's ruling on permission to enter a suspect's home or other property;
- without a ruling of the investigating judge under exigent circumstances with further obtaining such a ruling after entering the home or other property of the person.

If there is a permit from a person who owns a suspect's home or other property or a permit for door breaching, then there are no procedural obstacles to apprehending a person who is in the dwelling or other property of the person if there are legal grounds for such apprehension.

However, what if there are legal grounds for apprehension, but there is no ruling from the investigating judge and no permission from the person who owns the housing or other property? In this case, it is necessary to establish how the legal grounds for

detention correspond to the grounds for entering a person's home or other property in urgent cases. As rightfully remarks V.Yu. Kalugin, exigent circumstance, apprehension and search are mutually conditioned procedural actions. After all, when a person is apprehended in a dwelling where they are hiding from persecution, then, a search should be conducted to identify evidence of a criminal offence [3].

One of the exigent circumstances that give the right to access the home or other property of a person before the ruling of the investigating judge is the case related to the direct prosecution of persons suspected of committing a criminal offence (Part 3 of Article 233 of the CPC of Ukraine).

Direct prosecution of persons suspected of committing a criminal offence may concern a person suspected of committing a crime punishable by imprisonment only in the following cases: 1) if they were caught during the commission or attempted commission of a crime (paragraph 1, part 1, Art. 208 of the CPC of Ukraine); 2) if immediately after the commission of the crime, an eyewitness, including 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 (paragraph. 2, part 1, Art. 208 of the Criminal Procedure Code of Ukraine); 3) if there are reasonable grounds to believe that the person may escape with the purpose of evading criminal liability, provided that they are suspected of committing a grave or especially grave corruption crime, referred by law to the jurisdiction of the National Anti-Corruption Bureau of Ukraine, or of committing a crime under Art. 255, 255-1, 255-2 of the Criminal Code of Ukraine (paragraphs 3-4 of part 1 of Art. 208 of the Criminal Procedure Code of Ukraine). Direct prosecution also applies to a person suspected of committing a criminal offence, if during the immediate prosecution after committing a criminal offence such person fails to comply with the lawful requirements of an authorised official (paragraph 3 of Part 1 of Article 298-2 of the CPC of Ukraine). That is, all these cases are subject to the direct prosecution of persons suspected of committing a criminal offence (Part 3 of Article 233 of the Criminal Procedure Code of Ukraine), and therefore, if present, apprehension is possible in the home or other property of the person. In such cases, it does not matter whether the housing or other property belongs to the perpetrator or another person who may not be involved in the commission of a criminal offence. Such housing or other property may be the place where a person has committed a criminal offence or attempted to commit it, the place where such a person tried to hide, or through which the suspect tried to escape after the latter was committed.

In such cases, the detention of a person immediately after committing a criminal offence is entirely legal and does not require any additional actions to legalise this procedural action. However, the fact of entering into a person's home or other property by obtaining a warrant for an inspection or search actually after they have been conducted requires legalisation.

Direct prosecution in Part 3 of Article 233 of the Criminal Procedure Code of Ukraine means that a person suspected of committing a crime can be prosecuted both immediately after the commission of the crime and after a certain time, in particular, if his prosecution was continuous. In fact, continuous prosecution is one of the options for direct prosecution, and therefore it is logical that it is also used to interpret the provisions of Article 208 of the Criminal Procedure Code of Ukraine (detention by an authorized official) and Part 3 of Article 233 of the Criminal Procedure Code of Ukraine (forced entry into a person's home or other property in exigent circumstance), although the term "continuous" is contained only in Paragraph 2 of Part 2 of Article 207 of the Criminal Procedure Code of Ukraine.

Carrying out continuous persecution, authorised officials are not actually limited in time, the key factor is that the persecution does not stop. For example, a person can be detained for 10-15 minutes, 1-2 hours or even several days after committing a criminal offence during a continuous pursuit. In the process of continuous pursuit, persons suspected of committing a crime can avoid detention by constantly changing their location. In such cases, employees of operational units indicate such circumstances in the report, after which they perform actions aimed at establishing the location and detention of these persons.

Detention of a person suspected of committing a criminal offence without a decision is possible in any place, including housing, but only immediately after the commission of the crime or during its continuous prosecution. At the same time, if there is a court permit for detention in the form of a ruling, such detention can take place at any time, regardless of the time that has passed since the commission of a criminal offence [4].

From the time of establishing the location of a suspect in the housing or other possession of a person, the investigator, while apprehending a person in such places, also draws up a report of inspection or search. At the same time, it should be noted that the search as an investigative (search) action can be conducted after entering data into the Unified Register of Pre-trial Investigations (URPTI). Therefore, as O.V. Sachko rightly notes, having found the offender at the scene, investigators and detectives are

actually "beyond the possibilities" of legally defined actions, because criminal proceedings have not yet been opened, and the law not only allows but also requires such a person to be detained [5]. However, O.A. Luchko defends a different position on this issue, emphasising that although the CPC of Ukraine does not clearly provide for the possibility of conducting a search in the URPTI, however, after analysing Part 3 of Art. 233 of the CPC of Ukraine on the right of the investigator, prosecutor in exigent circumstance before the ruling of the investigating judge to enter the home or other property, applying after such actions to the investigating judge with a request for a search, it can be concluded that it is possible to conduct it before registering the data of the URPTI in cases provided for by this rule [6].

In practice, to avoid the problematic situation associated with the lack of a clear legislative provision on the possibility of conducting a search before entering information about a criminal offence into the URPTI, law enforcement officers only inspect the scene after the physical restraint of a suspect. Meanwhile, another investigator (who is on daily duty as a member of the investigative team) enters the relevant information into the URPI, and only after that the apprehension report is drawn up and the suspect is searched. Generally, if such actions are taken promptly enough, there are usually no problems.

Judge of the Criminal Court of Cassation under the Supreme Court S. Fomin rightly points out that many concerns that were raised in 2012, when the CPC of Ukraine was adopted, remain unresolved to this day. Among them, there are issues related to the regulatory expansion of the range of procedural actions that could be carried out before entering information in the unified state register of legal entities. It is primarily a matter of the possible apprehension of a person in respect of whom the police officers, who are not authorised to carry out criminal procedural activities, have information about committing or preparing to commit criminal offences, personal search and engagement of an expert for examination. He noted that the Supreme Court receives cassation appeals, in which the defenders point out violations of the rights of a person when he was forced to stay near the police officers who performed the functions of public order protection. The Law of Ukraine "On the National Police" provides for a superficial check and inspection and restriction of movement of a person or vehicle as preventive police measures. According to Part 1 of Article 37 of this Law, the police are authorised to apprehend a person on the grounds, in the manner and for the periods specified by the Constitution of Ukraine, the Criminal Procedure Code of Ukraine

and the Code of Ukraine on Administrative Offences, and other laws of Ukraine. Administrative detention is carried out on the grounds and in the manner prescribed by Art. 260-264 of the CAO, it can not be applied to persons suspected of committing a criminal offence, and detention as a measure to ensure criminal proceedings can be carried out only after entering data into the URPI. Such inconsistency between the normative acts in some cases may indeed lead to a violation of human rights, and subsequently – to the recognition of evidence obtained before the criminal proceedings as inadmissible [7].

That is, the lack of a clear indication in the CPC of Ukraine on who is the authorised person to apprehend, and the absence of clear regulation of the procedure and grounds for physical restraint by law enforcement officers of persons suspected of committing criminal offences, leads to errors in the execution of these actions. In some cases, this leads to the defence filing appeals and subsequently cassation appeals to the courts to challenge the detention.

Article 262 of the CAO states that the administrative detention of a person who has committed an administrative offence may be carried out only by bodies (officials) authorised by the laws of Ukraine. Administrative detention is carried out, in particular, by the National Police. That is, in the CAO, unlike the CPC of Ukraine, physical apprehension and its procedural registration can be carried out by the same authorised person. Instead, according to the CPC of Ukraine, physical detention can be carried out by any law enforcement officer, and procedural registration of this action can be carried out only by the investigator, or prosecutor.

The time of detention of a suspected person in specially designated premises starts from the moment of his/her apprehension. The concept of apprehension is defined in Article 209 of the Criminal Procedure Code of Ukraine (a person is apprehended from the moment when he/she is compelled by force or by obedience to an order to remain near an authorised official or in a room designated by an authorised official).

At the same time, the legislation does not provide for the possibility of apprehension on suspicion of committing a criminal offence before entering data into the URPTI. Consequently, the obtained evidence is recognised as inadmissible. In particular, the Ruling of the panel of judges of the First Trial Chamber of the Criminal Court of Cassation of the Supreme Court of February 16, 2021, in case No. 204/6541/16-k states that the defender requests to cancel the court rulings and close the criminal proceedings. In this case, the defence, among other arguments, raises the question of the inadmissibility

of narcotic drugs seized from the convicted person, since they were obtained during a personal search after he was detained under Article 209 of the Criminal Procedure Code of Ukraine.

Justifying their arguments, the defence refers to the fact that this apprehension and personal search were not documented in the report of apprehension, but in the report of an inspection of the scene. The report of the inspection of the scene in fact reflects a personal search of the detainee PERSON_1, which was conducted before entering information about the crime into the URPI. The court agreed that in such circumstances the protocol of inspection of the scene and the evidence derived from it should be declared inadmissible [8].

Given this, it is advisable to envisage the possibility of apprehension on suspicion of committing a criminal offence before entering data into the URPTI. In such circumstances, any apprehension of a person on suspicion of committing a criminal offence will be lawful regardless of the moment of physical restraint and procedural registration. If, after the introduction of these legislative changes, the apprehension occurs in a person's home or other property and it is necessary to conduct a search, the algorithm of actions will be as follows 1) entry into the dwelling or other property of a person with his/her voluntary consent or upon exigent circumstances (related to saving lives and property or direct prosecution of persons suspected of committing a criminal offence); 2) physical apprehension of a person and its procedural registration; 3) entering data into the URPTI; 4) conducting a search; 5) immediate appeal of the prosecutor, investigator, inquiry officer in agreement with the prosecutor after such actions to the investigating judge with a request to conduct a search.

Apprehension in the residence or other property of a suspect to bring him/her to participate in the consideration of the application for a preventive measure in the form of detention. Apprehension in a person's home or other property may also apply to persons who have acquired the status of a suspect or accused. For example, in accordance with Part 1 of Art. 188 of the CPC of Ukraine, the prosecutor, and investigator, with the consent of the prosecutor, have the right to apply for permission to apprehend the suspect, accused to bring him/her to participate in the consideration of the application for a preventive measure in the form of detention. Such cases occur when the whereabouts of the suspect is unknown and the suspect is put on the wanted list. After obtaining a permit to apprehend for the purpose of bringing such a person to justice and establishing their whereabouts, the question arises as

to how to apprehend them if they are in the housing or other property. If there are legal grounds for the apprehension of a person (the relevant decision or the person is officially wanted), law enforcement officers try to carry out the apprehension without entering the home or other property of the person, so as not to apply to the court for a search (inspection) of the premises. This situation is partly determined by a legal loophole, which does not classify such circumstances as exigent under Part 3 of Article 233 of the CPC of Ukraine, which significantly complicates the work of law enforcement. To avoid this problem, the investigator may use the provisions of Art. 234 of the CPC of Ukraine "Search", which states that one of the tasks of the search is to establish the location of the wanted persons. However, to achieve this goal, the investigator requires a search warrant from the investigating judge, unless, of course, there are grounds for an urgent search involving the saving of lives and property.

In this case, it would be advisable to supplement Part 3 of Article 233 of the CPC of Ukraine, namely: "Investigator, detective, the prosecutor shall have the right to enter the home or other property of a person only under exigent circumstances related to saving lives and property or direct prosecution of persons suspected of committing a criminal offence, or to apprehend a suspect, accused to bring him/her to participate in the consideration of a request for a preventive measure in the form of detention".

Thus, entering a person's home or other property to apprehend a person who has committed a crime may be carried out both with and without appropriate warrants in cases provided for by law. In practice, there may occur situations where a warrant to forcibly enter the premises is available, and the apprehension will be abrupt and carried out on the basis of Art. 208 of the CPC of Ukraine, or, conversely, there is a warrant to apprehend a person, and the entry into the premises is carried out with voluntary consent or in the presence of exigent circumstances because there is a real threat that the person sought is in a certain place and can hide.

Thus, having analysed the CPC, it should be noted that entry into a dwelling or other property of a person is possible by the ruling of the investigating judge, by the voluntary consent of the owner, and also under exigent circumstances. Such forced entry can be executed by authorized bodies, i.e., law enforcement officers. Further physical restraint or apprehension by order of a suspected person may also be carried out by law enforcement officers. However, the investigator and the prosecutor are authorised to draw up a report of apprehension or a report of the investigative (search) action. They are

the ones who are authorised to carry out criminal procedural activities. The lack of clear definitions of this issue in the CPC of Ukraine leads to confusion regarding the powers of apprehension.

■ Conclusions

Entering a residence or other property of a person due to the need to apprehend a perpetrator requires grounds for both entering and apprehending, as these are actually different procedural actions.

Apprehension in the housing or other property of a person, and, consequently, entering such housing or other property of a person for the purpose of apprehension is possible in such cases:

- with the voluntary consent of the person who owns the dwelling or other property of the person to enter the said premises;
- on the basis of the investigating judge's ruling on permission to enter a suspect's home or other property;
- without a ruling of the investigating judge under exigent circumstances with further obtaining such a ruling after entering the home or other property of the person.

In the event of apprehension by an authorised official without a ruling of an investigating judge or court, all police officers, in accordance with the Law of Ukraine "On the National Police", as well as employees of other law enforcement agencies, may physically restraint or apprehend by order. However, only the investigator or prosecutor has the right to formalise these actions by drawing up a protocol of detention. In view of the above, the provisions of the CPC of Ukraine require further elaboration by clearly delineating apprehension, which covers a range of measures from physical apprehension to drawing up a relevant protocol.

Article 208 of the Criminal Procedure Code of Ukraine should provide for a provision that physical restraint or apprehension by order can be carried out by law enforcement officers if there are legal grounds specified in Part 1 of Article 208 of the Criminal Procedure Code of Ukraine, and only authorized officials – investigator, prosecutor – can procedurally formalise these actions.

It is advisable to provide for the possibility of apprehension on suspicion of committing a criminal offence before entering data into the URPTI at the legislative level. In such circumstances, any apprehension of a person on suspicion of committing a criminal offence will be lawful regardless of the moment of physical restraint and procedural registration. If, after the introduction of these legislative changes, the apprehension takes place in a person's home or other property and there is a need to conduct a search, the algorithm of actions will be as follows:

- entering a person's home or other property with his or her voluntary consent or under exigent circumstances (in urgent cases related to saving lives and property or direct prosecution of persons suspected of committing a criminal offence);
- apprehension of a person and its procedural registration;
- entering data into the URPI;
- conducting a search;
- immediate appeal of the prosecutor, investigator, and inquiry officer upon agreement with the prosecutor to the investigating judge with a request to conduct a search after conducting such actions.

It is necessary to expand the list of exigent circumstances provided for in Part 3 of Art. 233 of the

CPC of Ukraine by granting the investigator, coroner, or prosecutor the right to enter the home or other property of a person in urgent cases related to the apprehension of a suspect, or accused in order to bring them to participate in the consideration of the motion for the imposition of a preventive measure in the form of detention. Therefore, Part 3 of Art. 233 of the CPC of Ukraine should be worded as follows: “Investigator, detective, prosecutor shall have the right to enter the home or other property of a person only under exigent circumstances related to saving lives and property or direct prosecution of persons suspected of committing a criminal offence, or to apprehend a suspect or accused to bring him/her to participate in the consideration of a request for a preventive measure in the form of detention”.

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Затримання уповноваженою службовою особою в житлі чи іншому володінні особи: актуальні проблеми теорії та практики

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■ **Анотація.** Метою статті є аналіз проблемних питань кримінального процесуального порядку затримання в житлі чи іншому володінні особи та формування на цій підставі науково обґрунтованих рекомендацій з удосконалення чинного законодавства та 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 учених, положення Кримінального процесуального кодексу України, а також практика його застосування. Наукова новизна статті полягає в тому, що в ній висвітлено особливості затримання особи, яка перебуває в житлі чи іншому володінні особи, сформульовано рекомендації щодо застосування відповідних положень Кримінального процесуального кодексу України на практиці, а також визначено напрями вдосконалення кримінального процесуального законодавства з метою підвищення ефективності проведення цієї процесуальної дії. За результатами дослідження сформульовано комплекс пропозицій, спрямованих на вдосконалення положень Кримінального процесуального кодексу України, що регламентують порядок затримання в житлі або іншому володінні особи, і практики їх застосування, зокрема: 1) для проникнення до житла чи іншого володіння особи у зв'язку з необхідністю затримання особи, яка вчинила кримінальне правопорушення, необхідні підстави як для проникнення, так і затримання, оскільки фактично це різні процесуальні дії; 2) у випадку затримання уповноваженою службовою особою без ухвали слідчого судді, суду фізичне затримання чи затримання за наказом можуть здійснювати всі працівники поліції відповідно до Закону України «Про Національну поліцію», а також працівники інших правоохоронних органів, однак процесуально оформляти ці дії шляхом складання протоколу затримання має право лише слідчий, прокурор (з огляду на зазначене положення цього Кодексу, потребують уточнення шляхом чіткого розмежування затримання, яке охоплює весь комплекс заходів від фізичного затримання до складання відповідного протоколу та фізичного затримання); 3) у ст. 208 Кримінального процесуального кодексу України доцільно передбачити положення про те, що фізичне затримання чи затримання за наказом можуть здійснювати працівники правоохоронних органів за наявності правових підстав, зазначених у ч. 1 ст. 208 Кодексу, а процесуально оформлювати ці дії можуть лише уповноважені службові особи – слідчий, прокурор; 4) на законодавчому рівні необхідно передбачити можливість затримання за підозрою у вчиненні кримінального правопорушення до внесення даних до Єдиного реєстру досудових розслідувань; 5) слід розширити невідкладні випадки, передбачені ч. 3 ст. 233 Кримінального процесуального кодексу України, шляхом надання права слідчому, дізнавачу, прокурору до постановлення ухвали слідчого судді ввійти до житла чи іншого володіння особи в невідкладних випадках, пов'язаних із затриманням підозрюваного, обвинуваченого з метою його приводу для участі в розгляді клопотання про застосування запобіжного заходу у вигляді тримання під вартою

■ **Ключові слова:** затримання; уповноважена службова особа; житло; інше володіння особи; проникнення до житла або іншого володіння особи; обшук; огляд; слідчий

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Subjective Side of the Criminal Offence of Illegal Enrichment

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■ **Abstract.** The purpose of the study is a comprehensive examination of the subjective side of the criminal offence of illicit enrichment by analysing the content of its individual features, and the development of new legal mechanisms to improve Article 368 of the Criminal Code of Ukraine. The methodology of the study is a set of scientific methods, among which a prominent one is a dialectical method, which allows for determining the theoretical, legislative, and applied aspects of the subjective side of illicit enrichment. The paper also uses general scientific and special methods of cognition, namely: formal-logical, system-functional, comparative-legal and historical. The scientific novelty of the study is that it highlights the relevant aspects of the subjective side of illicit enrichment using modern methods of cognition and considers the latest achievements of science. Specific suggestions for improving the content of Art. 368 of the Criminal Code of Ukraine was proposed. Based on the results of the study, the conclusions on the subjective side of the corpus delicti of illicit enrichment were formulated. In particular, it is argued that illegal enrichment can only be carried out with direct intent. The author proposes to define the intellectual moment of direct intent of illicit enrichment as the mental attitude of a person to their actions and consequences in case of committing the said criminal offence, which covers the awareness of three blocks of features: a) signs of the content of the act (the perpetrator, realising the social danger of their actions, acquires assets); b) features of social status (the subject's awareness of their legal status, the importance of the position held by the person in public authorities or local self-government bodies and the functions they performs); c) other signs of a socially dangerous act that depends on the time, method, place, and situation that the perpetrator must be aware of. In turn, the intentional aspect of the criminal offence in question involves the desire to commit the relevant socially dangerous act, namely the desire to acquire assets. Motive – mercenary (the method of which is the illegal, unlawful, prohibited by law acquisition of material wealth (acquisition of assets) for their own enrichment); purpose – acquisition of assets in respect of which a person will be able to directly or indirectly perform any actions at his discretion; emotional state – a state of strong emotional excitement (physiological affect), but does not affect the qualification of illicit enrichment. It is proposed to supplement Part 1 of Article 368 of this Code with the word “intentional” before the words “acquisition by a person... assets”

■ **Keywords:** illegal enrichment; criminal offence; subjective side; intent

■ Introduction

One of the key topical areas of the criminal law of Ukraine is the issue of the subjective side of a criminal offence. The establishment of the most important institutions of criminal law depends on the correct solution and establishment of the signs of the subjective side.

Criminal liability for illicit enrichment in Ukraine is provided for in Art. 368 of the Criminal Code of Ukraine: acquisition by a person authorised to

perform the functions of the state or local self-government of assets, the value of which exceeds his or her legal income by more than six thousand five hundred tax-free minimum incomes. Note 1 to Art. 368 of the Criminal Code of Ukraine defines the persons subject to criminal liability for illicit enrichment. Part 2 of Article 368 of the Criminal Code explains how to interpret the acquisition of assets. The subject of illicit enrichment is defined in parts 3 and 4 of Art. 368 of this Code. Part 5 of Art. 368 refers to the difference between the value of the acquired assets and the legitimate income of the subject of illicit enrichment. However, the subjective side in the studied criminal law provision is not defined by the legislator.

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Despite a significant number of scientific works devoted to the aspects of the subjective side of illicit enrichment, which are of important scientific and practical importance, many issues remain unexplored. This is primarily due to the fact that the criminal law norm of illegal enrichment in the Criminal Code has been changed and supplemented seven times. In addition, the vast majority of studies of illicit enrichment were carried out under the wording of Art. 368 of the Criminal Code, which, according to the decision of the Constitutional Court of Ukraine of February 26, 2019, No. 1-p/2019, was recognised as inconsistent with the Constitution of Ukraine. The above shows the relevance of the chosen topic and necessitates an in-depth theoretical analysis of the subjective side of illicit enrichment.

The purpose of the study is a comprehensive study of the subjective side of the criminal offence of illicit enrichment by analysing the content of its individual features, and the development of new legal mechanisms for improving Article 368 of the Criminal Code of Ukraine.

The scientific novelty of the study is that it highlights the relevant aspects of the subjective side of illicit enrichment using modern methods of cognition and considers the latest achievements of science. Specific proposals for improving the content of Art. 368 of the Criminal Code of Ukraine are proposed.

■ Results and Discussion

In criminal law theory, it is generally accepted that the subjective side of a criminal offence is the internal side of a socially dangerous act, that is, a set of processes that occur in the consciousness and will of a person, awareness of their own actions and foresight of consequences, the goal that a person seeks to achieve, the motive by which they are guided, and the emotions they experience [1].

Valid is the argument of R.V. Veresha, who in his thesis “Problems of the subjective side of a criminal offence” emphasised that the subjective side of a criminal offence as a legal construct involves structuring (modelling) of the most significant characteristics of mental activity of the relevant type (variety) of a socially dangerous act for criminal law [2].

The content of the subjective side of the composition of a criminal offence covers the following legal features: guilt, motive, purpose, and emotional state. The mandatory feature among them is the plea of guilty, while other features are optional, and have a mandatory nature, when directly mentioned in the disposition of the criminal law norm, or arise from its content. Theoretically, guilt is characterised by such features as form and content. Sometimes there is also such a sign as the degree of guilt [3].

Art. 23 of the Criminal Code stipulates that the concept of “guilt” should be interpreted as the

“mental attitude of a person to the committed action or inaction provided for by this Code and its consequences, expressed in the form of intent or negligence”, while the content of its forms is covered in Articles 24, 25 of the Criminal Code of Ukraine.

It is evident that the definition of direct intent in Part 2 of Article 24 of the Criminal Code of Ukraine is quite correct only in relation to the material elements of criminal offences.

The analysis of Article 368 of the Criminal Code of Ukraine, suggests that according to the construction of the objective side, illicit enrichment refers to acts with a material composition [4]. That is, illicit enrichment can be committed only with direct intent. In view of the above, it is necessary to highlight the intellectual and volitional aspects of the direct intent of the criminal offence under investigation.

In particular, M.V. Kocherov argues that the intent of a person who receives an unlawful benefit is embraced by the fact that the items received or services accepted are of a property nature and their receipt is illegal [5].

According to O.P. Deneha, the guilty person, the guilty person, illegally acquiring assets in ownership, is aware that his actions cause damage to public relations in the public service and economic and national security in general [6].

Regarding the above stance, I.M. Yasin stressed that the consciousness of the perpetrator is occupied by the acquisition of assets that are not equivalent to the time spent on the performance of the functions of the state or local self-government, or other income not prohibited by law, and vice versa, such assets acquired illegally, without grounds provided for in the law, as a result of corruption schemes, illegal transactions or other offences aimed at illicit enrichment [7]. That is, the content of the intellectual sign of intent also includes the perpetrator’s understanding of all the signs of the subject of illicit enrichment (physical, economic and legal).

