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Abuse of the right to prosecution in criminal proceedings: The experience of Ukraine and the United States

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Abstract. Unfair use of the prosecutor's discretionary powers leads to violations of the rights, freedoms, and legitimate interests of a person. Examining the main ways of abusing the right to prosecution will help prevent negative manifestations in criminal proceedings that hinder the performance of its tasks. The purpose of the study is to identify specific examples of unfair behaviour by prosecutors in Ukraine and the United States during criminal proceedings. The paper uses a set of methods of scientific knowledge: abstraction, analysis, synthesis, comparative legal, formal legal, modelling methods. Some aspects of the implementation of criminal prosecution as the main procedural function of the prosecutor are examined. The main structural elements of the prosecutor's activity in the implementation of criminal prosecution and methods of abuse of discretionary powers in the implementation of this function are analysed. Examples of abuse of the right to prosecution are given both in Ukraine and in the United States. Separate criminal cases were considered, in which higher courts concluded that the prosecutor was abusing their right to prosecution (criminal prosecution). The legislation and legal positions of the highest court of the United States were used to compare and consider best practices. It is noted that although the American and Ukrainian models of criminal justice differ in many (primarily, formal) ways, they are based on numerous joint democratic and humanistic principles that serve to achieve justice in the field of countering crime. The need to take legitimate response measures when the prosecutor exercises their discretionary powers is justified. It is concluded that abuse of the right to prosecution exists by public prosecutors in criminal proceedings both in Ukraine and in the United States. It is demonstrated that the methods of such abuses are virtually the same and lead to violations of the rights, freedoms, and legitimate interests of participants in criminal proceedings, harm justice, and lead to a loss of public confidence since the discretionary powers granted to the prosecutor are often directed to convict and punish a person instead of searching for the truth, establishing justice. The conducted study will contribute to the development of measures to prevent the prosecutors from abusing the rights granted to them

Keywords: prosecutor; discretionary powers; criminal prosecution; the "spirit" of the law; the task of criminal proceedings

Introduction

One of the participants in the criminal proceedings on the part of the prosecution is the prosecutor, who is charged with the duty of proof in criminal proceedings. The legislator has given the prosecutor broad discretionary powers to conduct criminal prosecution to implement it, which is the main activity of the prosecutor in criminal proceedings and, in a broad sense, begins with the start of entering relevant information about the commission of a criminal offence in the Unified register of pre-trial investigations (hereinafter referred to as the URPI) and ends with the application of a criminal penalty to the convicted person. The content of such activities is determined by the nature of criminal prosecution, since, according to the requirements of Part 2 of Article 37 of the Criminal Procedure Code (hereinafter referred to as the CPC of Ukraine) (2012), the prosecutor's powers are exercised in criminal proceedings from its beginning to its completion. Under US law, the prosecutor is also the main representative of the prosecution, who is charged with

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the duty of proof in criminal proceedings; for this, they are endowed with broad discretionary powers. Therefore, the study is based on a comparative analysis of law enforcement practices in Ukraine and the United States. According to the criminal procedure policy of the United States, a crime is mainly committed against society, and not against a person, so only the prosecutor, as a representative of society, has the right to decide whether to bring a person to criminal responsibility or not. Despite the different legal systems of these countries, prosecutors use the discretionary powers granted equally, contrary to the tasks of criminal proceedings, which negatively affects the established fairness in criminal proceedings.

In the field of legal literature, P.D. Guivan (2018) analysed the use of discretionary powers. The author devoted his paper to the analysis of the effectiveness of judicial discretion in the implementation of law enforcement activities. The criteria and main factors determining this area were considered in detail, and the need to develop approaches to judicial assessment of the proportionality of interference with citizens' rights was confirmed. Therewith, S. Kakhnovets (2021) examined the essence and importance of the prosecutor's view in criminal proceedings and the discretionary powers of the prosecutor in criminal proceedings in detail. This study delineates these concepts and defines the boundaries of prosecutorial review, draws parallels and identifies discrepancies between the discretionary powers of the prosecutor and judicial discretion in criminal proceedings. A. Voitenko (2023) noted the need for prosecutors to maintain political neutrality.

I. Malekh (2022) examined the theoretical and practical aspects of judicial discretion in criminal proceedings, defined the limits of judicial discretion, and characterised the manifestation of judicial discretion at different stages of criminal proceedings. These studies were used to confirm the need to limit the discretion of the prosecutor in the application of their discretionary powers and establish judicial control over their use. O. Torbas (2020) conducted important studies of the prosecutor's discretion, which led to the conclusion that it is wrong to limit the role of the prosecutor's discretion in criminal proceedings only to the function of prosecution. He considers discretion the power to make a decision, which the prosecutor uses throughout the entire criminal proceeding.

A.D. Sklansky (2017) highlights that in the criminal context, the state interest in ensuring the rules of professional conduct of the prosecutor is essential. The author examines examples of misconduct by prosecutors, in particular, the decisions they make when bringing charges and plea agreements. The author emphasises that the most remarkable feature of these important, sometimes vital decisions is that they are completely discretionary, and the most remarkable feature of these important, sometimes vital decisions is that they are completely discretionary. Therefore, plea agreements that are concluded by the prosecutor and violate the rights of a person cannot be concluded.

