

Research Article

DISSENTING OPINION: A DIFFICULT PATH TO FINDING THE TRUTH (BASED ON THE EXAMPLE OF UKRAINIAN JUDGES' INTERPRETATION OF CRIMINAL PROCEDURAL LAW)

Oksana Kaplina*, Anush Tumanyants, Olena Verkhoglyad-Gerasymenko and Liudmyla Biletska

ABSTRACT

The article is devoted to the issue of the dissenting opinion of a judge, which is relevant to modern law enforcement practice and legal theory and which may be expressed when a judge who participated in a collegial consideration of a case does not agree with the position of the majority of the panel of judges. The authors analyse the existing approaches to the institution of dissenting opinions in different legal systems, the factors that negatively affect the existence of dissenting opinions in the justice system, provide examples of dissenting opinions of Ukrainian judges expressed in different jurisdictions, their significance for law enforcement practice and the public outcry they caused. It addresses the procedural issues that may potentially arise during the judicial proceedings and the formation of a dissenting opinion of a judge.

The authors conclude that the institution of dissenting opinion is of undoubted value for justice and the authority of the court in the State and emphasise that the specifics of the text of a judge's dissenting opinion against the background of lapidary normative regulation by the rules of procedural law may indicate the genre independence of the content of a dissenting opinion in judicial discourse as compared to a court decision.

The authors propose the concept of dissenting opinion, by which they mean an official legal position of a judge which is formed during collegial consideration of a case as a result of an internal conviction which does not coincide (partially does not coincide) with the position of the majority of judges in terms of reasoning or final conclusion, and which is formalised in a procedural document which is an act of competent (professional) and doctrinal judicial casual interpretation. In addition, the authors present synthesised features which characterise a judge's legal opinion as a dissenting opinion, including the statement that it is undoubtedly a phenomenon of a democratic society; it has the features of an institution of law, albeit with lapidary normative regulation; it is issued by a judge within his/her competence as a result of judicial discretion and inner conviction; has a prognostic and forward-looking character, since

it sometimes serves as a means of overcoming outdated views that impede progressive legal development, evolution of sustainable approaches, and as a basis for the formation of a new legal position, which in the future may be transformed into a majority position and become a sustainable practice; besides, it is derivative, optional, as it is not binding, unlike a court decision, and is not an act of justice, as it is not issued in the name of the state and is not a mandatory part of a court decision.

1 INTRODUCTION

The topic of dissenting opinions of judges in the doctrine of law – whether from a judge in the first instance, court of appeal, Supreme Court, Constitutional Court or the European Court of Human Rights – remains poorly studied. Several factors contribute to this situation. Among them is the lapidary nature of the statutory regulation of the institute of dissenting opinion, its insufficient prevalence, and the absence of binding legal force, as dissenting opinions generally do not have legally significant consequences, particularly in Romano-Germanic legal systems. It should be noted that scholars and practitioners have recently started to refer to this institution more often, especially regarding the study of its phenomenon in constitutional jurisdiction. However, this increased attention is insufficient to develop a coherent concept of a dissenting opinion of a judge, particularly in Ukrainian criminal procedural law.¹

The significance of a judge's dissenting opinion is profound, reflecting the judge's independent and deep thinking and expressing their individual legal consciousness. Such opinions provide insights into the material and procedural aspects considered during the trial and help understand the essence of controversial approaches that judges interpret differently.

A judge's dissenting opinion typically reflects their originality, independence of judgment, freedom of will, individual creativity, worldview, intelligence, and perhaps even emotional state. When a judge disagrees with the majority opinion and presents a dissenting opinion, he/she is entrusted with a much greater responsibility since the reasoning of the opinion, in this case, must match or surpass the reasoning of the court

1 Victor Horodovenko, 'Dissenting Opinion of a Judge as a Creative Understanding of the Subject of Constitutional Proceedings' (2020) 1 Public Law 9, doi:10.37374/2020-37-01; Olena Kibenko, 'Dissenting Opinion of the Supreme Court Judge - A Diversion or a Heroic Act?' *Legal Newspaper online* (Kyiv, 20 August 2018) 26 <<https://yur-gazeta.com/publications/practice/inshe/okrema-dumka-suddi-verhovnogo-sudu--diversiya-chi-geroyichniy-vchinok.html>> accessed 3 March 2024; Irina Levandovska, 'On the Issue of Defining the Category of "Dissenting Opinion of a Judge" in Modern Constitutional Law' (2021) 9 Law of Ukraine 163, doi:10.33498/louu-2021-09-163; TV Stepanova and VD Nayflesh, *Dissenting Opinion of a Judge as a Component of Judicial Review in Commercial Proceedings* (Feniks 2015); Oleksandr Yu Vodyannikov, 'The Role of Dissenting Opinion of a Judge in the Development of Constitutional Jurisdiction' (2016) 3 Bulletin of the National Academy of Legal Sciences of Ukraine 15.

decision itself, making it more convincing and valuable. This opinion captures the discussion in the deliberation room and is implicitly embedded in the content of the reasoning of the court decision. In such cases, the depth of thought, rational and logical components, and emotional intensity should prevail over the standard presentation inherent in court decisions, even if most judges were monolithically united.

Thus, this article's subject matter is the phenomenon of a judge's dissenting opinion, its concept, legal essence, legal consequences of its preparation, and problematic aspects of procedural nature that may arise in court proceedings. In addition, to understand the importance of dissenting opinions in the search for truth in justice, the authors have referred to specific dissenting opinions of Ukrainian judges attached to court decisions, analysed their content and demonstrated their value.

2 DISSENTING OPINION OF THE JUDGE: STATEMENT OF THE PROBLEM

The institute of dissenting judge's opinion, despite having a long-term history, still belongs to the poorly studied phenomena that scholars do not often address in their research. An attempt to identify the reasons for this situation has allowed the authors to generate the following observations. Firstly, not all states perceive dissenting opinions as a legal phenomenon and envisage their existence in legislation. To cite the statistics on constitutional justice provided by the European Commission for Democracy through Law in its report "On Separate Opinions of Constitutional Courts", most EU Member States allow constitutional judges to submit separate opinions whenever they disagree with the court's judgment. The vast majority of Member States of the Venice Commission allow separate opinions in constitutional jurisdiction. However, some EU Member States either prohibit separate opinions or have no relevant provisions, rejecting this practice. Notable examples include Algeria, Andorra, Austria, Belgium, France, Italy, Liechtenstein, Luxembourg, Malta, San Marino, Switzerland, and Tunisia.²

As Jean-Paul Costa has noted, in countries with an Anglo-Saxon tradition, such as the United Kingdom and the United States of America, it has long been the practice that a judge who disagrees with the majority of their colleagues and, therefore, with a court decision, has the right to express their minority opinion publically.³ The US Supreme Court, for example, makes less than half of all its court decisions unanimously.⁴

2 Opinion no 932 / 2018 of European Commission for Democracy Through Law (Venice Commission) 'Report on Separate Opinions of Constitutional Courts' AD(2018)030 (17 December 2018) paras 7, 13 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)030-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e)> accessed 3 March 2024.

3 Jean-Paul Costa, 'En quoi consistent les opinions séparées, dissidentes ou concordantes? Quels en sont leurs mérites?' (*Justice-en-ligne*, 13 January 2012) <<https://www.justice-en-ligne.be/En-quoi-consistent-les-opinions>> accessed 3 March 2024.

4 Igor Kirman, 'Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions' (1995) 104(8) *Columbia Law Review* 2083.

Secondly, an analysis of current Ukrainian legislation, as well as the legislation of some foreign countries, reveals another factor contributing to the limited study of dissenting opinions is the rather lapidary regulatory framework for this institution. For instance, Part 3 of Article 375 of the Criminal Procedure Code of Ukraine (hereinafter - the CPC of Ukraine) states, “Each judge of the panel of judges has the right to write a separate opinion, which is not announced in court, but is attached to the materials of the proceedings and is open for review.”⁵ Almost verbatim, this provision is reproduced in Part 4 of Article 391 of the CPC “Procedure for voting in the jury,” with the only difference being the name of the panel of judges – “each of the jurors”.⁶ The right to dissent is granted to a judge of the court of cassation who disagrees with the decision to transfer (refuse to transfer) criminal proceedings to a chamber, joint chamber or the Grand Chamber of the Supreme Court. In this case, he/she has the right to state his/her dissenting opinion in writing in the decision to transfer the above criminal proceedings or in the decision adopted as a result of the cassation review (Part 5 of Article 434-2 of the CPC).

Despite the Ukrainian legislator’s careful regulation of the legal content of any court decisions, their components, and the procedural order of their adoption, it is not as thorough in regulating the content of the dissenting opinion, leaving full discretion to the judge who does not agree with the majority. The law does not define what types of dissenting opinions can be expressed by judges, how they should be constructed, and whether there are limits to the judge’s investigation of the actual circumstances of the case or the subsequent fate and legal significance of the dissenting opinion.

There are only minor differences in the legal regulation of dissenting opinions in other countries. In particular, according to the criminal procedural legislation of Kazakhstan and Latvia, the dissenting opinion of a judge is sealed in an envelope and attached to the criminal case. Only a Higher Court may open the envelope and read the dissenting opinion during the trial (Part 2 of Article 54 of the CPC of Kazakhstan,⁷ Part 2 of Article 516 of the CPC of Latvia⁸).

According to Part 6 of Article 299 of the Lithuanian CPC, a judge with a “dissenting opinion during the sentencing process has the right to express it in writing. The dissenting opinion shall not be taken into account when pronouncing the verdict but shall be noted in the case file.”⁹ In the authors’ opinion, such concealment of judges’ individual opinions

5 Code of Ukraine no 4651-VI of 13 April 2012 ‘Criminal Procedure Code of Ukraine’ (CPC of Ukraine) <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> accessed 27 February 2024.

6 *ibid.*

7 Code of the Republic of Kazakhstan no 231-V of 4 July 2014 ‘Criminal Procedure Code of the Republic of Kazakhstan’ (CPC of Kazakhstan) <https://online.zakon.kz/Document/?doc_id=32707007#activate_doc=2> accessed 27 February 2024.