The intellectual aspect of the direct intent of illicit enrichment is successfully reflected in the criminal legislation of the Republic of Lithuania. Based on the analysis of the problems that arose in the country on the way to implementing a modern legal mechanism of the criminalisation of illicit enrichment, C. Bikelis concludes that the concept of criminalisation of illicit enrichment is less promising than the concept of civil confiscation of property [8].

Part 1 of Art. 189 of the Criminal Code of the Republic of Lithuania stipulates that a person who owns property worth more than 500 minimum subsistence minimums and who at the same time was aware or could have been aware that such property was not acquired with the use of legitimate income shall be punished by a fine or arrest or imprisonment for up to four years.

The authors believe that the intellectual aspect of a person's mental attitude to his own actions and consequences during the commission of illicit enrichment includes awareness of three blocks of features: a) signs of the content of the act (the perpetrator, realising the social danger of his own actions, acquires assets that do not belong to him); b) features of social status (the subject's awareness of his legal status, the importance of the position held by the person in public authorities or local self-government bodies and the functions he performs); c) other signs of a socially dangerous act (depending on the time, method, place, situation, which the perpetrator must be aware of).

In turn, the volitional aspect of direct intent is the desire for the foreseeable consequences of one's own act. The volitional aspect of intent should be considered with regard to the differentiation of types of intent into direct (characterised by the desire for socially dangerous consequences) and indirect (unwillingness, but conscious assumption of socially dangerous consequences).

Given the outlined standpoint, along with the proposal by R.V. Vereshi, the authors find it reasonable to define the volitional feature of direct intent as the desire to commit relevant socially dangerous acts [2]. Since illicit enrichment can be committed only with direct intent, the volitional aspect of the criminal offence in question involves the desire to commit socially dangerous acts, in particular the desire to acquire assets.

It is also important to consider the motive, purpose and emotional state as signs of the subjective side of the criminal offence under Art. 368 of the Criminal Code of Ukraine.

Paragraph 2 of Part 1 of Article 91 of the CPC of Ukraine stipulates that in criminal proceedings the guilt of the accused in committing a criminal offence, the form of guilt, motive and purpose of committing a criminal offence shall be proved.

Motive is something that prompts a person to commit a socially dangerous act, a source of activity. Noteworthy is the conclusion of O.S. Yunin, who considers the motive of a criminal offence to be the result of a complex motivational process formed under the influence of the synthesis of subjective and objective factors, which proceeds in the mind of the subject and constitutes an internal incentive to commit a criminal offence [9].

According to K.V. Ilyashova, the vital need that the perpetrator wants to satisfy may be of a selfish nature or may not be related to the acquisition of material values or deprivation of property obligations at all, but its satisfaction can only be achieved by encroaching on a property, which does not yet indicate a selfish motivation for the perpetrator's behaviour [10].

It is necessary to emphasise that the commission of illicit enrichment has a predominantly selfish motive. Scholar V.I. Tyutyugin believes that the subjective side of illicit enrichment is characterised by the presence of a mercenary motive, because, pursuing such a goal, the guilty person is thereby guided by motives to illegally obtain material goods, acquire or preserve certain property rights, seeks to avoid material costs or achieve other material benefits [10].

Researcher I.M. Yasin shares this position and notes that the main motive on which the decision of the subject of illicit enrichment is based is mainly the desire to increase assets and improve their financial situation [7].

According to the authors, the defining feature for assessing the mercenary motive of illicit enrichment is the method, which consists of the illegal, unlawful, prohibited by law acquisition of material wealth (acquisition of assets) for their own enrichment.

It is important to note that there is a close internal connection between the motive and purpose of a criminal offence.

In criminal law theory, the purpose of a criminal offence is defined as a person's understanding of the result of his or her activity, and what the person is going to achieve [1]. Thus, this is what the subject of the criminal offence is trying to achieve by committing a socially dangerous act under the Criminal Code.

Justified is the argument of R.V. Veresha regarding the fact that the whole process of committing a criminal offence is accompanied by the formation of perception images. By committing criminal activity, the subject of a criminal offence seeks to get closer to the desired goal, that is, to achieve a certain result in the future [2]. Besides, the actors of corrupt relations aim to keep the committed socially dangerous acts secret. In this regard, the perpetrators avoid criminal liability, and illegally obtained assets are not contributed to the state revenue [11].

The main goal of the subject of illicit enrichment is to acquire assets in respect of which he will be able to directly or indirectly perform any actions at his discretion.

Emotional state – a state of strong emotional excitement (physiological affect) – is a constructive feature exclusively provided for in the article of the Criminal Code, and also, according to paragraph 7 of Article 66 of the Criminal Code, is a circumstance that mitigates the punishment. However, it is almost impossible to commit a criminal offence under Art. 368 of the Criminal Code under the influence of strong emotional distress caused by illegal or immoral actions of another person.

In view of the above, it is advisable to amend Art. 368 of the Criminal Code, in particular: Part 1 of Art. 368 of this Code should be supplemented with the word "intentional" before the words "acquisition of assets by a person...".

■ Conclusions

The study of the subjective side of the corpus delicti of illicit enrichment was conducted in view of legal features: guilt, motive, purpose and emotional state. It is established that illegal enrichment can only be carried out with direct intent. Based on this, the intellectual and volitional aspects of the direct intent of this criminal offence are investigated.

The author proposes to define the intellectual moment of direct intent of illicit enrichment as a person's attitude towards his actions and consequences in case of committing the said criminal offence, which includes awareness of three blocks of features: a) signs of the content of the act (the perpetrator, realising the social danger of his own actions, acquires assets); b) features of social status (the subject's awareness of his legal status, the importance of the position held by the person in state authorities or local self-government bodies and the functions he performs); c) other signs of a socially

dangerous act that depend on the time, method, place, and situation that the perpetrator must be aware of. In turn, the intentional aspect of the criminal offence in question involves the desire to commit the relevant socially dangerous act, namely the desire to acquire assets.

Based on the study of optional features of the subjective side of illicit enrichment, it was established that the motive is mercenary (the method of which is the illegal, unlawful, prohibited by law acquisition of material wealth (acquisition of assets) for their own enrichment); purpose – acquisition of assets in respect of which a person will be able to directly or indirectly perform any actions at his discretion; emotional state – a state of strong emotional excitement (physiological affect), but does not affect the qualification of illicit enrichment.

It is proposed to supplement Part 1 of Article 368 of this Code with the word “intentional” before the words “acquisition by a person... assets”.

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Суб'єктивна сторона складу кримінального правопорушення незаконного збагачення

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■ **Анотація.** Метою статті є комплексне дослідження суб'єктивної сторони складу кримінального правопорушення незаконного збагачення шляхом аналізу змісту окремих її ознак, а також розроблення нових правових механізмів удосконалення ст. 3685 Кримінального кодексу України. Методологію дослідження становить комплекс наукових методів, серед яких важливе місце посідає діалектичний метод, який дає змогу визначити теоретичні, законодавчі та прикладні аспекти суб'єктивної сторони незаконного збагачення. Також у роботі використано загальнонаукові та спеціальні методи пізнання, а саме: формально-логічний, системно-функціональний, порівняльно-правовий та історичний. Наукова новизна статті полягає в тому, що в ній висвітлено актуальні проблеми суб'єктивної сторони незаконного збагачення з використанням сучасних методів пізнання та врахуванням новітніх досягнень науки. Запропоновано конкретні пропозиції з удосконалення змісту ст. 3685 Кримінального кодексу України. За результатами здійсненого дослідження сформульовано висновки щодо суб'єктивної сторони складу незаконного збагачення. Зокрема, аргументовано, що незаконне збагачення може бути здійснено лише з прямим умислом. Запропоновано інтелектуальний момент прямого умислу незаконного збагачення визначати як психічне ставлення особи до власних діянь і наслідків, у випадку вчинення нею зазначеного кримінального правопорушення, що охоплює усвідомлення трьох блоків ознак: а) ознак змісту діяння (винний, усвідомлюючи суспільну небезпечність власних дій, набуває активи); б) особливостей соціального статусу (усвідомлення суб'єктом свого правового статусу, важливості посади, яку особа обіймає в органах державної влади або органах місцевого самоврядування, і функцій, які вона виконує); в) інших ознак суспільно небезпечного діяння, що залежать від часу, способу, місця, обстановки, які повинен усвідомлювати винний. Своєю чергою вольовий момент розглянутого кримінального правопорушення передбачає бажання вчинити відповідне суспільно небезпечне діяння, а саме бажання набути активи. Мотив – корисливий (спосіб якого полягає в незаконному, протиправному, забороненому законом заволодінні матеріальними благами (набуття активів) для власної потреби збагачення); мета – набуття активів, щодо яких особа зможе безпосередньо чи опосередковано вчинити будь-які на її розсуд дії; емоційний стан – стан сильного душевного хвилювання (фізіологічний афект), однак на кваліфікацію незаконного збагачення не впливає. Запропоновано ч. 1 ст. 3685 цього Кодексу доповнити перед словами “набуття особою... активів...” словом “умисне”

■ **Ключові слова:** незаконне збагачення; кримінальне правопорушення; суб'єктивна сторона; умисел

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Method Commission of Illegal Manufacture, Processing or Repair of Firearms or Fraud Unlawful Removal or Changes its Labelling or Illicit Manufacture of Ammunition, Explosives or Explosive Devices

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■ **Abstract.** The purpose of the study is to identify the methods of illegal manufacture, modification or repair of firearms or falsification, illegal removal or alteration of their markings or illegal manufacture of ammunition, explosives or explosive devices. The methodological basis of scientific research is a set of methods and techniques of scientific cognition necessary for the realisation of a certain goal, the specifics of the object and the subject of research. The use of these methods ensured the credibility and reliability of the research results. The main method of research is dialectical, which uses laws and categories to define the means of illegal manufacture, modification or repair of firearms or falsification, illegal removal or alteration of their markings or illegal manufacture of ammunition, explosives or explosive devices. Special research methods were also applied, namely: system analysis method, system-structural, formal-logical, sociological and statistical. The scientific novelty of the study is: establishing the main methods of committing the crime in question as active measures in relation to firearms, ammunition, explosives or explosive devices: manufacturing (for all items of weapons defined in Art. 263-1 of the Criminal Code of Ukraine); processing, removal of markings, change of markings (only in relation to firearms); most methods of committing crimes are full-structured (have stages of preparation, commission and concealment); actions covered by the features of this crime are often a separate link in the chain of detailed planned criminal activity related to trafficking in weapons, ammunition, explosives or explosive devices; the expediency of defining in Art. 263-1 of the Criminal Code of Ukraine criminal liability for the illegal modification of ammunition. Conclusions. Most of the methods of committing crimes under Art. 263-1 of the Criminal Code of Ukraine are complex, that is, they include the following stages: a) preparation: selection of premises; preparation of necessary materials, devices, and tools; using publicly available information in open sources on the manufacture, structural changes to weapons; purchase of tools, metalworking devices; visits to facilities related to their production, storage and use; targeted inspection of military conflict zones; b) committing and c) concealing: failure to appear when summoned; giving false testimony; refusal to testify; putting forward a false alibi; destroying traces and instruments of a criminal offence; influencing witnesses. In addition to the established, typical methods of committing crimes under Art. 263-1 of the Criminal Code of Ukraine, tendencies to improve, and modernise methods of illegal manufacture, modification or repair of weapons have been identified: high-tech processing, manufacturing using modern technical means; use of reference information, purchase of individual structural mechanisms, parts for weapons through Internet sites; use of camouflage means. The activities falling under Art. 263-1 of the Criminal Code of Ukraine often constitutes a separate link in the chain of well-planned criminal activities related to illicit trafficking in weapons, ammunition, explosives or explosive devices

■ **Keywords:** firearms; military supplies; explosive device; manufacturing; recycling

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■ Introduction

According to statistics, of all the crimes related to violation of the established rules for handling dangerous goods, the illegal manufacture, modification or repair of firearms or falsification, illegal removal or alteration of their markings or illegal manufacture of ammunition, explosives or explosive devices defined in Art. 263-1 of the Criminal Code of Ukraine is one of the least common. However, in recent years, such

illegal activities have become organised, these crimes have become highly professional and specialised. Improvised explosive devices, grenades, grenade launchers, mines and shells are actively used [1].

The method of committing a crime, is a fundamental element of any forensic characteristic, it is regarded as a source of information necessary for the detection and prevention of crimes. Crimes under Art. 263-1 of the Criminal Code of Ukraine are no exception, as the importance of the method of this socially dangerous act is evidenced by the disposition of the article of the Criminal Code of Ukraine. According to the method of committing these crimes, it is possible to establish certain characteristics of the criminal's identity, such as the presence of professional skills and criminal experience, physical data, the degree of awareness about the ways of using firearms, military supplies, explosives or explosive devices for criminal purposes, and so on.

The issue of illicit trafficking of weapons, special features of their examination and analysis of the relevant cases were studied by the following Ukrainian and foreign scientists: P.D. Bilenchuk, V.I. Borysov, V.V. Bychkov [2], V.F. Vasyukov, A.V. Kokin, O.S. Sokolov [3-5], V.Ya. Tatsii, A.E. Shalagin, V.O. Yaremchuk et al. [6]. At the same time, many issues in this area remain unresolved. Given the above, it is important to investigate the methods of manufacturing, modification or repair of firearms or falsification, illegal removal or alteration of their markings or illegal manufacture of ammunition, explosives or explosive devices.

The purpose of the study is a systematic analysis and presentation of the material related to the definition of typical ways of committing criminal offences under Art. 263-1 of the Criminal Code of Ukraine to form adequate counteraction and investigation methods.

To achieve this goal, the following tasks are set: 1) to outline the stages of committing crimes under Art. 263-1 of the Criminal Code of Ukraine; 2) to determine the features of the methods of committing these crimes; 3) to identify trends in improving the methods of committing crimes under Art. 263-1 of the Criminal Code of Ukraine, on the basis of which to propose effective solutions to detect and prevent them.

The scientific novelty of the study is: establishing the main methods of committing the crime in question as active measures in relation to firearms, ammunition, explosives or explosive devices: manufacturing (for all items of weapons defined in Art. 263-1 of the Criminal Code of Ukraine); modification, removal of markings, change of markings (only in relation to firearms); most methods of committing crimes are full-structured (have stages of preparation, commission and concealment); actions

covered by the features of this crime are often a separate link in the chain of detailed planned criminal activity related to trafficking in weapons, ammunition, explosives or explosive devices; the expediency of defining in Art. 263-1 of the Criminal Code of Ukraine criminal liability for the illegal modification of ammunition.

■ Results and Discussion

Among a number of possible interpretations of the category under study, the authors chose the approach to the interpretation of the method of committing a crime proposed by V.K. Veselsky, S.M. Zavyalov & V.V. Piaskovsky, who formulate it as a pattern of actions for the preparation, commission and concealment of traces of a crime, which characterises forensically significant information about the perpetrator and the means used by him and the possibility of their use in the detection and investigation of crimes [7].

The generalised forensic investigative practice and analysis of the assessment of this element of forensic characteristics by leading scientists gives grounds for concluding that it is necessary to identify new modern methods of preparing, committing and concealing crimes under Article 263-1 of the Criminal Code of Ukraine as one of the most important sources of formation of criminalistically significant information.

Differentiation of the perpetrator's actions by the stage of their execution allows a more detailed study of the specifics of the preparation, commission and concealment of the crimes under investigation, and on the basis of knowledge of these features to establish and expose the identity of the offender. Actions of the perpetrator in preparing for the manufacture or modification of firearms, ammunition, explosives, explosive devices, concealment of such actions are closely interrelated, forming the method of this crime or group of crimes, as they are driven by a single plan and intent.

The objective side of the crime under Art. 263-1 of the Criminal Code of Ukraine consists in committing the following active actions in relation to firearms, ammunition, explosives or explosive devices: 1) manufacture; 2) modification (only for firearms); 3) repair (only for firearms); 4) removal of markings (only for firearms); 5) change of markings (only for firearms). Such methods of illegal actions in relation to these items defined in the disposition of Article 263-1 of the Criminal Code of Ukraine play the role of a criminal-forming feature in case of their illegality. At the same time, the establishment of the method of committing a criminal offence should not be based on the criminal legal qualification of the crime, it is primarily an element of the manifestation of the act in the external environment.

The procedure for handling certain types of weapons, approved by the resolution of the Cabinet of Ministers of Ukraine “Regulations on the licensing system” of October 12, 1992 No. 576, concerns objects, materials and substances that are subject to the requirements of the licensing system, which include firearms, cold weapons, air weapons of calibre over 4.5 mm and a bullet speed of more than 100 meters per second, devices of Ukrainian manufacture for firing cartridges equipped with rubber or similar non-lethal projectiles, and the said cartridges, explosive materials and substances. Also, the Resolution of the Verkhovna Rada of Ukraine “On the Right of Ownership of Certain Types of Property” of June 17, 1992, No. 2471-XII establishes a list of types of property that cannot be owned by citizens, public associations, international organisations and legal entities of other states on the territory of Ukraine, which include weapons, ammunition (except for hunting and pneumatic weapons and ammunition, as well as sports weapons and ammunition). The main departmental normative legal act that regulates the circulation of weapons is the Instruction on the procedure for the manufacture, acquisition, storage, accounting, transportation and use of firearms, pneumatic, cold and chilled weapons, devices of domestic production for firing cartridges equipped with rubber or similar non-lethal projectiles and ammunition, ammunition for weapons, main parts of weapons and explosives” of August 21, 1998, No. 622.

O.D. Shelkownikova considers the circulation of specific types and types of weapons, ammunition and ammunition within the country (a particular region) to be the legal circulation of weapons, which covers all operations from the moment of its creation or receipt for sale, dispatch, transfer through sales channels, receipt by the user or exporter, on the basis of the relevant rules and restrictions contained in the current legislation. The researcher defines illegal arms trafficking as the movement of weapons with violations in the sphere of legal circulation [8].

The dictionary interprets the term “illegal” as contrary to the law, inconsistent with it, prohibited by law, violating the law [9]. The UN Model Law on the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition of 8 July 2011 defines “illicit trafficking” as the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or through the territory of one State to another State...” [10].

According to the draft law “On the circulation of civilian firearms and ammunition” (reg. No. 4335 of November 6, 2020), the production (manufacture) of weapons is the creation of a new unit of weapons from materials and substances that were not weapons;

assembly of weapons from parts and components in the conditions of production (institution) or modification of any items, due to which they acquire the properties of weapons; creation of the main parts of weapons or means of reducing the volume of the shot. Consequently, the subject of criminal activity can be these actions not only in relation to weapons, but also in relation to their individual components.

The production (manufacture) of combat supplies is defined as the creation of a new unit of combat supplies from materials and substances that were not combat supplies (except for the re-equipment of combat supplies). Such actions are carried out to endow these items with the properties of firearms, their main parts or devices for changing the modes of fire.

Illegal manufacture should also be considered an act in the form of non-application by the manufacturer of weapons of the legal marking (product name, country or place of manufacture, serial number) on the main parts of firearms or devices for changing the firing modes or actions to remove such marking by a person [11].

According to para. 14 of the Code of Judicial Practice of Ukraine “On judicial practice in cases of theft and other illegal handling of weapons, ammunition, explosives, explosive devices or radioactive materials” of April 26, 2002 № 3, the repair of firearms is the restoration of the characteristic properties of the specified object by replacing or restoring worn or otherwise unsuitable parts, mechanisms, eliminating defects, breakdowns or damage, establishing the normal functioning of various parts and mechanisms, as a result of which these items become suitable for use for their intended purpose.

Illegal repair of firearms A.A. Chistyakov considers, firstly, the elimination of inconsistencies in it (except for the repair and replacement of its non-main parts), its main individual and adapted, in particular, to change the modes of fire; secondly, actions that restore the destructive properties of both firearms or the suitability of its main parts and the considered devices intended to be used in certain types of weapons; thirdly, customization by owners of such items for their own needs [11].

Article 37 of the draft law No. 4335 of November 6, 2020, stipulates that the right to manufacture civilian firearms and ammunition is granted to legal entities that have obtained a license for the production of civilian weapons and ammunition, a permit for the operation of an establishment for the production of weapons and ammunition. Legal entities that have the right to manufacture civilian firearms must ensure the safety of production, exercise control over the production modification, and comply with the licensing conditions for such activities. Each unit of manufactured civilian firearms assigned to the appropriate category must be marked,

and meet the safety requirements and technical requirements for weapons of this category. Also, the right to repair civilian firearms has legal entities, individual entrepreneurs who have received a license to repair civilian weapons and ammunition and permission to operate a weapons repair shop. The procedure for obtaining licenses for the production and repair of civilian weapons and ammunition, a permit for the operation of an institution for the production of weapons and ammunition, and a permit for the operation of a weapons repair shop is established by the Cabinet of Ministers of Ukraine (Part 8 of Article 37 of the draft law).

Repair of firearms and their main parts are not considered to be a type of their manufacture, which cannot be said about the alteration of firearms and their main parts. Repair is essentially the restoration of consumer properties of an item. Accordingly, the concept of repair cannot be considered as manufacturing [11]. The Great Ukrainian Legal Encyclopedia defines the conversion of weapons as the transformation, and alteration of certain objects by giving them the properties of firearms [4].

Some experts interpret the illegal modification of firearms (Part 1 of Art. 263-1 of the Criminal Code of Ukraine) as the impact on the existing firearms without the permission provided by law to change their individual properties [12]. According to paragraph 13 of the Resolution of the Plenum of the Supreme Court No. 3, the modification of firearms is the alteration of certain items by giving them the properties of firearms. Such actions, in particular, include the conversion of rocket launchers, starter, construction, gas pistols, and other devices adapted for firing cartridges equipped with rubber or similar non-lethal projectiles into weapons suitable for firing, etc. or hunting weapons (including smoothbore) into cuttings).

For example, if a firearm was manufactured by modification a gas pistol, then such a pistol after mechanical changes received new tactical and technical characteristics, and the illegal trafficking of such weapons becomes more dangerous for society than the illegal trafficking of gas weapons. Often, such illegal modification is determined by the calibre of ammunition available to the offenders, as it is a source material and time-consuming to produce for a number of reasons. The fact of illegal modification of firearms with the introduction of irreversible technical changes may include shortening of the barrel (barrel block), dismantling of the stock, etc. There are facts of illegal alteration of firearms without making irreversible technical changes to them [11].

The illegal installation of a fire mode selector on Glock pistols manufactured by the Republic of Austria (Glock-18 pistol) does not require the introduction of irreversible technical changes to this

weapon. This device is installed to replace the rear bolt cap of Glock pistols and makes them more dangerous, as the rate of fire of this type of weapon in the automatic mode of fire (fire is carried out in a series of shots) increases to 1200 shots per minute.

Besides, the illegal modification of firearms without making irreversible technical changes to them is the use of rifled barrels in smoothbore firearms, which, depending on the calibre of the ammunition used for the barrel, can significantly increase the target range. Such cases of modification of firearms are dangerous because after using them, a suspect can restore the previous technical condition of the weapon, after which it will be impossible to establish the fact of illegal modification.

The phenomenon of converting non-lethal ammunition is common in the practice of forensic ballistics examinations. In particular, the standard non-lethal ammunition is modified in the following way: the standard projectile is removed, the powder load is significantly increased or replaced with powder of a different brand. Then, instead of a rubber ball, a projectile is placed, which by its dimensional characteristics will not exceed the size of the gap formed between the protrusions in the barrel channel. The contents of the cartridge are filled with candle wax, plugged with a piece of foam or rubber. The projectile in the shell is positioned in parallel so that it does not collide with the protrusions during the shot, but can pass by them through the formed gap in the barrel channel of the converted traumatic pistol. As a result of this modification, the ammunition becomes significantly more "powerful". Not only non-lethal ammunition, but also ammunition for rifled firearms [3], which pose a high public danger, is being modified.

At the same time, the analysis of the title of Art. 263-1 of the Criminal Code of Ukraine shows that criminal liability for committing such an act occurs only for the illegal manufacture of ammunition. Instead, with regard to firearms, the legislation includes such methods as illegal manufacture, modification, repair, falsification, illegal removal or alteration of its marking. Such legislative inconsistency can become a significant tool for the defence party in case of ammunition modification. This legislative inconsistency in the title of Art. 263-1 of the Criminal Code of Ukraine was also noted by 68% of the surveyed prosecutors, investigators and operatives.

The above prompts to make appropriate changes to the title of Art. 263-1 of the Criminal Code of Ukraine, which in our proposed version will be called "Illegal manufacture, modification or repair of firearms or falsification, illegal removal or alteration of its markings, or illegal manufacture and modification of ammunition, explosives or explosive devices".

Markings along with information about the manufacturer, type, make, model, marking, calibre and year of manufacture of the weapon are identification features of the weapon. Marking is a unique designation of weapons in the process of manufacturing by applying to the weapon the name of the manufacturer, country or place of manufacture, serial number or any other easy-to-use designation consisting of simple geometric symbols combined with a digital and (or) alphanumeric code designation, which allows quickly identifying the weapon.