C.R. Skylar (2019) highlights the main problems in the work of prosecutors, including: the great power they possess, the powers they use, to the illegality of which they often resort, the punitive ideology that forms many of their actions, and their frequent organisational inertia. Considering these conclusions, the authors of this study analyse individual decisions of prosecutors that they make in the course of exercising their powers and highlight the main ways of prosecutors' powers abuse.

A thorough investigation of the problem of abuse of the prosecutor's authority was conducted by B.J. Casey (2023), who, using basic concrete examples, proved that the abuse of power by prosecutors leads to judicial errors, and the integrity of the US criminal justice system lies on the shoulders of the most influential players – prosecutors. The author researched the problems of prosecutors' use of their powers and mechanisms for taking response measures in case of abuse. The shortcomings of the prosecutor's discretion, which are not in its existence, but in the randomness and arbitrariness of its application, were emphasised. Therefore, it remains relevant to clarify the use of discretionary powers by the prosecutor at different stages of criminal proceedings since the criminal procedure legislation contains a considerable number of evaluative concepts and gaps in criminal regulation, which is the basis for possible abuses by the prosecutor. However, the amendments and additions to the legislation proposed in the literature aimed at eliminating the shortcomings of such regulation do not improve law enforcement.

As a rule, the prosecutor's exercise of discretionary powers is not given due attention because such powers are generally not controlled. It is considered that in the specified legal field, the prosecutor acts at their own discretion within the permitted limits and, therefore, cannot perform any actions that contradict the law. However, both in scientific circles and among the community of legal practitioners, there is concern about the lack of legal means of responding to the manifestations of the prosecutor's use of the right in their favour and the inability to control such manifestations of the prosecutor. As noted by J. Cox *et al.* (2021), prosecutors may be influenced by non-legal factors, in particular, when they decide how to proceed with criminal prosecution.

Therewith, as judicial practice shows, when a prosecutor exercises discretionary powers, these powers may be abused – the prosecutors act contrary to the assignment of the right granted to them, while not violating any established prohibitions. Thus, the purpose of this study is to analyse the activities of prosecutors to identify possible ways of abuse of their discretionary powers.

Materials and methods

The choice of scientific methods is primarily determined by its subject matter and the place of the analysed legal phenomenon in the system of related social phenomena. Abuse of the right to prosecution is assessed as a deviation from the civilised principles of justice and a violation of the rights not only of the accused and other participants in the process but also of society and the state in general.

The basis for the application of general and special scientific methods is dialectics. The dialectical approach to the analysed legal phenomenon consists in analysing the abuse of the right to accuse as a dynamic phenomenon that is in constant motion and change and is characterised by a complex of interrelated elements that together constitute a complex and systemic phenomenon. This approach involves considering many factors that determine the existence of abuse on the part of the prosecution. Therewith, attention is focused both on the determinants of abuse that are common to the legal systems of Ukraine and the United States and on those that are different and specific in the compared models of criminal justice. Abuse of the right to prosecution

is investigated using a number of general scientific methods. Among them are the following: abstraction (for an imaginary departure from insubstantial differences in legislation and law enforcement practice of Ukraine and the United States), analysis and synthesis (the use of this method allows considering this phenomenon as an integral and relatively separate phenomenon and simultaneously as a component of a broader concept of abuse of law), systematic (the use of which allowed considering elements of abuse of the right to accuse and the relationship between such elements), modelling (to build an optimal model of countering the abuse of the right to accuse, which includes positive features taken for comparison and examination of national means of preventing this abuse).

The authors also used special scientific methods of research, which is legal in its content. Among them: the dogmatic method (through which the content of legal norms and law enforcement positions was established), the method of comparative law (to compare common and different in the legislation and law enforcement practice of Ukraine and the United States), legal forecasting (using this method, it was assumed that the proposed measures to counteract the abuse of the right to accuse would be applied in practice and ensure respect for human rights and ideals of modern justice), formal-legal (to establish the characteristic features and the legal consequences of abuse of the right to accuse from the standpoint of respect for human rights). These and other methods were used in their relationship to process the source database. The current Ukrainian legislation, Criminal Procedural Code of Ukraine (2012), Law of Ukraine "On the Prosecutor's Office" (2014) and the legal positions of the U.S. Supreme Court in the Brady v. Maryland (1963), United States v. Giglio (1972), United States v. Agurs (1976), United States v. Bagley (1985) are analysed to compare and consider best practices.

Results and discussion

An analysis of the current legislation and judicial practice has established that when a prosecutor exercises discretionary powers to conduct accusatory activities, hypothetically, there are opportunities to abuse their right to make the following decisions on: 1) initiating the issue of starting a charge; 2) sending criminal proceedings to the court (including appealing decisions to a higher instance); 3) changing and rejecting the charge; 4) applying an alternative to criminal prosecution: concluding a plea agreement or releasing a person from criminal liability. Further, the most common ways of abuse of the prosecutor's right to charge are analysed.

