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ABSTRACT

Today, a comprehensive (integration) approach combining preventive and repressive measures is implemented in European countries. They are covered by the term "antidote". Why exactly this term, and because it is a general generic concept that covers activities aimed at minimizing contradictions and factors that generate or contribute to crime, at reducing certain types of crimes by preventing their commission at various stages of criminal behavior (crime prevention measures), as well as adequate response measures to already committed crimes (repressive approach).

However, in many respects, the views of domestic scientists at the theoretical level coincide with the positions of foreign scientists. Nevertheless, until now, the implementation of scientific developments and recommendations in the practice of the subjects of combating organized crime and the adoption of normative acts remains a problem in Ukraine. As for the analysis of crime, it is used as an effective preventive measure, which provides a number of methods and measures for understanding the depth of the essence of the complex relationship between the suspect, the criminal activity and the circumstances that contributed to it. This analysis of crime is used in practice to prevent and deter both all crime and its various types. The use of operational analysis during pretrial investigation and strategic analysis within the framework of the formation of law enforcement policy directions plays a very important role. Primarily for tactical analysis, it is extremely appropriate for crime analysts to be involved in a complex investigation from the outset or when the complexity of the process becomes apparent.

Keywords: *prevention, counteraction, organized crime, terminological and strategic concepts, comparative analysis, law enforcement officers of Ukraine, European countries, preventive strategy of analysis of criminal patterns.*

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OBSERVANCE OF THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE DURING THE APPLICATION OF THE CRIMINAL LEGAL PROHIBITION DEDICATED TO ILLICIT ENRICHMENT

Андрій Граб. ДОТРИМАННЯ ПРИНЦИПУ ПРЕЗУМПЦІЇ НЕВИНУВАТОСТІ ПІД ЧАС ЗАСТОСУВАННЯ КРИМІНАЛЬНО-ПРАВОВОЇ ЗАБОРОНИ, ПРИСВЯЧЕНОЇ НЕЗАКОННОМУ ЗБАГАЧЕННЮ. Однією з важливих гарантій дотримання прав підозрюваного та обвинуваченого у кримінальному процесі та обов'язковою складовою справедливого, повного та неупередженого судового розгляду є презумпція невинуватості. Будучи широко закріпленим як на міжнародному рівні так і в національному законодавстві України, вказаний принцип, за найменших підстав вважати його порушеним в тій чи іншій статті Кримінального кодексу України, закономірно є причиною визнання такої статті неконституційною, тобто такою, що не відповідає нормам Основного Закону України.

Показовим в цьому контексті є визнання Конституційним Судом України статті 368-2 Кримінального Кодексу України «Незаконне збагачення» неконституційною Рішенням від

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26.02.2019 № 1-р/2019, в тому числі, через порушення принципу презумпції невинуватості. Акцентовано увагу на тому, що вказане Рішення не позбавлене недоліків щодо аргументованості та обґрунтування наявних у ньому положень. Обґрунтовано, що стаття 368-5 «Незаконне збагачення» Кримінального кодексу України, що замінила собою минулу неконституційну редакцію, узгоджується з принципом презумпції невинуватості. Своєрідне обмеження вказаного принципу, шляхом пропорційного перекладання тягаря доказування на обвинувачену особу не порушує його суть та обсяг, і є цілком виправданим його обмеженням, що пов'язане з легітимною метою, суспільною необхідністю, високим рівнем корупції та є пропорційним з огляду на мету, яка досягається завдяки цьому.

Зроблено висновок про те, що незначне перекладення тягаря доказування на особу довести свою невинуватість, лише після того як сторона обвинувачення наведе достатні докази щодо наявності незаконно набутих активів у неї, під час застосування кримінальної відповідальності за незаконне збагачення, не є її обов'язком і у разі неподання відповідних доказів, аж ніяк не може вважатись підставою визнати її винною у вчиненні корупційного правопорушення.

