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## **CRIMINAL LAW CHARACTERISTIC OF AN IMPERSONAL VOTE (ARTICLE 364-2 OF THE CRIMINAL CODE OF UKRAINE)**

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**Purpose:** *criminal law characteristic of criminal offence, juridical content of which is provided in the disposition of ar. 364-2 of the Criminal Code of Ukraine. Historical legal, comparative legal, dialectical, logical semantic and other general scientific and special methods of cognition, with the help of which authors make criminal legal characteristic of criminal offence, judicial content of which is provided in the disposition of ar. 364-2 of the Criminal Code of Ukraine, form **the methodological base of an investigation.***

**Results:** *the judicial content of criminal offence, which is provided in the disposition of ar. 364-2 of the Criminal Code of Ukraine, was characterised, additional arguments on the separation of this criminal offence in a separate content were given. **Discussion:** authors suggest detailing the disposition of ar. 364-2 of the Criminal Code of Ukraine.*

**Keywords:** *impersonal vote; voting procedure; people's deputy; plenary session; parliament.*

**A problem statement and its urgency.** On January 16th 2020 the Criminal Code of Ukraine (then the CC of Ukraine) was supplemented with ar. 364-2 "Commitment of a vote by one people's deputy instead of another on the plenary session of the Verkhovna Rada of Ukraine" on the base of the law of Ukraine "About making changes in several legislative laws of Ukraine, concerning providing of a personal vote of People's Deputies of Ukraine on the plenary session of the Verkhovna Rada of Ukraine" from December 19th 2019 № 404-IX. Thereby the criminal liability for an impersonal vote on the plenary sessions of the parliament for People's Deputies is provided. The punishment for an impersonal vote is fine from three thousands to five thousands of the non-taxable minimum incomes. So this criminal offence appertains to the category of misdemeanors.

Issues, concerning determination of the aspects, which are necessary for classification of an imper-

sonal vote as criminal offence, arose with supplementation the CC of Ukraine with ar. 364-2. That's why the issue of criminal legal characteristic of an impersonal vote is actually and the necessity of researching features of the judicial content of this criminal offence arose.

**The analysis of research and publication.** Whereas the ar. 364-2 of the CC of Ukraine, which is analysed, is the novelty of legislation this issue have to be considered as little investigated. A few works of such researchers as M.S. Mishchuk, O.O. Danyliak, Y.V. Vereshchak, R. Stefanchuk, S.S. Filonenko are devoted to solving of the problems of criminal liability for an impersonal vote.

**Purpose.** The main purpose of the article is making criminal legal characteristic of the criminal offence, judicial content of which is provided in disposition of the ar. 364-2 of the CC of Ukraine.

**Presentation of the main material.** While analysing the issue of expediency of existence in the

CC of Ukraine the separate norm, which provides criminal liability for the impersonal vote of People's Deputies, it is expedient to take into consideration traditional for criminal law theory approach. M.S. Mishchuk writes about this approach that criminal legal policy implementation in fight against criminal offences on the legislative level is in the criminalisation of socially dangerous laws [1, p. 166].

Taking into account that an impersonal vote: firstly, violates norms of the Constitution and laws of Ukraine [2, p. 55; 3, p. 275]; secondly, it is quite spread issue in work of the parliament and according the statistic fixed amount is rising with every new convening [4, p. 7]; thirdly, although there was no liability for an impersonal vote, on our opinion, no other means, except criminal legal means, would have positive result, evidently; fourthly, in the country there is the State Bureau of Investigation, which is aimed to solve and investigate criminal offences, referred to the competence of an impersonal vote; finally, fifthly, according statistic data, society supports the idea of deprivation of a deputy mandate for an impersonal vote [2, p. 58] and a conviction of a court that has entered into force is one of the bases for early termination of powers of people's deputy (paragraph 2 part 2 ar. 81 of the Constitution of Ukraine) [5].

Consequently, on our opinion, there are enough arguments to think that there are all bases for an impersonal vote criminalisation.

