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## **Criminal-Legal Protection of Personal Freedom in Ukraine**

### **Introduction**

The Constitution of Ukraine in Article 3 proclaims a person, his or her life and health, honor and dignity, inviolability and security as the highest social values, which necessitates the normative guarantee of the inalienability of these values. However, the facts of frequent violations of fundamental human and civil rights indicate in some cases a misinterpretation of such rights, as well as objective lack of legal regulation of relations arising from these rights. Personal freedom is a human ability to make one's own choice and to be independent of the influence of external factors. That is why, in our opinion, freedom is the embodiment of the sense of life and the purpose of a person, because this phenomenon reveals the essence of a person as fully as possible and serves as a reference point in life.

### **Research results**

Issues of human freedom as a theoretical and legal definition are characterized by multivariate approaches to its definition, ambiguity of scientific views on its characteristics and multifaceted manifestations. That is why it is expedient to explore such a complex category as "freedom" and reveal its essence.

The objective of the research is to define the category of "freedom", to reveal its meaning and essence, as well as to analyze its relationship with law.

The state of the research. A number of works by many prominent scientists, including F.A. Hayek, V.A. Haponenko, O.I. Dunas, H.H. Kirilenko, P.M. Rabinovych, S.S. Slyvka, V. Tymoshenko and many others are dedicated to the study of the category "freedom". Studies of freedom as a factor in the functioning of democratic political system have been conducted by J. Locke, B. Constant, T. Payne, E. Bentham, J. Adams, A. Hamilton, T. Jefferson, J. Dewey and other scholars. In the Brief Glossary of Philosophical Terms, the category of "freedom" is

defined as one of the characteristics of a person, which is that a person (like God) “can act (or not act) of his or her own free will, without being determined by circumstances”<sup>1</sup>. In turn, V.L. Petrushenko interprets freedom as a fundamental property of a person, due to his or her lack of specialization, vital unfoundedness and unrootedness in life and is manifested through the ability of a person to determine the content, purpose and direction of their actions, to be able to choose the type and mode of behavior (choice)<sup>2</sup>. Scientist V.Ye. Kiemierov in the modern philosophical dictionary defines the concept of “freedom” as “the ability of man to master the conditions of his or her existence, to overcome dependence on natural and social forces, to preserve opportunities for self-determination, choice of actions and deeds”<sup>3</sup>. In our opinion, human freedom can be considered in two aspects: as internal and external freedom. It is worth emphasizing that internal freedom is an innate property of a person, it is not regulated by legal law and is manifested in the freedom to think, believe, hold certain views and so on. F.A. Hayek in the work “Constitution of Freedom” mentions that the state of freedom is a state of relations between people, when the coercion of some against others will be minimal<sup>4</sup>.

The multi-variance of the meanings of the concept “freedom” is due to the historical ambiguity of the interpretation of the category. During the period of slavery, slaves were not the subject, they were the object of law, because any actions could be committed with them at the opinion of the owner, even execution<sup>5</sup>. In support of this thesis, Ulpian stated that: “From the point of view of civil law, slaves are considered nobody”, *servi res sunt* – slaves are things (Ulpianus, *Regulae*. 19.9)<sup>6</sup>.

That is, freedom is the ability to act in accordance with one’s own desires and decisions, as opposed to the will of another, that is, “independence from any desires of another”<sup>7</sup>. A person is free from birth, so he or she is independent in the own beliefs, views and behavior, because he or she is guided by the own will in accordance with own interests, desires and needs and does not depend on the influence of external factors<sup>8</sup>.

Freedom is inextricably connected with responsibility, because every member of society, guided by the freedom to choose their behavior, must be aware of the responsibility for the consequences of this choice. The study of freedom as a factor in the functioning of the

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<sup>1</sup> *Korotkyi slovnyk filosofskykh terminiv*, 32.fatal.ru/src/files\_predmet/Philisophy/slovnyk.doc (access date: 1.06.2023).

<sup>2</sup> V. Petrushenko, *Filosofskyi slovnyk: terminy, personalii, sententsii*, Lviv 2011, p. 186.

<sup>3</sup> *Sovremennyyi filosofskii slovar*, pod red. d.f.n., prof. V.Ye. Kemerova, M.-Byshkek-Ekaterinburg 1996, 608 p.