Falsification of marking is a complete or partial change of the marking applied by the manufacturer. Removal of the marking from the main parts of the firearm or its unlawful non-application by the manufacturer to the main parts of the firearm undoubtedly complicates the functions of firearms control by the state. Removal of the marking consists in destroying it in any way, which makes it impossible to quickly identify the weapon. In an attempt to conceal the origin of the weapon, the markings, signs and numbers of the markings, its constituent numbers are erased, etched or removed by mechanical methods, such as sawing, grinding, sometimes with the application of new numbers and markings. The meaning of the concept of “changing the marking” is identical to the concept of falsification of marking [13].

The methods of repair, according to the explanations of the Plenum of the Armed Forces of Ukraine, include the restoration of the characteristic properties of weapons “by replacing or restoring worn or unusable parts, mechanisms, eliminating defects, breakdowns or damage, establishing the normal functioning of various parts and mechanisms, as a result of which these items are suitable for use for their intended purpose.”

In general, the illegal manufacture, modification or repair of firearms, the illegal removal or alteration of its markings or the illegal manufacture of ammunition, explosives or explosive devices is a form of exchange (transfer) of certain objects, the circulation of which is prohibited by law, except for those that are in free circulation or restricted in circulation. Such actions should not be performed without the appropriate permission provided by law. Such actions are not only illegal but also criminal, as they concern actions that violate criminal law prohibitions and for which criminal liability is provided in Article 263-1 of the Criminal Code of Ukraine.

According to the criminal proceedings studied on the grounds of crimes under Art. 263-1 of the Criminal Code of Ukraine, their most frequent forms include: illegal manufacture of firearms (6%); illegal modification of weapons from a certain type to firearms (falsification, illegal removal, change of marking) (71%); illegal modification or repair of firearms

to enhance their properties (18%); illegal manufacture of ammunition (9%); illegal modification of ammunition (3%); illegal manufacture of explosives (5%); illegal manufacture of explosive devices (15%).

According to the analysis of criminal proceedings initiated on the grounds of crimes under Art. 263-1 of the Criminal Code of Ukraine, manufacturing, modification, repair, and restoration can be carried out: at home using locksmith tools, or improvised equipment (76%). In particular, during the pre-trial investigation in criminal proceedings No. 12020060000000006, it was established that V., at the request of M. and I., orders Ekol Botan Cal. 9mm P.A.K.” starter pistols on the website of one of the online arms stores, after which he illegally altered them at the place of his registration and residence, and then illegally sold them to M. and I.

Considering the structure of the methods of committing crimes under Art. 263-1 of the Criminal Code of Ukraine, it should be mentioned that not all methods are full-structured, that is, they have stages of preparation, execution and concealment. At the same time, 91% of the studied criminal proceedings, including preparation, and 65% of crimes involved the stage of concealment of their consequences.

According to I.Yu. Rahulin, the preparatory level includes the following: searching for sources of technical information on the manufacture, repair and shipment of weapons, their main parts and components or assemblies and other objects of crime (books, machines, websites, etc.), studying the traces contained in them; searching for specialists with skills in working with metal, precision mechanisms, electronic, equipment related to the manufacture of weapons, ammunition, in the case of manufacturing devices with optical sights – optics with knowledge of chemical processes, etc.; supplying specialists with the necessary metal processing equipment, machine tools (for example, a small-sized HAAS Office series lathe for thread cutting (right, left), corner and internal turning, turning, etc.; table lathes, milling and drilling machines, vertical drilling machines, radial drilling machines, etc; acquiring small-sized bench lathes and other tools; improving individual skills previously acquired at weapons manufacturing and other plants; making diagrams, sketches of samples, models, products to be manufactured; deciding on the time, place and methods of manufacturing, repairing or processing weapons, their main and component parts or assemblies; selection of premises (workplace), equipment, tools, mechanisms, materials (raw materials) for the manufacture of weapons, ammunition, explosives and devices in selected form; exploring the possibility of using premises, equipment, tools, mechanisms and materials for the manufacture of objects of criminal encroachment during working and non-working hours; establishing contacts with officials

of bodies or enterprises directly involved in the production of legal trafficking of weapons, ammunition, explosives and devices in a particular territory [14].

Preparation actions may include: the use of publicly available information in open sources on the introduction of design changes to gas and pneumatic weapons, and their manufacture (including stolen parts and components); visits to facilities related to the production, storage and use of weapons; official acquisition of weapons for security agencies, security services on legal grounds for the purpose of their further processing; targeted inspection of military conflict zones to identify weapons (in particular, items that need restoration, structural changes).

According to the study of criminal proceedings initiated under Art. 263-1 of the Criminal Code of Ukraine, preparation for the illegal manufacture of weapons consisted of developing a plan (14%); selecting premises (18%); preparing the necessary materials, devices, tools (31%); searching for components for the relevant type of weapon (14%); purchasing tools, metalworking machines, machine tools and other equipment, etc; searching for missing parts from faulty weapons (11%); accessing information, in particular on the Internet, on the production, processing of weapons (33%); preliminary consultations with relevant specialists (9%); involvement of other persons in criminal activities (3%); preparation of means of disguising appearance (2%).

A case study: In March 2019, in Kyiv, for the purpose of illegal processing of firearms and their further sale, O. received a Glock 45 pistol and Scorpion submachine gun for modification, further storage and sale. In June 2019, O. gave Z. recommendations on the procedure and method of modification into firearms and the contacts of the person who would directly carry out the modification, after which he provided him with the specified weapons. Z. handed over the pistol and the machine gun to an unidentified person, who converted them into firearms suitable for firing 9 mm ammunition.

The unlawful manufacture, modification or repair of firearms or the unlawful manufacture of ammunition, explosives or explosive devices as an independent offence may serve as a preparatory stage for the commission of another offence. Such acts committed with the purpose of committing another crime are an ideal set of crimes and should entail liability under Art. 263-1 of the Criminal Code and for preparation for another relevant crime. Regardless of the completion of certain parts or actions to make changes to these objects, the crime under Art. 263-1 of the Criminal Code of Ukraine is complete if the modified object can be used as a weapon, ammunition, explosives or explosive device.

An optional component of the method of committing a crime is its concealment. In particular,

R.S. Belkin emphasises that the pattern of preparation, execution and concealment of a crime is determined by environmental conditions and psychophysiological characteristics of an individual. Actions aimed at preparing, committing and concealing crimes are united by a common criminal intent, but in some cases, it may be an independent act [15].

Actions to conceal the traces of a crime can be carried out at all stages of criminal activity. When preparing for a crime, they visit websites that specialise in selling weapons, objects related to their production, storage and use, etc. At the stage of committing a crime, measures are taken aimed at concealing traces at the site of illegal manufacture, processing and repair of weapons. After the crime is committed, they may first of all destroy or hide the objects used as a device for committing the crime, pressure witnesses, etc. In some cases, the inner walls of the barrel channel are subject to machining to prevent the identification of the weapon.

The method of concealment of a criminal offence under Art. 263-1 of the Criminal Code of Ukraine may contain a significant amount of forensic information that contributes not only to an understanding of the mechanism of the crime but also establishing the circle of persons suspected of committing it with less effort and resources. Actions to conceal a crime are connected by a single criminal intent with the preparation or commission of an illegal act and can be carried out at all stages: both during the preparation, commission and after the commission of the crime. In particular, during the manufacture, processing, repair, and design of weapons, tools, various devices, equipment, etc. are selected (prepared) in advance. The same actions are typical in the case of falsification, removal or change of markings on weapon samples.

The analysis of forensic practice made it possible to conclude that among the methods of concealing the crime under Art 263-1 of the Criminal Code of Ukraine, the suspect usually uses the following measures escaping from the scene (97%); failure to appear when summoned to the pre-trial investigation authorities (16%); giving false testimony, changing their content (67%); refusal to testify (23%); putting forward a false alibi (19%); destruction of traces and instruments of a criminal act (destruction of unsuccessful samples of weapons and their main parts) (86%); influencing (physically, mentally, attempts to bribe) witnesses (9%); establishing caches for storing manufactured weapons or other items related to it, the remains of unusable raw materials and materials (6%). Less common are the following counteraction actions: simulation of mental or other illness; changing the appearance or certain parts of the body; influence by causing material damage to the property of witnesses; influence by threatening

or bribing officials conducting the investigation. Their total share in the investigation of crimes under Article 263-1 of the Criminal Code of Ukraine was 4%.

The studied judicial and investigative practice makes it possible to assert that the actions covered by the signs of a crime under Art. 263-1 of the Criminal Code of Ukraine are often a separate link in the chain of criminal activity (mostly planned in detail) related to illegal trafficking in weapons, ammunition, explosives or explosive devices (that is, the beginning of illegal manufacture, processing, etc., and then – storage, carrying, sending, transportation, further sale or use).

In addition to the established, typical methods of committing crimes under Art. 263-1 of the Criminal Code of Ukraine, there are certain tendencies to improve and modernise the methods of illegal manufacture, modification or repair of firearms or falsification, illegal removal or alteration of its marking or illegal manufacture of ammunition, explosives or explosive devices. These include: the implementation of high-tech modification, manufacturing of weapons using modern technical means; the purchase of individual structural mechanisms, and parts for weapons through Internet sites; the use of reference information posted on the Internet on the independent introduction of structural changes to weapons; the legitimacy of the customer and the perpetrator of the crime under Art. 263-1 of the Criminal Code of Ukraine; the expansion of the practice of using persons who have committed illegal manufacture, processing of weapons, means of disguise to exclude their identification (the use of modern means of communication, the destruction of unsuccessful samples of weapons and their main parts, the creation of caches, etc.).

It must be noted that the investigator's understanding of the methods of preparation, execution and concealment of crimes under Art. 263-1 of the Criminal Code of Ukraine will contribute to the

most effective implementation of targeted cognitive activities directly related to the use of the modelling method in the investigation of a single fact of illegal manufacture, processing or repair of firearms or falsification, illegal removal or alteration of its marking or illegal manufacture of ammunition, explosives or explosive devices.

■ Conclusions

Most of the methods of committing crimes under Art. 263-1 of the Criminal Code of Ukraine are complex, that is, they include the following stages: a) preparation: selection of premises; preparation of necessary materials, devices, and tools; use of publicly available information in open sources on the manufacture, structural changes to weapons; purchase of tools, metalworking devices; visits to facilities related to their production, storage and use; targeted inspection of military conflict zones; b) committing and c) concealing: failure to appear when summoned; giving false testimony; refusal to testify; putting forward a false alibi; destroying traces and instruments of a criminal offence; influencing witnesses.

In addition to the established, common methods of committing crimes under Article 263-1 of the Criminal Code of Ukraine, trends towards improvement, and modernisation of methods of illegal manufacture, processing or repair of weapons items were revealed: high-tech processing, manufacturing using modern technical means; use of reference information, purchase of individual structural mechanisms, parts for weapons items through internet sites; use of means of disguise (use of modern means of communication, destruction of unsuccessful samples of weapons and their main parts, creation of caches, etc.).

The activities falling under Art. 263-1 of the Criminal Code of Ukraine often constitute a separate link in the chain of well-planned criminal activities related to illicit trafficking in weapons, ammunition, explosives or explosive devices.

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Спосіб учинення незаконного виготовлення, переробки чи ремонту вогнепальної зброї або фальсифікації, незаконного видалення чи зміни її маркування або незаконного виготовлення бойових припасів, вибухових речовин чи вибухових пристроїв

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■ **Анотація.** Метою наукової статті є з'ясування способів учинення незаконного виготовлення, переробки чи ремонту вогнепальної зброї або фальсифікації, незаконного видалення чи зміни її маркування або незаконного виготовлення бойових припасів, вибухових речовин чи вибухових пристроїв. Методологічну основу наукового пошуку становить комплекс методів і прийомів наукового пізнання, необхідних для реалізації визначеної мети, специфіки об'єкта та предмета дослідження. Використання цих методів забезпечило обґрунтованість і достовірність результатів дослідження. Основним методом дослідження є діалектичний, за допомогою законів і категорій якого визначено способи незаконного виготовлення, переробки чи ремонту вогнепальної зброї або фальсифікації, незаконного видалення чи зміни її маркування або незаконного виготовлення бойових припасів, вибухових речовин чи вибухових пристроїв. Також застосовано спеціальні методи дослідження, а саме: метод системного аналізу, системно-структурний, формально-логічний, соціологічний та статистичний. Наукова новизна публікації полягає в такому: встановлено, що основними способами вчинення досліджуваного злочину є активні дії щодо вогнепальної зброї, бойових припасів, вибухових речовин чи вибухових пристроїв: виготовлення (щодо всіх визначених у ст. 263-1 Кримінального кодексу України предметів озброєння); переробка, видалення маркування, зміна маркування (лише щодо вогнепальної зброї); більшість способів вчинення злочинів є повноструктурними (мають етапи підготовки, вчинення та приховування); дії, які охоплені ознаками цього злочину, часто є окремою ланкою в ланцюгу детально спланованої злочинної діяльності, пов'язаної з незаконним обігом зброї, бойових припасів, вибухових речовин чи вибухових пристроїв; аргументовано доцільність визначення в ст. 263-1 Кримінального кодексу України кримінальної відповідальності за здійснення незаконної переробки бойових припасів. Більшість способів вчинення злочинів, передбачених ст. 263-1 Кримінального кодексу України, є повноструктурними, тобто мають етапи: а) підготовки: вибір приміщень; підготовка необхідних матеріалів, пристосувань, інструментів; використання загальнодоступної інформації у відкритих джерелах щодо виготовлення, внесення конструктивних змін у предмети озброєння; придбання інструментів, металообробних пристосувань; відвідування об'єктів, пов'язаних з їх виробництвом, зберіганням і використанням; цілеспрямоване обстеження зон військових конфліктів; б) вчинення та в) приховування: неявка за викликом; давання неправдивих показань; відмова від давання показань; висунення неправдивого алібі; знищення слідів і знарядь злочинного посягання; здійснення впливу на свідків. Окрім усталених, типових способів учинення злочинів, передбачених ст. 263-1 Кримінального кодексу України, виявлено тенденції до вдосконалення, осучаснення способів незаконного виготовлення, переробки чи ремонту предметів озброєння: високотехнологічна переробка, виготовлення з використанням сучасних технічних засобів; використання довідкової інформації, купівля окремих конструктивних механізмів, деталей до предметів озброєння через інтернет-сайти; застосування засобів маскуванню. Дії, які охоплюються ознаками злочину, передбаченого ст. 263-1 Кримінального кодексу України, часто є окремою ланкою в ланцюгу детально спланованої злочинної діяльності, пов'язаної з незаконним обігом зброї, бойових припасів, вибухових речовин чи вибухових пристроїв

■ **Ключові слова:** вогнепальна зброя; бойові припаси; вибуховий пристрій; виготовлення; переробка

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Relevant Issues of Counteraction to the Illegal Seizure of Vehicles Committed by Organised Groups

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■ **Abstract.** The purpose of the study is to establish the main aspects of countering illegal possession of vehicles committed by organised groups. The methodological framework of the study is based on empirical and theoretical research methods. Among the empirical methods used were surveys of criminal investigation officers and investigators of the National Police of Ukraine, and analysis of data from the open section of the Unified State Register of Court Decisions. Theoretical methods include analysis and synthesis, analogy, comparison, and generalisation. The scientific novelty of the findings lies in the fact that the article comprehensively, based on the use of cognitive methods and the examination of the effective practice of the National Police of Ukraine, establishes the necessary modern aspects of counteracting the criminal environment regarding the illegal seizure of vehicles. It is advisable to apply a system of comprehensive measures to counteract the commission of such criminal offences through operational and tactical forecasting of the processes taking place in the criminal environment, based on the systematic collection of data and its analysis to help eliminate the circumstances that provide the basis for the commission of illegal seizure of vehicles by organised groups, through operational and search and other measures to prevent and counteract organised groups committing such crimes. Informing the population informed about the sources, and circumstances that influence the commission of such criminal offences, about the mechanisms of criminal behaviour of offenders will encourage citizens to participate in the prevention of such crimes

■ **Keywords:** illegal seizure of a vehicle; counteraction; organised group; criminal offence; integrated approach

■ Introduction

Historically, the traditional domains of professional crime were theft, embezzlement, banditry, and fraud, which provided members of criminal communities with sufficient profit [1]. Most scholars addressing the issues of organised crime highlighted the clear specialisation of types of criminal business and emphasised that extremely high activity was observed in the sphere of trafficking in narcotic drugs, psychotropic substances and precursors, weapons, human trafficking, trafficking in precious metals and stones, illegal seizure of vehicles for sale [2].

In recent years, Ukrainian and international scholars and practitioners have identified a tendency

towards the increase in the process of intellectualisation, qualification and professionalisation of criminal activity. Such activities are more often characterised by criminal encroachments that maximise profits [3]. Given the recklessness and aggressiveness of criminal offences, criminals more often target qualified crimes, which, on the one hand, provide quick and maximum benefit, and on the other hand, obstruct their timely investigation and prosecution.

Experts believe that huge criminal profits with minimal risk and costs make the illegal vehicle business extremely attractive for organised criminal communities and turn it into one of the main sources of profit. Criminal vehicle business should be considered the criminal acts committed for the aim of illegal seizure of vehicles and selling such vehicles or their parts for the purpose of personal illicit enrichment.

In most cases, registered crimes under Art. 289 of the Criminal Code of Ukraine are not solved, and therefore such proceedings are not referred to court, criminals remain unpunished and continue

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to commit criminal acts. Toughening the penalties for the illegal seizure of vehicles does not solve the problem of effective counteraction to such crimes.

Counteraction to these crimes has a specific character, which is primarily due to the subject of the relevant encroachments, and the affiliation of the investigated "craft" to a type of organised crime.

The description of organised groups, criminal organisations committing illegal seizure of vehicles, provides objective awareness of law enforcement officers both about individual cases of illegal vehicle business and about the state of combating crime in general.

Such knowledge allows law enforcement officers to analyse and forecast the crime environment, and to establish the exchange of information about persons, and members of organised groups who commit such illegal seizures, about the facts of their illegal activities.

The purpose of this study is to determine the main (important) modern aspects of counteraction to the illegal seizure of vehicles committed by organised groups, to identify the factors that hinder to counteract such criminal offences, to determine the features of effective counteraction to such criminal activities based on the analysis of investigative practice, studies by Ukrainian scientists.

The scientific novelty of the findings consists in the fact that the article comprehensively, using the methods of cognition and studying the positive practical experience of the National Police of Ukraine, establishes the necessary modern main aspects of counteracting the criminal environment regarding the illegal seizure of vehicles.

■ Results and Discussion

Criminologists consider organised crime as a single systemic set of various types of crimes committed professionally in the form of a permanent trade by the efforts of persons who are united in specially created stable, well-concealed and protected from detection formations, and an organised criminal group as a stable managed community of criminals who commit crimes as business and have created a system of protection from social control through corruption [4].

The main feature of an organised group is stability, and of a criminal organisation – hierarchy.

According to Part 3 of Art. 28 of the Criminal Code of Ukraine, a crime is considered to be committed by an organized group if several persons (three or more) participated in its preparation or commission, having previously organised into a permanent association for the purpose of committing this and other (other) crimes, united by a single plan with the distribution of functions of the group members aimed at achieving this plan, known to all members of the group [5].

Organized criminal groups that specialise in the illegal seizure of vehicles that have been operating for years have developed certain algorithms and tactics of criminal activity, which they adhere to when committing criminal offences. Such organised groups operate based on role distribution according to criminal specialisation and experience. Some of them search for customers of the vehicles, others, according to the customer's order, the brands of vehicles, learn about the places and methods of their storage, and collect the necessary information about the owners and drivers of the intended vehicles, experts in electronic systems and starting the engine disable anti-theft electronic systems and start the engine, racers who drive the vehicle to a certain pre-equipped place, which other persons find and equip with "jammers", other tools for interrupting the factory numbers, dismantling, means of transportation, etc. Also, the persons who produce false documents, sell and legalise the profits of such illegal vehicle business.

The high latency of the illegal seizure of vehicles committed by organised groups is caused by a remarkable organisation, careful planning, and distribution of roles, depending on the criminal specialisation between the members of such a group, discipline in execution and a high degree of concealment and disguise of criminal acts of illegal seizure and legalisation of the vehicle [7].

The illegal activity of organised groups committing illegal seizure of vehicles tends to increase the level of its organisation and legalisation. Participants of organised groups related to the criminal transport business systematically adopt the best practices of criminal activity from foreign "colleagues" [8].

Analysis of criminal proceedings on the fact of illegal seizure of vehicles committed by organised groups has concluded that the illegally seized vehicles were detected in various places. The spots are determined by how expensive the neighbourhoods where the vehicle was found are. Often, criminal offenders abandon low-value vehicles in residential areas in nearby courtyards among the cars of residents. Criminal offenders hide expensive vehicles in pre-rented garages arranged through phones using forged documents or straw parties.

With regard to the illegal seizure of vehicles committed for further paid return to the owner, such criminal offences involve primarily specialised sectoral criminal groups and groups with a more complex organisation, not only with a clear division of roles but also with a pronounced hierarchy: organised criminal organisations, which in most cases have an intra-regional character and a stable criminal influence in a particular territory.

It is worth noting that the proceeds from the sale of the illegally seized vehicle are used by members of organised criminal groups primarily for the development and maintenance of such groups (invested in the development of criminal transport business) [9].

Members of organised criminal groups and criminal organisations resort to countermeasures, they are visually familiar with the criminal police officers who fight against the illegal seizure of vehicles. Members of criminal organisations monitor personnel changes in the police force related to this field of service. Besides, most criminal organisations have information about the police officers and their personal vehicles, their make, type, state registration number plate, places of residence of some officers, their families, etc.

According to the results of the study, 68% of operatives of the Criminal Investigation Department, and 46% of investigators who participated in the detection and investigation of this type of criminal offence, noted that criminals used certain measures of influence against them, ranging from threats to bribery attempts.

Criminal structures more often use various countermeasures to complicate the operational and investigative activities of law enforcement agencies and the investigation of criminal proceedings. This actualises the need to use the complete arsenal of operational and investigative forces, means and measures not only under normal circumstances but also creating them artificially to increase the effectiveness of the anti-crime efforts and neutralise the criminal activity of leaders and active participants of organised criminal groups and criminal organisations [10; 11].

It is advisable to reinforce both internal and interagency cooperation of operational and investigative and procedural activities to detect, prevent and investigate such crimes. A satisfactory result directly depends on the extent to which law enforcement officers are able to analyse and predict the crime environment, to establish the exchange of information about individuals, members of organised criminal groups, as well as the facts of their illegal activities.

Counteraction to the illegal seizure of vehicles committed by organised groups and the selec-

tion of the necessary operational and investigative measures (which are used mainly in combination) should be offensive and based on the recommendations of operational and investigative tactics, considering the nature of the criminal environment.

The most effective counteraction to the illegal seizure of vehicles committed by organised groups is complex operations that involve significant forces and means of law enforcement agencies [12; 13].

■ Conclusions

The efficiency of counteraction to the illegal seizure of vehicles is conditioned by both the professional and organisational activities of law enforcement officers. However, such conditionality is not fully effective without a comprehensive approach that includes predicting the occurrence of such criminal offences by organised groups, identifying the factors that encourage its detection and progress, and applying appropriate preventive measures.

The study revealed that the actions of such criminal groups regarding the ways of committing and concealing such crimes have become more daring, and professional skills are constantly being improved and modified.

Therefore, preventive activities aimed at reducing the illegal seizure of vehicles committed by organised groups include informational and preventive efforts conducted by law enforcement agencies among the public, primarily through the media.

The promotion of propaganda among the population, criminological expertise on the sources, circumstances that lead to the commission of such criminal offences, the mechanisms of criminal behaviour, and methods of preventing the illegal seizure of vehicles committed by organised groups will contribute to the effective participation of individuals in the prevention of such crime. Therefore, it is necessary to reinforce the interaction of law enforcement agencies with the media by raising awareness about the most recent means, methods and tools of committing vehicle thefts and the most common places of commission, the most crime-prone regions, and popular brands of vehicles among such criminal offences.