Ключові слова: *незаконне збагачення, принцип презумпції невинуватості, кримінальна відповідальність, принцип пропорційності, тягар доведення.*

Relevance of the study. Criminal liability for illicit enrichment has undergone several changes and additions since its introduction into the criminal legislation of Ukraine in 2011. Among other problematic issues, the inconsistency between the principle of the presumption of innocence and the criminal law prohibition of illicit enrichment has almost always been the cause of such changes and related issues of debate. After all, by the Decision of the Constitutional Court of Ukraine dated February 26, 2019 No. 1-r/2019 (hereinafter – Decision dated February 26, 2019) Art. 368-2 of the Criminal Code of Ukraine (hereinafter – CC of Ukraine) was recognized as not in accordance with the Constitution of Ukraine (is unconstitutional). Among the key arguments in favor of adopting such a Decision, the Court included: 1) non-compliance with the requirement of legal certainty as a component of the constitutional principle of the rule of law; 2) inconsistency with the constitutional principle of presumption of innocence; 3) inconsistency with the constitutional prescription regarding the inadmissibility of bringing a person to justice for refusing to testify or explain about himself, family members or close relatives. Soon the CC of Ukraine was supplemented by Art. 368-5 "Illicit Enrichment" by Law of Ukraine No. 263-IX dated October 31, 2019. This addition was supposed to be the result of eliminating the crucial shortcomings of the previous edition of the norm of illicit enrichment. Despite this, in the scientific community, the updated article is also subject to unfounded criticism for violating constitutional principles, in particular, the principle of the presumption of innocence.

Recent publications review. In particular, such legal scholars as K. Zadoya, D. Mykhaylenko, S. Pogrebnyak, M. Rubashchenko, and others were engaged in research on the outlined topic. Despite the significant scientific achievements of scientists, the problematic aspects of the implementation of the principle of presumption of innocence during the application of criminal liability for illicit enrichment still do not lose their relevance.

The article's objective is to study the domestic criminal law ban on illicit enrichment in the context of clarifying its compliance with the principle of presumption of innocence.

Discussion. Adherence to the principle of presumption of innocence is an important basis for the successful construction of a state that follows European values and ensures the protection of fundamental rights and freedoms of participants and parties to criminal proceedings. The principle is enshrined in the modern legislation of almost all democratic countries of the world and acquires the characteristics of a complex legal phenomenon, which contains several key points, each of which requires a detailed analysis.

The international consolidation of this principle is provided for in clause 1 of Art. 11 of the General Declaration of the Rights of Man and Citizen, clause 2 of Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, clause 2 of Art. 14 of the International Covenant on Civil and Political Rights and other international documents. In the national legislation, it is provided for in Art. 62 of the Constitution of Ukraine, Art. 2 of the CC of Ukraine, Art. 17 of the Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine) and other acts of legislation. According to Art. 62 of the Basic Law of Ukraine, "A person is considered innocent of committing a crime and cannot be subjected to criminal punishment until his guilt is proven in a legal manner and established by a court verdict. No one is obliged to prove his innocence in committing a crime. The accusation cannot be based on evidence obtained illegally, as well as on assumptions. All doubts regarding the proven guilt of a person are interpreted in his favor".

The principle of presumption of innocence is traditionally defined as one of the basic

democratic principles of criminal justice, which has an international character, is independent and plays the role of a "protective mechanism" against illegal actions by the prosecution during a criminal trial, as well as against illegal conviction [1, p. 163]. Consolidation of the obligation to prove a person's guilt on the state is related to the fact that the prosecution in cases of public and private-public prosecution, due to its material, organizational and procedural (in particular, pre-trial investigation) capabilities, is significantly stronger in forming the evidence base compared to its opponent is the defense party. Thanks to this, the circumstances that it has to prove are objectively more accessible for it [2, p. 14]. At the same time, the use of this kind of opportunities and powers by the state in the person of the prosecutor, the head of the pre-trial investigation body, the investigator, implies the obligation to comprehensively, fully and impartially investigate and discover both those circumstances of the criminal proceedings that expose, and those that acquit the suspect, the accused, as well as the circumstances mitigating or aggravating his punishment (part 2, Article 9 of the CPC of Ukraine).

It is false to say that the accused's refusal to provide evidence is nothing more than confirmation of his guilt. The accused, thanks to the constitutional principle of presumption of innocence, as well as part 2 of Art. 17 of the CPC of Ukraine is not obliged to provide evidence of his innocence in the commission of a criminal offense at the request of the prosecution. Rather, it is his right, which he should use at his own discretion. Another issue is that a person who is innocent, has an appropriate evidentiary basis for this and is interested in closing the criminal proceedings against him as soon as possible – in most cases will submit such evidence to ensure a quick, full and impartial investigation and trial.