<sup>4</sup> F. Haiek, *Konstytutsiia svobody*, per. z anhl. M. Oliinyk ta A. Korolyshyna, Lviv 2002, p. 19.

<sup>5</sup> V. Makarchuk, *Zahalna istoriia derzhavy i prava zarubizhnykh krain: navch. Posib*, K. 2010, p. 36.

<sup>6</sup> *Ibidem*, p. 41-42.

<sup>7</sup> F. Haiek, *op. cit.*, p. 20.

<sup>8</sup> O. Punda, *Pravo na svobodu: monohrafiia*, Kh. 2006, p. 10.

democratic political system was initiated by the classics of liberalism (J. Locke, B. Constant, T. Payne, E. Bentham, J. Adams, A. Hamilton, T. Jefferson, J. Dewey). They can be credited with revealing the relationship between freedom and democracy, in which democracy is a means to freedom and freedom is a necessary condition for the functioning of the democratic political system<sup>9</sup>. The Constitution of Ukraine in Article 23 enshrines the idea of freedom, pointing out that “Everyone has the right to the free development of his or her personality, provided that the rights and freedoms of others are not violated, and has responsibilities to the society in which the free and comprehensive development of his or her personality is ensured”. Part 1 of Article 19 of the Basic Law states that: “The legal order in Ukraine is based on the principles according to which no one can be forced to do what is not provided by law<sup>10</sup>. That is, a person is allowed to do anything that is not prohibited by law. Accordingly, the right to freedom can be interpreted as a set of legal means of regulating the moral behavior of an individual (person, citizen) in various manifestations of freedom in law.

As a social regulator, criminal law has clearly defined instrumental possibilities and limits. Going beyond certain limits by the legislator testifies to the reassessment of the instrumental possibilities of criminal law, its “burden” with excessive formal and objectively unfeasible regulatory and protective features.

The current legislation of Ukraine, in particular the Criminal Code of Ukraine, enshrines a number of articles that regulate the protection of personal freedom. Thus, taking into account the situation both in Ukraine and in the world in connection with the COVID-19 pandemic and the ambiguous attitude to vaccination of the society, escalation and intensification of interethnic conflicts, we consider it necessary to focus on the thorough analysis of criminal law enforcement of human life and health from illegal experiments and crimes committed on the grounds of national, racial or religious intolerance.

An important indicator of the development of the state is the state of biomedicine, in connection with the rapid development of which we should analyze the crime under Article 142 of the Criminal Code of Ukraine. In accordance with Part 3 of Article 28 of the Constitution of Ukraine, no person may be subjected to medical, scientific or other experiments without his or her free consent<sup>11</sup>. The Nuremberg Code of 1947 and the Helsinki Declaration of the World Medical Association “Ethical Principles of Medical Research with

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<sup>9</sup> V. Haponenko, *Svoboda yak chynnyk funkcionuvannia demokratychnoi politychnoi systemy*, dissertation.com.ua/node/678018, p. 5 (access date: 1.06.2023).

<sup>10</sup> Konstytutsiia Ukrainy: vid 28.06.1996 r. z nast. zmin. i dop. vid 21.02.2014 r., zakon2.rada.gov.ua (access date: 1.06.2023).

<sup>11</sup> Ibidem.

Human Participation as an Object of Research” of 1964 are fundamental international legal acts regulating the principles and procedure for conducting medical research on humans. The key normative legal acts regulating the specified sphere within the limits of the national legislation are the Law of Ukraine “Fundamentals of the Legislation on Public Health Services” from 19.11.1992, the Law of Ukraine “On Medicines” dated 04.04.1996 and other branch regulations. The object of the crime under Article 142 of the Criminal code of Ukraine, is life and health of the person which objective party is characterized by: 1) actions in the form of illegal medical-biological, psychological or other experiments on humans; 2) consequences in the form of danger to his or her life or health; 3) the causal connection between these actions and consequences<sup>12</sup>. Thus, the analysis of the signs of the objective side of the crime allows us to draw conclusions: 1) liability for illegal experiments on a person occurs only in the presence of consequences in the form of danger to his or her life and health. According to the principle “Nullum crimen, nulla poena, sine lege” (no crime, no punishment without reference to it in law), it can be considered that if the cases do not pose a public danger, then their commission is not criminally liable. We do not agree with this interpretation, because although the act may not pose a threat to the life and health of the person, but be illegal; 2) in the title of Article 142 of the Criminal Code of Ukraine, in our opinion, it is not correct to use the category “experiment”, because in the field of biomedicine the category “experiment” (research) is more widely used; it needs to improve the definition of signs of illegal medical experiments. We agree with the position of S.V. Hizimchuk and V.O. Yehorova, who among the legal conditions for medical experiments determine: 1) socially useful purpose; 2) scientific validity; 3) the advantage of possible success over the risk of causing serious consequences for human life or health; 4) voluntary informed consent of the subject and (or) his / her legal representatives; 5) conducting an experiment in accredited health care facilities; 6) prohibition on conducting an experiment on certain categories of persons: a) patients; b) prisoners; c) prisoners of war; d) therapeutic experiment on people whose disease is not directly related to the purpose of the experiment<sup>13</sup>. That is, violation of one of the above mentioned conditions should be recognized as illegal medical experiment and constitute a basis for criminal liability. From the subjective point of view, the