Herewith, Main Scientific and Expert Department of the Verkhovna Rada of Ukraine made critical remarks, referring the project of the law about making changes to some legislative laws of Ukraine, referring providing of a personal vote by people's deputy of Ukraine № 2148 dated September 17<sup>th</sup> 2019 (which has become the law № 404-IX) pointing out that deed, judicial content of which is provided in disposition the ar. 364-2 of the CC of Ukraine does not have that level of social dangerous to be accepted as criminal offence, because it does not cause significant damage nature or legal person, society or country in its conclusion [6]. Against the background of this conclusion the fact that committing similar actions – voting by an elector, a referendum participant more than one time (which, on our opinion, could be thought as making

a voting by an elector, a referendum participant instead another elector, a referendum participant on election, referendum) is being considered as criminal offence against electoral rights for a long time (ar. 158-1 of the CC of Ukraine) contrasts significantly [2, p. 59].

We consider that this quite severe legislative step, referring criminalisation of an impersonal vote, has become another confirmation of our country course to counteract the criminal offences of people's deputy, who have to do their duties honestly. Of course, there is no court verdict under the ar. 364-2 of the CC of Ukraine because of objective factors (the article is new) now. However, in February 2020 the Office of the General Prosecutor opened criminal proceedings due to an impersonal voting of the people's deputy. It is reported that it is already being considered in court [7].

Ar. 364-2 is located in the chapter XVII "Criminal Offences in the Sphere of Official Activities and Professional Activities Related to the Provision of Public Services" of the Special Part of the CC of Ukraine. In order to understand why the legislator decided to locate the analyzing article in the chapter XVII of the CC of Ukraine exactly, it is expediently to analyze certain norms of the Ukrainian legislation. This way, legal status of people's deputies as officials, who occupy a particularly responsible position, is determined in the paragraph 1 part 3 of the note to ar. 368 of the CC of Ukraine. And in the note to the ar. 50 of the law of Ukraine "About preventions of the corruption" their status is determined as officials, who occupy responsible and especially responsible position [8].

Consequently, we consider that service activity, which People's Deputies are committing, have to be considered as generic object, taking into account the location of researched criminal offence in the chapter XVII of the CC of Ukraine and determination of the people's deputy's status as official.

Taking into account that ar. 364-2 of the CC of Ukraine is a novelty, in legal literature the content and features of the direct object of this criminal offence are not covered practically. This way, R. Stefanchuk understands it as established order of realization people's deputy's official activity, in particular, the order of a voting [8]. R. Stefanchuk's opinion is confirmed with the fact that the parlia-

ment is a public authority, whose activity is aimed at providing people's representation and expression of state will by passing laws by the voting of people's deputies of Ukraine (par. 3 p. 1 decision of the Constitutional Court of Ukraine dated by July 7<sup>th</sup> 1998 № 11-rp/98) [9].

This way, it is necessary to consider that the direct object of an impersonal vote is established order of the people's deputy's voting.

When it comes to expediency of separation of an impersonal vote in the separate article of the CC of Ukraine, different opinions are expressed referring this case. This way, M.S. Mishchuk considers an impersonal vote as abuse of power or official position (ar. 364 of the CC of Ukraine) [1, p. 168]. Y.V. Vereshchaka also considers that while voting impersonally people's deputies abuse their power [10, p. 330]. R. Stefanchuk has another opinion. He considers that an impersonal vote is a somewhat analog of official forgery (ar. 366 of the CC of Ukraine) [8].

On our opinion, it is hard to agree with above-indicated opinions of M.S. Mishchuk, Y.V. Vereshchaka and R. Stefanchuk, because committing a voting by one people's deputy instead of another is violation of the norms of three legislative laws simultaneously. This way, in p. 3 ar. 84 of the Constitution of Ukraine it is provided that a voting on the sessions of the Verkhovna Rada of Ukraine is committing by people's deputy personally [5]. Almost analogue formulation located in theses p. 4 part 1 ar. 24 of the law of Ukraine "About Status of a People's Deputy of Ukraine" and p. 3 ar. 47 of the Rules of Procedure of the Verkhovna Rada of Ukraine (then – the Rules of Procedure) [3, p. 274]. Before entry into position people deputies take an oath before the Verkhovna Rada of Ukraine, in which, in particular, they swear to obey the Constitution and laws of Ukraine mandatory (p. 1 ar. 79 of the Constitution of Ukraine) [5].

Consequently, there are basis to consider that an impersonal vote is illegal, so its separation into separate article of the CC of Ukraine is entirely expedient.

Under the disposition of the ar. 364-2 of the CC of Ukraine, an impersonal vote is an intentionally vote, committed by a people's deputy of Ukraine instead of another people's deputy of Ukraine on

the plenary session of the Verkhovna Rada of Ukraine [11].