In order to identify all the problematic issues related to the criminal law prohibition of illicit enrichment and the principle of presumption of innocence, it is necessary to first analyze the previous version of the norm that provided for the specified act. The last time the composition of illicit enrichment in part 1 of Art. 368-2 of the CC of Ukraine, before its recognition as unconstitutional, was set forth in the following version by Law of Ukraine No. 198-VIII dated 12.02.2015: "Acquisition by a person authorized to perform the functions of the state or local self-government into ownership of assets in a significant amount, the legality of the grounds for the acquisition of which not supported by evidence, as well as her transfer of such assets to any other person".

It should be noted that the addition of the rule on illicit enrichment to the CC of Ukraine was the result of the implementation of the provisions of the United Nations Convention against corruption from 2003, in Art. 20 of which it is determined that "subject to compliance with its constitution and the fundamental principles of its legal system, each participating State shall consider the possibility of taking such legislative and other measures as may be necessary to recognize as a crime intentional illicit enrichment, that is, a significant increase in the assets of a public official, which exceeds her legal income and which she cannot rationally justify." During the development of the Convention, there were constant disputes regarding the conflict of its provisions with the presumption of innocence. One side emphasized that the burden of proof will be placed on the accused, the other – that the article on illicit enrichment does not lead to such a shift. In the end, the parties agreed that the inclusion of this article is essential for the effective prosecution of corruption crimes, and more than 45 countries that have criminalized illicit enrichment are proof of that. Despite this, many countries still have not done so, fearing that such a rule would conflict with their constitution in terms of the presumption of innocence.

Such countries as Spain, Italy, the Netherlands, Norway, Sweden, and Finland, although they ratified the United Nations Convention against corruption from 2003, implemented its provisions sensu stricto. Arguing this by the fact that in the case of implementation sensu lato there is a threat of violation of the principle of innocence and their legislation already has sufficient and effective mechanisms to ensure the prosecution of persons for illicit enrichment. In this regard, O. Dudorov notes that the contextual form that the criminal law rule on illicit enrichment should have in the manner recommended by the United Nations Convention against corruption (when a person, in order to avoid criminal liability, is entrusted with the duty to explain the origin of the proper her property, and this obligation is included in the composition of the crime), would contradict the constitutional prescriptions provided for in Art. Art. 62 and 63 of the Constitution of Ukraine [3, p. 426].

A kind of pioneer in the criminalization of illicit enrichment is Argentina, which did it very successfully back in 1964. Thus, analyzing recent years, according to Transparency International, Argentina ranked 107th in the Corruption Perceptions Index (CPI) in 2014, and 96th in 2021 [4]. It remains an open question whether such success is related to the fact that the provision on illicit enrichment in Art. 268/2 of the CC of Argentina directly provides for the limitation of the principle

of the presumption of innocence: "The person who, in response to a legal demand, did not provide justification for the origin of his substantial property enrichment or the enrichment that was used by him for the purpose of covering up a false person, carried out during his stay in the public office and in the period of up to two years after leaving the specified office" [5].

With each new edition of Art. 368-2 of the CC of Ukraine, the legislator tried as best as possible to protect the disposition of the article from a direct indication in it of the obligation of a person to rationally substantiate the origin of assets that are greater than the legal income that he declared. But in practice, whatever the wording of Art. 368-2 of the CC of Ukraine, the transfer of the burden of proof to the subject of the corruption offense has always taken place to one degree or another, gradually changing the degree of its explicit nature from edition to edition. The Constitutional Court of Ukraine in para. 3 p. 7 of the motivational part of the Decision dated February 26, 2019, came to the conclusion that Art. 368-2 of the CC of Ukraine contradicts part 1-3 of Art. 62 of the Constitution of Ukraine, i.e. the principle of presumption of innocence. If the Constitutional Court of Ukraine did not provide specific arguments for its position regarding the violation of Part 1, then with respect to part 2 in para. 5, paragraph 5 of the motivational part of the Decision, the Court states that "the legislative definition of illicit enrichment as a crime, provided that the prosecution does not fulfill its duty to collect evidence of the legality of the reasons for the acquisition of assets by a person in a significant amount, makes it possible to transfer this duty from the side of the prosecution (the state) on the side of the defense (the suspect or the accused)" [6].

