

UDC 343.8:349.142](477)

DOI 10.32755/sjlaw.2025.02.117

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### **SOME ISSUES OF DETERMINING THE SUBJECT OF NON-ENFORCEMENT OF COURT DECISIONS AGAINST CONVICTS IN UKRAINE**

*The article deals with the problematic issues of determining the subject of non-enforcement of court decisions against convicts in Ukraine. It is proved that court decisions in respect of convicts in Ukraine are binding on the staff of penal bodies and institutions of the Ministry of Justice of Ukraine. It is noted that in case of non-enforcement of a court decision against convicts, the staff of the Department for Control over the Execution of Court Decisions of the penal institution of the State Criminal and Executive Service of Ukraine may be held criminally liable under Article 382 of the Criminal Code of Ukraine.*

**Key words:** *subject, failure to comply with court decisions, convict, places of detention, State Criminal and Executive Service, personnel, control, penal institution, official, criminal liability.*

**Target setting.** Court decisions in relation to convicted persons in Ukraine are binding on the staff of the bodies and penitentiary institutions of the Ministry of Justice of Ukraine. It is the provision of the criminal law, along with other measures, that provides for the mandatory execution of court decisions by the staff of the bodies and penitentiary institutions of the Ministry of Justice of Ukraine, otherwise criminal liability may arise.

It is important to note that this guarantee for persons serving their sentences in the penitentiary facilities of the State Criminal and Executive Service of Ukraine (hereinafter referred to as the SCES of Ukraine) can be implemented through the provision of Article 382 of the Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine), which provides for liability for failure to comply with a court sentence, decision, ruling or resolution.

Of course, one of the key issues in bringing to criminal liability for failure to execute a verdict, decision, ruling or court order is the definition

of the subject, which is one of the elements of a criminal offence and characterizes certain properties of the person who committed it.

In criminal law and penal science, Ukrainian scholars have noted that the subject of non-compliance with a court decision in relation to convicts in Ukraine is a natural person of sound mind who has committed a criminal offence at the age of criminal liability under the CC of Ukraine. Such a subject is the staff of the Department for Control over the Execution of Court Decisions of the Penitentiary Institution of the SCES of Ukraine.

Thus, given the specifics and tasks performed by the staff of the Department for Control over the Execution of Court Decisions of the Penitentiary Institution of the SCES of Ukraine, the subject of a criminal offence for failure to comply with a sentence, decision, ruling or resolution of a court is defined only as having those characteristics that may reveal the danger of encroachment on socially important values protected by criminal law, which form the objective side of this criminal offence.

**Actual scientific researches and issues analysis.** The theoretical basis for the study of the subject of a criminal offence for failure to comply with a court sentence, decision, ruling or resolution is the scientific works of Ukrainian scholars representing various branches of scientific knowledge, namely:

K. A. Avtukhov, I. H. Bohatyrov, A. Yu. Hnatchuk, O. O. Kvasha, M. Y. Korzhanskyi, O. H. Kolb, O. M. Kostenko, M. I. Melnykov, A. A. Muzyka, V. O. Navrotskyi, V. O. Navrotskyi, A. V. Naumov, V. I. Osadchyi, V. Ya. Tatsii, V. I. Tiutiuhin, Ye. V. Fesenko, M. I. Khavroniuk, O. O. Shkuta and other scholars. The works of these scholars dealt separately with the issue of non-enforcement of a court decision. However, currently in Ukraine there is no monographic scientific study of criminal liability for failure to comply with a judgment of the European Court of Human Rights. All of the above demonstrates the relevance, timeliness and importance of conducting a study on this topic.

At the same time, certain important issues for determining the subject of enforcement of court decisions against convicts in Ukraine remain unaddressed by scholars and require additional research.

**Statement of the task.** The purpose of the article is to consider the subject of a criminal offence under Art. 382 of the CC of Ukraine, since convicts serving a criminal sentence remain insufficiently protected by the administration and the staff of the Department for Control over the Execution of Court Decisions of the Penitentiary Institution of the SCES of Ukraine in the course of execution of court decisions.