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<sup>12</sup> *Kryminalne pravo Ukrainy. Osoblyva chastyna: pidruchnyk*, M.I. Bazhanov, Yu.V. Baulin, V.I. Borysov ta in., za red. prof. M.I. Bazhanova, V.V. Stashysa, V.Ia. Tatsiia, K. 2005, p. 67.

<sup>13</sup> C. Hizimchuk, V. Yehorova, *Pytannia kvalifikatsii nezakonnogo provedennia doslidiv nad liudynoiu (st. 142 Kryminalnoho kodeksu Ukrainy)*, “Visnyk Luhanskoho derzhavnoho universytetu vnutrishnikh sprav” 2008, № 3, p. 43.

crime in the certain area will be expressed in direct intent to act and negligence in the form of criminal negligence before and / or the possibility of socially dangerous consequences.

According to Article 142 of the Criminal Code of Ukraine, the subject of the crime is a natural, sane person who conducts experiments on a person and who has reached 16 years of age. In addition, Part 2 of Article 142 of the Criminal Code of Ukraine defines the qualifying features of illegal experiment on a person, in particular: 1) in relation to a minor; 2) two or more persons; 3) by coercion or deception; 4) causing a long-term health disorder of the victim<sup>14</sup>.

It should be noted that the experiment (research) conducted on humans is aimed at achieving a specific result, in particular the invention of new methods of diagnosis and treatment of diseases. So, the attention should be paid to the fact that a person who conducts researches with special education may not be reliably aware of the full range of dangerous consequences that arise or may arise as a result of this research. That is why we fully agree with the opinion of K.I. Surilova that: “From the subjective point of view, the crime in question can be characterized in terms of mixed or negligent forms of guilt. The mental attitude of the subject to a socially dangerous act can be expressed in the form of direct intent or criminal negligence, and to socially dangerous consequences – in the form of criminal arrogance or criminal negligence”<sup>15</sup>. Therefore, the question of the qualifying indicator as “death of the subject” is relevant.

Increased manifestations of intolerance, anti-moral attitude towards people of other nationalities, religions, political and ideological preferences have led to a number of conflicts and crimes based on national, racial or religious hatred. One of the important conditions for the realization of Ukraine’s European integration aspirations is the awareness, perception and implementation of international human rights standards in all spheres of public relations, and especially those where their restriction is possible. The main international legal acts that establish universal standards of human rights and freedoms and relate to the legal status of a person and a citizen and which are consistent with the provisions of the Constitution and relevant regulations of Ukraine include: Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols (1950), European Social Standard

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<sup>14</sup> Kryminalnyi kodeks Ukrainy (Vidomosti Verkhovnoi Rady Ukrainy, 2001, № 25-26, st. 131), zakon.rada.gov.ua/laws/show/2341-14#Text (access date: 1.06.2023).

<sup>15</sup> K. Surylova, *Pravovyye aspekty meditsynskoho eksperimenta s uchastiem cheloveka*, “Aktualni problemy derzhavy i prava” 2002, Vyp. 15, p. 35.

(1961), Final Act of the Conference on Security and Cooperation in Europe (1975), Closing Document of the Vienna Meeting of Representatives of the States Parties to the Conference on Security and Cooperation in Europe (1989), Document of the Copenhagen Meeting – Conference on the Human Dimension of the CSCE (1990)<sup>16</sup>.