In a separate opinion, the judge of the Constitutional Court of Ukraine S. Holovaty expressed his opposite view in this regard, "the wording of Art. 368-2 of the CC of Ukraine in no way gives grounds for assuming that the suspect/accused (the defense) bears the burden of proving his innocence or refuting the accusation's arguments" [7]. As K. Zadoya notes, the Constitutional Court of Ukraine interpreted Art. 368-2 of the CC of Ukraine, significantly deviating from the text of the criminal law and not motivating such a deviation in any way. The author claims that in part 2 of Art. 62 of the Constitution of Ukraine refers to the inadmissibility of imposing on a person the obligation to prove innocence in the commission of a crime, but not the inadmissibility of imposing on a person the existence of certain circumstances (facts) [8, p. 73]. Inconsistency of Art. 368-2 of the CC of Ukraine to part 3, Art. 62 of the Constitution of Ukraine, which is also referred to in the Decision dated February 26, 2019, was that the provisions of Art. 368-2 of the CC of Ukraine are formulated in such a way that doubts regarding the legality of the reasons for a person's acquisition of assets in a significant amount may not be interpreted in favor of this person and may be considered as confirmation of his illicit enrichment (paragraph 11, item 5) [6].

The Constitutional Court of Ukraine, without any objective reasons, interpreted the relevant provision in exactly this sense (formal, not substantive) without providing any convincing argument. Since the actual content of the criminal law norm on illicit enrichment consists in its application already after it is impossible to take preventive measures against the person committing illegal acts related to the acquisition of property. Such property is already acquired. As K. Zadoya rightly observes regarding the constitutionality of Art. 368-2 of the CC of Ukraine, "...such a legislative provision is a challenge to the constitutional provisions on fundamental human rights, but it cannot be considered unequivocally incompatible with part 3 of Art. 62 of the Constitution of Ukraine in view of the reasoning given in Decision No. 1-r/2019" [8, p. 73].

According to Judge V. Kolisnyk of the Constitutional Court of Ukraine, "... the third part of Article 62 of the Constitution of Ukraine contains an unambiguous imperative requirement, according to which the accusation cannot be based on assumptions. That is, the statement regarding the possibility of a "prosecution based on assumptions" in itself is an assumption only in view of the potential possibility of individual representatives of the prosecution showing insufficient professional level and theoretical training during the evaluation of evidence" [9].

In Part 6 point 7 of the decision of February 26, 2019, the Constitutional Court of Ukraine made a caveat, which cannot be allowed, in the following legislative formulation of the composition of such a crime as illicit enrichment: to prove one's innocence; grant the prosecution the right to require the person to confirm with evidence the legality of the grounds for his acquisition of assets; to make it possible to bring a person to criminal liability only on the basis of the lack of confirmation by evidence of the legality of the grounds for his acquisition of assets" [6]. It is necessary to analyze whether the addition of Article 368-5 of the CC of Ukraine "Illicit Enrichment" by the Law of Ukraine No. 263-IX dated 31.10.2019 really plays the role of an effective criminal-legal instrument for combating corruption in Ukraine, and whether this

happened not in opposition to, but in accordance with the above reservations.

The composition of a criminal offense under part 1 of Art. 368-5 of the CC of Ukraine is "Acquisition by a person authorized to perform the functions of the state or local self-government, assets, the value of which exceeds his legal income by more than six thousand five hundred non-taxable minimum incomes of citizens". According to p. 2 of the notes to Art. 368-5 of the CC of Ukraine "The acquisition of assets should be understood as their acquisition by a person authorized to perform the functions of the state or local self-government, as well as the acquisition of assets by another natural or legal entity, if it is proven that such acquisition was carried out on behalf of a person, authorized to perform the functions of the state or local self-government, or that the person authorized to perform the functions of the state or local self-government can directly or indirectly perform actions with respect to such assets that are identical in content to the exercise of the right to dispose of them" [10].