Initiating the issue of starting a pre-trial investigation

According to the legislation of Ukraine, the prosecutor must enter information in the unified state register of legal entities and initiate a pre-trial investigation based on the submitted application for a criminal offence or their own identification of circumstances that may indicate the commission of such an offence from any source. According to Paragraph 1 of Part 2 of Article 36 of the CPC of Ukraine (2012), the prosecutor's powers include the right to initiate a pre-trial investigation if there are grounds provided for in the CPC of Ukraine. The adoption of this particular decision affects the further development of criminal procedural legal relations, the application of measures to ensure criminal proceedings, and the restriction of constitutional human rights.

Consequently, the legislator grants the prosecutor the right to independently initiate criminal proceedings, both in relation to the fact of the committed criminal offence (in rem) and in relation to a specific person (*in personam*). The granted right allows the prosecutor, at their own discretion, to determine the sufficiency of data confirming the commission of a criminal offence and thus initiate criminal prosecution. Therewith, an application for a criminal offence, based on which information is entered in the unified state register of legal entities, may be filed by a person (applicant) who may make a mistake in assessing the act or know in advance that a potentially suspected person cannot be brought to criminal responsibility due to the absence of their guilt. Despite this, the applicant insists on the need for their criminal prosecution.

In such a case, the prosecutor must ensure that they have good reasons to start criminal proceedings and reasonable expectations that the suspicion (accusation) can be proved in the future. However, such criminal proceedings can also be initiated for the purpose of future deliberate violation of procedural rules, improper use of legal instruments with the intention of scaring someone using a summons; restrict the freedom of the free press, encouraging the court to apply a particular measure of restraint; create restrictions on the use of property by seizing, etc. Therefore, the initiation of criminal prosecution, which provides for the possibility of using the criminal process for a different purpose than that determined by the objectives of criminal proceedings, is an abuse of the process and is subject to termination. The use of the judicial and legal system for inappropriate or illegal purposes is considered an abuse of process or an abuse of procedure and indicates the baselessness of criminal prosecution. Therefore, the concept of preventing the use of the process provides for preventing the use of the judicial system in a way that contradicts its fundamental values, goals, and principles. They can be divided into the following categories:

- proceedings that would lead to an unfair charge;
- legal actions that are offensive or abusive and therefore may be unfair in a broad sense;
- proceedings initiated for the purpose of arrest;
- proceedings that otherwise lead to the creation of a negative reputation in relation to the administration of justice.

Under US law, one of the elements of the right to charge is the right of the prosecutor to start (initiate) criminal proceedings. In the case of Pellegrino Food Products Co v. City of Warren (2000), it is stated that misuse of judicial procedure is considered an inappropriate use of civil or criminal proceedings due to an unintentional, malicious, or erroneous purpose. Malicious and deliberate abuse constitutes the use of civil or criminal proceedings that are not related to the proceedings initiated. Abuse of judicial procedure includes procedural actions committed with malicious intent and aimed at delaying the administration of justice. An example of such actions is the initiation of criminal proceedings in the absence of any legal basis to obtain a certain benefit through intimidation, the use of legal tricks, or an unfair, illegal advantage. Recognition of what exactly is unfair or wrong is conducted by the court on the basis of the factual circumstances of each case. The key components of the abuse of judicial procedure are the malicious and knowingly incorrect use of criminal proceedings, which does not correlate with the initiated legal proceedings, and the person who commits

such abuse is only aiming to achieve a certain goal through legal proceedings. Therefore, abuse of the judicial procedure is a deliberate violation of the legal rights of other persons.

For example, a case when a district judge in the United States decided that Donald Trump should pay almost USD 1 million fine for providing unconfirmed allegations of rigging the 2016 presidential election by former Secretary of State Hillary Clinton can be considered. The court identified that the lawsuit was meaningless and believed that Trump used the court for political purposes, demonstrating abuse of the rights. The case was evidently inadequate as a legal requirement and should not have been dealt with. No reasonable lawyer would have brought such a claim because it was clear from the very beginning that it was aimed at achieving political goals (Lowell, 2023). This case is a vivid example of the use of a judicial procedure contrary to its purpose and should be considered when determining certain actions as an abuse of process.

Bringing a criminal charge by a prosecutor as the moment when a person is brought to criminal responsibility

One of the important stages of criminal proceedings is the moment when the prosecutor, on the basis of the collected evidence, decides whether to bring the person who, in their opinion, committed a criminal offence to criminal responsibility. This point is important because, after its procedural registration (notification of suspicion), the corresponding legal consequences occur for a person. In addition, according to the provisions of Part 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), at the time of notification of suspicion, a "criminal charge" is brought. It is not for nothing that this special decision is given to the prosecutor since, according to the concept of the CPC of Ukraine, it is the prosecutor who exercises procedural management of all pre-trial investigations and further (during the trial) assumes the role of the sole representative of the state and responsibility for the legality and validity of bringing a person to criminal responsibility (Criminal Procedural Code of Ukraine, 2012).