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Актуальні питання протидії незаконним заволодінням транспортними засобами, учиненим організованими групами

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■ **Анотація.** Мета статті – встановити основні аспекти протидії незаконним заволодінням транспортними засобами, учиненим організованими групами. Методологічне підґрунтя наукової статті становлять емпіричні й теоретичні методи дослідження. Серед емпіричних методів використано опитування оперативних працівників карного розшуку та слідчих Національної поліції України, аналіз даних відкритої частини Єдиного державного реєстру судових рішень. З-поміж теоретичних методів застосовано аналіз і синтез, аналогію, порівняння, узагальнення. Наукова новизна отриманих результатів полягає в тому, що в статті комплексно, на підставі використання методів пізнання та вивчення позитивного практичного досвіду Національної поліції України встановлено необхідні сучасні основні аспекти протидії кримінальному середовищу щодо незаконних заволодінь транспортними засобами. Доцільно застосовувати систему комплексних заходів протидії вчиненню таких кримінальних правопорушень шляхом оперативно-тактичного прогнозування процесів, що відбуваються в кримінальному середовищі, на підставі систематичного збору інформації та її аналізу щодо сприяння усуненню обставин, що дають підґрунтя вчинення незаконних заволодінь транспортними засобами організованими групами, шляхом проведення оперативно-розшукових й інших заходів щодо попередження та протидії організованим групам із вчинення таких злочинів. Профілактичне інформування населення про джерела, обставини, що впливають на вчинення таких кримінальних правопорушень, про механізми злочинної поведінки зловмисників спонукатиме до участі громадян у попередженні таким злочинам

■ **Ключові слова:** незаконне заволодіння транспортним засобом; протидія; організована група; кримінальне правопорушення; комплексний підхід

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Constitutional Right to Peaceful Assembly in the System of Modern Legal Values

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■ **Abstract.** The purpose of the study is to investigate the constitutional right of citizens to peaceful assembly in the system of modern legal values. The scientific novelty of the study is that the paper substantiates the place of the constitutional right of citizens to peaceful assembly in the system of modern legal values, defines the concept and essence, presents a general overview of the system of legal values in Ukraine, studies the role of the constitutional right of citizens to peaceful assembly in the relevant system, and formulates scientifically sound conclusions based on arguments and available facts. The issue of the formation and development of the system of modern legal values is extremely relevant in the context of the formation of national democracy and the establishment of the principles of the rule of law. The legal system of society is a purely legal phenomenon, which is closely related to the system of legal values, takes its origins from it and is formed on the basis of traditions and established public (social) practices. According to the analysis of the impact of the culture of peaceful assembly, the exercise of the relevant right by citizens and its formation in the system of modern legal values, it was proved that each historical stage of the formation of Ukrainian statehood was marked by a mass assembly. Ukrainian history, in particular the history of Ukrainian law and the legal system, has several clear examples of public exercise of the right to peaceful assembly by citizens, which led to real legal consequences, and prevention of the usurpation of power and other illegal acts, which supports the authors' stand on the fundamental importance of the relevant right of citizens

■ **Keywords:** constitutional law; peaceful assembly; rally; march; demonstration; legal values; meaning; human and civil rights

■ Introduction

Any modern society has a certain legal system that regulates it. This provides an opportunity to assert democratic values and live together in a peaceful environment, reach new civilisational and technological heights in science and technology.

Ukrainian statehood, which is young in comparison with established European democracies, is at the stage of formation, which is characterized by the search for possible ways to implement it as a state based on the rule of law. This also gives grounds to assert that all institutions of the rule of law are at the stage of formation or development and do not function at the proper level.

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The constitutional right of citizens to assemble peacefully, unarmed, to hold rallies, marches and demonstrations are one of the leading human rights institutions that played a critical role in the formation of Ukrainian statehood and marked its revival after a long period of Soviet oppression. This is emphasised in the research by E. Kobruseva [1], I. Konyev [2], A. Chub [3] and M. Sambor [4].

Given the fact that the system of Ukrainian legal values is only now being formed, it is reasonable, to determine the role and place of the right to peaceful assembly in it, and also to define the content and essence of this system in general.

At the same time, the most prominent applied research on this issue was presented by O. Vaskovskaya [5], O. Vlasenko [6], O. Klymenko [7], R. Melnyk [8], O. Shkarnega [9], M. Sereda [19], M. Filoretova [11; 12], A. Zagorodniuk [13] et al.

The achievements of these researchers contributed to the study of the implementation of the right to peaceful assembly under different branches

of legal science. However, given the critical social significance of the relevant right, the crucial issues of its normative regulation, as emphasised by researchers, and the necessity to determine the place of the constitutional right to peaceful assembly in the system of modern legal values, this topic requires further study.

The purpose of the study is to investigate the place of the constitutional right of citizens to peaceful assembly in the system of modern legal values.

The set goal necessitated the implementation of a number of research tasks, including, in particular: defining the concept and essence, providing a general overview of the system of legal values in Ukraine; studying the role and place of the constitutional right of citizens to peaceful assembly in the relevant system, substantiating this statement; substantiating the conclusions to the study based on the arguments and available facts.

The scientific novelty of the publication is that the constitutional right of Ukrainian citizens to assemble peacefully, unarmed, is defined as one of the fundamental democratic mechanisms that form the basis of the rule of law, serves for the realisation of other political rights and freedoms of citizens, and must be ensured at a high constitutional level in any civilized society.

■ Results and Discussion

The modern system of legal values of Ukraine is a direct reflection of the level of legal consciousness of citizens, which evidences the complex efforts in the sphere of human rights and guarantees sustainable democratic development of all spheres of public legal life.

Scientists O. Zaychuk & N. Onishchenko's approach to law is based on the fact that it is freedom conditioned by equality, an equal measure of freedom, legitimized in society by norms that are determined by the level of morality and ethics achieved by society, based on the means of protection of power [14]. At the same time, O. Petryshyn, S. Pogrebnyak & V. Smorodynsky argue that law is a measure of the possible behaviour of an individual [15]. This gives grounds to assert that the legal system and law as its basic element are essentially interrelated since the law itself cannot exist without a set of characteristic features.

By its content, law is a set of norms and regulations that regulate social relations and define a set of rules of conduct, the application of which is sanctioned by the state in the regulation of social relations. That is, the conscious active or passive behaviour of subjects of law actually determines the formation of the legal essence of the law. It is the individual who chooses a specific variant of his behaviour that can satisfy a certain interest or need.

The content of any subjective right is that it provides the authorised subject with the opportunity to: behave accordingly (the right to their own actions); demand appropriate behaviour from other subjects (the right to other people's actions); apply to the state for the protection of their legal right [16]. Thus, these phenomena consist primarily in the society's certainty as to what is the boundary of law, what behaviour is legal and what is illegal, what means of protection of the law are established in a particular society, and what hierarchy of human rights is established in a particular society.

The most thorough definition of human rights is proposed by M. Kozyubra, who believes that human rights are the benefits and living conditions recognised by the world community, which a person can seek from the state and society in which he lives, and the provision of which is possible in the conditions of progress achieved by mankind [17]. However, A. Kolodiy notes that despite the difference in the views on the problem of the principles of law, legal science in the relevant historical epochs was united in the proclamation of certain provisions and ideas as principles of law [18]. At the same time, the key function of law in a liberal society is to regulate existing social relations on the basis of the principles of law that constitute its essence, which can be characterized as permissive and regulatory [19]. Thus, the decisive role of law in the formation of the legal system of society is indisputable. The law is the matter that forms it, and the system, in turn, ensures its action in space, and compliance by all subjects, bringing to justice those who violate it. The most fundamental is the essential role of human rights and the processes of their implementation in the development of modern democracy since it is through the practical implementation of their rights that individuals participate in important social and state processes.

Scientists V. Nagrebelyny & V. Stretovych argue that the Ukrainian national legal system was formed in difficult conditions, and this is due to the lack of state independence for long periods of history, and the geopolitical location of Ukraine and the corresponding ideological influence on Ukrainian society of opposite European and Eastern concepts [20; 21].

In previous studies, it was stressed that the historical stages of the formation of the Ukrainian legal system and statehood significantly influenced the modern functioning of the relevant concepts, and not all of them had positive features, and since the liquidation of the Cossacks, until Ukraine gained independence (with the collapse of the USSR), the Ukrainian legal system experienced times of systematic destruction.

Nowadays, the legal system of Ukraine is in the process of identifying the most effective means

of social development and adequate reflection of general social processes. In the context of the globalisation of society, the legal system of Ukraine is guided by international standards, accumulated experience of the world community and achievements of civilisational development of mankind [22]. This is evidenced by a number of historical events that have dramatically influenced the formation of Ukrainian statehood, as European integration efforts in particular and the European choice of Ukrainians, in general, have significantly changed its vector.

According to M. Miroshnychenko, the national legal system of Ukraine is a system that reflects the socio-economic, political, cultural and historical peculiarity of the development of the Ukrainian people (the legal system of a particular society). Its cultural and historical originality is an expression of the mental traits of the Ukrainian people, formed into a nation. The core of the Ukrainian legal system is its law, which develops on the basis of traditions and innovations [23]. Ukrainian law, like any other component of the formation of statehood in the countries of the world, played a decisive role in this process. Since it is the active and systematic demand of Ukrainian society to involve it in the management of public affairs, the realisation of fundamental human and civil rights and freedoms that formed the main core of the Ukrainian legal system. Perhaps the most important in these processes was the institution of peaceful assembly and the direct realisation of this right by the society in situations when the national policy in cases where the national policy was pursuing a different direction than the one chosen by the community.

According to N. Pilgun & O. Vinichuk, along with the process of establishing human rights and freedoms, Ukrainian society underwent a thorny path, applying the principle of equality to more and more people and the range of relations between them. In fact, the entire civilizational history of mankind is the genesis of human rights. It was the struggle for human rights, for new degrees of individual freedom that became the catalyst for large-scale changes in the socio-political life of most states of the world, led to a new understanding of the role of man in his relations with other people, society and the state [24]. Such a position gives grounds to assert that in the process of formation of the legal system of Ukraine, the processes of regulation and implementation of a number of fundamental human and civil rights and freedoms, the most important thing is to try to build a state based on the rule of law.

Thus, one of the fundamental factors in the formation of the Ukrainian legal system, and the establishment of democratic processes in the context

of the rule of law is the exercise by citizens of the right to peaceful assembly, which is one of the fundamental rights in the world and is also regulated by the Constitution of Ukraine. Article 39 of the Basic Law stipulates that citizens have the right to assemble peacefully, unarmed, to hold meetings, rallies, marches and demonstrations, which shall be officially notified in advance by the executive authorities or local self-government bodies. Restrictions on the exercise of this right may be imposed by a court in accordance with the law and solely in the interests of national security and public order – to prevent disorder or crime, to protect public health or to protect the rights and freedoms of others [25]. At the same time, it should be noted that the norms of the Constitution of Ukraine are the norms of direct action, which make it possible for citizens to implement them without special legislation (although this would significantly simplify the relevant processes, and provide additional guarantees for the implementation of the right in modern realities). Therefore, the unambiguity of the importance of the institute of peaceful assembly in the process of formation of national statehood is undisputed, as stated by researchers.

Analysing the content of the constitutional provisions on the right to freedom of peaceful assembly, R. Melnyk, Ye. Kobruseva, I. Konev, A. Chub & M. Sambor note that such a right is recognised without alternative and guaranteed by the Basic Law of the respective country; does not require authorisation by the authorities; is subject to protection under the condition of peaceful and unarmed assembly; the limits of the exercise of this right are different, some countries recognise this right for every person, others - exclusively for their citizens; provides for the possibility of restricting the right to freedom of peaceful assembly on the basis of and in accordance with a special law [1; 2; 8].

It is necessary to highlight the history of the largest peaceful assemblies that played a key role in the formation of Ukrainian statehood, in particular, the Revolution on Granite (October 1990), Orange Revolution (November 2004 – January 2005) and Revolution of Dignity (November 2013 – February 2014). The authors believe that these events had a decisive influence on the establishment of the right to peaceful assembly in the system of modern legal values, which made it possible to realise other human and civil rights and freedoms.

One of the participants of the Revolution on Granite V. Roh notes that the protest was organised by students, and its result was the resignation of the Chairman of the Council of Ministers of the Ukrainian SSR Vitaliy Masol and the fulfilment of a number

of demands. These events had a significant impact on the further activity of young people. Moreover, a lot of Western literature has expanded to other regions [26]. The key in the legal context is the provision of the resolution of the Supreme Soviet of the Ukrainian SSR “On consideration of the demands of students on hunger strike in Kyiv since October 2, 1990”, to address all the demands of the protesters in paragraphs 1 (on holding new elections), 2 (on military service of Ukrainian citizens), 3 (on nationalization of the property of the CPSU and Komsomol on the territory of Ukraine), 4 (on the Union Treaty), 5 (on the resignation of the Chairman of the Council of Ministers of the Ukrainian SSR) [27], which became the imminent point of restoration of Ukrainian statehood, the establishment of democratic values in Ukrainian society, despite centuries of attempts to destroy the Ukrainian national idea.

Besides, another significant factor influencing the formation of the system of legal values of the Ukrainian society and state is the Orange Revolution that took place in 2004-2005. According to R. Ofitsynskyi’s estimates, up to 500,000 protesters gathered in the centre of the capital, in Lviv – more than 100 thousand, in Kharkiv – up to 70 thousand [28], which testified to the mass nature of the protest movement. At the same time, it is necessary to emphasize the significant legal consequences of the protests, which were primarily related to the indignation of Ukrainian society as a result of the massive falsification of the 2004 presidential elections.

Therefore, the resolution of the Verkhovna Rada of Ukraine of November 27, 2004, № 2214-IV “On the political crisis in the state that arose in connection with the election of the President of Ukraine” recognised the political crisis in Ukraine and formed the main organisational and legal forms and specific steps that should have influenced the active way out of it, stabilisation of the functioning of the legal system of society in its classical sense.

For example, the Verkhovna Rada of Ukraine decided to invalidate the results of the second round of voting in the 2004 presidential election (as a result of violations of electoral legislation); expressed distrust in the Central Election Commission in connection with the improper performance of its duties; proposed that the President of Ukraine submit to the Verkhovna Rada of Ukraine by December 1, 2004, a proposal for early termination of the powers of the members of the Central Election Commission; recognised the need for further consideration of the establishment of a temporary investigative commission, the procedure for holding a solemn meeting of the Verkhovna Rada of Ukraine, as well as other important steps [29]. Thus, the Ukrainian government

has confirmed the declared provisions of the Constitution of Ukraine regarding the determining and constituent nature of the position of the Ukrainian people, which was embodied as a result of mass peaceful assemblies in the form of protest (in this case).

According to D. Kostyuk, an important initiative that helped to determine the level of civil society development in Ukraine on the basis of documentary data collection and surveys of citizens was the project “Determination of the Civil Society Development Index”, conducted during 1999-2005 by the International Organization CIVICUS. The study revealed a number of positive features that characterise the civil society in Ukraine. This is, in particular, the development of human rights groups that inform citizens about the state and ways to protect their rights, and the tolerance of civil society, its inclination to non-violent methods of struggle. The Orange Revolution dispelled the widespread stereotype: the study showed a fairly high level of participation of citizens in civil society actions (although only 12% of the adult population as of 2005 was covered by formal organisations, 50% of respondents admitted that they participate in various actions [30]). This demonstrates the necessity and importance of systematically strengthening the institution of peaceful assembly in the hierarchy of human and civil rights and freedoms in the world in general and in Ukraine in particular. Only this institution, through the cooperation of many citizens, is able to demonstrate the importance of civic position on the course of state policy in the pre-election period.

At the same time, the most tragic, but effective were peaceful protests in the autumn and winter of 2013-2014, which gradually escalated into a bloody confrontation with representatives of the ruling elite and resulted in their delegitimation and the overthrow of the totalitarian regime.

The main reason for holding an indefinite peaceful assembly on Independence Square in Kyiv was the refusal of the current government on November 21, 2013, to sign the Association Agreement with the EU, which was to take place on November 28. This decision caused public outrage, which resulted in the protest movement “Euromaidan”, the main events of which took place in Kyiv [31].

Furthermore, one of the factors was the adoption and signing of a number of laws of Ukraine (from January 16, 2014 № 731-VII “On Amendments to the Law of Ukraine “On Elimination of Negative Consequences and Prevention of Persecution and Punishment of Persons in relation to the Events that took place during Peaceful Assemblies”” [32] (which exempted from criminal liability the law enforcement officers accused of mass

unlawful use of force, special means and weapons against peaceful protesters); No. 728-VII of January 16, 2014 “On Amendments to the Law of Ukraine “On Amendments to Article 297 of the Criminal Code of Ukraine regarding liability for desecration or destruction of monuments erected in memory of those who fought against Nazism during the Second World War – Soviet soldiers-liberators, participants of the partisan movement, underground fighters, victims of Nazi persecution, soldiers-internationalists and peacekeepers” [33] (which would automatically provide law enforcement agencies with the possibility of bringing to justice for the overthrow of memorials and sculptures to Soviet leaders), etc.), significantly restricted the rights and freedoms of man and citizen, contradicted the position of society on the vector of development of the Ukrainian state, and contradicted the conscious and accepted democratic values of the Ukrainian people.

The result of these events and steps that marked the establishment of the institution of the right to peaceful assembly as a key instrument of influence on Ukrainian politics was the adoption of a number of laws that restored human and civil rights and freedoms and were aimed at stabilising the functioning of law and order in society by preventing the establishment of a dictatorship of power (for example, the Laws of Ukraine of January 28, 2014, № 732-VII “On the recognition as invalid certain laws of Ukraine” (which abolished the above-mentioned number of anti-democratic) [34], and the Law of Ukraine No. 742-VII of February 21, 2014 “On the Restoration of Certain Provisions of the Constitution of Ukraine” (which determined the superiority of the Ukrainian Parliament over the institution of the President of Ukraine, which is traditional for a parliamentary-presidential republic) [35], and other important legal acts.

The Revolution of Dignity played a decisive role in the history of Ukraine. The events on Maidan contributed to the reawakening of the values of freedom. Maidan became the epicentre of drastic changes in the country, it directed Ukraine on the path to Europe [36]. In this regard, I. Korotenko argues: “Protest spirit of winter 2013-14 began with students. The real Revolution of Dignity, active phases of confrontation began just after the beating of students on Independence Square. However, prior to that, the demands of young people were simple – European association. Despite various economic disputes, students, public activists and ordinary people at large saw the European vector as a better future. The winter protests can be divided into phases, where the student phase was the calmest, peaceful and tolerant” [37] The authors believe that the sacralisation

of the Revolution of Dignity process is quite justified, as these events, which were realised as a peaceful assembly due to the brutal aggression of the then government, demonstrated to the world the totalitarian context of the current regime, and at the same time the invincibility of the Ukrainian people.

Besides, A. Kyrydon emphasised that the Revolution of Dignity became a marker and a powerful impetus of processes in the modern history of Ukraine, a litmus test of the European community as a whole, which in domestic political terms made significant adjustments to the processes of self-identification and creation of a political nation, as well as to the idea of Ukraine’s place in the world as a subject of international relations [38]. It is the strong desire of the Ukrainian people to integrate into the European community and the possibility of exercising the right to peaceful assembly provided for by international and national legislation that allowed them to freely express their position on the further vector of state policy and identify the Ukrainian nation as part of the global European community.

At the same time, positively assessing the revolutionary movements and the practice of solving important state issues at peaceful assemblies of citizens, V. Stepanenko notes that the only decisive and effective lever to overcome the post-Soviet stagnation in Ukraine should be recognised the activity and pressure of civil society, the entrepreneurial class and the youth. However, even such pressure and engagement can be effective in the conditions of, first of all, mass public demand for reforming the country, constant and effective public control over the authorities by an effective and efficient civil society [39], which once again shows that the right to peaceful assembly and the relevant institution are fundamental in any democratic society, and the systematic expression of the will of the people of Ukraine makes it possible to form a system of legal values based on democratic principles, gives grounds to assert that the right to peaceful assembly is a fundamental right in any democratic society.

■ Conclusions

Thus, based on the establishment of the concept and substance, and a general overview of the system of legal values in Ukraine, the study of the role of the constitutional right of citizens to peaceful assembly in the relevant system, the following conclusions are substantiated:

1. The formation and establishment of a system of modern legal values are one of the most urgent issues in the context of the formation of national democracy and the establishment of the principles of the rule of law. The legal system of society is a

purely legal phenomenon that is closely related to the system of legal values, formed on the basis of long-standing traditions and established public (social) practices.

2. Human and civil rights and freedoms, which, according to the Constitution of Ukraine, form the content and direction of state policy, have specific features in determining directions for the formation of the legal system as an integral legal category and mechanism, and, being shaped directly as a result of the development of the system of legal values, influence the definition of the most important rights in society.

3. Based on the analysis of the influence of the culture of peaceful assemblies and the exercise by citizens of the relevant right, its formation in the system of modern legal values, the conclusion is formulated that each historical stage of the formation

of Ukrainian statehood was marked by a mass assembly. Ukrainian history, in particular the history of Ukrainian law and legal system, has several outstanding examples of public exercise of the right to peaceful assembly by citizens, which led to real legal consequences, and prevention of usurpation of power and other unlawful acts.

4. In addition to the above, a comprehensive analysis of the role and place of the constitutional right to peaceful assembly in the system of modern legal values, first of all, shows that it can also serve as a foundation for the realisation of such rights as: the right to freedom of expression and freedom of speech, the right to participate in the management of public affairs, the right to respect for dignity, the right to liberty and security of person, the right to freedom of movement, etc.

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Конституційне право громадян на мирні зібрання в системі сучасних правових цінностей

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■ **Анотація.** Мета статті – дослідити конституційне право громадян на мирні зібрання в системі сучасних правових цінностей. Наукова новизна дослідження полягає в тому, що в публікації обґрунтовано місце конституційного права громадян на мирні зібрання в системі сучасних правових цінностей, з'ясовано поняття та сутність, а також здійснено загальний огляд системи правових цінностей в Україні, досліджено роль конституційного права громадян на мирні зібрання у відповідній системі, на підставі аргументів і наявних фактів сформульовано науково обґрунтовані висновки. Питання формування та становлення системи сучасних правових цінностей є надзвичайно актуальним в умовах становлення національної демократії, утвердження принципів правової державності. Правова система суспільства є суто юридичним явищем, що тісно пов'язане із системою правових цінностей, бере з нього витoki та формується на підставі традицій та усталених суспільних (соціальних) практик. За результатами аналізу впливу культури мирних зібрань, реалізації громадянами відповідного права та його становлення в системі сучасних правових цінностей було доведено, що кожен історичний етап становлення української державності знаменувався масовим зібранням. Українська історія, зокрема історія українського права та правової системи, має кілька виразних прикладів публічної реалізації права на мирні зібрання громадянами, що зумовили реальні юридичні наслідки, а також недопущення узурпації влади й інших протиправних діянь, що підтверджує позицію авторів щодо фундаментального значення відповідного права громадян

■ **Ключові слова:** конституційне право; мирне зібрання; мітинг; похід; демонстрація; правові цінності; значення; права людини і громадянина

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State Policy of Human Rights in the Field of National Security in the context of Digitalization

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■ **Abstract.** The purpose of the study is to determine the main principles of the state policy of promoting human rights in the national security sphere in the digital environment based on the analysis of scientific approaches, normative documents in the national security domain, human rights and digitalisation of the country. To meet this goal, the following tasks have been set: to provide arguments for the relevance of the chosen topic for research; to characterise the content of the identified areas; to substantiate the importance of ensuring state security and human rights in the context of digitalisation; to determine the relationship between information and cyber security at several levels – the security of the individual, society and the state. The methodological basis of the scientific article is a coherent and consistent system of methods that allowed analysing the subject of the study properly, in particular, scientific methods of analysis, synthesis, induction and deduction were used. The theoretical basis of this publication includes the writings of Ukrainian scholars on ensuring human rights in the national security sphere in the context of digitalisation and the reports of government officials delivered at special events dedicated to the chosen topic. The scientific novelty of the publication lies in the fact that, based on the analysis, two areas of human rights protection in the sphere of national security in the context of digitalisation have been identified: 1) ensuring information security as a component of national security in digitalisation; 2) implementation of digital transformation of the Armed Forces and ensuring information security. At the same time, it is substantiated that more such areas can be identified, however, given the limited scope of the study, other areas will be the subject of further scientific research. It is proved that information security should be considered in the context of cyber security. Their symbiosis can be represented at three levels: state security, public security, and individual security. The article emphasizes the importance of prioritising the information and cyber security of the individual: its provision will become the basis for the information security of society and the state as a whole. Cybersecurity is argued to reach a new level – the national level, moving from the civilian to the defense sphere

■ **Keywords:** digitalisation; ensuring human rights; national security; cyber security; cyber attack; security and defence; aggression

■ Introduction

Ensuring state security has become the central concern for representatives of the government, society and the international community. Human rights protection in the sphere of national security in the conditions of aggression of the Russian Federation

is of great importance. National security policy has always required increased attention from the state and civil society, and now this issue has become even more relevant. It is associated with the conflict in the East of the country, the development of digital technologies, the emergence of new information threats, the increased risk of cyber attacks, etc.

May 11-13, 2021 within the framework of the All-Ukrainian forum “Ukraine 30. Security of the Country” [1], a number of key issues in the national security sphere were discussed: conducting a socially significant dialogue on national security issues with representatives of strategic partners of

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the state; identifying priorities in reforming and developing forces, sectors and industries related to ensuring security in Ukraine; addressing the topic of information and cybersecurity, and the measures necessary to strengthen them, in particular the creation of cyber defence forces, etc.