In the updated edition of the norm on illicit enrichment, the legislator applied the construction "if proven", again, without directly specifying by whom and in relation to what. It is obvious that the prosecution meant persons authorized to perform the functions of the state or local self-government. However, not everything is as clear as we would like, and the scientific community has once again divided opinions on the existence of a violation or limitation of the principle of the presumption of innocence.

To begin with, it is necessary to find out whether any limitation of the mentioned principle is allowed at all, because it rightfully belongs to the fundamental rights and freedoms of a person and is quite often assessed as an absolute right, that is, it does not provide for any deviation or limitation. Well, judicial practice demonstrates another position, from which a person in the process of realizing his fundamental rights and freedoms (often they are also the principles of law) can observe a situation when these same rights come into conflict with the rights or legitimate interests of other persons, whether even society or the state. Traditionally, the presumption of innocence is considered in a narrow and broad sense. The narrow meaning covers the well-known principle according to which, when a person is accused of committing a crime, the burden of proof is on the prosecution, and the proof must be beyond a reasonable doubt. And the broad meaning includes the fact that not only the treatment of a person whose guilt in the establishment of a criminal offense has not been established by a guilty verdict of the court should correspond to the treatment of an innocent person, but also the preliminary investigation should be conducted, as far as possible, as if the accused is innocent [11, p. 64].

The practice of the European Court of Human Rights (hereinafter – ECHR) is indicative, which contains several key decisions regarding the possibility of limiting the principle of the presumption of innocence. Back in 2006, the European Commission summarized the ECHR practice related to the presumption of innocence and singled out three cases in which the prosecution does not always have the full burden of proof. We are talking about: "strict liability offenses" (crimes for which strict liability is established) – the prosecution must submit evidence to prove that the accused committed the act ("actus reus"), but is not required to prove that his intention was aimed at such a result ("mens rea"); "offenses where the burden of proof is reversed" (crimes where the burden of proof under certain conditions is partially transferred to the accused) – the prosecution must prove that the accused acted in a certain way, and in this case the latter must prove that his actions were carried out absence of guilt; "when a confiscation order is made" (when confiscation of property is made) are cases in which the case involves the recovery of assets at the expense of the accused or a third party, where the burden of proof may be shifted due to the assumption that the relevant assets are the proceeds of crime , in fact, which the asset owner must refute. The above-described cases of shifting the burden of proof for their implementation should be provided for by national legislation [12].

D. Mykhaylenko, analyzing the above three cases, agrees with the thesis that when establishing responsibility for illicit enrichment, it is impossible to completely eliminate the transfer of the burden of proof to the accused, and a compromise must be sought. In the opinion of the author, the introduction of the limitation of the principle of presumption of innocence in relation to representatives of state and municipal authorities in order to combat corruption and ensure national security in this area cannot be considered as a step towards unfreedom, unfree criminal law in the security agreement [13, p. 572-573].

In particular, the ECHR in the case "Beldjoudi v. France" came to the conclusion that such goals as the protection of public order and the prevention of crimes, despite their limitation of human rights in accordance with the Convention on the Protection of Human Rights and Fundamental Freedoms, are fully compatible with the same Convention (§ 70). And if the state's

decision may violate the right enshrined in the Convention, it must be necessary in a democratic society, that is, it must be supported by an urgent public need and, at the same time, be proportional to the pursued goal (§ 74) [14].

One of the demonstrative examples of shifting the burden of proof when the individual circumstances of the situation and the general public interest require it (in this case, the inevitability of punishment for violating traffic rules) is the case "Joost Falk against the Netherlands", which was considered by the ECHR. According to the case materials, liability will be applied to the car owner if it is impossible to establish the person who drove the car and committed the offense and at the same time the accused does not provide strong evidence that another person was driving his car against his will [15].

The depth of limitation of the principle of presumption of innocence should not cause concern, provided that such transfer of the burden was accompanied by the presence of the accused in an opportunity to effectively defend himself, to provide evidence of his innocence or to refute the facts incriminated against him. After all, we are not talking about restricting the accused in his procedural rights during the criminal process or reducing the scope of the fundamental rights and freedoms granted to him and the person. There is an interference within the limits of the realization of this or that right, supported by exceptional social significance and guaranteed by a number of other constitutional guarantees, which in their totality do not deprive the accused of the legal opportunities granted to him.