8 Law of the Republic of Latvia of 21 April 2005 ‘Criminal Procedure Law’ (CPC of Latvia) <<https://likumi.lv/ta/en/en/id/107820>> accessed 27 February 2024.

9 Law of the Republic of Lithuania no IX-785 of 14 March 2002 ‘Criminal Procedure Code’ <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr>> accessed 27 February 2024.

does not align with the transparency of court decisions, the essence of justice, and the principle of judicial independence.

In Estonia, the issue of dissenting opinions is dealt with differently, though not fundamentally. In Estonia's criminal procedure legislation, dissenting opinions are attached to the case file but are not announced during the verdict (Article 306(4) of the Code of Criminal Procedure of Estonia). However, they are attached to the decisions of the State Court and published along with them (Article 23(6) of the CPC of Estonia).¹⁰ Moreover, the legislator provides that a judge who remained in the minority during the voting may submit his/her dissenting opinion. This means that only a judge who voted against the decision made by the panel can file a dissenting opinion, which means that his or her position can be the subject of a dissenting opinion. In other words, it cannot be submitted to support the position of the panel, but with different arguments, as is possible, in particular, in the European Court of Human Rights or the Constitutional Courts.

Under Moldovan law, the dissenting opinion is attached to the court decision in the same way. However, unlike in Estonia, those present in the courtroom are informed about the dissenting opinion, and it is published together with the court decision on the official website of the court (Article 340(3-4) of the CPC of Moldova).¹¹

Attention should be drawn to the approach of the Georgian legislator, who provided for the delivery of a dissenting opinion together with the verdict to the convicted or acquitted person within five days, and in complex cases involving many persons, within 14 days after the verdict is pronounced (Article 278 of the CPC of Georgia).¹²

More detailed regulation is found in Poland's legislation. In particular, a dissenting opinion must be delivered together with the court decision. The CPC of Poland establishes the content of the dissenting opinion, indicating that it must state in which part and on which issue the judge disagrees with the court decision. Moreover, the legislation states that a dissenting opinion may also relate to the reasoning of the decision itself. In such cases, such an opinion is indicated when signing the reasoning. Procedural issues are also regulated, namely, "if the law does not require immediate justification of the court decision, in case of dissenting opinion, the justification of the court decision must be drawn up *ex officio* within seven days from the date of the decision, and the judge who delivered the dissenting opinion

10 Law of the Republic of Estonia (RT I 2003, 27, 166) of 12 February 2003 'Criminal Procedure Code' <<https://www.riigiteataja.ee/akt/106012016019>> accessed 27 February 2024.

11 Code of the Republic of Moldova no 122-XV of 14 March 2003 'Criminal Procedure Code of the Republic of Moldova' <https://www.legis.md/cautare/getResults?doc_id=123540&lang=ro> accessed 27 February 2024.

12 Law of Georgia no 1772 of 9 October 2009 'Criminal Procedure Code of Georgia' <<https://matsne.gov.ge/en/document/view/90034?publication=162>> accessed 27 February 2024.

shall attach the justification to it within the next seven days; such obligation does not apply to the people's assessor" (Article 114).¹³

Thus, with rather rare exceptions, the legislation is limited to a few phrases of regulatory regulation of the institution of dissenting opinion, leaving gaps in regulation, wide scope for judicial discretion, promoting the emergence of informal practices and giving the authority of dissenting opinion a secondary (optional) meaning.

The third factor that, in the authors' opinion, reduces interest in the institution of dissenting opinions is their lack of prevalence in different judicial jurisdictions. A dissenting opinion may only be issued in cases where a panel of judges considers the proceedings, and panels primarily consider cases in the appellate or cassation instance. Thus, according to the Unified State Register of Court Decisions of Ukraine, between 2020 and 2023, 272 dissenting opinions were issued in courts of all instances: criminal jurisdiction - 272 (an average of 6 per year), civil jurisdiction - 737 (approximately 16 per year); administrative courts - 1138 and commercial courts - 498 dissenting opinions (24 and 10 per year, respectively).

The fourth factor is the non-binding nature of the dissenting opinion and the absence of legally significant consequences. In some states, the existence of a dissenting opinion is not disclosed when a court decision is made; it is hidden in a sealed envelope and attached to the case file (Part 2 of Article 54 of the CPC of Kazakhstan,¹⁴ Part 2 of Article 516 of the CPC of Latvia¹⁵).

Another factor is the occasional negative attitude toward dissenting opinions on the part of judges within a court or panel of judges. A survey conducted by the authors of this article, which included 157 judges, lawyers, prosecutors and academics, revealed that it is judges and prosecutors who sometimes view dissenting opinions negatively. They believe these opinions can create obstacles to understanding the court decision as lawful and justified. Specifically, 19 people (13% of the total number of respondents) expressed this view, comprising twelve judges and seven prosecutors. Although this percentage is relatively small, it nevertheless indicates that some colleagues do not accept the position of the author of the dissenting opinion. They view it as an "encroachment" on the unity of the panel's approaches and perceive the legal stance of the dissenting judge as excessive activism.

Despite the above factors that explain the lack of interest in the institution of dissenting opinion, important factors increase its importance for the judiciary and make it necessary to turn to this institution at the doctrinal level. In particular, a dissenting opinion increases the interest of society or individual lawyers in a court decision, as it is usually

13 Law of the Republic of Poland of 6 June 1997 'Criminal Procedure Code' <<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970890555>> accessed 27 February 2024.

14 CPC of Kazakhstan no 231-V (n 7).

15 CPC of Latvia of 21 April 2005 (n 8).

expressed on the most controversial issues. The reasoning behind a dissenting opinion is particularly valuable to lawyers, who often use it to appeal court decisions; all 26 lawyers who were interviewed for this study have encountered a judge's dissenting opinion in their practice of law.

Dissenting opinions also hold doctrinal importance. Scholars study these opinions because they often deal with controversial issues that have ambiguous approaches to specific law enforcement issues. Therefore, the interpretation of a legal provision that may be the subject of scientific discussion, as indicated by 48 scholars interviewed, shapes the discourse of social and political dialogue. Moreover, the institution of dissenting opinions in the United States is a matter of particular pride for the American justice system, and they are said to be a treasure of "legal thought".¹⁶

3 DISSENTING OPINIONS OF JUDGES IN SPECIFIC CASES: THE RIGHT TO DISAGREE WITH THE MAJORITY

Turning to the dissenting opinions expressed during the constitutional proceedings before the Constitutional Court of Ukraine and the criminal proceedings before the Ukrainian Supreme Court, this analysis aims to classify these opinions, demonstrate their significance for law enforcement practice and democratic justice, ensuring the internal independence of the court. Please note that the most relevant court decisions have been selected for analysis, as they are of constant law enforcement and scientific interest, resonate with the public, and feature differing approaches to the interpretation of the law. These decisions may also be of great interest to foreign scholars and practitioners in terms of comparative research.

The issue of presumption of innocence and liability for illicit enrichment. In 2019, 59 people's deputies of Ukraine filed a constitutional petition with the Constitutional Court of Ukraine to recognise Article 368-2 of the Criminal Code of Ukraine (hereinafter - the CCU)¹⁷ as inconsistent with the Constitution of Ukraine (unconstitutional). According to Article 368-2 of the Criminal Code of Ukraine, "acquisition by a person authorised to perform the functions of the state or local self-government of assets in a significant amount, the legality of the grounds for which is not confirmed by evidence" was recognised as punishable. In the opinion of the subject of the right to constitutional petition, Article 368-2 of the Criminal Code of Ukraine is inconsistent with the provisions of a number of articles of the Constitution of Ukraine, namely Article 1, Part 1 of Article 3, Part 1 and 2 of Article 8, Article 58, Part 1 of Article 61, Article 62, Part 1 of Article 63, Part 1 of Article 64, and

16 Edward Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90 University of Pennsylvania Law Review 929.

17 Code of Ukraine no 2341-III of 5 April 2001 'Criminal Code of Ukraine' (CCU) <<https://zakon.rada.gov.ua/laws/show/2341-14/ed20240519#top>> accessed 27 February 2024.

Paragraphs 1 and 3 of Part 2 of Article 129 of the Constitution of Ukraine.¹⁸ Among the reasons for the constitutional petition, the people's deputies pointed out that the article of the Criminal Code of Ukraine in question does not meet the requirements of the presumption of innocence; namely, it imposes on a person the *obligation to prove his or her innocence of committing a crime*, forces to give testimony or explanations about himself or herself, family members or close relatives, which is unacceptable in view of the constitutional provisions of the presumption of innocence contained in Article 62 of the Constitution of Ukraine,¹⁹ and reflected in Paragraph 1 Article 11 of the Universal Declaration of Human Rights,²⁰ Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,²¹ Article 14(2) of the International Covenant on Civil and Political Rights.²²

To realise the significance of this Decision of the Constitutional Court of Ukraine for Ukrainian society, it is necessary to point out the background against which it was discussed. The problem stirred up the whole society and left no lawyer indifferent. It was discussed at the doctrinal level by research teams and at numerous scientific and practical conferences. Many scholars and practitioners have expressed their attitude to the main components of society's awareness of the principle of presumption of innocence and, most importantly, to the key issue, namely, who bears the burden of proving the illegality of the acquisition of assets by a person authorised to perform state functions.

On 26 February 2019, the Constitutional Court adopted the Decision.²³ Moreover, seven judges out of 18 expressed dissenting opinions, indicating the extreme relevance for society and the ambiguity of approaches to the interpretation of constitutional provisions. In particular, the Constitutional Court of Ukraine proceeded from the fact that combating corruption in Ukraine is a task of exceptional social and state importance, and criminalisation of illicit enrichment is an important legal means of implementing state policy in this area. At the same time, when defining illicit enrichment as a crime (Article 368-2 of the Criminal Code of Ukraine), it is necessary to take into account the constitutional provisions that establish the principles of legal responsibility, human and

18 Decision no 1-p/2019 in Case no 1-135/2018(5846/17) on the constitutional petition of 59 people's deputies of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with Article 368-2 of the Criminal Code of Ukraine (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291.