This way, an objective part of the analyzed criminal offence is characterized with only one form, which is an active form of personal behaviour.

In order to understand what is said in the disposition of the ar. 364-2 of the CC of Ukraine it is necessary to refer to domestic legislation. This way, in p. 2 ar. 84 of the Constitution of Ukraine it is provided that decisions of the Verkhovna Rada of Ukraine are made only on its plenary sessions by voting [5].

A voting is the order of direct realization people's deputy's representative function by voting for projects of laws, decrees and other acts, which are passed by the parliament. This order includes range of sequential and interrelated actions and is established by the Constitution of Ukraine, the law of Ukraine "About the Status of the People's Deputy of Ukraine" and the Rules of Procedure. During a voting people's deputy is expressing his positive or negative attitude to decisions on behalf of the citizens of Ukraine who have elected him. On one plenary session of the parliament several votes on different issues could occur. People's deputy has right to vote on each of these votes. So, on our opinion, a vote instead another people's deputy, in meaning of the disposition of the ar. 364-2 of the CC of Ukraine, have to be considered as one exact type of a vote (e.g. for amendment to the project of a law).

Criminal offence is even one episode of an impersonal vote, because systematic is not provided as a feature of objective side in the disposition of ar. 364-2 of the CC of Ukraine. Herewith, there is no importance if the act, which has been voted, is accepted or rejected. So, if the parliament does not perform the duty to vote personally, that a voting makes objective side of an impersonal vote.

An impersonal vote is considered to be completed from the moment when a people's deputy has voted instead of another people's deputy on the plenary session of the parliament. Consequently, the content of this criminal offence is formal.

On our opinion, the absence of instructions of socially dangerous consequences in the disposition of the ar. 364-2 of the CC of Ukraine could be connected with a legislator's opinion that in this crimi-

nal offence socially dangerous consequences are minor or even they are absent. However, we do not agree with this opinion. In this issue we consider it is expedient to support the opinion of S.S. Filonenko, who writes that every direct violation of the law, especially the Constitution of Ukraine, constitutes significant damage both to the legal component of the state and to society at all [3, p. 275]. We also support the opinion of O.O. Danyliak, who writes that the violations, made during a vote in the parliament, make repeal of many legislative acts impossible and cause high financial losses of the state [2, p. 55]. The decision of the European Court of Human Rights in case Oleksandr Volkov v. Ukraine from January 9<sup>th</sup> 2013 (application № 21722/11) could be considered as confirmation of this thesis. After examining the case file, the Court found that the decision to dismiss the applicant had been taken in the absence of a majority of the deputies. The deputies, who were present, made several votes, which belong to their absent colleagues, intentionally and illegally [12]. Violation of the voting procedure established in 2010 in 2018 cost taxpayers UAH 1.43 million in compensation established by the European Court of Human Rights [13].

Consequently, although the disposition of the ar. 364-2 of the CC of Ukraine does not contain the instruction to socially dangerous consequents, it is possible to say that socially dangerous consequents of this criminal offence really exist, however, they are beside the juridical content of the criminal offence technically.

The objective side of an impersonal vote characterise time and place of committed criminal offence, which is examined [3, p. 275].

In the disposition of the ar. 364-2 of the CC of Ukraine it is established that an impersonal vote is criminally punished only in the case when it is committed on the plenary session of the Verchovna Rada of Ukraine. In accordance, the disposition does not include other types of a vote on the sessions of the parliament, to which people's deputy is elected (in committee, conciliatory councils, commissions and so on), because they are certain forms of parliament's work. So, it is impossible to bring people's chosen to the criminal liability under the ar. 364-2 of the CC of Ukraine for an impersonal

vote, for instance, in a parliament committee, to which composition he is elected.

Taking into account the statistic of the violations of the requirements to a personal vote on the plenary sessions of the Verkhovna Rada of Ukraine [4, p. 7], we consider that it is necessary to complete the disposition of the ar. 364-2 of the CC of Ukraine with provisions that it is criminally punished to commit a vote by the people's deputy both on the plenary session of the Verkhovna Rada of Ukraine and on the sessions of its authorities, to which composition a people's deputy was elected.