Drawing parallels with the principle of presumption of innocence and the burden of proof transferred to the accused, such burden should not be excessive and individual in relation to the person. It is necessary to find a "fair balance" between the requirements of the general interests of society and the requirements for the protection of fundamental human rights, as noted by the ECHR in the case "Gogitidze and Others v. Georgia" (§ 97) [16].

Otherwise, such a balance will not be achieved and the measures applied to the accused person will not be appropriate to achieve a legitimate goal, namely to reduce the level of corruption in the country, bring the guilty parties to justice and identify illegally acquired property assets. The need to combat corruption is especially acute in countries with a high level of its spread and latency, to which Ukraine belongs. Therefore, the specified balance will be formed differently in each country. Depending on the general interest and the validity of the legitimate goal, on the one hand, which are quite widely differentiated from country to country (for example, the index of perception of corruption, society's values), and on the other hand, the relatively constant level of extraordinary importance of constitutional human rights, including those that related to the principle of presumption of innocence.

In the recent case "Xhoxhaj v. Albania", which was considered by the ECHR, clearly demonstrates a differential approach to understanding this very balance, which will be special in its own way in each country. The essence of the case was that the judge of the Constitutional Court of Albania tried to prove that the use of extraordinary measures during the judicial reform was a violation of human rights. Also, the case assessed the process of checking the assets of civil servants (judges and prosecutors) for unclear origins and the verification measures that can be applied to such persons by specially authorized bodies to fight corruption in Albania. The ECHR denied protection under Art. Art. 6, 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms to those who seek to abuse human rights in order to protect the status quo of corruption. Thus, the Court notes that any interference with the right to respect for private life will be considered "necessary in a democratic society" to achieve a legitimate aim if it corresponds to a "pressing public need" and, in particular, if it is proportionate to the legitimate aim and if the reasons given by the national authorities for his justification are "relevant and sufficient" (§ 402). Under the circumstances prevailing in Albania, the reform of the justice system, which provided for an extraordinary review of acting judges and prosecutors, corresponded to an "urgent public need" (§ 404) [17].

Thus, the ECHR changed the constitutional balance in favor of measures to ensure integrity, thereby consolidating its position even in earlier cases, according to which the restriction of fundamental human rights and freedoms can be allowed, provided that such depth of restriction is proportionate to all necessary conditions (urgent public need, proportionality legitimate purpose, fair balance, etc.).

On the basis of "preliminary conclusions" about assets of unclear origin, the burden of proof may be transferred to the official "in order to prove the opposite" (§ 347). If the official does not prove the contrary, this will be enough to prohibit such a person from holding a position in the public service for life. However, the transfer of the burden of proof is possible only for the

dismissal of the official, and not "within any criminal proceedings" (§ 243) [17].

Regarding Albania, the European Commission for Democracy through Law (Venice Commission) in 2016, in its conclusion regarding the draft constitutional amendments on the judiciary in the country, noted the following. Emergency measures to check judges and prosecutors are not only justified, but necessary for Albania to protect the country from the scourge of corruption, which, if not addressed, could completely destroy its judicial system (§ 52) [18]. A similar conclusion was reached regarding granting the council of international experts the right to promise the selection of judges in Ukraine. The Commission believes that the situation in Ukraine justifies and requires exceptional measures. Therefore, certain deviations from the general rules regarding courts and judges appear acceptable (§ 34) [19]. We are talking about an exceptional situation, when corruption is one of the main problems of society in the country, and the judicial system has been considered weak, politicized and corrupt for many years.

Speaking about the need to find a kind of compromise between the observance of the principle of the presumption of innocence and the effective implementation of the criminal law prohibition of illicit enrichment, the proportionality test is widely used in scientific circles when solving questions of the constitutionality of certain provisions of the CC of Ukraine, as well as to find out whether they were applied by the authorities restrictions on a person are proportionate to the legitimate purpose of such application. The main components considered in this test are the legitimacy of the goal, the necessity and appropriateness of the restrictive measures.