**The statement of basic materials.** The basis for considering the issue of proper enforcement of court decisions in the SCES of Ukraine is the legislative definition of a subject who commits a criminal offence under Article 382 of the CC of Ukraine “Failure to comply with a court decision” [1].

Given the legislative definition of non-compliance with a court decision, we single out only an individual as the first feature of the subject of this criminal offence.

The second feature of the subject of a criminal offence is sanity.

According to Part 1 of Article 19 of the CC of Ukraine, a person who, at the time of committing a crime, could be aware of his/her actions (inaction) and control them, is deemed sane. V. V. Len, clarifying the legislative definition, indicates that sanity is a mental state of a person capable of realizing and being aware of his/her actions or inaction, i.e. understanding their social significance and controlling them, as well as the ability to bear criminal responsibility and punishment for the crime committed [2, p. 50].

A slightly different definition of sanity is offered by V. M. Burdin – it is the ability of a person to realise the social danger and criminal unlawfulness of his/her act, to foresee the social danger and criminal unlawfulness of its consequences specified in the Special Part of the CC of Ukraine, and to manage this act [3, p. 703]. The criteria of sanity are legal and medical. The legal criterion is created by two features - intellectual (the ability to be aware of one's actions) and volitional (the ability to control them). The medical criterion is the absence of mental illnesses and diseases that can exclude the above abilities [4, p. 127].

A type of insanity is limited insanity, which, according to Article 20 of the CC of Ukraine, is the inability of a person to fully realize his/her actions (inaction) and (or) control them due to the presence of a mental

disorder during the commission of a crime. The criteria for partial insanity may also be called medical and legal. The medical criterion is a certain mental disorder, which is a prerequisite for such a mental state, which is characterized by the legal criterion as a significantly limited ability of a person to be aware of his/her actions (inaction) or to control them during the commission of a crime [5, p. 202].

The next feature of the subject of the offence is the age, which is used by the legislator to indicate the lower limit from which criminal liability may arise. Taking into account the provisions of Article 22 of the CC of Ukraine, a person who was 16 years old before committing the offence may be held criminally liable for failure to comply with court decisions regarding convicted persons in Ukraine.

We consider this age to be quite reasonable, since failure to comply with a court decision cannot be typical for persons aged fourteen to sixteen, as this requires a person to have an education, hold a relevant position related to the performance of duties related to the execution of court decisions, etc. In addition, taking into account the norms of the legislation regulating labour relations, the employee of the department has the status of an official.

These features of the subject of the crime are mandatory. However, the legislator also provides for additional special characteristics of the subjects of some criminal offences, and depending on their presence or absence, the subjects are divided into general and special. Therefore, such corpus delicti of criminal offences, which contain an indication that the subject of their commission is special, are of particular importance in qualification. Such a subject is a natural sane person who has committed a criminal offence at the age of criminal liability, which can only be committed by a certain person (part 2 of Article 18 of the CC of Ukraine).

According to M. S. Maharin and D. V. Baranenko, it is advisable to recognize a special subject of a criminal offence as a natural sane person guilty of a criminal offence, the composition of which necessarily involves the presence of certain features characterizing its perpetrator [6, p. 18].

From our point of view, a special subject of a criminal offence under Article 382 of the CC of Ukraine “Non-compliance with a court decision” is a person who, along with sanity and age of criminal responsibility, also has an additional legal feature provided

for in the criminal law, or one which directly follows from the organizational and administrative functions for the failure to perform which a person may be held liable under this law.

When examining the criminal law nature of non-enforcement of court decisions against convicts in the SCES of Ukraine, it should be noted that the subject of a criminal offence under Part 4 of Article 382 of the CC of Ukraine, given the direct instruction of the legislator, must have additional legal features that would allow such a person to be held criminally liable as a perpetrator of this act (official).