19 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>> accessed 27 February 2024.

20 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 3 March 2024.

21 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 3 March 2024.

22 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <[https://undocs.org/en/A/RES/2200\(XXI\)](https://undocs.org/en/A/RES/2200(XXI))> accessed 3 March 2024.

23 Decision no 1-p/2019 in Case no 1-135/2018(5846/17) (n 18).

civil rights and freedoms, as well as their guarantees. According to Articles 62 and 63 of the Constitution of Ukraine, the legislative wording of the crime of illicit enrichment cannot impose on a person the obligation to confirm with evidence the legality of the grounds for acquiring assets, i.e. to prove his/her innocence; give the prosecution the right to demand from a person to confirm with evidence the legality of the grounds for acquiring assets; allow bringing a person to criminal liability only based on the absence of evidence of the legality of the grounds for acquiring assets; allow bringing a person to criminal liability only on the basis of the absence of evidence of the legality of the grounds for acquiring assets. Thus, Article 368-2 of the Criminal Code of Ukraine was declared unconstitutional by the Constitutional Court.

Recognising this article as unconstitutional resulted in the closure of criminal proceedings that had brought certain individuals to criminal liability.

As already noted, seven judges of the Constitutional Court of Ukraine expressed their dissenting opinions. Judge Viktor Kolisnyk justified the need for a dissenting opinion on issues not covered in the Decision but were crucial to the case. Some judges, like Judge Oleg Pervomaiskyi, spoke out about the legal position of the Constitutional Court of Ukraine regarding the lack of approaches to the interrelation of the concepts of democratic, legal state, rule of law and anti-corruption state in the Decision. Judge Vasyl Lemak rebuked the Court for defects in the Judgment's methodology. Judge Viktor Horodovenko conducted an in-depth analysis of foreign anti-corruption legislation, emphasised the problem of harmonious implementation of Article 20 of the United Nations Convention against Corruption of 2003 and pointed out the risks of recognising the unconstitutional provision of the Criminal Code of Ukraine. Judge Stanislav Shevchuk explained in more depth and detail the issues raised in the Decision. Judge Ihor Slidenko provided arguments in favour of the opinion that the constitutional gift was unjustified. Notably, only Judge *Serhiy Holovaty* called his dissenting opinion divergent, pointing out that he did not vote with the majority of judges to declare Article 368-2 "Illegal enrichment" of the Criminal Code of Ukraine unconstitutional because he did not agree in general with the legal position of the Court, on which this decision was based. He reproached the judges for the falsity of their approaches and substantiated the legality of the article and its compliance with the requirements of Part 1 of Article 8, Article 62, and Part 1 of Article 63 of the Constitution of Ukraine.

The key approaches of Judge Serhiy Holovaty are worth highlighting, as his approach is important for the development of the doctrine of constitutional law, criminal procedure and criminal law. He proceeded from the fact that Article 4 368-2 of the Criminal Code of Ukraine does not require the guilty person to provide any explanations and does not explicitly oblige him to provide information. In the judge's opinion, the defendant has the right, but not the obligation, to provide explanations as to the origin of the assets whose "illegality" is claimed by the prosecution. The prescription of the Criminal Code of Ukraine

and the disposition of the article (cited above) does not *per se* establish any burden of proof in terms of providing evidence. This is the subject of regulation exclusively by the rules of criminal procedure law. In addition, “the special status of the person to whom this provision applies (“a person authorised to perform the functions of the state or local self-government”) entails that any *public official* is aware in advance that the standards of integrity applicable to him/her during his/her tenure are too high; Similarly, such person is aware in advance that holding a certain position in the public service entails for him/her the corresponding obligations to declare and explain (justify) his/her income in accordance with the procedures established by the provisions of national law”.

The argumentation of the judge of the Constitutional Court is important for Ukrainian society, doctrine and law enforcement practice in terms of not so much changing the paradigmatic content of the presumption of innocence - of course, its components, which are enshrined at the constitutional level, cannot be questioned or erased. Attention must be drawn to this dissenting opinion, which does not coincide with the decision of the Constitutional Court of Ukraine because the entire Ukrainian society should change the vector of approach to understanding the requirements for *public officials* who should be subject to increased requirements for their income statements. Such agents of the state should not hide behind the provisions of the presumption of innocence as a democratic value, violating these values through their irresponsible behaviour towards society. One of the key elements of the concept of “illicit enrichment” is the lack of explanation (justification) for the legitimacy (confirmation) of the growth of wealth (property) in a significant amount. At the same time, it is quite easy for an official to provide satisfactory and convincing explanations for acquiring certain assets that are subject to public and law enforcement attention.

To further affirm the solidarity of the authors of the article with the opinion of Judge Serhiy Holovaty, the ECHR judgment in the case of *John Murray v. UK* can be cited. This judgment explicitly states: “...in each case, the question is whether the evidence presented by the prosecution is sufficiently convincing to require a response. A National Court cannot conclude that the accused is guilty merely because he prefers to remain silent. Only if the evidence against the accused “requires” some explanation that the accused is likely to be able to provide, the failure to provide any explanation “may, in the eyes of common sense, lead to the conclusion that there is no explanation and that the accused is guilty”. Conversely, if the evidence presented by the prosecution is so weak that no explanation is required, the failure to provide one cannot support a finding of guilt”.²⁴

The problem of establishing procedural filters regarding appeals to the investigating judge. Continuing the analysis of individual opinions of judges, it is worth referring to the legal positions developed by judges of the Supreme Court of Ukraine and the Supreme Court.

24 *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 8 February 1996) para 51 <<https://hudoc.echr.coe.int/eng?i=001-57980>> accessed 3 March 2024.

For example, it is known that the issue of appealing against the investigating judge's rulings issued outside the scope of his/her clearly defined powers²⁵ in the law has been and remains relevant to criminal proceedings since the top priority areas of Ukraine's course towards building a state governed by the rule of law are the recognition, observance and protection of constitutional rights and freedoms of man and citizen. They are of particular importance in the field of criminal procedure, where the rights and freedoms of a person, in particular, the right to liberty and security of person, inviolability of the home, secrecy of correspondence, telephone conversations, telegraph and other correspondence, non-interference in personal and family life, collection, storage, use and dissemination of confidential information, are subject to significant restrictions in connection with criminal proceedings.²⁶ This necessitates the creation of effective mechanisms for the realisation of the right to judicial protection – “a fundamental human right which is a guarantee of protection of other human rights, freedoms and legitimate interests, and the level of its provision characterises the democracy of the state and its legal nature”.²⁷ One of such mechanisms aimed at ensuring judicial protection of the rights and legitimate interests of participants in criminal proceedings is the institute of appealing against the decisions of the investigating judge during the pre-trial investigation, regulated in Paragraph 2 of Chapter 26 of the CPC of Ukraine.²⁸

The conceptual legislative approach is to establish in Article 309 of the CPC of Ukraine the possibility of appealing only an exhaustive list of rulings of investigating judges. However, based on the systematic interpretation of a number of provisions of the criminal procedural law, the rulings of the investigating judge issued in accordance with

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- 25 In particular, this refers to decisions on the obligation of the investigator to recognize non-residential premises as material evidence: Case no 642/831/18 (Criminal Court of Cassation of the Supreme Court of Ukraine, 15 November 2018) <<http://reyestr.court.gov.ua/Review/77969039>> accessed 3 March 2024; transfer of seized property to the operational management of the State: Case no 522/20851/16-к (Criminal Court of Cassation of the Supreme Court of Ukraine, 10 April 2018) <<http://reyestr.court.gov.ua/Review/73469580>> accessed 3 March 2024; or for safekeeping: Case no 229/1542/17 (Criminal Court of Cassation of the Supreme Court of Ukraine, 12 December 2018) <<http://reyestr.court.gov.ua/Review/78627676>> accessed 3 March 2024; appointment of unscheduled inspections within criminal proceedings: Case no 237/1459/17 (Marinsky District Court of Donetsk Region, 13 April 2017) <<https://reyestr.court.gov.ua/Review/65971799>> accessed 3 March 2024; the obligation of the prosecutor to issue a decision to close criminal proceedings on the basis of paragraph 10 of part 1 of Article 284 of the CPC: Case no 757/26714/22-k (Criminal Court of Cassation of the Supreme Court of Ukraine, 5 December 2023) <<https://reyestr.court.gov.ua/Review/115617715>> accessed 3 March 2024.
- 26 AR Tumanlyants, 'European Standards of Human Rights Protection in Appealing against Decisions of the Investigating Judge During the Pre-Trial Investigation' (2013) 6(2) Scientific Bulletin of Kherson State University. Series: Legal Sciences 143.
- 27 Olha G Shilo, *Theoretical and Applied Bases of Realization of the Constitutional Right of a Person and Citizen to Judicial Protection in pre-Trial Proceedings in the Criminal Process of Ukraine* (Pravo 2011) 25.
- 28 CPC of Ukraine no 4651-VI (n 5).