Conducting a study of the proportionality test in the context of a violation of the principle of the presumption of innocence under the application of criminal liability for illicit enrichment, D. Mykhaylenko in his research summarizes that according to the results of the test and taking into account the practice of the ECHR, the limitation of the principle of the presumption of innocence by shifting the burden of proof by the norm of illicit enrichment for the purpose of combating corruption does not contradict Article 2. 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms and is consistent with the provisions of Art. 62 of the Constitution of Ukraine and Art. 17 of the CPC of Ukraine, but is proportionate in view of the goal achieved by the action of this measure. To the conditions of such compliance, the author includes preliminary proof by the state of a significant increase in the assets of the subject of the corruption crime and the inconsistency of such an increase with his declared legal income when criminal liability for illicit enrichment is established [13, p. 591; 20, p. 383–384].

According to the scientist, putting the burden of proof on the defense side in a situation with illicit enrichment, as it is understood by the United Nations Convention against Corruption of 2003, is not only appropriate, but also fair. Especially given that the events related to the increase of property assets are completely or to a large extent under the control of the accused, or at least with his participation, and he has an objective opportunity to confirm the legality of the origin of such assets in a fairly simple way. That is, reasonable confirmation of the circumstances regarding the legality of the origin of assets for the accused persons is objectively and clearly more accessible to them than to the prosecution. Therefore, in a criminal trial, a much stronger party for proving the specified circumstance is the defense party, which retains the opportunity to effectively defend itself by refuting the presumed fact – the illegality of the origin of assets in case of their inconsistency with established sources of income [13, p. 586].

S. Pogrebnyak, analyzing the principle of proportionality as a general principle of law, point out that the unwavering provision of human rights and the establishment of the rule of law depends on the establishment of a fair balance, which consists in the consistent and conscientious application of the principle of proportionality, judicial review of acts for their appropriateness and necessity [21, p. 44].

At the same time, the application of the proportionality test to limit the principle of presumption of innocence in different countries will have different results, depending on the level of corruption of the country, the depth of the applied restriction measures and the urgent public need. It is obvious that in Ukraine, where corruption is a long-standing social need, the depth of restriction of this principle will be completely different than in countries such as Germany or Finland, which invariably belong to the leaders according to the Corruption Perception Index, which cannot be said about Ukraine, which in 2021 took 122-nd place out of 180 countries in the world [4].

Returning to the analyzed Decision of February 26, 2019, the Constitutional Court of Ukraine clearly demonstrated in it the impossibility of redistributing the burden of proof under any circumstances. Actual article 368-5 of the CC of Ukraine is constructed in such a way that

from the content of its disposition, it does not directly follow the obligation of a person to substantiate the discrepancy between his legal and actual income, the construction "if proven" is used. Nevertheless, during the evidence, the defense must put forward a substantiated version of the receipt of one or another type of assets, as opposed to the version of the prosecution. If the accused is not able to do this, the version of the prosecutor about the illegal acquisition of assets will appear even more convincing in order for the court to pass a verdict against the accused person as a result of a full and impartial trial. The described situation can be considered a deviation from the current rule regarding the burden of proof in criminal proceedings. Despite this, such limitation of the principle of presumption of innocence does not encroach on the very essence of the said right, is proportional to the purpose of applying such a limitation and corresponds to a fair balance between anti-corruption and the depth of limitation of the right not to prove one's innocence.

Also, it is quite difficult for the prosecution to fully establish the entire range of legal income of a public official, while it is much easier for the latter to confirm the legality of the origin of significant property assets that do not correspond to her legal income. Therefore, despite a significant advantage in organizational and procedural capabilities of the state, in cases of investigation of illicit enrichment, this advantage does not seem to be so significant. Taking into account the recent decisions of the ECHR, the high level of latency of corruption offenses, the important social importance of the fight against corruption in Ukraine and the observance of a fair balance in the process of proof, it is permissible to partially place the burden of proof of facts of criminal legal significance on the side of the defense. Not to mention that sometimes the accused finds himself in a particularly advantageous position for him, hiding behind the presumption of innocence and taking advantage of the significant difficulty in proving legal facts by the prosecution, and sometimes even the fact that the presumption of innocence is not rebuttable. Any interference with the specified principle must be accompanied by established limits, which must take into account the limits of procedural equality between the parties and in no case limit the right to effective defense of the accused and refutation of the existence of the facts incriminating him.

