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## **THE CONCEPT OF THE CONSTITUTIONAL RIGHT TO FREEDOM OF MOVEMENT AND ITS LIMITATIONS IN CRIMINAL PROCEDURE OF UKRAINE**

In recent years the scientists have paid enough attention to the development, interpretation and recommendations for bringing modern legislation with the rights and freedoms of man and citizen. And yet, in this area a lot of “white spots” mismatch appropriate regulations to ensure the legal status of the person in the legislation of Ukraine, including – Criminal Procedure.

Only on the basis of the rights and freedoms of man and citizen may be based a practical function of the democratic welfare state that is recognized by the Constitution of Ukraine a major target of the Ukrainian state. The general provisions of the constitutional order of society and the state Constitution of Ukraine 1996 relates that a person’s life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value and one of constitutional rights is a fundamental human right to freedom of movement.

One of constitutional rights is a fundamental human right to freedom of movement. Is known, this right is inalienable element of legal status. Everyone always uses the movement in everyday life without even realizing until a certain point its importance.

The ability of any living creature to move freely – is a necessary condition for the possibility of life, the essence of nature. For a man need to travel from the moment of her birth and leaves a lifetime. She dictated a biological (natural) necessity of its existence, and the need for self-realization of the individual as a person. However, when the first social institutions historical formation of the human right, this right is guaranteed by the Universal Declaration of Human Rights, the Convention on Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the Constitution of Ukraine and other normative legal acts.

First, going on to analyze the concept of the right to freedom of movement in the criminal procedural aspect, should begin with the study of general concepts of rights and freedoms of man and citizen to freedom of movement is also a history of its limitations.

The concept of rights and freedoms of man and citizen, directly related to the humanistic essence and orientation theory of law, all branches of legal science, is one of its central concepts, which further defines the conceptual content and conceptual structure of law. It acts as a major system idea is not only in the creation of the Constitution as an act of

constituent power of the people and the fundamental law of the country, but also in the design of certain laws, legal acts that govern the implementation of certain rights and freedoms.

The Constitution of Ukraine, as well as in the constitutional law of many other countries, the terms “human rights”, “freedom of man.” These two concepts should be distinguished. their terminological differences emerged historically from the French Declaration of 1789, but were largely offset by more recent human rights instruments such as the Declaration of Human Rights of 1948<sup>1</sup>. Man’s place in society, its social role largely depends on the scope of the rights and freedoms that define its social opportunities, the nature of life, system of relationships of people in the society<sup>2</sup>.

In criminal procedural aspect draws attention O.G. Shylo – in criminal justice human rights and freedoms are particularly important as advocate for public authorities as imperative, value protection which determines the orientation and content of the whole of criminal procedure”<sup>3</sup>.

In modern jurisprudence is still not completely resolved the issue of distinction rights and freedoms, as these concepts are always used together and in international and national legislation. Let’s try to analyze their coexistence.

First of all, it should be emphasized that between “rights” and “freedom” as a legal category no sharp differences, since the rights and freedoms outline some legal human capabilities in different areas of life that are guaranteed by the state. But between them can be a distinction based on the degree of certainty possible behavior and mechanism of government guarantee. The term “right” is used when talking about concrete possibilities of behavior (the right to work, leisure, education, social security, etc.). When it is necessary to emphasize the more space you choose the behavior is at your own discretion and under its own responsibility, the term “freedom”<sup>4</sup>.

B. Pohorilko, distinguishing the concept of rights and freedoms, constitutional defines freedom as the possibility of free (active or passive) behavior (activity) of a person and citizen in society and state, the

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<sup>1</sup> Цвік М. В., Ткаченко В. Д., Богачова, Л. Л. та ін. (2002). *Загальна теорія держави і права*. Харків: Право.

<sup>2</sup> Оніщенко, Н. (2013). Невідкладність завдань по забезпеченню прав, свобод і законних інтересів особи (теоретичні моделі та практика реалізації). *Вісник Національної академії правових наук України*, 2 (73), 18.

<sup>3</sup> Шило, О. Г. (2011). *Теоретико-прикладні основи реалізації конституційного права людини і громадянина на судовий захист у досудовому провадженні в кримінальному процесі України*. Харків, Право.

<sup>4</sup> Цвік, М. В., Ткаченко, В. Д., Богачова, Л. Л. та ін. (2002). *Загальна теорія держави і права*. Харків: Право.