Part 2 of Article 117, Part 7 of Article 583, Part 9 of Article 584, Part 6 of Article 591 of the CPC of Ukraine may also be appealed.²⁹

In law enforcement practice, the problem of the possibility or impossibility of appealing a separate category of decisions of investigating judges, namely decisions issued outside the powers exhaustively defined in the Criminal Procedure Code, has arisen. The first legal position on this issue was formulated by the Supreme Court of Ukraine in its ruling of 12 October 2017 and was as follows: “If the investigating judge issues a ruling that is not provided for by the criminal procedural rules to which the provisions of Part 3 of Article 309 of the CPC refer, the court of appeal may not refuse to verify its legality by referring to the provisions of Part 4 of Article 399 of the CPC. The right to appeal against such a court decision is subject to the provisions of Paragraph 17 of Part 1 of Article 7 and Part 1 of Article 24 of the CPC, which guarantee it, taking into account the provisions of Part 6 of Article 9 of the CPC, which establishes that in cases where the provisions of the CPC do not regulate or ambiguously regulate the issues of criminal proceedings, the general principles of criminal proceedings determined by part one of Article 7 of the CPC shall apply.”³⁰

In explaining the approach of the Supreme Court of Ukraine, it is notable that the judges justified the positive ruling on this issue by referring to the general principles of criminal proceedings, namely, the principle of criminal proceedings contained in Article 24 of the CPC “Ensuring the right to appeal against procedural decisions, actions and inaction”, which, without reference to specific decisions that may be appealed (listing them), formulates a rule of law in general: “Everyone is guaranteed the right to appeal against procedural decisions, actions or omissions of a court, investigating judge, prosecutor, or investigator in the manner prescribed by this Code”.³¹

This approach was further confirmed in the decision of the Grand Chamber of the Supreme Court on 23 May 2018, which stated: “verification of the legality of the investigating judge's rulings by the court of first instance during the preparatory proceedings is not an effective remedy for a possible violation of Article 8 of the ECHR and Article 1 of the First Protocol to the Convention, because: firstly, not all criminal cases in which unscheduled inspections were carried out will be brought to court with an indictment; secondly, the preparatory hearing in the court of first instance, even if the indictment is brought to court, may take place too late to be able to remedy the violation; thirdly, during the preparatory hearing, the judge does not have the authority to take actions and make decisions that may lead to the remedy of the violation of the Convention caused by state interference. The Grand Chamber concluded that Part 3 of Article 309 of the CPC applies only to those rulings, the

29 *ibid.*

30 Case no 757/49263/15-к (Supreme Court of Ukraine, 12 October 2017) <<http://reyestr.court.gov.ua/Review/70326277>> accessed 3 March 2024.

31 CPC of Ukraine no 4651-VI (n 5).

possibility of which is expressly provided for by the CPC. If the possibility of making a certain type of court ruling is not directly provided for by the CPC, then there is neither permission nor prohibition to appeal such court rulings. Such rulings include rulings on granting permission to conduct unscheduled inspections. In such cases, the general principles of criminal proceedings should be applied. Given the lack of reliable procedural mechanisms for protecting rights during the preparatory proceedings, the Grand Chamber considers the right to appellate review of such rulings at the pre-trial investigation stage to be practical and effective. Thus, the appellate courts are obliged to open appeal proceedings on complaints against the decisions of investigating judges to grant permission for unscheduled inspections".³²

In this case, Judge Natalia Antoniuk expressed an alternative dissenting opinion, in which she emphasised: "... it is unlikely that the approach to the possibility of appealing absolutely all decisions of investigating judges that are not directly provided for by the provisions of the CPC during the pre-trial investigation can be considered correct since it will actually lead to the abandonment of the so-called 'filters' for appealing decisions of investigating judges determined by the legislator during the pre-trial investigation".³³

A few issues should be noted when analysing the legal position of the Supreme Court and the dissenting opinion of Judge Natalia Antoniuk. Ukraine's European integration processes require implementing European standards into national legislation. Based on the provisions of the Law of Ukraine, "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights",³⁴ the judgments of the European Court of Human Rights are the benchmark that ensures the effectiveness of criminal justice.

The European Court of Human Rights has repeatedly stated in its judgments that the Convention for the Protection of Human Rights and Fundamental Freedoms does not oblige States parties to establish courts of appeal or cassation, but where such courts exist, the guarantees of everyone to a fair hearing by a court established by law, as set out in Article 6 of the Convention, must be observed (Paragraph 22 of the judgment in the case of *Sokurenko and Strygun v. Ukraine*).³⁵ Therefore, if the state provides for appellate review of the investigating judge's decisions made at the pre-trial

32 Case no 237/1459/17 proceedings no 13-19кк18 (Grand Chamber of the Supreme Court of Ukraine, 23 May 2018) <<http://reyestr.court.gov.ua/Review/74475877>> accessed 3 March 2024.

33 Dissenting Opinion of Judge NO Antoniuk in Case no 243/6674/17-к (Grand Chamber of the Supreme Court of Ukraine, 23 May 2018) <<http://reyestr.court.gov.ua/Review/74688072>> accessed 3 March 2024.

34 Law of Ukraine no 3477-IV of 23 February 2006 'On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights' <<https://zakon.rada.gov.ua/laws/show/3477-15>> accessed 3 March 2024.

35 *Sokurenko and Strygun v Ukraine* App nos 29458/04, 29465/04 (ECtHR, 20 July 2006) <<https://hudoc.echr.coe.int/ukr?i=001-76467>> accessed 3 March 2024.

investigation stage, such review must meet a number of standards,³⁶ including proportionality of restrictions on the right to appeal against procedural decisions made at the pre-trial investigation stage.

According to Clause 8, Part 2 of Article 129 of the Constitution of Ukraine, the basic principles of judicial proceedings include the right to appeal against a court decision and, in cases specified by law, to cassation.³⁷ According to the legal position of the Constitutional Court of Ukraine, the right to appeal against court decisions in the courts of appeal and cassation is a component of the constitutional right to judicial protection. This right is guaranteed by the basic principles of judicial proceedings defined by the Constitution of Ukraine, which are mandatory for all its forms and courts, particularly by ensuring appeal and cassation appeal of court decisions, except in cases established by law (Clause 3.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 11-pn/2012 dated 25 April 2012).³⁸

This position was further developed in the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance of the provisions of Part 2 of Article 171-2 of the Code of Administrative Procedure of Ukraine of 8 April 2015 with the Constitution of Ukraine (constitutionality), which states that the right to judicial protection includes, in particular, the possibility of appealing against court decisions in appeal and cassation, which is one of the constitutional guarantees of the realisation of other rights and freedoms, protection against violations and unlawful actions.³⁹

Thus, according to the Constitution of Ukraine, it is possible to restrict the right to appeal and cassation of a court decision, but it cannot be arbitrary and unfair.⁴⁰ Such restrictions must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal and be conditioned by the social need to achieve this goal proportionately and justly. In case of restriction of the right to appeal against court decisions, the legislator is obliged to introduce such legal regulation that will allow to achieve the

36 See, for more details: ME Savenko, 'Appeal and Review of Rulings of the Investigating Judge Issued During the Pre-trial Investigation' (PhD (Law) thesis, Yaroslav Mudryi National Law University 2020) 50-77.

37 Constitution of Ukraine (n 19).

38 Decision no 11-pn/2012 in Case no 1-12/2012 On the constitutional petition of citizen Oleksiy Leonidovych Shapovalov regarding the official interpretation of provisions of paragraph 20 of part one of Article 106, part one of Articles 111-13 of the Commercial Procedural Code of Ukraine in connection with provisions of paragraphs 2, 8 of part three of Article 129 of the Constitution of Ukraine (Constitutional Court of Ukraine, 25 April 2012) [2012] Official Gazette of Ukraine 36/1341.

39 Decision no 3-pn/2015 in Case no 1-6/2015 On the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance of the provisions of Part 2 of Article 171-2 of the Code of Administrative Procedure of Ukraine with the Constitution of Ukraine (constitutionality) (Constitutional Court of Ukraine, 8 April 2015) [2015] Official Gazette of Ukraine 32/926.

40 Constitution of Ukraine (n 19).

legitimate goal with minimal interference with the right to judicial protection and not violate the essential content of such a right.

Therefore, it should be noted that the restriction in the Criminal Procedure Law of Ukraine on the possibility of appealing against the decisions of the investigating judge at the pre-trial investigation stage should be considered an effective procedural filter that protects the national judicial system from unjustified overload. The correctness of the point of view of Judge N. Antoniuk, expressed in the dissenting opinion, is also indicated by further law enforcement practice. Thus, according to the conclusion on the application of procedural law outlined in the decision of the Joint Chamber of the Criminal Court of Cassation of 31 May 2021 in case No. 646/3986/19: "... only the decisions of the investigating judge, which are related to the possibility of significant restriction of the rights, freedoms and interests of a person or are crucial for the progress of the pre-trial investigation or criminal proceedings in general, are subject to review in the appellate instance".⁴¹

The above problem can also be viewed from a different perspective. A practical situation of no considerable interest arises when authorised entities do not comply with the procedural procedure for exercising the powers provided for by the CPC. For instance, on 11 December 2017, an investigating judge of the Novohrad-Volynskiy City District Court of Zhytomyr region granted the motion by the senior investigator of the Investigation Department of the Novohrad-Volynskiy Police Department of the Main Directorate of the National Police in Zhytomyr region. This motion, agreed upon by the prosecutor of the Novohrad-Volynskiy Local Prosecutor's Office, allowed the compulsory taking of the suspect's bust images (photos) for forensic portrait examination. The said ruling was appealed by the suspect's defence counsel on the grounds that the investigating judge had issued the ruling beyond his authority. However, on 19 December 2017, a judge of the Zhytomyr Regional Court of Appeal denied the opening of the appeal proceedings.

Subsequently, the Supreme Court, by the panel of judges of the First Judicial Chamber of the Criminal Court of Cassation, concerning the legal position of the Grand Chamber of the Supreme Court expressed in the decision of 23 May 2018 in case No. 243/6674/17-k (discussed above), granted the cassation appeal of the defence counsel, stating that "...the court of appeal, by refusing to open the appeal proceedings, significantly violated the requirements of the criminal procedural law, as it deprived the participant of the court proceedings of the right to appeal the procedural decision".⁴²

Analysing the above decision of the panel of judges of the Supreme Court in terms of the identity of these procedural situations, the authors of this paper support the position of Supreme Court judge *Arkady Bushchenko*, who expressed in his dissenting opinion: "a

41 Case no 646/3986/19 proceedings no 51-3335кМ20 (Criminal Court of Cassation of the Supreme Court of Ukraine, 31 May 2021) <<https://reyestr.court.gov.ua/Review/97429838>> accessed 3 March 2024.