The scientific relevance of the chosen subject is evidenced by a significant amount of scientific research that directly or indirectly covers the issues of state policy of ensuring human rights in the field of national security in the context of digitalisation. Three main areas of scientific research can be distinguished: 1) state policy in national security; 2) ensuring human rights as a factor in ensuring national security; 3) digitalisation and its impact on human rights and national security. At the same time, a detailed study on the state policy of ensuring human rights in the national security area in the context of the development of digitalisation has not yet been carried out. In particular, I. Doronin considered the issues of digital development and national security in the context of legal problems [2], and also devoted his dissertation thesis to the theoretical and legal study of the national security of Ukraine in the information age [3]. O. Pyshchulina analysed the current stage of world economic and social development, which is characterised by a significant impact of digitalisation, identified the main determinants and grounds for the development of the digital economy in Ukraine, and the country's readiness to introduce and use digital technologies (both from the point of view of suppliers and consumers of digital services), analysed the potential risks and threats of digitalisation in Ukraine and the world [4]. The study of the issue of national security is carried out by V. Smolyanyuk, who investigated the systemic principles of the national security of Ukraine [5]. S. Drobotov devoted his research to the constitutional and legal provision of national security in Ukraine [6]. O. Kubetska, T. Ostapenko, Ya. Paleshko defined the conditions for ensuring the national security of the state [7]. P. Bugutskyi studied the theoretical foundations of the formation and development of national security laws in Ukraine [1]. The analysis of these scientific works shows that a holistic, comprehensive study of the state policy of ensuring human rights in the field of national security in the context of the development of digitalisation has not yet been carried out. Some issues in this area of research are considered in this study.

The purpose of the publication is to determine the main areas of the state policy of ensuring human rights in the national security sphere in the context of digitalisation, based on the study of scientific approaches, normative documents in the sphere of national security, human rights and digitalisation of the country.

To achieve this goal, the following tasks are set:

- to present arguments on the relevance of the chosen research topic;

- to substantiate the importance of ensuring state security and human rights in the context of digitalisation;

- to describe the content of the outlined directions;

- to determine the interconnection of information and cyber security at several levels – security of the individual, society and state.

The study proves that the issue of ensuring state security has been the major one for Ukraine over the years. This is attributed to the conflict in the East of the country, the development of digital technologies and the increased risk of cyber-attacks, etc.

As a substantiation of the relevance of the study of the selected issues, the All-Ukrainian Forum “Ukraine 30. Security of the Country”, which discussed a number of key issues in the field of national security, the approval of the Strategic Defence Bulletin of Ukraine, one of the priorities of which is the digital transformation of the Armed Forces and information security, and a number of modern scientific developments in this area.

Based on the analysis, two areas of scientific research were identified to address the subject of the article:

- ensuring information security as a component of national security in the context of digitalisation;

- implementation of digital transformation of the Armed Forces and ensuring information security.

■ Results and Discussion

To begin with, the rights of every person can be considered protected and their interests secured only in conditions where the security of the country is not threatened. It is difficult to imagine a situation in which the state, whose security is constantly under threat, will be able to provide full protection of the rights of its citizens.

Article 3 of the Constitution of Ukraine defines a person, his life and health, honour and dignity, inviolability and security as the highest social value. Accordingly, this also includes ensuring security in general, i.e., national security.

Article 17 of the General Principles states that “to protect the sovereignty and territorial indivisibility of Ukraine, and to ensure its economic and informational security are the most important functions of the State and a matter of concern for all the Ukrainian people” [8].

During his speech at the All-Ukrainian forum “Ukraine 30. Security of the country” President of Ukraine – Supreme Commander-in-Chief of the Armed Forces V. Zelenskyy [9] emphasised

the importance of security for the state. Along with freedom and justice, security is one of the most important values for Ukrainians. In the context of Russian aggression, society has no doubts: security is the main condition for the existence of the state and its independence. One of the main focuses of the programme is the security of the person and the country. Its provision as an integral element of a complex social system with all its needs, interests, and opportunities is the basis of the national security policy of Ukraine. This once again confirms the interconnection and interdependence of personal and state security.

As part of the study, it is also necessary to formulate a definition of the national security of Ukraine. The Law of Ukraine “On the National Security of Ukraine” interprets it as “the protection of state sovereignty, territorial integrity, democratic constitutional order and other national interests of Ukraine from real and potential threats” [10]. There is no exhaustive list of objects subject to protection as objects of national security. Thus, the objects of national security are all spheres of public life: vital interests of a person, society and the state, their protection from external and internal threats. Scientists claim that the triad of objects of national security of the state is the security of the individual, society and the state [11].

The examination of scientific and regulatory sources on the analysed topic made it possible to identify several areas of scientific research:

- ensuring information security as a component of national security in the context of digitalisation;
- implementation of digital transformation of the Armed Forces and ensuring information security.

There are many more such areas. However, given the limited scope of the study, they will be the subject of further scientific research.

The following areas should be considered thoroughly:

1) ensuring information security as a component of national security in the context of digitalisation. Digitalisation penetrates all spheres of human life. Ukraine became the first country in the world where digital passports in a smartphone became official legal analogues of ordinary documents. In September 2021, Ukraine started the process of introducing a “no-paper” approach: state authorities will not request paper documents if the necessary information is already in the registers [12]. Other digital

services should also be mentioned: eMalyatko is an integrated service for parents of newborns. With one application submitted online, it is possible to register the birth of a child and access up to 9 state services from various authorities needed immediately after the birth of a child; eCase – a system for optimising pre-trial investigations of anti-corruption agencies of Ukraine, which is integrated with the Unified Register of Pre-trial Investigations and judicial systems, which will allow NABU, SAP and HACC to interact online. Under such conditions, the issue of ensuring information security is becoming more and more relevant: databases of information about citizens, databases of holders of such data, the results of receiving certain services through internet requests, and so on should be reliably protected. Specially authorised officials direct their attention to these issues. In particular, within the framework of the All-Ukrainian forum “Ukraine 30. National Security” Deputy Head of the State Service for Special Communications and Information Protection of Ukraine noted that “information security in the context of national security is dual in nature. Firstly, information security aims to protect the balanced interest in the information sphere of a person, individual, citizen, state and society. There is a balance in the information sphere of all stakeholders. This balance must be protected and maintained. On the other hand, the object of information security is the information infrastructure that provides information resources, and technologies that form the digital state today, the digital economy, and the digital society. Relevant processes are also being implemented: digital democracy, digital voting. Thus, there is a duality: interests, in particular, protection of psychological and other influence on the consciousness of an individual citizen or society, and on the other hand – an object of a purely technical nature. On this basis, an appropriate pool or set of opportunities is formed, developing which, it is possible to assess the state of information security of the state” [13].

Information security should be considered together with cyber security. The draft Law of Ukraine “On Cyber Security of Ukraine” was submitted, so it is proposed to consider cyber security as the state of protection of vital interests of a person and a citizen, society and the state in cyberspace. Cyberspace is an environment formed by an organised set of information processes on the basis of the information,

telecommunication and information-telecommunication systems interconnected by common principles and rules [14].

Given the digitalisation process, it is believed that information security can be fully ensured only in the case of achieving cybersecurity. Their symbiosis can be represented at three levels: state security, public security, and individual security. It is believed that the security of the individual, society and state can be ensured at national, regional and international levels. The authors argue that the information and cyber security of an individual should be put at the highest level. Its provision will become the basis for ensuring the information security of society and the state as a whole.

The importance of ensuring cybersecurity can be supported by the following arguments. In particular, the Petya virus has affected more than 60 countries in the world. The damage from the virus attack was estimated at USD 8 billion. Ukraine lost UAH 10 billion in half an hour [15]. In 2017, Ukrposhta suffered UAH 100 million in losses due to the Petya virus [16].

It is also necessary to highlight the case of personal data leaks from the digital public service of the application "Diia". On May 12 last year, investigators of the Main Investigation Department of the National Police of Ukraine initiated criminal proceedings under Part 2 of Article 361 of the Criminal Code of Ukraine. The operation of the resource, which illegally distributed the personal data of citizens, was promptly blocked. Subsequently, information appeared on official websites that the data was not confirmed, and within the framework of the pre-trial investigation, it was established that the information disseminated in social networks, including Telegram channels, has signs of fragmented data sets compiled from various sources and resources, including open information from registers [17]. This demonstrates the importance of creating a reliable system of protection of citizens' information data and the high threat to national security in case of their unauthorised dissemination.

It seems that now, in the context of countering the aggression of the Russian Federation, it is extremely difficult to effectively ensure the information security of citizens. Therefore, it is important that information and cyber security is ensured at the state level, taking into account external threats;

2) Implementation of digital transformation of the Armed Forces and ensuring information security.

In September 2021, the President of Ukraine V. Zelenskyy [9] approved the Strategic Defense Bulletin of Ukraine, which identifies the digital transformation of the Armed Forces and information security as one of the priorities. As a result of the implementation of the military policy of Ukraine, the defence forces will meet the requirements of comprehensive defence of Ukraine and will be: built on national and Euro-Atlantic values; interoperable with the relevant structures of NATO member states; able to ensure the defence of the territory of Ukraine within the state border, confrontation in the information space, cyberspace as a component of the information space using the potential of the state and society, using all possible forms and methods to repel armed aggression. The above gives grounds to assert that cybersecurity is reaching a new level – the national level, and moving from the civilian to the defence sphere [18].

It should also be noted that this development is "new" for Ukraine and is currently at the stage of developing a regulatory framework. These normative acts, in turn, will become the basis for further development of the system of information and cyber security of the country as a whole and each citizen.

■ Conclusions

The article substantiates the position that in the current conditions of digital transformation, the issue of information security is becoming increasingly relevant: databases of information on citizens, databases of holders of such data, the results of obtaining certain services through Internet applications, etc. should be reliably protected. It is proved that information security should be considered in the context of cyber security. Their symbiosis can be represented at three levels: state security, public security, and individual security. The authors argue that the information and cyber security of an individual should be put at the highest level. Its provision will become the basis for ensuring the information security of society and the state as a whole. The conducted study gave grounds to assert that cyber security is reaching the general state level, moving the civilian to the defence sphere. This statement is based on the adoption of new normative legal acts in this area, in particular the Strategic Defense Bulletin of Ukraine, one of the priorities of which is the digital transformation of the Armed Forces and information security.

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Державна політика забезпечення прав людини у сфері національної безпеки в умовах цифровізації

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■ **Анотація.** Мета статті – на підставі дослідження наукових поглядів, нормативних документів у сфері національної безпеки, забезпечення прав людини, а також цифровізації країни визначити основні напрями державної політики забезпечення прав людини у сфері національної безпеки в умовах цифровізації. Для реалізації цієї мети поставлено такі завдання: навести аргументи щодо актуальності обраної теми для дослідження; схарактеризувати зміст визначених напрямів; обґрунтувати важливість забезпечення державної безпеки та прав людини в умовах цифровізації; визначити взаємозв'язок інформаційної та кібернетичної безпеки на декількох рівнях – безпека особи, суспільства й держави. 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 вчених стосовно забезпечення прав людини у сфері національної безпеки в умовах розвитку цифровізації, а також виступи державних посадових осіб на спеціальних заходах, присвячених обраній тематиці. Наукова новизна публікації полягає в тому, що на підставі здійсненого аналізу ми виокремили два напрями забезпечення прав людини у сфері національної безпеки в умовах розвитку цифровізації: 1) забезпечення інформаційної безпеки як складової національної безпеки в умовах цифровізації; 2) впровадження цифрової трансформації Збройних сил і забезпечення інформаційної безпеки. Водночас обґрунтовано, що таких напрямів можна визначити більше, однак, з огляду на обмежений обсяг дослідження, інші напрями стануть предметом подальших наукових пошуків. Доведено, що інформаційну безпеку слід розглядати одночасно з кібернетичною. Їх симбіоз може бути представлено на трьох рівнях: безпека держави, безпека суспільства, безпека особи. У статті акцентовано, що слід поставити на найвищий щабель інформаційну й кібернетичну безпеку особи: її забезпечення стане підґрунтям для інформаційної безпеки суспільства та держави загалом. Обґрунтовано, що забезпечення кібербезпеки переходить на новий рівень – загальнодержавний, а також із цивільної сфери – в оборонну

■ **Ключові слова:** цифровізація; забезпечення прав людини; національна безпека; кібернетична безпека; кібератака; безпека й оборона; агресія

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Characteristics of the Legal Institution and Legal Relations of Confidential Cooperation

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■ **Abstract.** Confidential cooperation is a separate intersectoral legal institution and a separate type of procedural and legal relations between authorised employees of state authorities and individuals who cooperate with them. According to Article 19 of the Constitution of Ukraine, such relations and activities of these bodies must be regulated by the laws of Ukraine. However, the institution of confidential cooperation is not sufficiently regulated in the legislation, there is no definition of the basic concepts, and the existing legal norms are contained in different laws and only fragmentarily regulate the relevant legal relations, which complicates their understanding, research and use. The purpose of the study is to provide a general legal analysis of the institution of confidential cooperation and relevant legal relations; to define its concepts, principles, subjects, object and content in the context of the National Anti-Corruption Bureau of Ukraine. General scientific methods: system analysis, analogy, and comparison; general legal methods: comparative legal, formal legal, and logical legal methods were used in writing the article. The state of scientific research and the current legislation of Ukraine, which regulates the relevant legal relations, is analysed, and its individual norms are compared. The main legal terms on the topic under study are defined. A systematic analysis of the legal institution and legal relations of confidential cooperation is carried out both from a purely doctrinal position and on the example of the activities of a law enforcement agency. Some features and characteristics of the relevant institution and relations are determined. The results of the study are generalized, specified and presented in the form of statements and conclusions, and can therefore be used in other scientific studies, having both scientific and practical value. The scientific novelty of the study is that confidential cooperation is systematically considered in open sources as a separate legal institution and a type of legal relationship for the first time; the conceptual and categorical apparatus, principles, subjects, object and content are defined, in particular, the rights, duties, responsibilities and guarantees of both authorised employees and confidants are studied in detail. For the first time the issue of the functioning of the institution of confidential cooperation in the National Bureau, which has certain features and differences in comparison with other law enforcement agencies, was studied. The results of the study can also be used to raise awareness among practitioners, the legal community and the public on this issue, as well as in rule-making. The institution of confidential cooperation should be regulated in detail by law since it is associated with the law enforcement activities of state bodies and the risk of violation of constitutional human rights and interests. Regulation of the legal institution and legal relations does not pose a threat to the disclosure of forms and methods of conducting special investigative, intelligence and counterintelligence activities, at the same time provides legal certainty, as well as guarantees the state's compliance with the principles of legality, the rule of law, respect for human rights and freedoms. In general, the relevant legal relations should be regulated within the framework of the operative-search law and enshrined in one legislative act – the Law of Ukraine “On Operative-Search Activity”, which should define the basic concepts, subjects and their rights, duties, responsibilities and guarantees. It is also necessary to eliminate conflicts with other legal norms, in particular those regulating the whistle-blower institution

■ **Keywords:** confidential cooperation; covert cooperation; confidant; whistleblower; corruption; Covert Human Intelligence Sources (CHIS); Confidential Informant (CI)

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■ Introduction

Corruption as a social phenomenon is one of the main problems of modern Ukrainian society. This is evidenced by the increased attention of citizens to the process of fighting corruption in the government. International organisations also pay attention to Ukraine's progress in this direction: European

Commission, European Parliament, Council of the European Union, World Bank, International Monetary Fund, Organization for Economic Cooperation and Development, European Anti-Fraud Office, etc.

One of the most effective legal institutions in the fight against organised crime and combating corruption, given their hidden (latent) nature, is the Institution of confidential cooperation. The efficiency of using confidential services in combating crime is confirmed, in particular, by empirical studies conducted by M.L. Gribov & O.I. Kozachenko [1], according to the results of which 78.5% of the surveyed operational workers consider confidential cooperation to be the main tool for preventing and detecting crimes, and 71.5% and 68%, respectively, of operational workers and investigators – the investigation of crimes.

The importance of cooperation between law enforcement agencies and citizens in combating crime is confirmed by international experience, primarily of developed countries of North America and Europe, which was studied in the works of E.E. Grechyn, O.I. Kozachenko, V.V. Matviychuk, I.I. Musiyenko, D.I. Nikiforchuk & A.V. Savchenko [2-4] and others. This demonstrates the truly universal nature of such cooperation regardless of legal systems, national culture and political regimes. The differences lie in the definition of: the levels of legislative support for confidential cooperation (at the level of laws, codes of practice, bylaws); subjects who have the right to relevant activities; persons with whom it is possible or, conversely, forbidden to establish appropriate relations; the boundaries of confidential cooperation (depending on the permitted passive or active role of the confidant and the purpose of such cooperation); the specifics of documentation (granting permits to involve certain persons in general and to perform specific tasks, registration of the results of cooperation, procedural consolidation of evidence, etc.); the possibilities of using information obtained by the confidant as evidence.

Given the national and international experience proving the effectiveness of confidential cooperation, especially in combating latent types of crime, it is important to study this institution in the context of the National Bureau, which is responsible for preventing, detecting, disclosing, and investigating corruption crimes and preventing new ones. Such research should begin with a general legal analysis, that is, with the theoretical part, which is given insufficient attention, possibly due to the fact that operational search science focuses on its practical aspect.

The issue of confidential cooperation in the context of law enforcement and pre-trial investigation bodies has been previously addressed. In particular, in the work of D.V. Talalay & S.M. Saltykov [5]

considers the correlation of confidential cooperation with secret investigative (search) actions. It appears reasonable to conclude that confidential cooperation is not a separate investigative or procedural action, and the concept of confidential cooperation is much broader than the procedural activities of an investigator or operative officer. However, to identify the exact differences between confidential cooperation and procedural activities, it is necessary to clarify its legal content.

The CPC of Ukraine of 1960 [6] did not include provisions that would regulate confidential cooperation and covert investigative (detective) actions. These novels appeared in 2012 with the adoption of the new edition of the Code [7]. The issue of using confidential cooperation is regulated in Article 275 and partially in Article 272 of this Code. The legislator placed these articles in the third paragraph “Other types of covert investigative (detective) actions” of Chapter 21 “Covert investigative (detective) actions”. This is what caused some lawyers, judges, practitioners, lawyers to attribute confidential cooperation to a separate type of covert investigative (search) actions. Such a picture became possible, in particular, due to insufficient scientific research and, first of all, insufficient coverage of the legal content of confidential cooperation and relevant activities of law enforcement agencies, which traditionally had and still has a hidden nature, in open scientific sources.

It can be argued that excessive secrecy is gradually being removed from the institution of confidential (covert) cooperation, and some legislative acts contain provisions that partially regulate these and related legal relations. In addition, the legislation introduced the institution of anti-corruption whistleblowers, which is a step forward in ensuring the safety, legal and social protection of persons who report corruption and facilitate investigations. At the same time, the whistleblower institution does not account for certain key principles and foundations of the institution of confidential cooperation and operational and investigative activities, such as confidentiality, secrecy, expediency, planning, etc. This indicates a certain competition of institutions and requires separate research.

Due to the imperfection of the legislation governing the relations of confidential cooperation, the subject of the confidential cooperation institution actualises the need for additional study and development of proposals and recommendations for its regulatory improvement. The issue of the composition and principles of legal relations between confidential employees also remains relevant and requires additional analysis.

The purpose of this publication is a systematic general legal analysis and characterisation of legal relations arising from confidential cooperation between law enforcement officers and individuals, on the example of the National Bureau, and the legal institution that should regulate the relevant relations. Achieving this goal will be an important argument in the debate on the need for legislative regulation of these relations and will allow both lawmakers and practitioners to comprehend the scope of relations that need to be regulated.

To achieve this goal, the following tasks are set: 1) to analyse the current legislation of Ukraine and scientific works on the subject matter, primarily those in which international experience is studied; 2) to define the basic concepts, to characterise the legal institute of confidential cooperation and the relevant legal relations; 3) to define the principles, subjects, object and content of these legal relations; 4) to summarise the results of the study.

The scientific novelty of this study lies in the fact that confidential cooperation and the relevant legal institution, which are mostly of purely practical application and have been studied mainly using the inductive method, are examined through the prism of general legal theories, i.e., using the deductive method. Thus, the definition of legal terms, features and structure of the relevant legal institution and legal relations is carried out with the help of general legal ideas and concepts.

■ Results and Discussion

Legislation regulating the legal institution of confidential cooperation and relevant legal relations in the context of the National Bureau's activities contains certain provisions of the Constitution of Ukraine, the Convention for the Protection of Human Rights and Fundamental Freedoms, the CPC of Ukraine, the Criminal Code of Ukraine, the Laws of Ukraine "On the National Anti-Corruption Bureau of Ukraine" (hereinafter – the Law "On NABU"), "On Operational Investigative Activity" (hereinafter – the Law "On OIA"), "On Prevention of Corruption", "On Organisational and Legal Framework for Combating Organised Crime", "On Ensuring Security of Persons Participating in Criminal Proceedings", by-laws and departmental regulations.

In view of the above, the institute of confidential cooperation is an interdisciplinary legal institution, which is located at the intersection of such branches of law as: criminal and criminal procedural law, operational and investigative law and civil law (on material liability, compensation of expenses, etc.), labour (labour relations with confidants) and administrative (on the organisation of

activities and management of the relevant law enforcement units) law.

At the same time, there are no definitions of the terms "confidential" and "confidential cooperation" in any legislative act, they exist only in the legal doctrine.

Definition of the concepts of "confidential cooperation", "confidential" and "legal institution of confidential cooperation".

In a narrow sense, confidants are persons with whom confidential cooperation relations are established. The authors support the position of K.M. Olshesky & V.V. Dirman, which use a more detailed definition of confidants, formulated by V.B. RUSHAILO: "these are private individuals with whom operational units carrying out operational and investigative activities have established, on a paid or free of charge basis, relations of cooperation, which provide for the assistance of these persons on a confidential basis to the activities of operational units in the performance of their tasks" [8].

The proposed definition should be improved by adding such features as the legal capacity of a person, voluntary entry and maintenance of relations, and also delete the word "private", since the confidant may be, in particular, an employee, official or official of a legal entity of public law.

In addition, according to the provisions of Article 275 of the Criminal Procedure Code of Ukraine [7], the right to use confidential cooperation is also granted to the investigator.

Similar in content to the concept of "confidant" in the legislation and practice of foreign countries and law enforcement agencies are the concepts of "CHIS" (Covert Human Intelligence Sources – in the UK), "CI" (Confidential Informant – in the United States), "V-Personen" (Vertrauenspersonen, trusted person – in the Federal Republic of Germany).

According to § 26(8) of the Regulation of Investigatory Powers Act 2000 [9], a person is a "CHIS" if:

- it establishes or maintains a personal or other relationship with any person for the clandestine purpose of facilitating anything falling within paragraph (b) or (c);
- it secretly uses such relationship to obtain information or provide access to any information to another person; or
- it secretly discloses information obtained through the use of such relations or as a result of the existence of such relations.

In view of the above, in the context of criminal proceedings, confidants are individuals with legal capacity with whom law enforcement officers authorised to carry out operational and investigative activities and/or pre-trial investigation have

established and maintain relations that provide for the assistance of these persons to perform the tasks assigned to these bodies on a paid or unpaid basis and on the basis of confidentiality and voluntariness.

In this context, confidential cooperation is a relationship that is established and maintained by law enforcement officers (hereinafter referred to as authorised employees) authorised to carry out operational search activities and/or pre-trial investigation with individuals with the legal capacity to assist these persons in fulfilling the tasks assigned to these bodies, on a paid or gratuitous basis and on the basis of confidentiality and volunteerism.

It should be pointed out that lawmakers made several attempts to define the concepts of confidential and covert cooperation during the development of the new version of the Law "On OIA" in 2016 and 2019.

The draft law of September 2, 2019, No. 1229 [10] proposed to define confidential cooperation as the interaction of citizens with operational units of law enforcement or intelligence agencies of Ukraine, which consists in providing them with systematic, lawful assistance in performing operational and investigative tasks on a voluntary basis.

This definition corresponds to the essence of legal relations of confidential cooperation. However, it is necessary to clarify the subject composition by adding pre-trial investigation bodies, and instead of citizens to indicate physical capable persons, since the relevant relations can also be established with foreigners and stateless persons. Comparing the definitions of the concepts of confidential and covert cooperation contained in the draft law, it should be noted that the main difference is the sign of systematic confidential cooperation, the importance of which will be highlighted below.

Within the framework of this study, given these and other insignificant differences, the concepts of confidential and covert cooperation will be considered as almost identical, since the respective relations have identical subjects, objects and content.

Based on this definition, it is possible to conclude that the legal relations of confidential cooperation are distinguished by the fact that they are both regulatory and protective relative, bilateral, active, contractual, ongoing and procedural. The moment of origin of this relationship is the moment of reaching an oral or written agreement between the parties.

Confidential cooperation as an institution of law is a personified group of legal norms that regulate homogeneous social relations of a particular type [11], namely legal relations of confidential cooperation.

As an institution of law, confidential cooperation is characterized by the fact that it is an interdisciplinary legal institution (i.e., a set of rules of law of

different branches of law, which is aimed at regulating social relations of a certain type [11]; functions autonomously as a separate type of law enforcement activity; is complex in its composition since it simultaneously regulates both procedural and legal relations; is both regulatory (gives rights and obligations) and protective (establishes liability for misconduct). Principles of confidential cooperation.