As Ukraine has joined to a number of international and European treaties in the field of preventing and combating discrimination against national minorities, racial discrimination, and religious hatred, it is necessary to monitor the implementation of such treaties by the relevant institutions. The purpose of the monitoring was not only to calculate quantitative indicators, but also to establish the root cause of such processes as the development of racial discrimination, sexism, homophobia, xenophobia, transphobia and religious hatred. The emergence of racial discrimination in Ukraine is the result of political, economic and cultural processes and is committed due to the presence of deep social and psychological reasons associated with the rejection of “others”, social disorganization. In Ukraine, a separate article of the Criminal Code of Ukraine (Article 161) defines criminal liability for discriminatory crimes committed on the grounds of hatred, is unsystematic and does not entail international legal liability, provided the state is conscientious in fulfilling its obligations to prevent them. Modern law of the vast majority of states criminalizes manifestations of violent intolerance, systemic, supported by public policy and individual<sup>17</sup>. Actions aimed at inciting national, racial or religious hatred and detestation, degrading national honor and dignity should be understood as any actions aimed at increasing the population’s feelings of strong hostility and enmity to other ethnic or racial groups or religions, deliberate humiliation of positive qualities of a nation compared to others. In particular, public incitement to expel from Ukraine or relocate members of relevant ethnic or racial groups, propaganda of racial, national, religious exclusivity or intolerance, insult to certain historical and cultural relics of national minorities, destruction or damage of monuments or buildings, which represent the religious or cultural value of any population group, etc<sup>18</sup>. Such acts are characterized by the presence of such elements as nationality, ethnic origin, socio-economic status, religion, which are characteristic of the victim or group of victims. Incitement to national hatred and enmity is often combined with the humiliation of national honor and dignity of citizens, which can be both violent and

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<sup>16</sup> T. Slinko, *Mizhnarodno-pravovi standarty v haluzi prav liudyny ta yikh vidobrazhennia v Konstytutsii Ukrainy*, dspace.nlu.edu.ua/bitstream/123456789/15177/1/Slinko\_30-34.pdf (access date: 1.06.2023).

<sup>17</sup> O. Shlehel, *Metodyka rassledovaniia prestuplenii protiv lichnosti, sovershaiemykh po motivu natsionalnoi nenavisti ili vrazhdy*, dys. ... kand. jurid. nauk: 12.00.09, M. 2008, 208 p.

<sup>18</sup> *Zlochyny na grunti nenavysti: novyi kryminalnyi fenomen svitovoho suspilstva: naukovo-praktychne vydannia*, za zah. red. Dzh. Perlina, upor. O.A. Martynenko ta Yu.L. Bielousov, Lviv 2010, 524 p.

non-violent. Violent acts include beatings, torment, and torture to degrade a person's national dignity by degrading his or her national dignity or religious feelings.

Recently, hatred towards people of non-traditional sexual orientation and people who believe that they were born of the wrong sex and dress and behave like members of the opposite sex has become widespread in the world. It can also be a reason to restrict rights or grant privileges.

## **Conclusions**

Based on the above, we can conclude that law is the main expression of freedom, it is the main form of embodiment of freedom. The right to freedom is an inseparable and inalienable constitutional human right and provides for the possibility to choose one's behavior, to act independently in accordance with one's own decisions and intentions, to do everything that is not prohibited by law. Restriction of the constitutional right to freedom must be carried out in compliance with the constitutional guarantees of protection of human rights and freedoms and exclusively on the basis of a reasoned court decision. The analysis of international and national regulations has shown that the national legal framework is largely in line with international documents in the context of the state's positive obligations to ensure such a right. Under the influence of a number of political, economic and social factors, the issues of conducting experiments (researches) on people and discrimination and hate crimes have a stable tendency to increase and are insufficiently regulated within the current legislation.

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## Summary

The level of guarantee and protection of the right to freedom is an important indicator of democratization of society and formation of the rule of law. The human right to freedom is freedom itself, i.e. the ability of a person to perform any lawful actions, in other words freedom can be interpreted as the right of every person to do everything within the existing legal laws. Personal freedom is that no one in the state has the right to forcibly restrict human freedom under current law to take action, enjoy freedom of movement and so on. The constitutional right to freedom is enshrined in Article 29 of the Constitution of Ukraine and is the indicator of the “democracy of society” within the meaning of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

**Key words:** freedom, responsibility, state, rights, person