42 Case no 285/1673/17 (Criminal Court of Cassation of the Supreme Court of Ukraine, 13 September 2018) <<https://reyestr.court.gov.ua/Review/76822780>> accessed 3 March 2024.

judgment of the judiciary that grants the executive branch powers not provided for by law, thus levelling the restrictions established by law, and a judgment of the judiciary that confirms the validity of the executive branch's use of the powers granted to it by law, even if it is not obliged to apply to the court for such confirmation, are fundamentally different in terms of legal characteristics and legal significance. Applying to the court for permission to exercise a power that a party has the right to exercise without the permission of the judiciary cannot be equated with applying to the court for additional powers not provided for by law".⁴³

In this context, it is worth noting that the court practice takes into account this position. In particular, the panel of judges of the Second Judicial Chamber of the Cassation Criminal Court of the Supreme Court, in its decision of 21 December 2023 in case No. 757/10151/23-к concluded that the decision of the investigating judge to engage a forensic psychologist to conduct a forensic psychological examination using a computer polygraph is not subject to appeal.⁴⁴

The problem of involvement of an insurance company which is an insurer of civil liability of a vehicle owner as a civil defendant in criminal proceedings. In national court practice, there is no unity in approaches to resolving the issue of application of Articles 35, 37 of the Law of Ukraine "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles" (hereinafter - the Law of Ukraine "On Compulsory Insurance"),⁴⁵ as well as Part 1 of Article 128 of the CPC of Ukraine⁴⁶ in cases where the victim has not sought compensation from the Motor (Transport) Insurance Bureau of Ukraine (hereinafter: MTIBU). The MTIBU's obligations, although derived from the law, are identical in nature to those of the insurer.

The legal challenge arises when a victim, instead of following the procedure set out in Article 35 of the Law of Ukraine "On Compulsory Insurance", directly files a civil claim directly to the court in criminal proceedings. To address the above procedural anomaly and promote a unified law enforcement practice, the criminal proceedings on the cassation appeal of the representative of the civil defendant MTIBU against the verdict of the Frankivsk District Court of Lviv dated 28 February 2017⁴⁷ and the decision of the Court of

43 Dissenting Opinion of Judge AP Bushchenko in Case no 285/1673/17 (Criminal Court of Cassation of the Supreme Court of Ukraine, 13 September 2018) <<http://reyestr.court.gov.ua/Review/76822714>> accessed 3 March 2024.

44 Case no 757/10151/23-к (Criminal Court of Cassation of the Supreme Court of Ukraine, 21 December 2023) <<https://reestr.court.gov.ua/Review/115822461>> accessed 3 March 2024.

45 Law of Ukraine no 1961-IV of 1 July 2004 'On Compulsory Insurance of Civil Liability of Owners of Land Vehicles' <<https://zakon.rada.gov.ua/laws/show/1961-15#Text>> accessed 3 March 2024.

46 CPC of Ukraine no 4651-VI (n 5).

47 Case no 465/4621/16-к (Frankivsk District Court of Lviv, 28 February 2017) <<https://reyestr.court.gov.ua/Review/65064437>> accessed 3 March 2024.

Appeal of Lviv Region dated 27 November 2017⁴⁸ in case No. 465/4621/16-к were accepted for consideration by the Grand Chamber of the Supreme Court on 14 May 2019.⁴⁹

Based on the results of the consideration, the Grand Chamber of the Supreme Court formulated several legal positions. First, a civil claim may be filed within criminal proceedings against the MTIBU as a civil defendant, given its obligations arising from the provisions of the Law of Ukraine “On Compulsory Insurance of Civil Liability of Owners of Land Vehicles”. Second, to satisfy a civil claim of a victim against the MTIBU for recovery of damage caused as a result of a criminal offence under Article 286 of the Criminal Code of Ukraine,⁵⁰ the victim’s prior application to the MTIBU for payment of insurance indemnity in accordance with the procedure established by Article 35 of the Law of Ukraine “On MTPL” is not mandatory.⁵¹ However, not all judges agreed with the conclusion on the application of the rule of law of Part 1 of Article 128 of the CPC of Ukraine,⁵² in terms of the possibility of filing a civil claim by the victim in criminal proceedings under Article 286 of the Criminal Code of Ukraine⁵³ against the Motor (Transport) Insurance Bureau of Ukraine as a legal entity. Four judges of the Grand Chamber of the Supreme Court expressed a dissenting opinion, arguing that “in the course of criminal proceedings, the relevant person may not file a civil claim against the MTIBU as a legal entity, since the Bureau is not legally liable for damage caused by the actions of a suspect, accused or insane person who committed a socially dangerous act”.⁵⁴

Expressing their view of the above problem, the authors consider it necessary to point out the following. Indeed, the CPC of Ukraine does not contain a provision that directly addresses whether a claim can be brought against an insurance company for compensation for damage caused by a road traffic accident within criminal proceedings.

According to Part 1 of Article 128 of the CPC of Ukraine, “a person to whom property and/or moral damage has been caused by a criminal offence or other socially dangerous act has the right during criminal proceedings before the start of the trial to file a civil lawsuit against the suspect, the accused or against a natural or legal person who by law bears civil responsibility for damage caused by the actions of a suspect, accused or unconvicted person who committed a socially dangerous act”.⁵⁵

48 Case no 465/4621/16-к (Court of Appeal of the Lviv Region, 27 November 2017) <<https://reyestr.court.gov.ua/Review/70652458>> accessed 3 March 2024.

49 Case no 465/4621/16-к (Grand Chamber of the Supreme Court of Ukraine, 14 May 2019) <<https://reyestr.court.gov.ua/Review/81753336>> accessed 3 March 2024.

50 CPC of Ukraine no 4651-VI (n 5).

51 Case no 465/4621/16-к (Grand Chamber of the Supreme Court of Ukraine, 19 June 2019) <<https://reyestr.court.gov.ua/Review/82703512>> accessed 3 March 2024.

52 CPC of Ukraine no 4651-VI (n 5).

53 CCU no 2341-III (n 17).

54 Dissenting opinion of the judges of the Grand Chamber of the Supreme Court in Case no 465/4621/16-к (Grand Chamber of the Supreme Court of Ukraine, 19 June 2019) <<https://reyestr.court.gov.ua/Review/82915306>> accessed 3 March 2024.

55 CPC of Ukraine no 4651-VI (n 5).

Therefore, the starting point for obtaining the result of scientific understanding in this direction is the concept of a civil claim in criminal proceedings, which, based on the analysis of the legal content of Articles 127, 128, and 129 of the CPC of Ukraine,⁵⁶ is defined as a claim of a victim of a criminal offence, a natural person, a legal entity or its representative, and in the cases provided by law - the prosecutor for compensation for property and moral damage directly caused by a criminal offence to a suspect, accused person or to a natural or legal person who by law bears civil responsibility for damage caused by the actions of a suspect, accused person or an unconvicted person who committed a socially dangerous act action in the form determined by law, which is subject to consideration in the order of criminal proceedings.

Although the phrase “directly caused by a criminal offence” is not used in any of the mentioned articles of the CPC, their current version leaves no doubt about the procedural content of the concept of a civil claim, which constitutes the subject of a civil claim and the grounds (procedural prerequisites) of a civil claim. The subject of a civil lawsuit in criminal proceedings is the material and legal claims of the plaintiff or the prosecutor to the suspect, the accused or the civil defendant for compensation for the damage caused by them. The grounds for a civil lawsuit are legal facts from which the plaintiff or prosecutor derives his claims and with the presence of which the law connects the emergence of a legal relationship between the specified subjects: 1) commission of a criminal offence or a socially dangerous act; 2) the presence of property or moral damage caused by this act; 3) the presence of a direct causal connection between the act and the damage caused.

Part 1 of Article 128 of the CPC of Ukraine defines the circle of participants in criminal proceedings against whom a civil lawsuit may be brought: in addition to the suspect, the accused, these are natural or legal persons who, by law, bear civil responsibility for the damage caused by a criminal offence and are defined by the Code of Criminal Procedure as civil defendants (Part 1 of Article 62 of the CPC of Ukraine).⁵⁷ An analysis of the current legislation allows the authors to attribute to the latter the persons referred to, in particular, in Part 1 of Article 1172, Articles 1178-1184, Part 2 of Article 1186, and Article 1187 of the Civil Code of Ukraine.⁵⁸

Since indemnification is a liability and not a monetary obligation that arises from a contractual relationship, the insurer is not an entity that is legally liable civilly for damages caused by a criminal violation in a criminal proceeding. One of the main arguments for such a conclusion is that in the situations provided for in Part 1 of Article 128 of the CPC, there must be a causal connection between the committed criminal offence and its harmful consequences.⁵⁹ It is absent in relation to the losses suffered by

56 *ibid.*

57 *ibid.*

58 Code of Ukraine no 435-IV of 16 January 2003 ‘Civil Code of Ukraine’ <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> accessed 3 March 2024.

59 CPC of Ukraine no 4651-VI (n 5).

the insurer after paying the insurance compensation and the damage caused by the criminal offence committed by the insured.

The Law of Ukraine “On Compulsory Civil Liability Insurance of Owners of Land Vehicles”⁶⁰ confirms this position, where the preamble states that this law regulates relations in the field of compulsory civil liability *insurance* of owners of land vehicles and is aimed to *ensure* compensation for the damage caused. Therefore, the insurer carries out civil liability insurance activities and is not liable under the law. Such relations, in the event of a dispute between the parties to the contract, are governed by the norms of civil procedural legislation.

It should be noted that despite the legal position expressed in the decision of the Grand Chamber of the Supreme Court, the dispute regarding the correctness of the conclusions made does not subside, and the judges who expressed a separate opinion have many supporters.