Given that the prosecution is based on the evidence collected and on the prosecutor's internal conviction as to their belonging, admissibility, reliability, and their totality – sufficiency to convince that the accused is guilty, such powers are nevertheless characterised by substantial discretion. In addition, to inform a person about suspicion of committing a criminal offence or not to report it is one of the most substantial of the many important powers of the prosecutor and, at the same time, something that prosecutors often abuse. This belief follows from the fact that the decisions of the procedural prosecutor are relatively unlimited and subject to slight supervision by the Supreme prosecutor and control by the investigating judge due to complaints from participants in the proceedings. The procedural prosecutor directs the entire course of the pre-trial investigation and, at their request, makes a decision on reporting and bringing charges.

The announcement of suspicion marks the beginning of legal prosecution of a particular person, and according to Article 246 of the CPC of Ukraine, this must necessarily happen if a person is detained where a criminal offence is committed or immediately after it is committed. This also applies when choosing one of the preventive measures provided for by the CPC of Ukraine against this person and if there is sufficient evidence indicating the possible involvement of this person in the commission of a criminal offence. It is the latter basis that gives the prosecutor power, which is the basis for monitoring the entire system of criminal proceedings during a pre-trial investigation. The prosecutor, at their own discretion, can manage the entire outcome of the process already through the possibility of notifying or not notifying a person of suspicion at a particular stage of the pre-trial investigation. Therefore, there is a lack of transparency when it comes to making this decision (Criminal Procedural Code of Ukraine, 2012).

According to J.B. Casey (2023), the decision on charges is made at the discretion of the prosecutor and is not subject to review. This power results in prosecutors having more influence than any other official in the criminal justice system. The factors that are the basis for making such decisions are behind "closed doors". There are absolutely no requirements for the prosecutor to substantiate their arguments. Most prosecutor's offices do not even have uniform standards that guide such decisions. Often, decisions on bringing charges are made considering special circumstances (if any). For example, the prosecutor discovered that the accused has a criminal record or other information that can be used.

Former U.S. federal prosecutor P. Bharara (2019) believes that a criminal charge changes lives forever, even if a person is found not guilty or acquitted on appeal. It is not enough just to get a fair trial in court – during this time, the defendant may become an outcast, bankrupt, unemployed, or unable to be hired. Therefore, the decision to bring charges should be as fair and honest as possible. As a consequence, notably, only for the result of a full, comprehensive and impartial investigation, on the basis of appropriate, permissible, and sufficient evidence, the prosecutor should make a decision on bringing a person to criminal responsibility.

It is impossible to underestimate the importance of this discretion because the prosecutor can manage the entire outcome of the process at will already through a report of suspicion. However, in the current criminal procedure legislation (Article 94) (Criminal Procedural Code of Ukraine, 2012), the legislator sets the limits of the prosecutor's discretion. The prosecutor, guided by an internal conviction based on a thorough, complete, and impartial investigation of all aspects of criminal proceedings and adhering to the law, analyses each piece of evidence in terms of its relevance, admissibility, and reliability. The totality of the collected evidence is evaluated from the standpoint of its sufficiency and interrelation for making an appropriate procedural decision. Thus, it is reasonable to agree with A. Lapkin (2020), stating that expanding the discretion of law enforcement agencies can increase the risks of abuse and corruption. Such freedom must be limited, and these restrictions are determined by: 1) the law, which sets out possible options for alternative actions and criteria for their choice; 2) the tasks to which the prosecutor's activity is aimed; 3) reasonableness and common sense, which, combined with the professional experience of the prosecutor and other factors, ensure the use of discretion within the limits that determine the most optimal behaviour; 4) professional ethics, which forms the internal attitude of the prosecutor, according to which they exercise their discretion.

Procedure and conditions for concluding a plea agreement

The legislation of Ukraine gives the prosecutor the right to apply alternatives to criminal prosecution of a person who

has committed a criminal offence, in particular: release of the person from criminal liability, closure of criminal proceedings on the grounds defined by law, the refusal of charges; conclusion of a plea agreement.

In general, the institution of agreements in national and US legislation aims to speed up the criminal process and promptly resolve criminal proceedings at minimal economic costs. However, the desire for such savings leads to human rights violations, which are allowed in the conclusion of agreements, in particular plea agreements between the prosecutor and the suspect, the accused. Initiating the issue of concluding a transaction prosecutors quite often use the opportunity to avoid the obligation of comprehensive, complete and objective proof of the guilt of the suspect (accused) before the court due to insufficient evidence or lack of it for the undoubted formation of a conclusion about their guilt. Thus, the prosecutor uses the authority to conclude a transaction as an effective way, if not to deprive, then at least to simplify the prosecutor's obligation to prove the guilt of the suspect (accused) under the procedure established by law. As an auxiliary means for this, the following provisions of the CPC of Ukraine are used: 1) depriving the suspect (accused) of the right to a trial, during which the prosecutor is obliged to prove every circumstance in relation to criminal proceedings, including ensuring the appearance of questioning prosecution witnesses during the trial, filing a petition for their summons and providing evidence testifying in their favour (Part 2 of Article 473); 2) prohibiting the prosecutor, including a higher-level prosecutor, from appealing the court verdict adopted based on an agreement (Part 4 of Article 393, Part 2 of Article 473) (Criminal Procedural Code of Ukraine, 2012).