Thus, the form in which the provision on illicit enrichment is currently established in Art. 368-5 of the CC of Ukraine, does not violate the principle of presumption of innocence. A slight transfer of the burden of proof to the person to prove his innocence, only after the prosecution has provided sufficient evidence regarding the presence of illegally acquired assets in his possession, is not his duty, and in case of failure to provide the relevant evidence, is not a reason to find him guilty of committing a corruption offense. After all, first the investigator or prosecutor must prove the presence of unsubstantiated property assets of a person that do not correspond to his declared income. And only then, within the framework of procedural equality, the accused, using his opportunities, provides evidence of innocence. Therefore, the goal set for the probable restriction of the principle of presumption of innocence by applying criminal liability for illicit enrichment is legitimate, and the measures used in this case contribute to the solution of one of the most painful problems of Ukrainian society – the fight against corruption.

Conclusions. Summarizing the above, it can be concluded that the current criminal law ban on illicit enrichment is consistent with the principle of presumption of innocence. Shifting the burden of proof to the accused person does not violate or contradict its observance, but is a fully justified limitation of it, which is connected with public necessity, a high level of corruption and is proportionate in view of the goal achieved by it. We are talking about the protection of social relations, without which a democratic and legal state is impossible, the effective implementation of the mechanism of applying responsibility to persons who commit corruption offenses and effective countermeasures against their manifestations. Numerous decisions of the ECHR show that the mentioned approach is gradually becoming more and more established, especially in those countries where internal circumstances related to the fight against corruption require it.

Undoubtedly, the study of Article 368-5 of the CC "Illicit Enrichment" in terms of its alignment with the principle of presumption of innocence and other fundamental principles of law has a great perspective for further scientific research in this matter. Especially, taking into account the significant scope of these rights and their exceptional importance for observing the rights and freedoms of the suspect or the accused.

Conflict of Interest and other Ethics Statements
The author declares no conflict of interest.

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ABSTRACT

The presumption of innocence is one of the most important guarantees of respect for the rights of the suspect and the accused in the criminal process. The article examines the domestic criminal law ban on illicit enrichment, as well as the previous version of the norm, in the context of clarifying its compliance with the principle of the presumption of innocence. It is substantiated that Article 368-5 "Illicit Enrichment" of the Criminal Code of Ukraine, which replaced the previous unconstitutional edition, is consistent with the principle of presumption of innocence.

A peculiar limitation of the specified principle, by proportionally shifting the burden of proof to the accused person, does not violate its essence and scope, and is a fully justified limitation of it, which is connected with a legitimate goal, social necessity, a high level of corruption and is proportional in view of the goal, which is achieved through this.

Keywords: *illicit enrichment, principle of presumption of innocence, criminal liability, principle of proportionality, burden of proof.*

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FUNCTIONS OF THE STATE MIGRATION SERVICE IN COMBATING THE OFFENSES OF FOREIGNERS IN UKRAINE

Світлана Рижкова. ФУНКЦІЇ ДЕРЖАВНОЇ МІГРАЦІЙНОЇ СЛУЖБИ У БОРОТЬБІ З ПРАВОПОРУШЕННЯМИ ІНОЗЕМЦІВ В УКРАЇНІ. У статті проаналізовані функції Державної міграційної служби України як суб'єкта протидії вчиненню адміністративних правопорушень іноземцями. Наголошено, що функціям управління властивий дуалізм – поряд з їх статичним характером, їм властива динаміка, що в процесі здійснення публічного регулювання сферою міграції, завдання, мета діяльності та компетенція суб'єктів владних повноважень у цій сфері можуть трансформуватись, що обумовить певні зміни у переліку його функцій. Відповідна зміна функцій відображає їх динаміку, тобто зміна напрямків діяльності суб'єкта владних повноважень у сфері міграції викликає зміну основних функцій його управлінської діяльності. Підкреслено, що функції ДМС України, зокрема ті, що спрямовані на протидію адміністративним правопорушенням іноземців в Україні знаходяться у фазі трансформації, що обумовлюється як внутрішніми (короткий термін від створення ДМС України як виду державної служби) так і зовнішніми факторами (розвиток і оновлення доктрини адміністративного права), в тому числі діяльність ДМС як суб'єкта протидії вчиненню адміністративних правопорушень іноземцями в

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