Employees of the National Bureau carry out confidential cooperation on the basis of general legal principles: the rule of law, legality, and respect for human rights and freedoms, enshrined in Art. 4 of the Law "On OIA" [12] and Art. 7 of the CPC of Ukraine [7]; as well as sectoral principles of the science of operational and investigative activities related to confidential cooperation: confidentiality, voluntariness, security, legal and social protection, moral and material incentives, enshrined in Articles 7, 8, 13 of the Law "On OIA" [12] and in Articles 16, 17 of the Law "On NABU" [13], as well as the principles of secrecy, admissibility, systematicity and expediency [8], formulated by science and practice.

The listed principles are aimed at ensuring the rights and interests of confidants, which testifies to the special value of the institution of confidential cooperation for the state, and its compliance with the principle of the rule of law enshrined in Article 3 of the Constitution of Ukraine [14].

The principle of the rule of law in the institute of confidential cooperation is that human rights and freedoms (confidants; persons about whom information is collected; third parties) are of the highest value, and their provision is a priority for authorised employees of the National Bureau.

The principle of respect for human rights and freedoms is that authorised employees of the National Bureau apply confidential cooperation in a way that does not degrade human dignity and does not violate or restrict human rights and freedoms. In cases provided for by law, such rights and freedoms may be restricted, but in a manner that restricts them the least. Their arbitrary restriction or violation is unacceptable. Such rights and freedoms shall be restored in the event of unlawful violation of human rights and freedoms, the damage caused shall be compensated, and the information obtained that degrades the honour and dignity of an individual shall be destroyed.

The principle of legality is that confidential cooperation and certain procedures are carried out exclusively in accordance with, on the grounds, in the manner and in the manner prescribed by law, and exclusively by authorised entities.

The principle of confidentiality means that the fact of conclusion and maintenance of confidential

cooperation relations between a particular authorised employee of the National Bureau and a confidant must be kept secret. This principle imposes a corresponding obligation not to disclose the existence and results of such cooperation on both parties to these relations in order to ensure the effectiveness, efficiency and security of such cooperation. Disclosure of this secret entails liability under the current legislation, except in cases of disclosure of information about illegal actions that violate human rights.

The principle of voluntariness means that no one can be forced to enter into confidential cooperation with the National Bureau. The use of physical and psychological coercion is strictly prohibited.

Ensuring security, legal and social protection means that the law guarantees confidentials physical, legal and social protection, and for authorised employees of the National Bureau for Ensuring the Rights and Freedoms of Confidentials, their safety and well-being is a priority duty. The authorised employees of the National Bureau are obliged to ensure the safety, rights and freedoms, and property of the confidant, his close relatives and family members during and after the existence of confidential cooperation relations in case of a relevant threat caused by such cooperation.

The principle of moral and material encouragement is to approve and encourage the involvement of individuals in the fight against crime. Since entering into confidential cooperation is voluntary, the state should take care to create positive motivation for these persons. Such encouragement can be moral, i.e., recognition by the National Bureau and its authorised employees of the merits and efforts of confidants in cleansing the authorities from corruption for the establishment of the rule of law and civil society, elimination of threats to national security, as well as material, i.e., payment of monetary rewards, compensation for expenses, time and efforts, and other material and financial issues.

The principle of conspiracy, in turn, is determined by the principle of confidentiality and consists in the fact that in order to keep secret the fact, details and results of these relations, the authorised employee and the confidant agree on compliance and comply with a certain system of measures, use security, disguise, conspiracy during meetings, movement, communication, transfer and use of information, etc.

The principle of admissibility, which corresponds to the principles of the rule of law, legality and respect for human rights and freedoms, is that it is prohibited to involve in confidential cooperation persons whose professional activities are related to the preservation of professional secrets, namely: lawyers, notaries, medical workers, clergymen,

journalists, if such cooperation will be associated with the disclosure of confidential information of a professional nature.

The principle of expediency is that persons are involved in confidential cooperation, and confidential cooperation is applied only if it is impossible to perform the tasks assigned to the National Bureau in a particular situation or if their implementation is significantly complicated. Confidential cooperation involves only those persons who, by their moral, business and professional qualities, knowledge, skills and abilities, are able to perform the tasks entrusted to them, have or can get access to certain information, and are also able to keep the fact, details and results of such cooperation secret.

The importance of this principle is rightly emphasised by K.M. Olshevsky & V.V. Dirman, who call it the principle of expedient necessity (rationality). The formation of a network of confidants, which are a natural component of the criminal environment and criminal objects, should be carried out taking into account the operational situation, a specific operational and investigative situation, and in this regard, the interests of the relevant services that carry out operational and investigative activities, based on determining the optimal sufficiency of confidants. Their insufficient number will not provide the necessary information, and an excessive number of such persons does not always give a positive result, but, on the contrary, reduces the efficiency of their use [8].

The principle of systematicity is inextricably linked to the principle of expediency and qualitatively distinguishes confidential cooperation from covert cooperation as a type of involvement of citizens in the performance of certain short-term tasks of law enforcement agencies. The systematic principle consists in that the main purpose of confidential cooperation is mainly to involve persons in long-term cooperation with law enforcement agencies to counteract socially dangerous illegal behaviour in a particular area or object. Such objective may be conditioned by the complexity of studying the direction or object, the latency of criminal acts, "mutual responsibility", closeness and countermeasures of the criminal environment, etc.

Cooperation with law enforcement agencies in a normal society is an honourable civic duty for a law-abiding citizen, and even more so for a representative of state authorities and local self-government, as the person contributes to the performance of the state law enforcement function in the interests of society. Essentially, confidential cooperation provides an opportunity for citizens to join the cleansing of the authorities from corruption. However, in

modern Ukrainian society, the attitude to the institution of confidential cooperation is ambiguous.

The argument of K.M. Olshevsky & V.V. Dirman is worth consideration, as they cite E. Vydok & I. Karpets, regarding the thesis that one of the reasons for the negative perception of the confidential cooperation institution by individuals is not the best example of its application in the Soviet era when the information received from confidants was sometimes used in the criminal interests of the authorities [8].

It is also worth emphasising the high efficiency and public benefit of the use of covert cooperation with citizens by the criminal police, which solved the most complex crimes in the Soviet and post-Soviet years 1980-2000 and were able to restrain organised crime and banditry. Without the help of conscious citizens, this would hardly have been possible.

In this regard, it is important to note that the National Bureau is outside politics and is independent of politicians, representatives of state authorities and local self-government, legislative, executive and judicial branches of power, law enforcement agencies and is controlled and accountable to the public (Article 3 of the Law "On NABU" [13]. The National Bureau has a single goal – to eradicate corruption from Ukraine, as it is an attribute of dishonest government officials, to whom the National Bureau is in opposition.

The composition of relations arising from confidential cooperation: their subjects, object and content. Confidential cooperation, like any legal relationship, has subjects (parties), objects and content. The subjects of confidential cooperation, that is, the parties between which these legal relations arise, on the one hand, are authorised to conduct a pre-trial investigation and operational search activities.

Such persons are investigators of pre-trial investigation bodies; operational employees of operational units; detectives (combining the powers of an investigator and an operational employee); heads of operational units and pre-trial investigation bodies that have rights in relation to operational employees and investigators. On the other hand, the subject of confidential cooperation (confidant) is a natural person with legal capacity, that is, a person who has reached the age of majority (eighteen years) and has not been declared incapacitated or partially incapacitated by a court.

At the same time, not every natural person with legal capacity can be a confidant. A confidant can only be a person who, by his/her business, professional, moral qualities, skills, abilities and knowledge, is able to perform the assigned tasks and keep secret the fact of involvement in confidential cooperation, possesses or has access to information of operational interest.

A person whose professional activity is related to the preservation of professional secrets, namely: a lawyer, notary, medical worker, clergyman, or journalist, if such cooperation will be associated with the disclosure of confidential information of a professional nature, cannot be a confidant. It is important to consider the role of the prosecutor in the functioning of the institute of confidential cooperation, given that the legislator in Art. 272 of the CPC of Ukraine [7] granted, in particular, the prosecutor the right to decide on the conduct of such a type of covert investigative (search) action (operational search measure) as a special task to disclose the criminal activities of an organised group or criminal organization that is directly related to confidential cooperation. Such a decision is made in the form of a resolution with the confidentiality of reliable information about the person.

According to the CPC of Ukraine [6], the Laws of Ukraine "On Prosecutor's Office" [15] and "On Investigative Procedure" [12], the prosecutor is not authorised to establish or maintain confidential cooperation. Furthermore, in accordance with Part 4 of Article 14 of the Law "On Intelligence" [14], information about persons who confidentially cooperate or have cooperated with the intelligence agency of Ukraine, the affiliation of specific persons to the personnel of intelligence agencies, along with forms, methods and means of intelligence activities and the organisational and staffing structure of intelligence agencies are not subject to prosecutorial supervision. At the same time, it is necessary to emphasise the mistake made by the legislator, since it is obvious that the legislator in this article probably meant, in particular, operational units and counter-intelligence agencies of Ukraine.

A prosecutor who is not authorised to identify, study and engage candidates for a special task, and then develop a plan and directly introduce a person into the criminal environment, maintain appropriate confidential relations with them, ensure their safety and perform other related actions, in practice, will not be in a position to make an appropriate reasoned and motivated decision. If such a decision is made, the resolution will have the force of a permit and instructions for the pre-trial investigation body or operational unit to conduct such a covert investigative (detective) action (operational search operation).

In any case, the above shows that the prosecutor has the right only to authorise the relevant actions of authorised employees of operational units and pre-trial investigation bodies. However, this does not indicate the acquisition of legal personality by the prosecutor, that is, the ability (capacity) to

be a party to legal relations of confidential cooperation, primarily due to the lack of legal capacity, that is, the ability (capacity) to have subjective rights and perform subjective legal duties [16]. Consequently, the prosecutor is not a subject of confidential cooperation relations.

Determination of the object of legal relations is important for understanding the essence of the relationship, concerning what and for which purpose they arise between the parties. By definition, the object of legal relations is tangible or intangible goods, for the receipt, transfer or use of which the rights and obligations of the parties to legal relations arise. The objects of legal relations are specific and individualised, they are associated with the rights and obligations of the subjects of legal relations, the ability to use and dispose of anything and allow to claim certain actions of other persons [11]. Given the above, in the context of law enforcement activities, the object of legal relations of confidential cooperation is for the law enforcement agency to receive assistance from the confidant (in the form of providing information, taking certain actions, and making decisions) in the performance of tasks of prevention, detection, termination, investigation and disclosure of criminal offences, as well as prevention of new ones.

The content of legal relations of confidential cooperation consists of the powers, rights, obligations, responsibilities and guarantees of the subjects of these relations.

The employees of the National Bureau who are authorised to carry out operational and investigative activities and pre-trial investigations, in particular detectives and senior detectives of detective units, internal control, employees of the operational and technical unit and covert staff members, have the authority to carry out confidential cooperation in the National Bureau (part 4 of Article 5, part 1 of Article 10 of the Law "On NABU") [13].

The Director of the National Bureau has certain control and authorisation powers related to confidential cooperation, in particular the following: control over the legality of the operational and investigative measures carried out by the National Bureau, pre-trial investigation, observance of the rights and freedoms of persons, and granting permission to use the resources of the fund of special operational and investigative activities of the National Bureau (clause 1, clause 16 of part 1 of Article 8 of the Law "On NABU" [13]. Unlike the prosecutor, since the Director is an employee of the National Bureau, although not an investigator or operational officer, he, according to clause 7 of part 1 of Article 16, clause 12 of part 1 of Article 17 of the Law "On NABU" [13], is authorised to

confidentially cooperate on an equal footing with other authorised employees of the National Bureau.

A detailed list of authorised structural units and employees of the National Bureau, their rights, duties and responsibilities are defined in departmental acts of the National Bureau, which are documents with restricted access.

The authorised employees of the National Bureau have the following powers: to engage individuals in confidential cooperation and maintain appropriate relations with them in order to perform the tasks assigned to the National Bureau; to give confidential instructions and tasks; to receive the results of their implementation; to encourage confidentials morally and financially; to terminate confidential cooperation. They have the right to use the information received: as grounds and reasons for conducting operational and investigative activities (Article 6 of the Law "On OA") [12]; as reasons and grounds for initiating a pre-trial investigation; to obtain factual data that may be evidence in criminal proceedings; to prevent, detect, suppress and investigate criminal offences, search for persons who have committed a criminal offence; to ensure the safety of court officials, law enforcement agencies and persons involved in criminal proceedings (including confidants), their families and close relatives (Article 10 of the Law "On Investigative Procedure") [12]. According to the provisions of Article 275 of the Criminal Procedure Code of Ukraine [6], authorised employees of the National Bureau have the right to use information obtained as a result of confidential cooperation with other persons during covert investigative (detective) actions (operational search activities), or to involve these persons in conducting covert investigative (detective) actions (operational search activities) in cases provided for by this Code, as well as to involve confidants in the performance of a special task to prevent or detect criminal activities of organized crime.

Authorised employees of the National Bureau are obliged to carry out confidential cooperation only for the purpose of fulfilling the tasks assigned to the National Bureau, to respect the honour and dignity of the confidant, adhere to the principle of voluntariness in relations with the confidant; not to disclose the true identity of the confidant, the fact, purpose, results and other details of such cooperation; in cases provided for by law and at the request of the confidant, conclude an appropriate agreement with them; to independently comply with the rules, measures and apply means of conspiracy; to instruct and train the confidant of these rules and measures, and the methods and means of receiving and transmitting information; to instruct the confidant on the limits of permitted actions, behaviour and decisions,

as well as to prevent the commission of crimes, compromising, illegal and provocative actions; to explain to the confidant their rights and obligations, to warn of responsibility; in case of relevant threats, to ensure the safety of the confidant, his family members and close relatives and their property.

Authorised employees of the National Bureau bear criminal responsibility for disclosure of pre-trial investigation data, operational and investigative activities, in particular, confidential cooperation (Article 387 of the Criminal Code of Ukraine); state secrets (Article 328 of the Criminal Code of Ukraine); disclosure of information on security measures in respect of a person taken under protection (Article 381 of the Criminal Code of Ukraine); for failure to make a decision, untimely adoption or adoption of insufficiently substantiated decisions, and failure to take, untimely adoption of sufficient measures for security (Article 380 of the Criminal Code of Ukraine); and the responsibility for giving an unmistakably criminal order, task, instruction; arbitrary and unlawful violation of constitutional human rights and freedoms, causing damage to these rights and freedoms [17].

Confidants have corresponding rights: to respect for honour and dignity, to give voluntary consent to confidential cooperation or to refuse it; to terminate such relations; to conclude a corresponding written agreement; to receive sufficient information about their rights, obligations and legal responsibility for their actions and decisions, about the limits of permitted behaviour, actions and decisions, about the rules, measures and means of secrecy, about the existing risks and dangers, about behaviour, actions, decisions that should be refrained from; to refuse to execute an obviously criminal order, assignment, task; to compensation for expenses incurred in connection with the performance of tasks; to remuneration; to social and legal guarantees; to ensure their safety, the safety of close relatives and family members and their property.

Confidants are obliged not to disclose information about the fact, results and other details of confidential cooperation; conscientiously and professionally carry out instructions, instructions, assignments, and tasks of the authorised employee; during their implementation not to violate the rights and freedoms of third parties; comply with the rules and measures of secrecy, use appropriate means; not to go beyond the limits of behaviour, actions and decisions allowed by the authorized employee; not to commit crimes, illegal and provocative actions; keep confidential the information obtained as a result of confidential cooperation and communicate it only to a specific authorised employee; observe appropriate security measures.

Confidants are criminally liable for disclosure of information constituting a state secret (Article 328 of the Criminal Code of Ukraine); data of pre-trial investigation, operational and investigative activities, including confidential cooperation (Article 387 of the Criminal Code of Ukraine); disclosure of information about security measures in relation to a person taken under protection (Article 381 of the Criminal Code of Ukraine) [17]; material liability for unjustified loss of property issued for security, secrecy and performance of the task.

Guarantees of persons involved in confidential cooperation cover legal (juridical), social and guarantees of personal safety of the confidant, their family members and close relatives, as well as their property.

According to the provisions of Art. 13 of the Law "On the OIA" [10], social and legal protection of persons involved in the performance of tasks of operational and investigative activity provides that such persons are under the protection of the state; cooperation of persons with the operational unit is accounted in their total record of service in case of entering into an employment contract with them, and if in connection with the performance of such person's tasks of operational and investigative activity his disability or death occurred, he is entitled to the benefits provided in such cases for employees of operational and investigative activity. In the event of a threat to life, health or property of a person involved in the performance of tasks of operational and investigative activity, his/her protection shall be ensured in the manner prescribed by part three of Article 12 of this Law. Consequently, the state actually equates the rights and guarantees of their compliance with employees of operational units and persons who cooperate with them.

At the same time, the issue of applying these guarantees to confidants who cooperate with the pre-trial investigation body to perform the tasks of criminal proceedings is controversial, since Article 13 of the Law "On the OIA" [10] specifies confidants who are involved in the performance of tasks of operational and investigative activities. This is a clear disadvantage and a gap in the regulation of the legal status and guarantees of confidants.

The norms of the Law of Ukraine "On Ensuring the Security of Persons Participating in Criminal Proceedings" enforce the state security guarantees for persons who have reported a criminal offence to a law enforcement agency or otherwise participated or contributed to the detection, prevention, suppression or disclosure of criminal offences (effectively confidants), whistleblowers, victims, witnesses and others (Article 2) [18].

This Law defines the bodies authorised to make decisions on security measures and ensure their implementation (in particular, a special unit of the National Bureau) (Article 3); the rights and obligations of persons under protection (Article 5); the rights and obligations of bodies providing security (Article 6); types of security measures (Articles 7-19); the process of application and cancellation of security measures (Articles 20-23); liability for failure to fulfil the obligations established by this Law (Articles 24-26); financing and logistical support of security measures (Articles 27-28).

A special mention should be made of the security measures envisaged by this Law that can be applied to confidants: personal protection, protection of housing and property; issuance of special personal protective equipment and warning of danger; application of technical means of control and tapping of telephone and other communications, visual surveillance; replacement of documents and change of appearance; change of place of work or study; relocation to another place of residence; placement in a pre-school educational institution or institution of social protection bodies; ensuring the confidentiality of information about the person; closed trial.

Considering the nature and degree of danger to the life, health, housing and property of persons taken under protection, other security measures may be taken.

For military personnel and persons who are being held in custody, additional measures are applied due to the relevant factors.

An important legal guarantee for the protection of the rights of confidants who perform a special task to prevent or disclose the criminal activities of an organised group or criminal organisation is that, according to Art. 43 of the Criminal Code of Ukraine [17], it is not a criminal offence to cause forced harm to the law-protected interests of a person who, in accordance with the law, performed a special task, participating in an organised group or criminal organisation to prevent or disclose their criminal activities. Such a person shall be liable only for committing, as part of an organised group or criminal organisation, a particularly serious crime committed intentionally and combined with violence against the victim, or a serious crime committed intentionally and associated with causing grievous bodily harm to the victim or other grave or especially grave consequences. And even in this case, such a person cannot be sentenced to life imprisonment, and the penalty in the form of imprisonment cannot be imposed on him for a term greater than half of the maximum term of imprisonment provided for by law for this crime. In turn, in accordance with paragraph 9 of Part 1 of Article 66

of the Criminal Code of Ukraine [17], the execution of a special task to prevent or disclose the criminal activity of an organised group or criminal organisation, combined with the commission of a criminal offence in cases provided for by this Code, is recognised as a circumstance mitigating the punishment.

This legal guarantee of protection of persons who cooperate with the investigation on a confidential basis is also enshrined in Part 2 of Article 14 of the Law of Ukraine “On Organizational and Legal Framework for Combating Organized Crime”, according to which a member of an organized criminal group may be partially or fully exempted from criminal liability and punishment in cases provided for by the Criminal Code of Ukraine, if in the process of operational and investigative activities, pre-trial investigation or judicial proceedings the member contributes to the exposure of organized criminal groups and criminal offences committed by them, bringing the perpetrators to justice, compensation for damage to individuals or legal entities or the state [19].

The procedure for mitigation of liability for such crimes is defined by Chapter 35 of the CPC of Ukraine (Criminal proceedings on the basis of agreements) [7].

In the science of operational and investigative law, primarily in the circles of scientists and practitioners, it is commonly believed that public disclosure of covert activities of law enforcement agencies harms the effectiveness of counteracting socially dangerous acts of individuals and groups of individuals. However, this approach is justified if it concerns the disclosure of forms and methods of work of law enforcement agencies and other information that may pose a threat to the effectiveness of the state's response to criminal encroachments and the safety of relevant law enforcement officers and persons cooperating with them.

Otherwise, excessive “secrecy” of established, stable, socially useful relations that law enforcement agencies have long maintained with citizens leads to insufficient legal regulation and poses a real danger of violation of constitutional rights and freedoms of man and citizen.

In this regard, the scientific study proved that the covert activities of law enforcement agencies related to confidential cooperation and the relevant legal relations can be investigated, and the findings of the study published in a publicly available source while not revealing state secrets, forms and methods of work. Therefore, such activities and legal relations can and should be regulated by law.

In this study confidential cooperation is systematically considered in open sources as a separate legal institution and a type of legal relationship for the first time; the conceptual and categorical apparatus,

principles, subjects, object and content are defined, in particular, the rights, duties, responsibilities and guarantees of both authorised employees and confidants are studied in detail. For the first time the issue of the functioning of the institution of confidential cooperation in the National Bureau, which has certain features and differences in comparison with other law enforcement agencies, was studied. The results of the study can be used for further elaboration on the topic, raising awareness of practitioners, the legal community and the public on this issue, and in rule-making.

■ Conclusions

The institution of confidential cooperation is an interdisciplinary procedural and legal institution. This institution regulates the covert activities of law enforcement agencies related to the involvement of individuals by authorised employees of these agencies to cooperate to fulfil the tasks of operational and investigative activities and criminal proceedings, and the relevant legal relations arising in this regard. Such activities are associated with the risk of restriction and violation of constitutional human rights and freedoms and the interests of legal entities and create a danger to the life, health and property of law enforcement officers and persons involved in cooperation. Therefore, this legal institution should be regulated in detail at the legislative level.

However, the legal framework for this institution is insufficient, and the existing legal norms are

scattered in a number of legislative acts that have different subjects of legal regulation. Therefore, there is a necessity to regulate the legal relations of confidential cooperation in one legislative act – the Law of Ukraine “On Operational and Investigative Activity”.

The new version of the Law of Ukraine “On Operational and Investigative Activity” should enshrine the basic concepts, principles, subjects and content of legal relations of confidential cooperation.

Particular attention should be paid to the issue of regulatory support of guarantees for the protection of life, health and property of confidants, their legal and social protection, in particular labour rights and the right to free legal aid. During the development of the relevant draft laws, it is necessary to eliminate the existing gaps, in particular, to provide appropriate guarantees for confidants involved and cooperating with operational units, with the investigation and the court at the stages of operational and investigative activities, criminal and judicial proceedings, and also after their completion. It is also necessary to eliminate the competition of norms governing the legal institutions of confidential cooperation and whistle-blowers if a person acquires both statuses at the same time.

Legislative regulation of the institution of confidential cooperation within the outlined limits regulates and therefore increases the effectiveness of covert activities of law enforcement agencies, without disclosing the forms and methods of such activities.