It should be noted that in connection with the adoption of the Law of Ukraine “On the Judiciary and the Status of Judges” of 7 July 2010, conceptual changes were made to the criminal offence of ‘failure to execute a court decision’ (Article 382 of the CC of Ukraine) with regard to the subject of the criminal offence. Thus, if before the amendments to Art. 382 of the CC of Ukraine only an official was a subject of a criminal offence, since 2010 the subjects of this criminal offence have been differentiated, in particular, under Part 1 of this Article, liability of a general subject is provided for.

At the same time, our analysis of the regulations governing the activities of the staff of penitentiary bodies and institutions in the execution of court decisions in the SCES of Ukraine suggests that only a special subject can be held liable for failure to execute such a decision, and in particular, a correctional colony employee.

At the same time, according to our research, it is virtually impossible to bring to criminal responsibility the perpetrators in case of failure to comply with a court decision in relation to convicts in Ukraine. This is due to the fact that part 4 of Article 382 of the CC of Ukraine stipulates that not only the staff, but also the administration of the correctional colony of the SCES of Ukraine must comply with such decisions.

This is confirmed by the fact that no one has been convicted of non-compliance with court decisions regarding convicts in Ukraine, although official inspections have taken place. At the same time, as our research has shown, the failure to enforce court decisions against convicts in Ukraine is not systematic and does not violate the rights and interests of persons serving criminal sentences in places of detention.

Given the fact that a certain group of officials of the bodies and penitentiary institutions of the SCES of Ukraine are involved in the process of enforcement of court decisions against convicted persons in Ukraine, it should be noted that the concept of an official (officer) had a slightly different meaning at different stages of development of national criminal law.

According to part 3 of Article 18 of the CC of Ukraine, an official is a person who permanently, temporarily or by special authority performs the functions of representatives of government or local self-government, as well as permanently or temporarily holds positions in government authorities, local self-government bodies, enterprises, institutions or organizations related to the performance of organizational and administrative or administrative and economic functions, or performs such functions by special authority granted to the person by an authorized body of government, a body of

In general, a similar formula for an official is reflected in paragraph 1 of the note to Article 364 of the CC of Ukraine. In addition, part 4 of Article 18 of the CC of Ukraine defines several other categories of positions in the relevant bodies, the work in which for the purposes of the CC of Ukraine is associated with the status of an official.

Ukrainian scholar R. L. Maksymovych classifies officials according to the following criteria: importance of the powers performed, content of powers, duration of powers, remuneration of relevant activities, method of obtaining relevant powers, citizenship, form of ownership of enterprises, institutions or organizations, etc.

In the context of our study, the persons performing organizational and administrative functions are of the greatest interest. This particular function is of particular importance in the execution of court decisions in relation to convicts, as it is carried out within the bodies and penitentiary institutions of the Ministry of Justice of Ukraine and applies only to persons subordinate to them. This is the so-called “internal” function of the staff of the department for control over the execution of court decisions of the penitentiary institution of the SCES of Ukraine.

The organizational and administrative functions of the staff of the department for control over the execution of court decisions of penal institutions include:

1) to receive from the representative of the convoy unit of the military unit of the National Guard of Ukraine (internal affairs body of the Ministry of Internal Affairs of Ukraine) personal files of convicts and a passing list of convicts) who are moved under custody (escorted), to check the presence on this list of the signature of the representative of the convoy unit of the military unit of the National Guard of Ukraine (internal affairs body of the Ministry of Internal Affairs of Ukraine) who carried out the movement under custody (escort) of convicts;

2) to compare the number of arrived convicts with the number indicated in the list of convicts being transferred under custody (convoyed) and to establish the belonging of each personal file to a particular convict by interviewing this convict and comparing the answers with the questionnaire and other information, which are indicated in the personal file of the convict, by a photograph, personal characteristics, and, if necessary, by a fingerprint card, the form of which is established by the Instruction on operational and reference and fingerprinting records) [8].