When it comes to the place of committing criminal offence, judicial content of which is provided in the disposition of the ar. 364-2 of the CC of Ukraine, the analysis of the Rules of Procedure gave us the opportunity to suggest a classification of the places of holding the plenary sessions of the Verkhovna Rada of Ukraine: 1) simple – takes place in the House of Parliament at the address: Kyiv, st. Hrushevskoho, bldg. 5; 2) special – a whatever place (except for the House of Parliament), established with the decision, made by the majority of people's deputies from the parliament constitutional content; 3) specific – the place of holding, which is determined by the Chairman (First Deputy or the Deputy of Chairman) of the Verkhovna Rada of Ukraine in case of imposition of martial law or state of emergency in Ukraine or in certain territories.

Consequently, an impersonal vote could be committed by a people's deputy during session of the Verkhovna Rada, on the plenary session (in the House of Parliament or another place, where people's deputies have gathered to hold plenary session in the order, established by the Rules of Procedure).

Although in the disposition of the ar. 364-2 of the CC of Ukraine there is no direct mention of the method of committing this criminal offence, we consider that a method is a feature of the objective side of an impersonal vote.

In the draft law № 2148 it was provided that the disposition of the ar. 364-2 of the CC of Ukraine would contain phrase "any method", so it would be certain instruction on the method of committing criminal offence. However, during completing mentioned project this phrase was excluded with one of the amendments. As it can be seen from the Comparative table to the second reading of the draft

law № 2148, the author of this amendment has substantiated his suggestion with the fact that the instruction on the illegal behaviour of a people's deputy in the form of a vote instead of another people's deputy on the plenary session of the Verkhovna Rada of Ukraine (without specification – “any method of a vote”) means that the violation of the procedure of open or a secret vote, established with the ar. 37 of the Rules of Procedure is considered as criminally punished [14].

Consequently, it is necessary to refer to the Rules of Procedure in order to establish the methods of the vote of people's deputies on the plenary sessions of the Verkhovna Rada of Ukraine.

This way, under the part 1 ar. 37 of the Rules of Procedure the decisions of the Verkhovna Rada are made with open or a secret vote in the order, which is established with this Rules of Procedure (ar. ar. 47-50) [15]. The analysis of the Rules of Procedure shows that an open vote could be carried out in two ways: 1) namely with the help of electric system with fixation of the vote results (main method); 2) with the help of rising hands (it is carried out when there is no technical ability to vote with the help of electrical system). A secret vote is carried out in way of submission of a ballot paper (it is carried out only in rare cases, for example the voting for a draft resolution on the impeachment of the President of Ukraine).

This way, we could make an assumption that people's deputy could commit an impersonal vote in one of such ways: 1) “button pressing” (with use of an electric system vote). It is main and one of the most spread way of committing an impersonal vote; 2) rising hand for several times or rising to hands simultaneously on one vote (with the vote without using an electronic system). In 2014 the most shameful laws in the Ukrainian history, which were called “dictatorial” were passed exactly due to such type of a vote; 3) when people's deputy has voted several times during one vote (two and more) with the help of a ballot paper for a secret vote, it is considered by us as one of the possible variants of committing an impersonal vote, because in the parliament a secret vote is practically non-committed currently and no cases have been reported so far.

The means of committing the criminal offence, provided in the disposition of the ar. 364-2 of the

CC of Ukraine, depend on the way of its committing.

A card for a namely vote is the card, specially made for each people's deputy, with his personal data on it, without which it is impossible to make a vote with using of the electronic system.

A ballot paper for a secret vote is the blank, which is specially made with the form, established by the parliament. The aim of carrying out a vote and other details is indicated in this blank. A people's deputy have to put one mark in the place allocated for this purpose in order to make his vote in the ballot paper for a secret vote, but the decision can be made by the list therefore there can be more marks.

Consequently, the means of committing an impersonal vote by the people's deputy are the card for a namely vote and a ballot paper.

The disposition of the ar. 364-2 of the CC of Ukraine contains the direct instruction of the intentional form of blame. S.S. Filonenko emphasize that the subjective part of an impersonal vote is “only direct intention, because a person commits actions, which is prohibited by the law, intentionally” [3, p. 275]. Unfortunately, the representatives of the deputy corps do not consider an impersonal vote in the parliament as illegal. For example, ex-deputy T. Chornovil said directly that he had a full right to violate the law, voting instead of his colleague in the Verkhovna Rada [4, p. 5].

The aim of an impersonal vote could be different, its determination does not influence on the qualification of the committed criminal offence.