Prosecutors at the first stages of the investigation or even during the entry of information into the unified state register of legal entities deliberately overestimate (aggravate) the qualification of the committed criminal offence with the hope of bargaining about "underestimating" the qualification or making concessions to the suspect (accused) to admit guilt in the commission of the offence to avoid the obligation to prove the guilt of the suspect (accused), due to insufficient evidence. Thus, prosecutors make a field of retreat for themselves for future tactics of Investigation and prosecution. Such behaviour is inappropriate and unacceptable for any reason, but at first glance, there are no violations of the provisions of the CPC of Ukraine. Most importantly, it allows such behaviour of prosecutors to remain hidden from view.

The analysis of law enforcement practice gives grounds to identify a number of ways for a prosecutor to abuse the right when concluding a plea agreement, using manipulations with the criminal legal qualification of the committed act. These include, in particular, the following: incriminating a suspect (accused) of an article of the Criminal Code of Ukraine (2001) for a more serious offence than the suspect (accused) actually committed; incriminating a part of the article of the Criminal Code of Ukraine that contains qualifying or especially qualifying signs of an offence; non-application of norms that provide for circumstances that exclude criminality of an act; the use of various forms of complicity, etc.

On the one hand, such actions of the prosecutor do not go beyond the limits of the granted right to conclude a plea, and on the other hand, such a right is used not for the purpose of procedural economy but for freeing oneself from the obligation of comprehensive, complete, and objective proof, and encouraging the suspect (accused) to conclude a deal, which is a clear abuse of such a right since it is not used for the purpose for which it is granted. Such abuses by prosecutors when qualifying an act at the first stages of the investigation are not a clear violation of the rights of a suspect or accused, but they lead to certain consequences that affect the violation of their rights and freedoms in the future, in particular: the correct definition of jurisdiction depends on the correct qualification; depending on the severity of a criminal offense, the term of pre-trial investigation changes; the type of application of a preventive measure and its term depends on the qualification of an offense in severity; the dependence of qualification on the severity of a criminal offense and the severity of punishment.

"Qualification with a margin" deserves an exceptionally negative assessment, when the legal assessment of the act allows "exaggeration" of qualification under a more serious article. This situation runs counter to the fundamental principle of criminal law qualification – its accuracy. Therefore, the accuracy of qualification is an independent value. It is precisely with accuracy that its legality and correctness are connected. Ultimately, even an inaccurate qualification made at the initial stages (even if the final court decision is still correct, corresponding to the factual circumstances of the case), in particular, one in which the act is qualified in the wrong structural part of the rule of law, can by no means be considered either correct or fair. As already noted, qualification has an impact on the resolution of many legal issues, and irregularities in it affect both the position of the suspect (accused) and the position of their accomplices. In the end, the accuracy of criminal law qualification is the accuracy of both social and legal assessment of the committed crime. This means that the approach of those prosecutors who consistently defend the need to achieve what practitioners call "purity of qualification" is morally and professionally mature (Khitro *et al.*, 2019). A similar problem of prosecutors abusing their right to enter into transactions is one of the most acute in the United States. As noted by the former assistant prosecutor of the United States in New Jersey, American professor W.T. Pizzi (1999), a prosecutor can add new charges to an indictment to "raise the stakes" and increase the risk of an adverse outcome in court for an accused who wanted a full trial. For example, sometimes, a prosecutor can dramatically increase the range of punishment for an accused person by adding additional charges for committing a violent crime or for committing a crime against an elderly person, against a person who was in a dependent or helpless state, or against a disabled person. Such points dramatically increase the penalty imposed on them if they are convicted by a court, which is one of the ways to put pressure on the accused to conclude plea agreements. Thus, the prosecutor convinces the accused that this way, they can avoid a more severe sentence. Therewith, W.T. Pizzi (1999) notes that in the United States, the prosecutor's wide margin of discretion and plea practices have led to constant complaints that prosecutors overstate charges to gain some leverage to negotiate before a plea is concluded and thus encourage a suspect to plead guilty.

U.S. federal prosecutors are using coercive plea deal tactics to scare people and force them to make a decision they wouldn't otherwise have made. For example, prosecutors have set up specific procedural mechanisms for pleading guilty by further failing to fulfil a promise to delay a sentence or treat drug addiction and improve mental health in

the hope that their cases will remain pending (Casey, 2023). Most of these charges in such cases would never stand up to the scrutiny of the adversarial process. Such behaviour can be qualified as a factor in the pathology of a plea bargain. Despite this, the US Supreme Court , in the case of Chaffin v. Stynchcombe (1973), noted that threats may force some defendants to withdraw from the trial, but "imposing these difficult decisions is an unavoidable attribute of any legitimate system that tolerates and encourages negotiation to make deals". It is difficult to agree that Ukrainian society would accept such an approach in the criminal proceedings of Ukraine.