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■ **Анотація.** Конфіденційне співробітництво є окремим міжгалузевим правовим інститутом й окремим видом процесуально-правових відносин між уповноваженими працівниками органів державної влади та фізичними особами, які з ними співпрацюють. Відповідно до ст. 19 Конституції України, такі відносини та діяльність цих органів повинні бути врегульовані законами України. Однак інститут конфіденційного співробітництва в законодавстві недостатньо унормований, немає визначення основних понять, а наявні норми права містяться в різних законах і лише фрагментарно регулюють відповідні правовідносини, що ускладнює їх розуміння, дослідження та використання. Метою статті є загальноправовий аналіз інституту конфіденційного співробітництва та відповідних правовідносин; визначення його понять, принципів, суб'єктів, об'єкта й змісту в контексті діяльності Національного антикорупційного бюро України. Під час написання статті застосовано загальнонаукові методи: системного аналізу, аналогії та порівняння; загальноправові методи: порівняльно-правовий, формально-юридичний, логіко-юридичний. Проаналізовано стан наукового дослідження та чинне законодавство України, яке регулює відповідні правовідносини, здійснено порівняння його окремих норм. Визначено основні юридичні терміни з досліджуваної тематики. Здійснено системний аналіз правового інституту та правовідносин конфіденційного співробітництва як із суто доктринальної позиції, так і на прикладі діяльності правоохоронного органу. З'ясовано окремі ознаки та характеристики відповідних інституту й відносин. Результати дослідження узагальнено, конкретизовано та викладено у формі тверджень та висновків, тому їх можна використовувати і в інших наукових дослідженнях, вони мають як наукову, так і практичну цінність. Наукова новизна дослідження полягає в тому, що у відкритих джерелах конфіденційне співробітництво вперше системно розглянуто як окремий правовий інститут і вид правовідносин; визначено понятійно-категоріальний апарат, принципи, суб'єкти, об'єкт та зміст, зокрема детально досліджено права, обов'язки, відповідальність і гарантії як уповноважених працівників, так і конфідентів. Уперше досліджено питання функціонування інституту конфіденційного співробітництва в Національному бюро, яке має певні особливості й відмінності, порівняно з іншими правоохоронними органами. Результати дослідження може бути використано також з метою підвищення рівня обізнаності практичних працівників, юридичної спільноти й населення з окресленого питання, а також у нормотворчості. Інститут конфіденційного співробітництва має бути детально законодавчо врегульований, оскільки він пов'язаний із правоохоронною діяльністю державних органів і ризиком порушення конституційних прав й інтересів людини. Унормування правового інституту та правовідносин не становить загрозу розкриття форм і методів проведення оперативно-розшукової, розвідувальної та контррозвідувальної діяльності, водночас надає правової визначеності, а також гарантує дотримання державою принципів законності, верховенства права, дотримання прав і свобод людини. Загалом відповідні правовідносини мають бути врегульовані в межах оперативно-розшукового права та закріплені в одному законодавчому акті – Законі України “Про оперативно-розшукову діяльність”, у якому повинні бути визначені основні поняття, суб'єкти та їхні права, обов'язки, відповідальність і гарантії. Також слід усунути колізії з іншими нормами права, зокрема тими, які регулюють інститут викривачів

■ **Ключові слова:** конфіденційне співробітництво; негласне співробітництво; конфідент; викривач; корупція; Covert Human Intelligence Sources (CHIS); Confidential Informant (CI)

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Enhancement of the Prosecution and Defence Tactics During the Temporary Access to Objects and Documents

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■ **Abstract.** The article sets out the main recommendations for improving the activities of the prosecution and the defence in criminal proceedings during the procedure of providing temporary access to objects and documents. During the investigation, the prosecutor or investigator in almost every proceeding is required to seize any carriers of evidentiary information about the crime committed. In turn, defenders often use their authorities to conduct temporary access to objects and documents. The practice of applying this measure to ensure criminal proceedings indicates a significant number of mistakes made by the parties to criminal proceedings, as a result of which this measure is not carried out, the court refuses to make a decision, so the goal that was set is not achieved. The purpose of the article is to improve the quality of temporary access to things and documents by the parties to criminal proceedings, to obtain a positive practice of court decision-making on its conduct and to obtain results to ensure the tasks of criminal proceedings. To achieve this goal, the formal-logical method, system-structural, comparative-legal and statistical methods were used. The study compares the procedural and tactical legal capabilities of different parties to criminal proceedings – prosecution and defence. The mistakes commonly committed by them during the process of temporary access to objects and documents are highlighted. Considering this, proposals were put forward to improve both the general tactics inherent in both sides of the process and specific tactical and procedural actions and techniques characteristic of each separately. A number of recommendations were received for prosecutors, investigators and lawyers, aimed at improving the quality of the parties to criminal proceedings during temporary access to objects and documents

■ **Keywords:** : temporary access to objects and documents; party to criminal proceedings; prosecution; defence

■ Introduction

Prosecutorial, investigative and advocacy activities, like any human activity, are inherently subject to mistakes. Only by performing activities and committing mistakes [1], the subject of such activity improves. As a result, the quality of one's work and the final result improve. Two parties – the prosecution and the defence – participate in criminal proceedings based on adversarial rights, pursuing different goals. Their activities are imperfect both in the criminal process in general and in conducting individual procedural actions in particular. Temporary access to objects and documents provided for

in paragraph 5 of Article 131 of the CPC of Ukraine as a measure to ensure criminal proceedings is no exception to this rule [2].

Investigative and prosecutor's practice shows that this measure as a means of collecting evidentiary information in the process of investigating a crime is the most used in criminal proceedings both in Ukraine and in European countries [3]. The European Court of Human Rights has also focused on this measure in its practice [4-6].

In the state, this trend has been constant since the entry into force of the Criminal Procedure Code of Ukraine. In particular, in 2013, the largest number of applications for the application of measures to ensure criminal proceedings were applications for temporary access to objects and documents in accordance with Art. 163 of the CPC of Ukraine (about 70% of the total number of applications considered by the investigating judge of the local general court during the pre-trial investigation, 90% of which

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were satisfied) [7]. In addition, in recent years, the official statistics of the State Judicial Administration of Ukraine on the consideration of criminal proceedings by the courts of the first instance confirms the tendency to maintain a significant number of applications for temporary access to things and documents considered by investigating judges. In particular, in 2017, the investigating judges considered 256.255 applications for temporary access to objects; in 2019 – 264.185 applications, of which 87.3% were granted, which is 35.001 more applications than in 2018. The number of motions for temporary access to things and documents considered by investigating judges in 2019 is 27.57% of the total number of motions, complaints, and statements during the pre-trial investigation considered by investigating judges for the specified year [8].

The mentioned security measure is of interest due to the following aspects:

- first, the subjects of its execution, along with the prosecution, are also the defence;
- secondly, how efficiently it is substantiated in the petition to be approved by the court;
- thirdly, whether the purpose of this measure is achieved.

Consequently, the number of procedural documents within criminal proceedings is constantly increasing, which causes a significant number of errors and issues in law enforcement, and therefore requires greater scientific and practical attention aimed at improving criminal procedural activity in this segment. Thus, it is too early to consider this dialectical process of self-improvement of the parties to the proceedings completed. This is confirmed by the constant interest in this topic, which is reflected in the publications and scientific works of legal scholars on this topic [9; 10].

The issues of application of temporary access to objects and documents during the investigation of criminal proceedings at different times have been the subject of a significant number of scientific works, in particular by such legal scholars as: S.YE. Ablam-skiy, S.V. Andrusenko, Yu.P. Alenin, I.V. Basysta, V.V. Vintsuk, V.I. Galagan, G.I. Globenko, I.V. Glovyuk, Yu.M. Hroshevyi, O.M. Humin, O.V. Kaplina, M.P. Klymchuk, O.I. Korovaiko, O.M. Kuziv, B.A. Kuspis, V.A. Loboiko, L.M. Lyulich, M.A. Makarov, P.M. Malanchuk, O.R. Mykhailenko, V.T. Malyarenko, V.V. Nazarov, V.K. Nersesova, D.P. Nor, V.T. Pysmennyi, M.A. Pogoretskyi, O.A. Podkovskyi, V.O. Romanov, V.V. Sokurenko, M.I. Sofin, O.S. Starentkyi, M.S. Strogovych, O.S. Tarasenko, L.D. Udalova, V.I. Farynnyk, V.M. Fedchenko, V.O. Finahiev, S.S. Chernyavskyi, A.V. Chub, O.G. Shylo, M.E. Shumylo, O.O. Yukhno, and others. Scientists

have paid enough attention to this topic. However, the issues of overcoming gaps in the procedural activity during the application of temporary access by the parties to the proceedings, and elimination of errors remain insufficiently researched.

The purpose of the article is to develop procedural and tactical recommendations aimed at improving the algorithm for conducting the procedure of temporary access to objects and documents as an effective measure to ensure criminal proceedings.

■ Results and Discussion

Given the content of the requirements of Art. 131 of the CPC of Ukraine, measures to ensure criminal proceedings are applied in order to achieve the effectiveness of this proceeding, one of which is temporary access to things and documents. Given the content of the requirements of Art. 131 of the CPC of Ukraine, measures to ensure criminal proceedings are applied in order to achieve the effectiveness of this proceeding, one of which is temporary access to things and documents. Temporary access to objects and documents is carried out on the basis of the decision of the investigating judge or court.

With the development of advanced technologies, the legislator distinguishes the type of access to electronic information systems or their parts, mobile terminals of communication systems, which is carried out by making a copy of the information contained in such electronic information systems or their parts, mobile terminals of communication systems, without their seizure. The procedural order of execution is described in detail in Chapter 15 of the CPC of Ukraine.

According to the law, both the investigator with the prosecutor and the defence counsel have the same right to obtain temporary access. Despite the equality of the parties in criminal proceedings, which is ensured by the principle of adversarial proceedings, the majority of applications to the court for temporary access belong to the prosecution, not the defence [11]. At the same time, the role of the defender in temporary access is wider than that of the investigator or prosecutor, since the defender can initiate such a measure through the court in one case, and directly participate in it as a defender of the person who is being subjected in the other.

The prosecutor and investigator have the right to request the necessary information upon written requests for obtaining information relevant to establishing the truth in criminal proceedings. The defender also has the right to promptly receive such information at the request of the advocate (Article 24 of the Law of Ukraine “On the Bar and Practice of Law”) [12]. However, the procedural order for obtaining originals or copies of any documents,

even those containing publicly available information, is related to the decision of the investigating judge or court. Some scholars do not fully approve of this practice, since, in their opinion, this position of the legislator significantly increases the volume of documents and reduces the level of efficiency in making important procedural decisions [13]. And this is quite reasonable.

Thus, to obtain permission from the court to carry out this measure, the parties to the proceedings must draw up a petition - a procedural document with which they must apply to the investigating judge during the pre-trial investigation or the court during the trial.

The authors believe, it is the petition that is the main source of prosecutorial and investigative and lawyer's errors in this case. Articles 160 and 163 of the CPC regulate the process of drafting a motion by the parties to criminal proceedings and its consideration in court. Among the formal requirements for the petition, the most important are the next two. The first one – regarding the substantiation of the necessity of seizure of objects and originals or copies of documents, if the relevant issue is raised by a party to the criminal proceedings (paragraph 7 of Article 160). The second is the necessary evidence of sufficient grounds to believe that there is a real threat of alteration or destruction of objects or documents (Part 2 of Article 163). Why are these requirements crucial for convincing the investigating judge to make a positive decision? Since it is the detailed substantiation of the circumstances of the criminal offence, qualification, information about objects and documents, their location and significance for the case and their use as evidence that will create for the judge a qualitative overall picture of the crime and the opportunity to prove the need for such a measure by making an appropriate court decision.

The petition is the cornerstone for the implementation of temporary access to objects and documents, as the further legal fate of the entire measure depends on the quality of its elaboration. The party to the criminal proceedings must set out in the motion the maximum number of procedural arguments that will be sufficient for the investigating judge to satisfy it.

Practice shows that it is the errors in this document that result in the refusal to comply with it or return it to the party that filed it.

Despite the fact that the prosecution and the defence have different procedural vectors of activity, according to the principle of proportionality [14], recommendations have been developed for both parties, the implementation of which will serve to establish the truth and fulfil the tasks of criminal proceedings established by Art. 2 of the CPC of Ukraine.

As for the prosecution. The main reason for returning the motion or refusing to satisfy it is primarily non-compliance with the provisions of Article 160 of the CPC of Ukraine [15].

Currently, there are two procedural orders for consideration by the investigating judge, the court of the motion for temporary access to objects and documents.

The first is that after receiving the motion, the investigating judge and the court summons the person in possession of such things and documents. Failure to appear at the court summons of such a person without valid reasons or failure to notify of the reasons for non-appearance is not an obstacle to the consideration of the petition (Part 4 of Article 163 of the CPC of Ukraine).

The second option is applied if the party who filed the application proves that there are sufficient grounds to believe that there is a real threat of changing or destroying things or documents. In this case, the motion is considered by the investigating judge and the court without summoning the person in whose possession they are. Such a request shall be considered immediately. Emphasis should be placed on the content of the request in case it is necessary to obtain information about the customer and communications regarding several persons or several terminal devices. The High Specialised Court of Ukraine for Civil and Criminal Cases previously stated: "Investigating judges must account for homogeneous issues that must be clarified within the framework of one criminal proceeding by applying one or different types of interim measures related to each other (at the same time, the need to clarify such issues is justified by the same circumstances), may be initiated by the investigator (prosecutor) within one motion and decided by the investigating judge in one ruling". This approach should be used to consider motions for temporary access to documents held by telecommunications operators and providers and containing information about the subscriber and communication (Article 159, paragraph 7 of Part 1 of Article 162 of the CPC of Ukraine) [16]. These explanations remain relevant today.

According to clause 4 of part 2 of Article 160 of the CPC of Ukraine, the motion for temporary access to objects and documents must contain the grounds to believe that the objects and documents are or may be in the possession of the relevant individual or legal entity.

The analysis of judicial practice shows that often, in contradiction to the requirements of paragraph 4 of Part 2 of Article 160 of the CPC of Ukraine, the main reason for refusal to provide information is a request for temporary access to objects and documents in the possession of telecommunications

operators, banks and other business entities, but the fact that such branches do not have the status of a legal entity is not considered, which makes it impossible to positively resolve this issue.

For the most part, investigators, in addition to ignoring the specified norm, unreasonably include in the motion information about their consideration without the participation of persons in possession of certain things or documents. Thus, the motions contain formal references to the possibility of persons destroying things and documents without substantiated evidence of such facts. Unfortunately, investigating judges do not always consider such circumstances regarding the groundlessness of the petitions in terms of their consideration without the participation of the person, which subsequently leads not only to unreasonable approval of the position of the investigator or prosecutor but also to non-compliance with the basic principles of criminal procedure in general. Particularly, the motion must contain all the details, including the name of the telecom operator. For example, the provider “Lifecell” in official documents is spelt with a small letter – “lifecell”. Therefore, it should be indicated correctly in the motion. This is important when the prosecutor and investigator need to quickly solve the crime and save time [17].

To identify the offender in proceedings, it is often necessary to obtain objects and documents containing legally protected confidential information, in particular information from telecommunications operators and providers (paragraphs 7, 8 of Art. 162 of the Criminal Procedure Code of Ukraine) on communication, subscriber, provision of telecommunication services, in particular the receipt of services, their duration, content, transmission routes, etc. and which is necessary for the preparation, approval and consideration of applications for permission to conduct further covert investigative (detective) actions.

It is also necessary to distinguish the so-called zero calls. We are talking about an outgoing (incoming) connection between subscribers in cases where the connection was not established. That is, one subscriber called another, the latter recognised who it was from and why, but did not pick up the phone. This scheme of silent communication is used by criminals to commit crimes for the purpose of high secrecy and non-dissemination of information. Such calls can be a command to fire, during contract killings, the detonation of explosives in the process of committing terrorist acts, etc. The defining feature of a zero call is that the operator does not profit from it. Therefore, such information is useless for the operator. Therefore, there is no need to store it,

and hence the storage period of such data is from 7 to 14 days [18].

Given the above, prosecutors and investigators should consider this feature when substantiating these circumstances in the petition, namely:

indicate that some types of information (e.g., data on zero duration calls)

- is stored for a short time, and therefore its receipt due to the threat of destruction should be carried out promptly, immediately in the first hours or days after a high-profile crime was committed;

- since this type of temporary access to objects and documents from telecommunications operators and providers requires a prompt response, motions are considered without calling a representative of the telecommunications operator. This precise set of procedural decisions and actions will allow obtaining and consolidating evidentiary information quickly [11].

Also, the ruling of the investigating judge on granting temporary access to objects and documents states that in case of failure to comply with it, the investigating judge, at the request of the party to the criminal proceedings, which is granted the right to access to objects and documents, has the right to issue a ruling on a search to find and seize the said objects and documents.

If the representative of the law enforcement agency fails to provide access to the objects and documents within the period specified in the ruling of the investigating judge, the investigator, in agreement with the prosecutor, or the prosecutor must re-apply with the request, indicating, in particular, the circumstances that prevented him from providing such access within the time specified in the ruling of the investigating judge.

Regarding the defence side. The dominance of the number of requests of the investigating authorities to conduct this measure after the entry into force of the CPC of Ukraine in 2012 has persisted to this day. The study of the Unified Register of Court Decisions in all courts of Ukraine for the period from January 1, 2016, shows a significant advantage of the number of court decisions made as a result of consideration of motions for temporary access to objects and documents filed by representatives of the prosecution over the motions of the defence, and especially the victim. A significant part of them are the decisions on returning the motion (although this type of decisions for temporary access is not provided for in the CPC) [8] or refusal to satisfy it. The share of satisfied motions is so insignificant that in the entire body of court decisions on this issue they are hardly visible. This may be due to the following factors: 1) investigating judges are still not used to considering the defence and the victim as an active

subjects of collecting evidence by this means; 2) low activity of participants in criminal proceedings in the issue of filing relevant motions; 3) shortcomings in the preparation and formation of a motion for temporary access to objects and documents [19].

Since there are certain uncertainties concerning the procedure of execution of the ruling by the owner of the property, in case of a court decision in favour of the prosecution, is clearly regulated in the CPC of Ukraine. However, it is preferable to prepare the list of documents to be handed over to law enforcement officers personally without asking the representatives of the pre-trial investigation to make copies of such documents to be transferred. The description of the property transferred to the defender should be done personally: no law enforcement officer will be as patient as the owner of the property to carry out the description. Such advice can also be given in relation to the execution of rulings in the interests of the defence. However, in relations with the defence party, the question arises: how should the transfer of property and documents to the defence be formalised? The CPC does not answer this question, but in practice, it is decided by discretion. This may be a joint act with the defender on the transfer of property and documents pursuant to the decision of the investigating judge or a unilateral letter of the property owner on the transfer of property and documents. Another alternative is a receipt by the defender that everything listed in the ruling of the investigating judge has been received from the owner of the property, which, in turn, may be contained in the ruling, which remains at the disposal of the property owner [20].

In addition, practice shows that during the consideration of motions for temporary access to objects and documents, the investigator, or prosecutor is often limited to providing only information on entering information into the URPI, copies of witness interrogation protocols, resolutions on the creation of a group of investigators, reports of operational officers. The most common violations committed include failure to attach to the petition for temporary access to objects and documents a duly certified copy of the extract from the URPI on criminal proceedings; failure to indicate in the petition the legal qualification of the criminal offence, only indicating the article (part of the article) of the Criminal Code of Ukraine; lack of complete and specific information about the objects and documents to which temporary access is to be obtained [11]. If the above violations are detected during the consideration of the relevant motions for temporary access to things and documents, while performing the function of defence/representation, the lawyer should draw the attention

of the investigating judge to such violations, insisting on the need to dismiss the motions. It should be noted that during the preparation of motions for temporary access to objects and documents, defenders do not always comply with the provisions of Part 2 of Article 160 of the CPC of Ukraine, which define the requirements for the content of the motion. This results in decisions to deny temporary access to objects and documents. Typical mistakes of a lawyer include: lack of a clearly defined list of things and documents to which access is planned to be obtained; failure to provide evidence of the need for temporary access to things and documents; lack of information about the identifying features of the relevant things and documents; failure to indicate the name, address of institutions, enterprises and organizations in possession of things and documents; insufficient justification of the grounds and proof that things and documents may be in the possession of a person; things and documents specified in the petition contain [21].

If it is necessary to obtain temporary access to original documents for the purposes of the defence, the justification of the application in this part should also be taken seriously. In practice, requests for temporary access to original documents are more common among investigators and prosecutors. However, such a need may also arise on the part of the defence, for example, to perform a handwriting examination. Motions for temporary access to objects and documents and data stored by telecommunications operators and providers should be submitted in different packages (one operator – one motion). First of all, this is relevant when the defence raises the issue of consideration of the motion in a closed court session. Also, in relation to the persons indicated in the ruling, the investigating judge may grant temporary access not only to the lawyer who filed the motion but also to other lawyers who defend this suspect, if confirmation of authority is provided to the motion [22].

Besides, the attention of the parties to criminal proceedings should be directed to personal participation in the consideration of the motion by the court. Since its consideration without the initiator deprives the party of the proceedings of the opportunity to add arguments in its own favour, further justify the position if the court does not have enough justification set out in the petition and substantiate the need for this interim measure.

■ Conclusions

Tactical mistakes of the prosecution and the defence in criminal proceedings are technically extraordinarily similar. The difference lies in the procedural aspect since each of the parties performs its inherent

function of criminal proceedings, and for different purposes – to incriminate the committed crime to the suspect, and to protect against prosecution and acquit their client. To achieve their goal, the parties use the same tactical methods and means within the limits of the rights and powers granted to them by law, in particular, if any party uses such a procedural

measure, which is a measure to ensure criminal proceedings in the form of temporary access to objects and documents. It is one of the most common and frequently used subjects of proceedings in criminal procedural activities. Thus, the parties' recognition of their errors will allow for a more effective and efficient improvement of their activities.

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Удосконалення тактики дій сторони обвинувачення та захисту під час проведення тимчасового доступу до речей і документів

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■ **Анотація.** У статті викладено основні рекомендації для вдосконалення діяльності сторони обвинувачення та сторони захисту в кримінальному провадженні під час проведення заходу забезпечення – тимчасового доступу до речей і документів. Під час розслідування в прокурора, слідчого майже в кожному провадженні постає необхідність у вилученні будь-яких носіїв доказової інформації про вчинений злочин. Своєю чергою захисники також дедалі частіше використовують свої повноваження для проведення тимчасового доступу до речей і документів. Практика застосування цього заходу забезпечення кримінального провадження засвідчує значну кількість допущених помилок сторонами кримінального провадження, унаслідок чого зазначений захід не проводять, суд відмовляє в ухваленні рішення, тож мету, яку ставили, не досягають. Метою статті є підвищення якості проведення тимчасового доступу до речей і документів сторонами кримінального провадження, отримання позитивної практики ухвалення судом рішень про його проведення та отримання результату для забезпечення завдань кримінального провадження. Для досягнення поставленої мети застосовано формально-логічний метод, системно-структурний, порівняльно-правовий та статистичний методи. У публікації здійснено порівняння процесуальних і тактичних можливостей різних за напрямом своєї діяльності сторін кримінального провадження – обвинувачення та захисту. Висвітлено характерні помилки, яких вони припускаються під час здійснення своєї діяльності в процесі проведення тимчасового доступу до речей і документів. З огляду на це, висунуто пропозиції з удосконалення як загальної тактики, притаманної обох сторонам процесу, так і конкретних тактичних та процесуальних дій і прийомів, характерних кожній окремо. Отримано низку рекомендацій для прокурорів, слідчих та адвокатів, метою яких є підвищення якості діяльності сторін кримінального провадження під час проведення тимчасового доступу до речей і документів

■ **Ключові слова:** тимчасовий доступ до речей і документів; сторона кримінального провадження; обвинувачення; захист

Involvement of the Expert by the Defendant for an Examination during the Investigation of the Murder

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■ **Abstract.** The purpose of the study is to investigate the possibilities and mechanisms of engaging an expert by the defence counsel in criminal proceedings on murder; to highlight the possibilities of the defence counsel to engage an expert during mandatory examinations in the process of investigating murders; to formulate recommendations to the defence counsel on granting the expert, who is involved in the examination on the basis of the request, objects and samples for expert research. The article uses a set of scientific methods, namely: terminological, system-structural, formal-logical, and comparative-legal. In criminal proceedings on murder, the defence may obtain expert evidence independently on the basis of an agreement with an expert or an expert institution and submit it to the pre-trial investigation body or court to substantiate its legal position. At the same time, it is established that the defence counsel cannot initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or expert institution due to legal conflicts between the norms of the Criminal Procedure Code of Ukraine and the provisions of by-laws regulating the procedure for appointing these types of forensic examinations. The recommendation to the defender to engage or consult a specialist in this procedural action was formulated for the purpose of obtaining samples for examination. In criminal proceedings on murder, the possibility of the defender engaging an expert to conduct an examination concerns the appointment of mandatory and optional examinations. For mandatory examinations, such as forensic medical and psychiatric examinations, the defence counsel shall apply for their initiation to the investigator or prosecutor, and submit a corresponding request to the investigating judge in case of refusal. The inability of the defence counsel to initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or expert institution violates the equal opportunities of the parties to criminal proceedings to submit evidence to the court and prove their credibility before the court. For the examination in the criminal proceedings on murder to be possible, the defender requesting it submits to the investigator, prosecutor or investigating judge a petition on the need to obtain specific objects and samples or receives (requests) them independently. When receiving samples for examination, the participation of the defender who initiated the examination in the presence of appropriate samples is mandatory

■ **Keywords:** defender; expert; expert involvement; murder; forensic medical examination; forensic psychiatric examination

■ Introduction

The Constitution of Ukraine recognises human life and health as the highest social value. Obviously, the cases of unlawful deprivation of human life must be properly investigated to identify the perpetrators, impose a fair punishment on them, and

ensure compensation for damages, including moral damage to the victim's family and friends.

The criminogenic environment in Ukraine remains negative. It is “fueled” by the prevailing economic, political, environmental, energy and demographic issues. The current situation is aggravated by the hostilities in the East of Ukraine, and the oversaturation of illegal trafficking of weapons, explosives and devices, including those of criminal origin. This leads to an increase in the level of violent crime and the number of cases involving assassinations of competitors or government officials as a means of achieving super-profits associated with

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illegal or semi-legal activities. Every year the number of crimes against individuals increases significantly. Therefore, it is necessary to conduct a thorough and qualitative examination of physical evidence and objects based on cumulative analysis, forensic science, and expert research [1].