The problem of appointing an expert examination by an investigator who did not conduct a pre-trial investigation (was not a member of the group of investigators in this criminal proceeding). One of the key legislative provisions determining the rule on the proper subject of investigative, covert investigative and other procedural actions as a criterion for the admissibility of evidence is the normative provision contained in Paragraph 2 of Article 3 of Article 87 of the CPC of Ukraine: “3. Evidence obtained: ... 2) after the commencement of criminal proceedings by the pre-trial investigation or prosecution authorities exercising their powers not provided for by this Code to ensure pre-trial investigation of criminal offences is also inadmissible”.⁶¹

For a long time, the Supreme Court has consistently defended the position that only those subjects of the prosecution who are part of the group of prosecutors or investigators in a specific criminal proceeding based on the relevant resolution are empowered to conduct a pre-trial investigation. In particular, the authors refer to the decisions of the Joint Chamber of the Criminal Court of Cassation of the Supreme Court from:

- (1) 7 August 2019, which states: “Since the investigator did not have the authority to decide on the appointment of a forensic medical examination, as he was not a member of the group of investigators entrusted with the pre-trial investigation, the expert’s opinion is inadmissible as evidence”;⁶²
- (2) 22 February 2021 in case No. 754/7061/15, which states: “Within the meaning of Articles 36, 37, 110 of the CPC, the decision to appoint (determine) a prosecutor who will exercise the powers of a prosecutor in a particular criminal proceeding,

60 Law of Ukraine no 1961-IV (n 45).

61 CPC of Ukraine no 4651-VI (n 5).

62 Case no 555/456/18 (Criminal Court of Cassation of the Supreme Court of Ukraine, 7 August 2019) <<https://reyestr.court.gov.ua/Review/83617115>> accessed 3 March 2024.

and, if necessary, a group of prosecutors who will exercise the powers of prosecutors in a particular criminal proceeding, must be made in the form of a resolution, which must be contained in the pre-trial investigation materials to confirm the fact of the existence of authority. Such a resolution must meet the requirements for a procedural decision in the form of a resolution stipulated by the CPC, including being signed by the official who adopted it. The absence of such a ruling in the pre-trial investigation materials or its non-signature by the head of the relevant prosecutor's office results in the inadmissibility of evidence collected during the pre-trial investigation as such that was collected under the supervision and procedural guidance of a prosecutor (prosecutors) who did not have the legal authority thereto.”⁶³

- (3) 24 May 2021, in which the conclusion was drawn: “The ruling on entrusting the pre-trial investigation to another pre-trial investigation body, its justification and motivation must be the subject of a court investigation in each criminal proceeding, which is carried out taking into account its specific circumstances. The results of such research form the basis for further evaluation of the evidence obtained as a result of the conducted pre-trial investigation from the point of view of admissibility. In the case of entrusting the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies to carry out a pre-trial investigation of a criminal offence to another pre-trial investigation body without establishing the ineffectiveness of the pre-trial investigation by the pre-trial investigation body specified in Article 216 of the CPC, the specified authorised persons will act outside the scope of their powers. In such a case, there will be non-compliance with the proper legal procedure for the application of Part 5 of Article 36 of the Criminal Code and violation of the requirements of Articles 214 and 216 of the Criminal Code. The consequence of non-compliance with the proper legal procedure as a constituent element of the principle of the rule of law is the recognition of evidence obtained during the pre-trial investigation as inadmissible on the basis of Article 86 and Part 2, Part 3 of Article 87 of the CPC as collected (obtained) by unauthorised persons (authorities) in specific criminal proceedings, in violation of the procedure established by law”;⁶⁴
- (4) 4 October 2021, in which the position was formulated: “According to the provisions of Articles 39 and 110, Part 1 of Article 214 of the CPC, the decision to appoint (determine) a group of investigators who will conduct a pre-trial investigation, the determination of a senior investigative team that will supervise the actions of other investigators must be made in a form that must meet the requirements for a procedural decision in the form of a resolution specified by the criminal procedural

63 Case no 754/7061/15 (Criminal Court of Cassation of the Supreme Court of Ukraine, 22 February 2021) <<https://reyestr.court.gov.ua/Review/95139651>> accessed 3 March 2024.

64 Case no 640/5023/19 (Criminal Court of Cassation of the Supreme Court of Ukraine, 24 May 2021) <<https://reyestr.court.gov.ua/Review/97286253>> accessed 3 March 2024.

law. The absence of such a procedural decision in the criminal proceedings results in the inadmissibility of evidence collected during the pre-trial investigation as collected by an unauthorised person".⁶⁵

It is evident that Ukrainian law enforcement practice has long had a steady tendency to literally interpret the provisions of the law and has not known any exceptions to the relevant provisions regarding the proper subject of procedural actions.

At the same time, on 31 August 2022, the Grand Chamber of the Supreme Court, in its decision, actually deviated from the above legal positions. However, and this should be emphasised, it did not mention this fact in its decision, which was in one of the dissenting opinions expressed in this criminal proceeding.⁶⁶

The legal position of the Grand Chamber of the Supreme Court regarding the application of the rule of law in case No. 756/10060/17 (in question) is as follows: "In case of appointment of an expert examination by an investigator who is not a member of the investigative team determined in the criminal proceedings, the court, when deciding on the admissibility of the expert's opinion as evidence, must, within the arguments of the parties, check whether the method of appointment of the examination leading to a violation of certain human rights and freedoms provided for by the Convention and/or the Constitution of Ukraine. If the evidence is found to be inadmissible, the court must substantiate its conclusions about a significant violation of the requirements of the criminal procedure law, indicating which and whose rights and freedoms were violated and how this was expressed. When assessing the evidence for admissibility in accordance with the criteria established by the criminal procedure law, the court proceeds from the circumstances of a particular case and must also give reasons for its decision".⁶⁷

At a first approximation, it may seem that the Supreme Court provided a proper justification that can be fully supported by scholars and law enforcement officers (mainly representatives of the prosecution), whose key approach is the desire to protect law enforcement practice from excessive formalism not related to the violation of the rights and legitimate interests of persons involved in criminal proceedings. However, the decision of the Supreme Court was extremely negatively perceived by the legal community, and the judges issued eight separate opinions on the position of the Supreme Court, which can be seen as a factor that may subsequently determine possible changes in the legal position of the Supreme Court.

65 Case no 724/86/20 (Criminal Court of Cassation of the Supreme Court of Ukraine, 4 October 2021) <<https://reyestr.court.gov.ua/Review/100214751>> accessed 3 March 2024.

66 Dissenting Opinion (partially divergent) of the judge of the Grand Chamber of the Supreme Court in Case no 756/10060/17 (Grand Chamber of the Supreme Court of Ukraine, 31 August 2022) <<https://reyestr.court.gov.ua/Review/106243431>> accessed 3 March 2024.

67 Case no 756/10060/17 (Grand Chamber of the Supreme Court of Ukraine, 31 August 2022) <<https://reyestr.court.gov.ua/Review/106141457>> accessed 3 March 2024.

Indeed, the possibility of departing from its previous conclusions does not contradict the principle of legal certainty since such a need (as an indicator of the effectiveness of judicial practice) may be due to functional interpretation based on changes in law enforcement and social relations. In its ruling of 4 September 2018 in case No. 823/2042/16, the Grand Chamber of the Supreme Court, which made such a derogation, provided the following arguments for its legal position: “The reasons for the departure may be defects in the previous decision or group of decisions (their inefficiency, unclearness, inconsistency, unreasonableness, imbalance, error); changes in the social context”.⁶⁸

However, in the practical case under consideration, there are no such reasons. This is confirmed by the dissenting opinions of the judges in this proceeding, in which they argued their disagreement both in terms of the law, domestic case law and the ECHR case law, and based on doctrinal approaches and general principles of criminal proceedings. In particular, it was noted: “A systematic analysis of the above provisions leads to the conclusion that only those procedural subjects, including investigators, who are members of the relevant group in a particular criminal proceeding on the basis of a relevant resolution, are empowered to conduct procedural actions during the pre-trial investigation. They are the only ones who have the legal authority to make specific decisions during the pre-trial investigation. If an investigator who is not defined in accordance with the requirements of the criminal procedure law as conducting a pre-trial investigation (being a member of the group of investigators) in a particular criminal proceeding performs actions provided for in Article 40 of the CPC of Ukraine, these actions should be qualified as those performed by an improper subject. At the same time, conducting a pre-trial investigation by unauthorised persons is a significant violation of human rights and fundamental freedoms, regardless of other circumstances of a particular case”.⁶⁹

In summary, the decision of the Grand Chamber of the Supreme Court has significantly changed the decade-long judicial practice, caused outrage among legal professionals, and requires careful further reflection.

4 DISSENTING OPINION: A GENERAL THEORETICAL APPROACH

Familiarisation with the judicial practice of dissenting opinions by judges reasonably raises several important general theoretical issues for the authors of the article. In particular, regarding the definition of the concept of dissenting opinion. It should be noted that the authors have not found its legal definition in any law of Ukraine. Perhaps this is understandable since even in a country with a continental legal system, where law

68 Case no 823/2042/16 (Grand Chamber of the Supreme Court of 4 September 2018) <<https://reyestr.court.gov.ua/Review/77969515>> accessed 3 March 2024.

69 Dissenting Opinion (convergent) of the judges of the Grand Chamber of the Supreme Court in Case no 756/10060/17 (Grand Chamber of the Supreme Court of Ukraine, 13 September 2022) <<https://reyestr.court.gov.ua/Review/106205018>> accessed 3 March 2024.

enforcement officers are accustomed to clear algorithms and regulations, procedural codes and other laws cannot be turned into dictionaries. However, this again underlines the conclusion that there needs to be proper legal regulation of the institution of dissenting opinion.

However, the definition of the term “dissenting opinion” is explained in the Procedure for Maintaining the Unified State Register of Court Decisions,⁷⁰ which states that a “dissenting opinion of a judge” is a written document formed by a judge, serving as a form of expressing the judge's own position in case of disagreement with the decision (conclusion) made (given) or a statement of circumstances that supplement the reasoning part of the decision (conclusion). The dissenting opinion reflects the legal position of the judge in a particular case considered by the court and is aimed at challenging, clarifying or substantiating the conclusions in the court decision.⁷¹

Referring to doctrinal sources also does not clarify the scientific understanding of this phenomenon. The scientific mainstream addresses the question of the legitimacy of the institution of dissent in general and attempts to argue various approaches. Scholars are divided into two sides, either defending the democratic nature and importance of the dissenting opinion phenomenon⁷² or denying its existence, emphasising its harmfulness to the authority of court decisions and judges, its negative impact on public trust in the court and its legitimacy, and its potential to disclose the secrecy of judges' deliberations.⁷³

70 Decision of the High Council of Justice no 1200/0/15-18 of 19 April 2018 ‘On the approval of the Procedure for Maintaining the Unified State Register of Court Decisions’ <<https://zakon.rada.gov.ua/rada/show/v1200910-18#Text>> accessed 3 March 2024.