Such side effects of the institution of plea agreements and the abuse by prosecutors of their rights at their conclusion carry public despondency towards the state in the context of protecting their rights, freedoms, and legitimate interests since, in this way, justice would be conducted not by the court but by the prosecutor. The decision of an innocent defendant to plead guilty in exchange for a less severe sentence entails losses for society, even if the defendant prefers such an outcome, as it undermines the focus of the guilt determination process and public confidence in the meaning of the criminal conviction.

The negative consequences for criminal justice in the United States are also palpable due to prosecutors' use of their broad powers, which are directed to convicting a person instead of achieving justice. As noted by A.J. Davis (2012), wealthy defendants often enjoy more lenient plea agreements than low-income defendants; potential suspects in cases involving rich victims are harassed more harshly than poor ones. This daily practice of prosecutors leads to unfairness in criminal justice and abuse of their rights in implementing criminal prosecution.

One example of a prosecutor's abuse of their right to be charged when entering into a plea agreement may be, in particular, situations where the prosecutor refuses to enter into a plea agreement despite the fact that the suspect/accused offers and, most importantly, fulfils obligations that are beneficial in view of satisfying the public interest (for example, informs law enforcement officers about their role in the criminal offence under investigation, perhaps by telling them about such substantial facts and circumstances that they were not previously aware of, indicating their accomplices, telling them about their role in the act under investigation, helping to uncover other criminal offences), hoping, in return, for certain concessions on their part (in particular, the appointment of a penalty agreed by the parties on the basis of an agreement submitted to the court). In fact, the legislator provides prosecutors with such opportunities for abuse because: a) the prosecutor does not have an obligation to conclude such an agreement, even if all the circumstances indicate the expediency and possibility of its conclusion, b) a large number of facts that can be considered when making a decision to conclude an agreement are formulated using evaluative (and in fact, "elusive", "gutta-percha") concepts, their interpretation depends entirely on the prosecutor (Kislitsyna, 2018; Kakhnovets, 2021).

It appears that to defend the interests of the suspect/accused, it is necessary to proceed as follows: this decision of the prosecutor (to refuse to satisfy the request for an agreement) can be appealed to a higher prosecutor. The latter, having concluded a transaction, can cancel the decision of the lower prosecutor, giving the subordinate instructions to conclude a plea agreement. One of the conditions for concluding an agreement (according to the provisions of Part 6 of Article 474 of the CPC of Ukraine) is its voluntary nature (Criminal Procedural Code of Ukraine, 2012). The voluntary nature of such agreements is traditionally discussed due to the presence or absence of coercion (including psychological) against private participants in criminal proceedings who take part in it on an unprofessional basis. However, the question of the voluntary nature of the transaction may arise due to the fact that such a decision will be made by the lower prosecutor due to the influence of the power of their head, in fact, not according to their personal desire but under the influence of the appropriate procedural control of the chief.

Such a situation (when a higher-level prosecutor orders the procedural head to conclude an agreement in criminal proceedings) should not be assessed as not voluntary in its conclusion. The fact is that the prosecutor, being a party to a plea agreement, is also a representative of the state, an official. Representatives of state bodies do not have the rights in their "pure" form, those rights are mandatory for their use. Therefore, in such situations, the court should not refuse to approve the agreement only because the parties allegedly acted involuntarily when concluding it.

The plea agreement institution has vital advantages in procedural economy, but it is essential to consider its shortcomings, such as: the possibility of manipulating the judicial system and breaching legal and constitutional principles; the risk of stimulating abuse of power by prosecutors and judges; the creation of a situation where a lawyer may be tempted to serve their own interests rather than the interests of the accused; the possible imposition of lenient penalties on the offender; the increased risk of unlawful conviction (Potrebic Piccinato, 2004).

These examples allow the decision that a plea agreement should be concluded considering a comprehensive, complete, and unbiased study of all the circumstances of criminal proceedings as one of the important elements of the basis for the legality of criminal proceedings (Part 2 of Article 9) (Criminal Procedural Code of Ukraine, 2012). Limiting the appeal of a court verdict on the basis of a plea agreement does not contribute to the effective protection of the rights of the suspect (accused), as discussed in more detail in the paper by H.D. Boreiko (2022). In addition, limiting such an appeal is one of the prerequisites for abuse by the prosecutor when entering into the relevant agreement.

Concealment (failure to provide) by the prosecutor of exculpatory evidence

One of the main principles of criminal proceedings is the principle of legality, which requires accurate and unwavering implementation of laws by pre-trial Investigation, inquiry, prosecutor's office, and court bodies. Among other definitions of this principle, it should be considered that the prosecutor, the head of the pre-trial investigation body, and the investigator must conduct a comprehensive, complete, and impartial investigation of the circumstances of criminal proceedings. They must identify both circumstances that indicate the commission of a crime and those that can justify the suspect or accused. In addition, they must consider circumstances that may mitigate or aggravate the punishment, provide them with a proper legal assessment and guarantee the adoption of legal and impartial decisions (Part 2 of Article 9) (Criminal Procedural Code of Ukraine, 2012). In addition, this principle is reflected in special laws, in particular,

in Article 3 of the Law of Ukraine "On the Prosecutor's Office" (2014), it is established that fairness, impartiality, and objectivity are among the foundations of the prosecutor's office's activities.