As it is seen from the Comparative table of the second reading of the draft law № 2148, in the disposition of the ar. 364-2 of the CC of Ukraine it was proposed to predict that an impersonal vote is committed “with the aim to influence on the results of the vote” or “with the aim to vote on the issues, considered on a plenary session” [14]. Such suggestions were rejected.

On our opinion, an aim is characteristic of the people's deputies, who commit an impersonal vote for “important” laws or appointments. The mentioned happens when the people's deputy's votes are not enough (or could be not enough) for accepting a decision for different reasons (e.g. a law is not supported by the society, has openly political char-

acter or people's deputies are lobbying personal interests and so on).

We can determine that only the President of Ukraine is the subject of this criminal offence under the legislative instruction, located in the disposition of the ar. 364-2 of the CC of Ukraine.

**Conclusions.** Taking into account all the above, we made the conclusions that the criminalization of an impersonal vote could become an influential mean of providing the obey of the Constitution and laws of Ukraine by people's deputies during making decisions by the Verkhovna Rada of Ukraine on its plenary sessions. However, on our opinion, it could be said that the legislative changes really work only after the formation of the court practice, because it is early to tell this now.

Such definition of the concept of an impersonal vote is suggested by us: "the vote, that is committed by the people's deputy during making a decision referring the drafts of laws, resolutions or other acts on the plenary session of the Verkhovna Rada of Ukraine with violation of the requirements of the Constitution and the laws of Ukraine and which is that one people's deputy casts a vote instead another people's deputy, referring a decision, for which the vote is carried out".

The research, made by us, gives an opportunity to consider that the term "button pressing", which is used quite often unofficially to appoint an impersonal vote, does not quite match the composition of the researched criminal offence, because it was determined that it could be committed not only with the so-called "button pressing", but also with vote with the help of ballot paper and rising hand.

It would be expediently to detail the disposition of the ar. 364-2 of the CC of Ukraine with the provisions that it is criminally punished to commit a vote by the people's deputy both on the plenary session of the Verkhovna Rada of Ukraine and on the sessions of its authorities, to which composition a people's deputy was elected.

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**КРИМІНАЛЬНО-ПРАВОВА ХАРАКТЕРИСТИКА НЕОСОБИСТОГО ГОЛОСУВАННЯ (СТАТТЯ 364-2 КРИМІНАЛЬНОГО КОДЕКСУ УКРАЇНИ)**

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**Мета:** кримінально-правова характеристика кримінального правопорушення, юридичний склад якого передбачений в диспозиції ст. 364-2 Кримінального кодексу України. **Методологічну основу дослідження** складають історико-правовий, порівняльно-правовий, діалектичний, логіко-семантичний та інші загальнонаукові та спеціальні методи пізнання, за допомогою яких автори надають кримінально-правову характеристику кримінального правопорушення, юридичний склад якого передбачений в диспозиції ст. 364-2 Кримінального кодексу України. **Результати:** охарактеризований юридичний склад кримінального правопорушення, передбаченого в диспозиції ст. 364-2 Кримінального кодексу України, наведені додаткові аргументи щодо виокремлення цього кримінального правопорушення в окремий склад. **Обговорення:** автори пропонують деталізувати диспозицію ст. 364-2 Кримінального кодексу України. Автори наголошують, що кримінально караним має бути здійснення народним депутатом голосування замість іншого народного депутата як на пленарному засіданні Верховної Ради України, так і на засіданнях її органів, до складу яких обрано народного депутата. На думку авторів, це пояснюється тим, що за статистикою зафіксовані факти неособистого голосування народних депутатів на пленарних засіданнях Верховної Ради України з кожним новим скликанням парламенту зростають. При цьому, пленарні засідання, це не єдина форма роботи парламенту України. Крім пленарних засідань народні депутати також працюють у комітетах, підкомітетах, погоджувальних радах, комісіях та інших органах, які є окремими формами роботи Верховної Ради України. Диспозиція ст. 364-2 КК України визначає, що кримінально караним є здійснення народним депутатом на пленарному засіданні Верховної Ради України голосування замість іншого народного депутата, тобто диспозиція не охоплює голосувань народних депутатів на засіданнях органів Верховної Ради України, до яких обрано народного депутата. Отже, якщо народний депутат здійснить голосування замість іншого народного депутата на одному з засідань органу парламенту, то притягти його до кримінальної відповідальності за чинною ст. 364-2 КК України неможливо.

**Ключові слова:** неособисте голосування; порядок голосування; народний депутат; пленарне засідання; парламент.