71 This Provision is issued pursuant to the Laws of Ukraine "On the Judiciary and the Status of Judges" and "On Access to Court Decisions" by the High Council of Justice of Ukraine and is aimed at organising the functioning of the Unified State Register of Court Decisions as part of the state information system to ensure collection, recording, accumulation, storage, protection, search and review of information resources of the Register. Unlike the procedural codes, the Provisions provide, albeit incompletely, for the procedure for issuing a dissenting opinion. In particular, an electronic copy of the dissenting opinion of a judge is produced by the court in the automated court document management system on the day of the court decision or production of its full text in paper form, in case of collegial review, signed by qualified electronic signatures of the judge, and stored in a state that makes it impossible to further adjust it (clause 1).

72 For more on the arguments of the dissenters, see, inter alia: Catarina Santos Botelho, ‘Veni, vidi, vici: Quem tem medo dos votos de vencido?’ in Walter Claudius Rothenburg (ed), *Direitos fundamentais, dignidade, constituição: Estudos em homenagem a Ingo Wolfgang Sarlet* (Editora Thoth 2021) 655; Katalin Kelemen, ‘Dissenting Opinions in Constitutional Courts’ (2013) 14(8) *German Law Review* 1345; Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States: Study* (European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs 2012) para 1.2.3, 9.

73 For the arguments of those who oppose the existence of dissenting opinions, see, inter alia: Nancy Amoury Combs, ‘The Impact of Separate Opinions on International Criminal Law’ (2021) 62(1) *Virginia Journal of International Law* 1; Julia Laffranque, ‘Dissenting Opinion and Judicial Independence’ (2003) 8 *Juridica International* 162; Raffaelli (n 72) 9; David Vitale, ‘The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis’ (2014) 19(1) *Review of*

Considering the essence of the dissenting opinion, the question also arises of whether it constitutes as an act of justice and its relationship with the court decision it accompanies. In answering this question, it may be noted that, despite being written by a judge who was part of the panel of judges, a dissenting opinion is not an act of justice. In support of this point of view, it may be pointed out that a dissenting opinion is not delivered in the name of the state either in constitutional or any other type of proceedings, which, among other things, determines the perception of a court decision as an act of justice.

To further elaborate this point of view, a court decision is known to be an act of justice, a casual interpretation of the law, and it is subject to significant requirements, as, for example, in Articles 89 and 90 of the Law of Ukraine “On the Constitutional Court of Ukraine”,⁷⁴ Article 370 of the CPC of Ukraine,⁷⁵ Article 265 of the CPC.⁷⁶ The law does not set forth any requirements as to the content and procedural procedure for issuing or formalising dissenting opinions. Judges are trying to overcome this gap by developing their own approaches.

In this context, the authors recommend referring to the dissenting opinion of the Constitutional Court of Ukraine Judge Serhiy Holovaty, cited above,⁷⁷ and can, without exaggeration, be called unique for the constitutional judiciary of Ukraine. In particular, Judge Holovaty’s dissenting opinion is well-structured, providing the grounds for its presentation and his vision of interpreting the relevant articles of the Constitution of Ukraine. He includes an appendix elaborating on his understanding of the Rule of Law and its key element, legal certainty. He explains his vision of the fallacy of the approach of judges when forming their legal position, compares the Constitution of Ukraine in terms of the issues under constitutional submission with the norms of international law and the practice of the European Court of Human Rights, and references the Amicus Curia from the Anti-Corruption Initiative of the European of the Union (EUACI). Additionally, he discusses the international experience of introducing and improving criminal liability for crimes of “illegal enrichment” as a tool for overcoming corruption, foreign practices of constitutional courts, general theoretical issues, and the semantics of individual words and phrases and their adequate translation.

Constitutional Studies 83; James R Zink, James F SpriggsII and John T Scott, ‘Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions’ (2009) 71(3) Journal of Politics 909, doi:10.1017/S0022381609090793.

74 Law of Ukraine no 2136-VIII of 13 July 2017 ‘On the Constitutional Court of Ukraine’ <<https://zakon.rada.gov.ua/laws/show/2136-19#Text>> accessed 3 March 2024.

75 CPC of Kazakhstan no 231-V (n 7).

76 Code of Ukraine no 1618-IV of 18 March 2004 ‘Civil Procedure Code of Ukraine’ <<https://zakon.rada.gov.ua/laws/show/1618-15#Text>> accessed 3 March 2024.

77 See: Dissenting Opinion of Judge Serhiy Holovaty in the Case no 1-135/2018 (5846/17) on the constitutional petition of 59 people’s deputies of Ukraine on the compliance of Article 368-2 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality) (decision no 1-p/2019) (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291.

A dissenting opinion should not be considered part of a court decision. The author's approach can be explained by the fact that the court decision has legal significance and is subject to execution. In many jurisdictions, a dissenting opinion is not even announced in court when the judgment is delivered, and the dissenting opinion itself is only attached to the proceedings, although it is open for review. Thus, this gives grounds to conclude that a dissenting opinion results from the judge's discretion and internal conviction, reflects his/her legal position that developed during the trial and the adoption of the court decision, and often contains an alternative position with detailed arguments. However, it is an independent document, which is certainly a procedural document. Hence its name, "dissenting opinion", symbolises no monolithic unity in the court decision. On the contrary, there is a dissenting (separate) position, which, as a rule, does not coincide with the majority opinion.

Also, in this context, the authors would like to express their position that the dissenting opinions of judges in any jurisdiction should not be neglected. When announcing a court decision, it is necessary to indicate the existence of a dissenting opinion and to provide the parties with the opportunity to read it.

By concluding that a dissenting opinion is not part of a court decision, the question arises whether it is an act of interpretation. In this regard, it may be noted that given that in any case, a judge applying a rule of law interprets that rule, which is the first element in the law application process, since to apply it, it is first necessary to understand the meaning of that rule of law,⁷⁸ the legal position of a judge formulated in a dissenting opinion is also an act of interpretation, but the legal consequences of such interpretation are different. Before applying a rule of law, it is necessary to find its meaning and establish its content, i.e. to interpret it. Interpretation penetrates all stages of the application of legal norms, constantly accompanies this process, and is a means of feedback between the actual circumstances of the case and legal qualification, application of procedural and substantive rules and their interpretation. Therefore, a dissenting opinion reflects the judge's discretion regarding the casual professional interpretation of a particular rule of law or factual circumstances of a case. In addition, it is not known what position on the legal content of the rule will be taken by the higher court when reviewing a court decision. It may likely take the legal position expressed in the dissenting opinion.⁷⁹ The legislator also does not prohibit the judge from changing his approach in another decision, which he formulated in a dissenting opinion.

78 See: Aaron Barak, *Judicial Discretion* (Centre for Educational Literature 2022) 90-1; OV Kaplina, *Law Enforcement Interpretation of Criminal Procedure Law* (Pravo 2008) 17, 36, 59-60.

79 By the way, in this sense, a dissenting opinion is sometimes called a kind of constituent metalanguage, because a dissenting opinion today may turn into a majority position tomorrow. See: Nuno Garoupa and Catarina Santos Botelho, 'Judicial Dissent in Collegial Courts: Theory and Evidence' in WR Thompson (ed), *Oxford Research Encyclopedia of Politics* (OUP 2022) art 19, doi:10.1093/acrefore/9780190228637.013.1990.

With regard to constitutional interpretation, the Constitutional Court of Ukraine, like the constitutional court of any state, is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine. It decides on the compliance of the laws of Ukraine and, in cases provided for by the Constitution of Ukraine, other acts with the Constitution of Ukraine, and provides an official interpretation of the Constitution of Ukraine (Article 1 of the Law of Ukraine “On the Constitutional Court of Ukraine”⁸⁰). Decisions of the Constitutional Court have significant consequences for the state: it recognises acts (or their individual provisions) as constitutional or unconstitutional and provides an official interpretation of the Constitution of Ukraine. Its decisions are final and not subject to appeal.

In addition, judges of constitutional courts often make decisions on politically sensitive issues of the state,⁸¹ formulate legal positions on key issues of law enforcement,⁸² which a priori necessitates detailed arguments, creative understanding of the subject of constitutional proceedings,⁸³ justification of the content of the rule of law as understood by the judge. These decisions are often the focus of society’s attention. The decision of the Constitutional Court itself changes the legal regulation, transforms the understanding of the content of the interpreted provision, its compliance with the Constitution, and so forth.

The decision of a court of any jurisdiction, including the Constitutional Court, is subject to mandatory execution, as it is part of the right to a fair trial, enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6).⁸⁴ Failure to comply with a judgment of a court of any jurisdiction or the Constitutional Court of Ukraine shall result in the perpetrators being brought to justice in accordance with the law.

A dissenting opinion does not have such legal consequences. While it is an act of casual interpretation, a dissenting opinion cannot be a source of law. This is the key difference between a legal position contained in a court judgment and a dissenting opinion. In a court judgment, which usually consists of three parts (introductory, motivational and operative), the court resolves the issues that were the subject of the court proceedings. Moreover, the Ukrainian legislator strictly regulates the content of each court decision: ruling, verdict, and resolution. The legislator does not impose such a requirement on dissenting opinions.

Thus, the above leads to the approach that a separate opinion of a judge is an act of competent professional interpretation of a rule (or norms) of law but is not binding and is not part of a court decision, as it may be issued situationally.

80 Law of Ukraine no 2136-VIII (n 74).

81 See: Dmytro Vovk and Iurii Barabash, “‘Justices have a Political Sense’: The Constitutional Court of Ukraine’s Jurisprudence in Politically Sensitive Cases’ (2021) 2(18) *Ideology and Politics Journal* 312, doi:10.36169/2227-6068.2021.02.00014.

82 Tetiana Slinko and others, ‘The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine’ (2022) 5(1) *Access to Justice in Eastern Europe* 165. doi:10.33327/AJEE-18-5.1-n000099.