The completeness and impartiality of the establishment of all the facts and circumstances covered by the subject of proof (Articles 91, 485, 505 of CPC of Ukraine) is the first and foremost procedural means of establishing material (objective) truth, and the corresponding duty of the subjects conducting criminal proceedings is its procedural guarantee (Pikh, 2021). Therewith, impartiality is characterised primarily by the prosecutor's lack of a pre-formed vision and any stereotypes about the participants in criminal proceedings and the process in general. Objectivity in the investigation of the circumstances of criminal proceedings implies that the investigator and the prosecutor should perform procedural actions and make decisions only based on criteria defined by the CPC and factual data, avoiding accusatory evasion and personal interest in resolving the case (Hlynska, 2017). In other words, it implies their duty to identify both circumstances that indicate the commission of a crime and those that can justify the suspect (accused), including those that can mitigate or aggravate their punishment (the principle of accusatory bias).

One of the main reasons for the prosecutor's bias is the unwillingness to bear responsibility in the future for violations of human rights and freedoms during criminal proceedings in the event of improper performance of their official duties, in particular, unjustified detention of a person, illegal notification of suspicion, gross violation of human rights during investigative actions, which results in the recognition of evidence as inadmissible, and, in some cases, an acquittal, etc. As a result, the prosecutor is not interested in collecting evidence that can justify a person because this will confirm incompetence and violation and possibly the need to compensate for damage caused to a person by illegal actions. Such possible hypothetical negative consequences for the prosecutor are one of the reasons for the factual refusal to collect evidence justifying the person or failure to provide them for review to the defence if they are received. However, failure to reveal (if any) or to provide (conceal) the specified evidence usually contributes to the formation of a false belief about a person's guilt. Exculpatory evidence is an obstacle to proving a person's guilt, so the prosecutor is not interested in providing it because this can destroy their charge. In general, failure to comply with this requirement and the tasks of the prosecutor's activity ruins the criminal justice system and hinders the achievement of the tasks of criminal proceedings (Article 2) (Criminal Procedural Code of Ukraine, 2012). A similar problem of unfair behaviour exists in the activities of prosecutors in the United States. The duty of the prosecutor to provide the defence and the court with evidence that justifies the accused is enshrined in the Criminal Justice Standards of the US Bar Association (Criminal Justice Standard, 2017), which have been in force since 1968. They provide that the primary duty of the prosecutor is to seek justice within the framework of the law and not just to achieve a conviction. The prosecutor serves the public interest and must honestly and carefully form their judgments to enhance (ensure) public safety, both by prosecuting appropriate criminal charges with due severity and by applying discretionary powers, refusing to hold a person criminally liable in appropriate circumstances. The prosecutor must seek a legitimate opportunity to protect the innocent and convict the guilty, considering the interests of victims and witnesses and respecting the constitutional and legal rights of all persons, including suspects and accused persons.

According to American lawyers, the adversarial nature of the American criminal justice system is based on the concept that the parties to the proceedings – the prosecution and the defence – will argue facts and law from different points of view (Casey, 2023). However, the role of a prosecutor is more complex than just a one-sided lawyer. The prosecutor is a representative of a sovereign government, and it is their duty under oath to seek justice, not to win cases or convict every defendant. However, a prosecutor who verifies potentially exculpatory evidence should review the evidence not from the prosecutor's standpoint but from the lawyer's point of view. Thus, back in 1963 in the United States, in the case of Brady v. Maryland (1963), the accused required prosecutors to share with a lawyer any evidence that was "potentially exculpatory" and "essential" to establish the defendant's guilt or innocence. The decision of the Supreme Court of the United States sets out specific instructions for prosecutors to transfer "all favourable information" to the defence party if they have it (Table 1). Therewith, it is noted that society benefits not only when the perpetrators are convicted but also when the criminal process is fair. As the practice of the US Supreme Court shows, this is not the only case in which the court held a position on the duty of the prosecutor to provide the defence with the exculpatory evidence it received (Table 1).

Table 1. Cases in which the US Supreme Court expressed its position on the duty of the prosecutor to provide the defence with the exculpatory evidence it received

Year	Case	Resolution
1963	Brady v. Maryland	The U.S. Supreme Court, in this case, ruled that the prosecution's concealment of evidence in favour of the accused upon request violates due process if the evidence is essential either for a guilty plea or for punishment, regardless of the good faith of the prosecution
1972	United States v. Giglio	The Supreme Court ruled that the obligation to hand over exculpatory evidence extended to all prosecutors in the office, not just the prosecutor who was examining (conducting) a particular case.
1976	United States v. Agurs	The Supreme Court ruled that the prosecutor must hand over exculpatory evidence, even if the defence does not request it

Table 1, Continued

Year	Case	Resolution
1985	United States v. Bagley	The Supreme Court determined that physical evidence as those for which there is a "reasonable probability that, if the evidence had been disclosed", the outcome of the proceedings would have been different, so it should be handed over (read) to the defence party
1995	Kyles v. Whitley	The Supreme Court ruled that the obligation to hand over exculpatory evidence extended to all prosecutors in the office, not just the prosecutor examining (conducting) a particular case

Source: compiled by the author based on the decisions of the US Supreme Court in the cases Brady v. Maryland (1963), United States v. Giglio (1972), United States v. Agurs (1976), United States v. Bagley (1985), Kyles v. Whitley (1995)

Thus, despite the statutory duty of the prosecutor to establish and present to the court all the evidence that is the subject of proof (indictment and acquittal), still prosecutors in both Ukraine and the United States use the procedural opportunities to provide only those evidence that support the position of the prosecution. However, the establishment of the truth in the case does not take place and, accordingly, fair justice is not conducted.