It is worth noting that, according to some scholars, it is time to abandon the use of the concept of “official” in the CC of Ukraine. In particular, as noted by L. P. Brych and V. O. Navrotskyi, the concept of “official” is one of the cross-cutting criminal law concepts. Therefore, its content equally applies to all the provisions of the CC of Ukraine, which provide for the commission of a crime by an official, and not only to those contained in Section XVII “Crimes in the field of official activity” [9, p. 59].

We share the view of D. V. Baranenko that the concept of an official, as defined in the CC of Ukraine, should be considered an independent criminal law concept, and not equated or recognized as an analogue of such concepts as an official and an official used in the Constitution of Ukraine, as well as in the legislation on civil service and other acts [10, p. 68].

So, if we talk about officials as subjects of non-enforcement of court decisions against convicts in Ukraine, they can be officials of the bodies and penitentiary institutions of the Ministry of Justice of

Ukraine who, in accordance with their official duties, are responsible for the enforcement of court decisions. This is primarily the staff of the Department for Control over the Execution of Court Decisions of the Penitentiary Institution of the SCES of Ukraine.

**Conclusions.** Given the above, we conclude that the subject of non-enforcement of court decisions against convicts in Ukraine may be sane persons who have reached the age of criminal responsibility and have organizational and administrative functions. Among the grounds for non-enforcement of court decisions by the staff of the department for control over the execution of court decisions of the penitentiary institution of the SCES of Ukraine may be: untimely release of a convict from places of detention; failure to submit documents for the convict's conditional release within the time limit specified by law; delay in the convict's appeal to the European Court of Human Rights on the grounds of non-enforcement of a court decision, etc.).

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## **ДЕЯКІ ПИТАННЯ ВИЗНАЧЕННЯ СУБ'ЄКТА НЕВИКОНАННЯ СУДОВИХ РІШЕНЬ ЩОДО ЗАСУДЖЕНИХ В УКРАЇНІ**

*У статті зазначено, що судові рішення щодо засуджених в Україні є обов'язковими для виконання персоналом органів і установ виконання покарань Міністерства юстиції України. Саме норма кримінального закону поряд з іншими заходами передбачає обов'язковість виконання персоналом органів і установ виконання покарань Міністерства юстиції України судових рішень, в іншому випадку може наступити кримінальна відповідальність. Така гарантія для осіб, які відбувають покарання в місцях несвободи Державної кримінально-виконавчої служби України (далі – ДКВС України), може бути реалізована через норму ст. 382 Кримінального кодексу України (далі – КК України), що передбачає відповідальність за невиконання вироку, рішення, ухвали, постанови суду.*

*Одним із ключових питань у притягненні до кримінальної відповідальності за невиконання вироку, рішення, ухвали, постанови суду є визначення суб'єкта, який є одним з елементів складу кримінального правопорушення та характеризує певні властивості особи, яка його вчинила.*

*У кримінально-правовій та кримінально-виконавчій науці вченими зазначено, що суб'єктом невиконання судового рішення щодо засуджених в Україні є фізична осудна особа, яка вчинила кримінальне правопорушення у віці, з якого відповідно до КК України може наставати кримінальна відповідальність. Таким суб'єктом є персонал відділу контролю за виконанням судових рішень установи виконання покарань ДКВС України.*

*Зважаючи на специфіку і завдання, які виконує персонал відділу контролю за виконанням судових рішень установи виконання покарань ДКВС України, для суб'єкта кримінального правопорушення за невиконання вироку, рішення, ухвали, постанови суду визначено виключно ті її ознаки, які можуть виявити в ній небезпеку зазігання на охоронювані кримінальним законом суспільно важливі цінності, які утворюють об'єктивну сторону цього кримінального правопорушення.*

*Надано висновки, що суб'єктом невиконання судових рішень щодо засуджених в Україні можуть бути осудні особи, які досягли віку кримінальної відповідальності та наділені організаційно-розпорядчими функціями, тобто персонал відділу контролю за виконанням судових рішень.*

**Ключові слова:** суб'єкт, невиконання судових рішень, засуджений, місця несвободи, Державна кримінально-виконавча служба, персонал, контроль, установа виконання покарань, службова особа, кримінальна відповідальність.