It is necessary to enhance the application of forensic means and methods by law enforcement agencies, wide application of analytical tools in combating violent crime, removal of obstacles to a fair trial of criminal proceedings, in particular, murders. Obviously, the application of legal norms and the performance of actions of legal significance by the court should be based on the circumstances of a particular case and ensure effective protection of rights, freedoms and legitimate interests [2; 3]. These factors are fundamentally important for improving the activities of lawyers who act in the interest of protecting the rights and freedoms of murder suspects to comprehensively and impartially consider the materials of criminal proceedings and make informed decisions. The lawyer is assisted in this activity by the possibility of using the special knowledge of competent persons. The engagement of specialists in procedural actions, and conducting forensic examinations provides evidence that has a scientific and technical basis, and is distinguished by the transparency of the process of detection, research, evaluation and use in criminal proceedings.

The purpose of the study is to highlight the legislative regulation of the possibility of involving an expert by a defender in criminal proceedings and to identify the specifics of initiating forensic examinations by a lawyer during the investigation of murders. To achieve this goal, the authors set the following tasks: to outline the mechanism for initiating the involvement of an expert in criminal proceedings by the defender; to explore the possibilities of the defender to involve an expert during mandatory examinations during the investigation of murders; to highlight the issue of providing the expert, who was involved in the examination on the basis of the defender's request, with objects and samples for expert research.

In criminal proceedings on murder, the defence may obtain expert evidence independently on the basis of an agreement with an expert or an expert institution and submit it to the pre-trial investigation body or court to substantiate its legal position. At the same time, it is established that the defence counsel cannot initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or expert institution due to legal conflicts between the norms of the Criminal Procedure Code of Ukraine and the provisions of by-laws regulating the procedure for appointing these

types of forensic examinations. To obtain samples for examination, a recommendation was formed for the defender to engage a specialist in this procedural action or to receive consultations from a specialist.

■ Results and Discussion

According to Part 1 of Art. 47 of the CPC of Ukraine, the defender, who is a lawyer in accordance with Part 1 of Art. 45 of this Code, is obliged to use the means of protection (in particular, to collect evidence using the special knowledge of experts whose opinions are a procedural source of evidence) provided for by this Code and other laws of Ukraine to ensure the observance of the rights, freedoms and legitimate interests of the suspect, accused and clarify the circumstances that refute the suspicion or accusation, mitigate or exclude the criminal liability of the suspect, accused.

According to Part 1 of Art. 20 of the Law of Ukraine "On the Bar and Practice of Law", while practising law, an advocate has the right to receive written opinions of specialists, and experts on issues requiring special knowledge (paragraph 10) [4].

Article 7-1 of the Law of Ukraine "On Forensic Examination" stipulates that the basis for conducting a forensic examination is the relevant court decision or decision of the pre-trial investigation body, or an agreement with an expert or expert institution – if the examination is carried out by order of other persons.

Thus, Ukrainian legislation provides for the general right of the defender (attorney) to initiate forensic examinations in the proceedings where they represent the interests (defends) of the client.

Researchers rightly emphasize three possible options for the engagement of an expert by the defence party in criminal proceedings: by sending a substantiated request for an expert examination to the investigator or prosecutor, in case of their refusal – an appeal to the investigating judge, and independent engagement of experts on contractual terms for examination, including mandatory [5].

This article analyses the mechanism of conducting a forensic examination at the initiative of the defender in criminal proceedings, in particular during the investigation of murders.

According to Part 1 of Art. 242 of the CPC of Ukraine, the examination is carried out by an expert institution, expert or experts involved by the parties to the criminal proceedings or the investigating judge at the request of the defence in cases and in the manner prescribed by Art. 244 of the CPC if special knowledge is required to clarify the circumstances relevant to the criminal proceedings.

Article 93 of the CPC of Ukraine allows the defence counsel to file a petition to the investigator

to initiate the appointment of a certain examination with the questions defined by the defence counsel in the relevant petition. In accordance with Part 3 of this Article, the defence party collects evidence, in particular by obtaining expert evidence, initiating investigative (search) actions, covert investigative (search) actions and other procedural actions, and by performing other actions that can ensure the submission of proper and admissible evidence to the court. So, among the ways of collecting evidence by the parties to criminal proceedings listed in Article 93 of the Criminal Procedure Code of Ukraine are those that require the use of special knowledge, namely: requesting and obtaining expert opinions and conducting other procedural actions with the participation of a specialist. Moreover, an expert's opinion is an independent source of evidence [6].

The investigator and prosecutor are obliged to consider the request of the defence counsel for the appointment of a forensic examination within no more than three days from the date of submission and satisfy them if there are appropriate grounds. The defender is informed about the results of the consideration of the motion. A reasoned resolution on full or partial dismissal of the request shall be issued, a copy of which shall be handed to the lawyer who filed the relevant motion (Article 220 of the CPC of Ukraine).

For example, during the investigation of a murder committed by a group of persons, the defence counsel of one of the suspects filed a petition to the investigator of the Shevchenkivskiyi Police Department of the Main Department of the National Police in Kyiv to initiate an investigative action, namely the appointment of a molecular genetic examination. The petition stated that the pre-trial investigation body had at its disposal all the necessary initial data for this examination – materials of the criminal proceedings, physical evidence (jewellery), samples of the buccal epithelium (of the suspect O.), therefore, in accordance with Part 2 of Art. 93 of the CPC of Ukraine, they initiated the involvement of an expert (or expert institution) in the relevant examination. The investigator in his ruling refused the defence counsel to engage an appropriate expert (expert institution) to conduct a molecular genetic examination. Later, the defence lawyer initiated a corresponding petition to the investigating judge [7].

Based on the practice of criminal proceedings, it is concluded that in most cases, investigators refuse to appoint examinations to defenders, while such issues can be positively resolved by investigating judges at the pre-trial investigation stage or by the court during the trial of murder proceedings.

According to paragraph 1 of part 1 of Art. 244 of the Criminal Procedure Code of Ukraine, the defence

has the right to apply to the investigating judge with a request for an expert examination if it is necessary to engage an expert to resolve issues that are essential to criminal proceedings, however, the prosecution did not involve the expert, either for the prosecution to resolve the issues raised by the expert involved by the prosecution, or there are sufficient grounds to believe that the expert involved by the prosecution, due to lack of necessary knowledge, bias or for other reasons, will provide or provided an incomplete or incorrect conclusion.

The motion of the defender for the examination shall contain: 1) a brief summary of the circumstances of the criminal offence in connection with which the motion is filed; 2) legal qualification of the criminal offence with an indication of the article (part of the article) of the Law of Ukraine on criminal liability; 3) summary of the circumstances justifying the arguments of the motion; 4) the expert to be involved or the expert institution to be entrusted with the examination; 5) the type of expert research to be conducted and the list of questions to be put to the expert. The motion is also accompanied by: copies of materials substantiating the arguments of the motion; copies of documents confirming the impossibility of independent involvement of the expert by the defence.

The motion is considered no later than within five days from the date of its submission to the court by the investigating judge of the local court within the territorial jurisdiction of which the pre-trial investigation is carried out.

The person who submitted the application is notified of the place and time of its consideration, but his non-arrival does not prevent the consideration of the application, except in cases when the participation of such a person is recognised by the investigating judge as mandatory.

The investigating judge, based on the results of the consideration of the petition, has the right to entrust the examination to an expert institution, expert or experts if the person who filed the petition proves the existence of the grounds mentioned above.

The conclusion of the expert engaged by the investigating judge shall be provided to the person at whose request the expert was engaged (Article 244 of the CPC of Ukraine).

Article 243 of the CPC of Ukraine stipulates that the defence party has the right to independently engage experts on contractual terms to conduct an examination, including mandatory. This possibility is also provided for by clause 10 of part 1 of Article 20 of the Law of Ukraine "On the Bar and Practice of Law", according to which during the practice of law, the advocate has the right to perform any actions not prohibited by law, the rules of professional

ethics and the legal aid agreement necessary for the proper performance of the legal aid agreement, in particular, to obtain written opinions of specialists, experts on issues requiring special knowledge [4].

For example, relevant cases may occur when it is necessary to investigate murders with the dismemberment of the corpse when particles of soil, seeds or plants are found on the corpse or its parts. Then soil and biological expertise can be appointed. Such material evidence plays an important role in the investigation of crimes and the identification of the offender. When preparing materials for expert examination, they must be presented on carrier materials, in packaging that ensures safety during transportation. It should be noted that microparticles of soil and plant origin can be used to determine the crime scene. The list of objects that can be the subject of biological expertise is quite diverse. These include plant particles, animal feed, animal hair, bird feathers and down, mosquitoes, fish scales, and more. The most important for such studies is the ability to establish the age of burial of the corpse and the time of finding certain objects at the crime scene [8]. In the context of the engagement of an expert by the defence party on the basis of a contract, it should be noted that the concept of “contractual terms” is not defined by criminal procedural legislation and provides for the use of civil law provisions on contractual obligations. In particular, if the defender initiates a forensic examination by the units of the Expert Service of the Ministry of Internal Affairs of Ukraine, payment for the services provided by the enterprises of the Ministry of Internal Affairs is made by transferring funds by the requestor through banks, post offices or self-service software and hardware complexes or through an electronic payment instrument in non-cash form. Confirmation of payment for services is a payment document (payment order, receipt) with a stamp of the bank, post office or transaction code [9].

At the same time, the question of the conclusion of the contract and whether a written statement of an individual or legal entity, a payment document, etc. can be considered as “contractual terms” remains unaddressed. It is clear that the application of an individual or legal entity is an acceptance of a public offer defined in such a resolution as a list of paid services. At the same time, there are certain problems regarding compliance with the form of the contract. Thus, the concept of “contractual terms” should be interpreted as the conditions agreed by the parties that are essential (type of expertise, its complexity, cost), and the content of which is specified in certain documents exchanged by the parties during the provision of the service [10].

When engaging an expert on contractual terms, the defence party must pay for their work. This is provided for in Part 4 of Art. 15 of the Law of Ukraine “On Forensic Expertise”, according to which forensic examinations, examinations and research in criminal proceedings by state-specialised institutions, forensic medical and forensic psychiatric institutions at the request of the suspect, accused, convicted, acquitted, their defenders, legal representative, victim, his representative is carried out at the expense of the customer [11].

However, if the suspect or his defence counsel are unable to engage an expert on their own, in particular, due to financial insolvency, the investigating judge may assist them in this upon the relevant petition. At the same time, the defence party must prove (and submit the necessary evidence) that it cannot engage an expert on its own due to lack of funds or for other objective reasons and motivate the need for his engagement (Part 6 of Article 244 of the CPC of Ukraine).

The issue of warning the expert of criminal liability for the knowingly false conclusion and for refusal without valid reasons to perform their duties remains uncertain. If the prosecution party has all the rights to warn the expert about such criminal liability, the defence party does not have the appropriate powers.

Instead, upon the positive decision of the investigating judge on the defender's request to engage an expert to conduct an examination, the investigating judge issues a ruling in which he states that the experts are warned of criminal liability under Art. 384, 385 of the Criminal Code of Ukraine.

During the investigation of murders, a wide variety of examinations can be appointed. Among them, the most common are forensic medical, forensic psychiatric, genotyposcopic (molecular genetic), ballistic, and forensic chemical. According to the nature of the crime (hanging, poisoning, traffic accident, industrial injury that led to death), the expert is asked a set of questions, among which the main ones are the cause of death, whether it is violent, how and under what circumstances the murder was committed [8].

In criminal proceedings on murder, according to Part 2 of Art. 242 of the CPC of Ukraine, examination of the following is mandatory:

- establishing the cause of death (paragraph 1);
- determining the severity and nature of injuries (paragraph 2);
- assessment of the mental state of the suspect in the presence of information that raises doubts about his sanity, and limited sanity (paragraph 3) [4].

To resolve these issues, forensic medical and forensic psychiatric examinations are appointed. The need for the defence counsel to engage a forensic

medical expert to investigate the severity of the injuries was highlighted by O.P. Babkina and V.V. Zosimenco, in particular, to determine the presence/absence, mechanism and limitation of occurrence, the severity of injuries, proper/improper provision of medical care to persons in places of detention, it is necessary to appoint forensic medical examinations to provide legal assistance [12]. Positive in this aspect is the foreign experience of creating a standardised checklist of physical health in forensic institutions [13].

In the documents on the appointment of forensic examinations, typical questions are indicated: what is the cause of death; what is the time of death; whether there are injuries on the corpse; if so, what is their nature, location, number, mechanism of formation, time of onset and severity; whether there is alcohol or drugs in the blood of the person, etc.

At the same time, the methods used by forensic experts in determining the statute of limitations for death may not always meet the needs of investigative authorities due to the rather significant period of time between death and the result of the examination. Among the modern methods that are currently being developed by specialists, it is necessary to distinguish methods using laser polarimetry that provides fairly accurate results [14].

The analysis of investigative and judicial practice confirms the effectiveness of molecular genetic examinations in criminal proceedings on murders to determine certain time characteristics. The study of human biological traces should be undertaken in different aspects to obtain objective information not only about the source of their origin (a specific person) but also about the correspondence of the time of formation of biological traces to the time of the crime [15].

The object of molecular genetic research can be DNA obtained from blood, sperm, buccal and other epithelium, hair (if there is a hair follicle with a vaginal sheath), and fragments of organs and tissues of the human body [16; 17].

The subject of forensic psychiatric examination in the investigation of murders is the study of the psyche of the suspect to establish possible deviations from the norm.

The forensic psychiatric examination is appointed in cases where there are doubts about the mental competence of the suspects in the murder. Such examination mostly prevents attempts of suspects, referring to their own mental inferiority, to avoid possible punishment, as well as to delay the investigation and conceal important circumstances for the proceedings. In some cases, the behaviour of the suspect in the investigation process, and his behaviour during the commission of the crime, may raise doubts about the adequacy, especially when during the commission of the crime there were signs

of pathological affect or other manifestations, raising doubts about the mental integrity of the person [8].

For example, having considered in an open court session in Kramatorsk the petition of the defender, the judge of the Pokrovsky District Court of Dnipropetrovsk region, in accordance with Art. 332 of the CPC of Ukraine, appointed an inpatient forensic psychiatric examination to determine the mental state of the accused, and entrusted its conduct to the department of forensic psychiatric examinations of the municipal institution "Dnipropetrovsk Regional Clinical Psychiatric Hospital". The accused, who suffered from organic schizophrenic disorder and paranoid syndrome, was sent for inpatient examination for a period of one month. The following questions were asked for the examination: "What mental illnesses does PERSON_2 suffer from?", "Could PERSON_2, due to his mental illness, be aware of his actions and control them at the time of the criminal offence?" [18]. These questions are typical of forensic psychiatric examinations in homicide investigations.

The defence party has the right to apply to the investigating judge during the pre-trial investigation with a relevant motion, including a motion to engage an expert and appoint an examination in cases where such an examination is mandatory, but the investigator has not appointed an examination. The decision of the investigating judge to refuse the defender to engage an expert or partially satisfy his request may be challenged on appeal. According to V.S. Mardoyan, the defender must motivate his disagreement with the court decision, substantiate the arguments, provide evidence in support of the defence position, indicating them in the complaint, otherwise a positive result will not be achieved, and the work of the defender can be assessed as ineffective [19].

On September 3, 2020, the Supreme Court, by a panel of judges of the Second Judicial Chamber of the Criminal Court of Cassation in case No. 752/1498/14, upheld the cassation appeal of the defender, since the court did not provide the defence with the opportunity to defend its position during the appeal proceedings. The Supreme Court stated: according to the materials of the criminal proceedings, the defence counsel during the trial in the court of the first instance in accordance with the requirements of Articles 93, 242, 243 of the CPC of Ukraine provided an expert opinion, which was conducted at the request of the latter. At the same time, the local court did not consider this, as it concluded that the defence counsel, in violation of Art. 242 of the CPC, did not apply to the court with a relevant petition, and the examination itself was not carried out on behalf of the court. However, the panel of judges of the Supreme Court determined that such a conclusion of the local court did not

meet the requirements of the procedural law, since, given the provisions of Article 5 of the CPC, at the time of the defence's appeal to the expert, part 1 of Article 242 of the CPC provided the defence with the opportunity to apply for an expert examination in criminal proceedings, while in the new version, which was in force at the time of the trial, this article provided that the examination was carried out by an expert institution, expert or experts, on the instructions of the investigating judge or court, granted at the request of a party to the criminal proceedings (as amended by the Law of Ukraine No. 2147-VIII "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts" dated October 3, 2017). The Court of Appeal did not consider the above and did not provide the defence with the opportunity to argue its position during the appeal proceedings. Thus, the Supreme Court overturned the decision of the court of appeal and appointed a new hearing in the Court of Appeal [20].

In accordance with Part 7 of Art. 244 of the CPC of Ukraine, the decision of the investigating judge on the commissioning of an expert examination shall include questions posed to the expert by the person who filed the relevant request. The investigating judge has the right not to include in the decision the questions posed by the person who filed the relevant motion, if the answers to them are not related to the criminal proceedings or are not relevant to the trial, justifying such a decision in the resolution. When satisfying the request to engage an expert, the investigating judge, if necessary, has the right, at the request of the person who applied for the engagement of an expert, to decide on the receipt of samples for examination in accordance with Art. 245 of the CPC of Ukraine.

For example, the investigating judge of the Industrial District Court of Dnipro, having heard the participants of the trial, and after studying the materials of the defence counsel's motion to engage an expert, and the materials attached by the prosecutor in the court hearing, concluded that the defence counsel's motion should be partially satisfied. The relevant decision contained a limited range of questions compared to those that the defender set out in his petition for the engagement of an expert [21]. In practice, however, there are some issues with the appointment of forensic medical and forensic psychiatric examinations by the defence in criminal proceedings on murder.

Paragraph 2.1 of the Instruction on forensic medical examination foresees that forensic medical examination is carried out in accordance with the decision of the person conducting the examination,

investigator, prosecutor, judge, as well as by court order [22]. That is, the Instruction does not provide for the examination at the request of the defender or on contractual terms.

The Law of Ukraine "Fundamentals of the Legislation of Ukraine on Health Care" does not define such a possibility, Article 71 of which stipulates that forensic medical and forensic psychiatric examinations are appointed by the person conducting the inquiry, investigator, prosecutor or court in the manner prescribed by law to address issues that require special knowledge in forensic medicine or forensic psychiatry [23].

That is, these norms of by-laws contradict the content of Part 2 of Art. 243 of the CPC of Ukraine on the involvement of an expert on contractual terms, in particular for a mandatory examination, which may be a forensic medical or forensic psychiatric examination, and does not allow exercising the defence right through the use of special knowledge of experts – forensic doctors and psychiatrists.

At the same time, the right of each party to criminal proceedings to present to the court an expert opinion based on scientific, technical or other special knowledge is provided for in Part 2 of Article 101 of the CPC of Ukraine. And the adversarial nature of the parties and the freedom to present their evidence to the court and prove their convincing nature before the court are defined in Article 22 of the CPC of Ukraine.

The defence party does not have the right to conduct investigative (search) actions, but the defence attorney has the right to file a petition to the investigator to conduct appropriate investigative (search) actions, the purpose of which will be to obtain and provide the defence party with comparative samples. In case of refusal on the part of the prosecution, the defence counsel may file a substantiated motion in this regard to the investigating judge [24].

Unlike the main objects of expertise, samples for comparative research are not related to the event being investigated and are not material evidence. When receiving them, the investigator or prosecutor must ensure the participation of the person's defence lawyer.

In the criminal proceedings under Part 1 of Art. 115 of the Criminal Code of Ukraine, the panel of judges of the Judicial Chamber for Criminal Cases of the Dnipro Court of Appeal, considering the appeal of the defender, found that biological samples were taken from Person_2 for expert research, namely, in the office of the police department from 10.00 to 10.20, subungual and hand palms swabs were taken. Given that the suspect has a defender, he should have been involved in the collection of biological samples and had the right to be present during this procedural action [25].

It is known that the comparative material for the forensic examination can be voluntary, conditionally voluntary, and experimental samples. In particular, during the appointment of trace examinations in the process of investigating murders, if ropes tied with complex knots were found, experimental samples of knots made by the suspect should be submitted for expert examination, and the expert should decide what type of knots belong to and whether they are not typical for a particular profession. The specifics of binding nodes often indicate the presence of professional skills, it can become a source of putting forward versions about the identity of the criminal [8].

According to A.V. Sidelnikov, sometimes lawyers and investigators are unjustifiably simplistic and even irresponsible in collecting comparative samples for examination. Often they do not consult a specialist who could provide the necessary assistance [26].

In May 2019, in criminal proceedings, the investigating judge of the Kramatorsk City Court of Donetsk region granted the request of the defender to appoint a fingerprint examination, entrusting it to the experts at Hon. Prof. M.S. Bokarius Kharkiv Research Institute of Forensic Examinations. The ruling stated the obligation of the senior investigator of the SU of the Main Department of the National Police in the Donetsk region to take fingerprint samples of PERSON_1 with the support of an expert [27].

In the process of preparing for the appointment of an expert examination, it is advisable for the defender to involve specialists or consult them on the possibility of an expert examination and the limits of its research.

There are cases where obtaining comparative samples for the examination by the defence does not cause difficulties.

For example, to identify an unknown corpse from photographs, a portrait forensic examination can be conducted. It is prescribed in cases where it is impossible to establish the identity of the deceased in any other way. Such examination is carried out only if there is a photo of the victim (lifetime image of the person). When assigning this type of expert examination, certain requirements are imposed on the materials provided for research, which guarantee the correctness and reliability of the expert's conclusions. In particular, the following objects are needed

for the study: a photo, a skull, and an X-ray [8]. The defender can obtain these materials independently or by requesting them from medical institutions.

■ Conclusions

In criminal proceedings on murder, the possibility of the defender engaging an expert to conduct an examination concerns the appointment of mandatory and optional examinations. To perform such mandatory examinations, which are forensic medical and forensic psychiatric examinations, the defence counsel shall file a motion to initiate this investigative (search) operation with the investigator or prosecutor during the pre-trial investigation, and in case of their refusal – with the investigating judge, submitting the relevant motion and indicating in it the refusal of the investigator/prosecutor and the reasons for their refusal. The conclusion of the expert engaged by the investigating judge at the request of the defence provides evidence that does not require any additional legalisation.

The defence party may obtain an expert opinion on issues requiring special knowledge (without applying to the investigator, prosecutor, or investigating judge) and then submit it to the pre-trial investigation body or court to substantiate its legal position.

Currently, the defender cannot initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or an expert institution due to legal conflicts between the provisions of the CPC of Ukraine and the norms of by-laws regulating the procedure for appointing the relevant types of forensic examinations. At the same time, this violates the equal opportunities of the parties to criminal proceedings to submit evidence to the court and prove their credibility before the court.

The defender, who initiates this investigative (search) action, must provide objects and relevant samples or receive (request) them independently to ensure the possibility of conducting examinations in criminal proceedings on murder. He files a motion to the investigator, prosecutor or investigating judge on the need to obtain specific samples. To obtain samples for examination, it is advisable to involve a specialist or consult with one. During the relevant procedural action, the participation of the defender who initiated the examination, if there are appropriate samples, is mandatory.

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Залучення експерта захисником для проведення експертизи під час розслідування вбивств

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■ **Анотація.** Мета публікації – дослідити можливості й механізми залучення експерта захисником у кримінальному провадженні про вбивство; висвітлити можливості захисника щодо залучення експерта під час проведення обов'язкових експертиз у процесі розслідування вбивств; сформулювати рекомендації захиснику щодо надання експерту, якого залучено до проведення експертизи на підставі його клопотання, об'єктів і зразків для експертного дослідження. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. У кримінальному провадженні про вбивство сторона захисту може самостійно на підставі укладеного договору з експертом або експертною установою отримати висновок експерта й подати його органу досудового розслідування чи суду для обґрунтування своєї правової позиції. Водночас встановлено, що захисник не може ініціювати перед експертом або експертною установою проведення на договірних засадах судово-медичних і судово-психіатричних експертиз у зв'язку з правовими колізіями між нормами Кримінального процесуального кодексу України й положеннями підзаконних нормативно-правових актів, що регламентують порядок призначення цих видів судових експертиз. З метою отримання зразків для експертизи сформульовано рекомендацію захиснику залучати до цієї процесуальної дії спеціаліста або отримувати в нього консультації. У кримінальному провадженні про вбивство можливості захисника залучити експерта до проведення експертизи стосуються призначення обов'язкових і необов'язкових експертиз. Для проведення обов'язкових експертиз, якими є судово-медичні й судово-психіатричні, захисник звертається з клопотанням про їх ініціювання до слідчого або прокурора, а в разі відмови – до слідчого судді, надавши відповідне клопотання. Неможливість захисника ініціювати перед експертом або експертною установою проведення на договірних засадах судово-медичних і судово-психіатричних експертиз порушує рівні можливості сторін кримінального провадження подавати суду докази й доводити перед судом їх переконливість. Для забезпечення можливості проведення експертиз у кримінальному провадженні про вбивство захисник, який їх ініціює, подає слідчому, прокурору або слідчому судді клопотання про необхідність отримання конкретних об'єктів і зразків або отримує (витребує) їх самостійно. Під час проведення отримання зразків для експертизи участь захисника, який ініціював експертизу за наявності відповідних зразків, є обов'язковою

■ **Ключові слова:** захисник; експерт; залучення експерта; вбивство; судово-медична експертиза; судово-психіатрична експертиза