Conclusions

One of the subjects of these legal relations is the subject of power – the prosecutor, whose main procedural function is to conduct criminal prosecution. The prosecutor has a wide range of discretionary powers, the scope of which is insufficiently controlled by procedural means to exercise this function. This leads to the abuse by prosecutors of their powers, in particular: the right to prosecution by unjustifiably initiating the commencement of a pre-trial investigation (commencement of criminal prosecution); raising suspicion and charges; concluding a plea agreement; the prosecutor's concealment of exculpatory evidence. According to judicial practice, such abuses are conducted by both Ukrainian and US prosecutors. The nature of the professional deformation of criminal justice officials, the goals they are trying to achieve in the course of abuse of their professional rights, and the public interest in preventing such abuse in Ukraine and the United States are, to some extent, identical. Some criminal procedure institutions recently introduced in Ukraine, such as the Institute of plea agreements, are relatively new for Ukraine, but for the United States – on the contrary- are traditional and well-established. Therewith, the use of such an institution leads to manipulation of the process, and it is used not to establish the truth in the case but for quick decision-making. Despite the comments made by researchers of the last century, the Institute of plea agreements still remains unresolved.

The analysis of the prosecutor's discretionary powers showed that it is possible to use them contrary to the assignment of the powers granted without going beyond the limits defined by law. Such powers are exercised through the prosecutor's discretion, which is applied arbitrarily and accidentally, not for the purpose of performing the tasks of criminal proceedings. Thus, it is determined that the abuse of the right in criminal proceedings provides for the exercise of the right by the subject of criminal procedure relations contrary to the content of this right and its purpose while simultaneously acting within the limits defined by law.

One of the measures to prevent the prosecutor from abusing their rights in these procedural situations would be to provide for a legislative definition of the concept of "abuse of the right" and legitimate opportunities to respond to its manifestations. Further research on the problem of abuse by the prosecutor of the right to charge will consist of identifying the shortcomings of the regulatory regulation of the prosecutor's powers, which create hypothetical opportunities for abuse of the right, clear powers of the court and other bodies regarding the legal response to the prosecutor who abuses this right.

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Conflict of interest

None.

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Зловживання правом на звинувачення у кримінальному провадженні: досвід України та США

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Анотація. Недобросовісне застосування дискреційних повноважень прокурора призводить до порушень прав, свобод та законних інтересів особи. Вивчення основних способів зловживання правом на звинувачення допоможе запобігати негативним проявам у кримінальному провадженні, які перешкоджають виконанню його завдань. Мета статті – визначити конкретні способи недоброчесного поводження прокурорів в Україні та США під час кримінального провадження. У роботі використано комплекс методів наукового пізнання: абстрагування, аналіз, синтез, порівняльно-правовий, формально-юридичний, метод моделювання. Досліджено окремі аспекти здійснення кримінального переслідування як основної процесуальної функції прокурора. Проаналізовано основні структурні елементи діяльності прокурора в здійсненні кримінального переслідування та способи зловживання дискреційними повноваженнями під час реалізації цієї функції. Наведено приклади зловживань правом на звинувачення як в Україні, так і в США. Розглянуто окремі кримінальні справи, у яких вищі судові інстанції зробили висновки про те, що прокурор зловживає своїм правом на звинувачення (кримінальне переслідування). Для порівняння та врахування передового досвіду використано законодавство та правові позиції вищої судової інстанції США. Виснувано, що хоча американська та українська моделі кримінальної юстиції, зовні й відрізняються за багатьма (насамперед, формальними) ознаками, проте базуються на численних спільних демократичних та гуманістичних засадах, які служать досягненню справедливості в сфері протидії злочинності. Обґрунтовано необхідність вжити легітимних заходів реагування, коли прокурор реалізує свої дискреційні повноваження. Зроблено висновок, що зловживання правом на звинувачення допускаються публічними обвинувачами (прокурорами) у кримінальних провадженнях як в Україні, так і в США. Продемонстровано, що способи таких зловживань фактично однакові та призводять до порушень прав, свобод та законних інтересів учасників кримінального провадження, шкодять правосуддю і призводять до втрати довіри громадськості, оскільки надані прокурору дискреційні повноваження нерідко спрямовуються на засудження і покарання особи замість пошуку істини, встановлення справедливості. Проведене дослідження сприятиме розробленню заходів щодо запобігання можливостям з боку прокурора зловживати наданими йому правами

Ключові слова: прокурор; дискреційні повноваження; кримінальне переслідування; «дух» закону; завдання кримінального провадження