83 Horodovenko (n 1).

84 Council of Europe (n 21).

The authors consider it appropriate to refer to the axiological significance of the dissenting opinion and its positive legal and social value features. The existence of a dissenting opinion of a court indicates the democratic nature of justice and the internal and external independence of the court and judges. According to scholars, "in any legal state, the judiciary has a special place as a guarantor of justice and the fundamental values of democracy. The effective functioning of the judiciary is a necessary condition for implementing the rule of law doctrine in any democratic state. The judge, who represents the judiciary in society as a person who administers justice, will always be the focus of the public, experts, and all those involved in the creation of judicial reform in Ukraine. Through the prism of assessing the judge's behaviour and his/her statements, both in and out of court, a public image of a fair trial and trust in the judiciary is formed. That is why it is important that a judge's motives and reflections correspond to the existing values and norms of morality in society..."⁸⁵

Thus, a dissenting opinion, the right to express which is granted to a judge, clearly demonstrates the state's attitude to justice, is a way of finding the truth, ensuring the right to a fair trial, and sometimes is a means of overcoming outdated views that impede progressive advancement.

Considering the essence of a judge's dissenting opinion, questions of a procedural nature also arise. In particular, whether a judge should refuse to sign a court decision if he or she decides to write a dissenting opinion and whether he or she should announce when delivering a court decision that he or she disagrees with the panel and will write a dissenting opinion. In answering the first question, it can be noted that Ukrainian law does not provide for the right of a judge to refuse to sign a court decision. The decision is made by the panel of judges. The legal nature of a dissenting opinion is that if a judge does not agree with the reasoning or with the court decision in general, he or she issues a dissenting opinion. If a judge disagrees with the decision of the panel of judges, he or she should vote against it but sign the judgment. As to whether a judge must inform the panel that he or she will deliver a dissenting opinion, the law does not provide for such a requirement. Hypothetically, it can be imagined that the decision to present one's view of the argumentation or the opposite position may come to the judge later, and such notification of the panel of the intention, or rather the absence thereof, will be an obstacle to the dissenting opinion. Certainly, such notification of colleagues would be desirable but not mandatory.

Another crucial question is if a judge participates in proceedings with similar issues on which he or she has already issued a dissenting opinion. Should he or she write a separate opinion again, or should he or she somehow communicate that he or she already has a separate opinion on the same or similar issue? It seems that the judge in such a situation

85 See: Oksana Khotynska-Nor and Lidiia Moskvych, 'Limits of a Judge's Freedom of Expressing his/her own Opinion: The Ukrainian Context and ECHR Practice' (2021) 4(3) Access to Justice in Eastern Europe 171-2, doi:10.33327/AJEE-18-4-3-n000077.

should use his or her own discretion. Since the law does not directly prohibit or oblige a judge to express a dissenting opinion on any decision. However, if a judge has formed a strong legal position on a particular issue, then from the point of view of ethics and professional integrity, he or she should write a dissenting opinion with reference to the previous legal position expressed in the dissenting opinion. In addition, it is possible to formulate additional justification since there will always be new arguments that were not given in the previous position.

5 CONCLUSIONS

The authority of the court rests not on formal power or its external attributes but on the persuasiveness of judges' decisions. The quality of a court decision depends primarily on the persuasiveness of its reasoning, which cannot be neglected at the expense of speed of trial. Fair judgment is a key component of the rule of law, crucial for the functioning of the entire judicial system, and an indicator of the quality of justice in a country. Achieving a fair judgment is the most challenging task facing every judge at any level of the judicial system who resolves a case. Undoubtedly, the adoption of a court decision is preceded by the titanic work of a judge or a panel of judges to understand the actual circumstances of the case, to qualify, examine and evaluate evidence and the actual circumstances of the case, summarise national court practices, consider foreign experiences, and reference the European Court of Human Rights case law, which guides existing human rights standards. Thus, the main vector for improving judicial professionalism is constantly honing the art of writing judgments and enriching the judicial experience with positive knowledge of its motivation and internal structure.

Dissenting opinions by judges signify the democratic nature of justice. They demonstrate respect for the authority of the judiciary in the state and the judge as its bearer, provide an opportunity to exercise personal, professional and individual traits for the sake of the authority of justice and are a way of seeking justice and evolutionary interpretation of the law, which is especially felt at the turn of the century when the stuck rules of law slow down society's progress.

The specifics of the text of a dissenting opinion, which has a personalised character and significantly differs in its individual authorial style and the special purpose pursued by its author, allow us to speak of the genre independence of a dissenting opinion in judicial discourse.

Based on the conducted research, it can be concluded that a dissenting opinion is an official legal position of a judge formed during a collegial consideration of a case as a result of an internal conviction which does not coincide (partially does not coincide) in terms of reasoning or final conclusion with the position of the majority of judges and is formalised in a procedural document which is an act of competent (professional) and doctrinal judicial casual interpretation.

The features of a dissenting opinion include several key aspects: 1) is a phenomenon of a democratic society; 2) has the features of an institution of law, albeit with lapidary normative regulation; 3) is issued by a judge within his/her competence as a result of judicial discretion, internal conviction, formation of a legal position that does not coincide with the majority of judges in terms of motivation or final conclusion; 4) it is a vivid example of internal and external independence of courts and judges in states, a guarantee of justice, an indicator of freedom of judicial discretion; 5) it combines competent (professional) and doctrinal judicial casual interpretation; 6) it shapes public and legal opinion, promotes the development of doctrine, scientific concepts, and enriches science; 7) has a prognostic and prospective character, as it sometimes serves as a means of overcoming outdated views that impede progressive advancement, evolution of sustainable approaches, and is the basis for the formation of a new legal position, which in the future may be transformed into a majority position and become a sustainable practice; 8) promotes the search for truth (or the comprehensiveness and completeness of proceedings); 9) is distinguished by an individual author's style, which allows us to speak of its genre independence; 10) is derivative, optional, as it is not binding, unlike a court decision; 11) is not an act of justice, as it is not delivered in the name of the state; 12) is not a mandatory part of a court decision.

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AUTHORS INFORMATION

Oksana Kaplina*

Dr. Sc. (Law), Prof., Head of Department of Criminal Procedure, Yaroslav Mudryi National Law University, Kharkiv, Ukraine

o.v.kaplina@nlu.edu.ua

<http://orcid.org/0000-0002-3654-673X>

Corresponding author, responsible for methodology, data collection, writing, and supervising.

Anush Tumanyants

Ph.D. (Law), Associate Professor at the Department of Criminal Procedure, Yaroslav Mudryi National Law University, Kharkiv, Ukraine

anushjurist@gmail.com

<https://orcid.org/0000-0001-6403-8436>

Co-author, responsible for conceptualization and writing – review & editing.

Olena Verkhoglyad-Gerasymenko

Ph.D. (Law), Assistant Professor at the Department of Criminal Procedure, Yaroslav Mudryi National Law University, Kharkiv, Ukraine

o.v.verhoglyad-gerasymenko@nlu.edu.ua

<https://orcid.org/0000-0003-3461-0483>

Co-author, responsible for conceptualization, writing, and data collection.

Liudmyla Biletska

Ph.D. (Law), Higher Educational Institution «Interregional Academy of Personnel Management», judge of the economic appeal court retired, Dnipro, Ukraine

ludmila_8888@i.ua

<https://orcid.org/0000-0002-5081-610X>

Co-author, responsible for conceptualization, writing and formal analysis.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ОКРЕМА ДУМКА: СКЛАДНИЙ ШЛЯХ ПОШУКУ ІСТИНИ (НА ПРИКЛАДІ ТЛУМАЧЕННЯ КРИМІНАЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНОДАВСТВА УКРАЇНСЬКИМИ СУДДЯМИ)

Оксана Капліна*, Ануш Туманянц, Олена Верхогляд-Герасименко та Людмила Білецька

АНОТАЦІЯ

Стаття присвячена актуальному для сучасної правозастосовної практики та теорії права питанню щодо окремої думки судді, яка може бути висловлена у разі незгоди судді, який брав участь у колегіальному розгляді справи, з позицією більшості суддівської колегії. Автори проаналізували наявні підходи до інституту окремої думки в різних правових системах, фактори, що негативно впливають на існування окремої думки в системі правосуддя, навели приклади окремих думок українських суддів, які були висловлені в різних юрисдикціях, їх значення для правозастосовної практики та той суспільний резонанс, який вони викликали; було розглянуто процесуальні питання, які потенційно можуть виникнути під час здійснення судочинства та формування окремої думки суддів. Автори також роблять висновок про безумовну цінність інституту окремої думки для правосуддя та авторитету суду в державі, також наголошують на тому, що специфіка тексту окремої думки судді на тлі лапідарного нормативного регулювання нормами процесуального права може вказувати на жанрову самостійність змісту окремої думки в судовому дискурсі порівняно з судовим рішенням. У статті автори також пропонують визначення поняття окремої думки, під яким розуміють офіційну правову позицію судді, що формується під час колегіального розгляду справи за внутрішнім переконанням, яке не збігається (частково не збігається) із позицією більшості суддів у частині аргументації чи остаточного висновку. Також автори зазначають, що вона має бути оформлена процесуальним документом, який є актом компетентного (професійного) та доктринального суддівського казуального тлумачення. Крім того, автори навели синтезовані ознаки, які характеризують правову позицію судді як окрему думку, серед яких твердження про те, що вона є, безперечно, феноменом демократичного суспільства; має ознаки інституту права, хоч і з лапідарним нормативним регулюванням; ухвалюється суддею в межах його компетенції за суддівським розсудом і внутрішнім переконанням; має прогностично-перспективний характер, оскільки іноді є засобом подолання застарілих поглядів, які перешкоджають прогресивному розвитку права, еволюції сталих підходів, а також основою для формування нової правової позиції, яка в майбутньому може трансформуватися в позицію більшості і бути сталою практикою; крім того, вона є похідною, факультативною, оскільки є необов'язковою для виконання, на відміну від судового рішення, і не є актом правосуддя, адже не ухвалюється іменем держави і не є обов'язковою частиною судового рішення.

Ключові слова: правосуддя, судовий розгляд, окрема думка судді, правова позиція, суддівський розсуд, право на справедливий суд, судове рішення.