Constitution and laws of Ukraine. Rights are opportunities acquisition, possession, use and disposal of certain benefits, the freedom is only prerequisites acquisition of ownership, use and disposal of the relevant goods. That is a prerequisite of any right is the freedom of man and citizen. By constitutional freedoms he considers freedom of movement<sup>1</sup>.

Interesting observations N.A. Limonova, in her view, the fundamental differences in the social and legal sense between the rights and freedoms there. Features freedoms compared to its right is in the nature of individual action, the possibility of doing in its sole discretion, determine the very course of action and obligated entities, including state agencies, designed to protect the sphere of individual freedom. Moreover, the same legal opportunity is not always clear normative fixed. Correctly notes N.A. Limonova, the concept of “freedom to choose his residence” and “the right to choose one’s place of residence” used as identical<sup>2</sup>.

Constitutional rights and freedoms – is inherent opportunities that are represented by old, is the basis of legal status enshrined in the constitution and have the highest legal protection – such a position holds Y. Todyka. He sees the difference between rights and freedoms in the process of implementation: the implementation of freedom no one can interfere in the internal world of the person and the realization of the rights associated with the actions of the state and entitlement rights to participate in the activities of political and economic structures<sup>3</sup>.

Constitutional law – is the subject of some opportunities constitutional and legal relations, ie legal opportunities to meet individual needs and interests ..., constitutional freedom – is their ability to act according to their interests and goals, the ability to own, independent of the choice of a decision<sup>4</sup>.

Legal possibilities of man and citizen are defined in the Constitution through the “right” – the ability of a particular behavior that is guaranteed to certain means and forms, including – through the “right to freedom” (freedom, freedom of thought and speech and free expression of attitudes

<sup>1</sup> Погорілко, В. (2005). Свободи конституційні. *Міжнародна поліцейська енциклопедія: у 10 т. Т. II: Права людини у контексті поліцейської діяльності*, Київ, 108.

<sup>2</sup> Лимонова, Н. А. (2000). *Право граждан Российской Федерации на свободу передвижения, выбор места пребывания и жительства и деятельность органов внутренних дел по его обеспечению (вопросы теории)*. Дисс. на соискание ученой степени кандидата юридических наук. Москва, 24.

<sup>3</sup> Олійник, А. Ю. (2011). Поняття, види і зміст конституційної свободи пересування в Україні. *Науковий вісник Дніпропетровського державного університету внутрішніх справ*, 1, 101.

<sup>4</sup> Шукліна, Н. Г. (2005). *Конституційно-правове регулювання прав і свобод людини і громадянина в Україні (проблеми теорії і практики)*. Київ.

and beliefs, etc.). In the latter case, freedom must be understood as a sociological category, and right – as a category of law.

Depending on the affiliation to the citizenship of the country should distinguish between human rights and freedoms and the rights and freedoms of citizens. This approach to the understanding of the legal heritage of human and civil society meet proclaimed the Constitution of Ukraine on the course of human recognition as the highest social value recognized as valid not only citizens of Ukraine, but also other categories of persons who are within its territory – foreign citizens and stateless citizenship. Thus, in accordance with Art. 26 of the Constitution of Ukraine, foreigners and stateless persons who are in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same responsibilities as citizens of Ukraine – the exceptions established by the Constitution, laws or international treaties of Ukraine<sup>1</sup>.

The individual's right to freedom of movement belongs to the individual and civil rights that define human freedom in private life, its legal protection against any interference. This right – is the ability of the individual, provided and protected by the state, in its sole discretion to move freely<sup>2</sup>.

The right to housing and the right to choice of residence originally associated with the right to freedom of movement. The term “movement” as used in the constitutional norm is fundamental, representing a range of activities related to the change in location of the entity (object). It requires strength or mobility costs, transportation.

In other words, its objective expression of movement – is primarily a spatial and temporal process. In the broadest sense, it is an art movement and organize their activities, rational way possible using the most effective means. In a narrow sense, the movement is nothing like moving from one place to another. The process of movement includes the exact destination; choice of methods and means of movement; clarify the necessary resources and sources of support. In addition, the movement can be defined as a way to achieve the goal by moving in space in sequence<sup>3</sup>.

In the explanatory dictionary V.Dal says that movement is a set of activities related to the change in location of the entity (object), requires strength or mobility costs, transportation<sup>4</sup>. In other words, its objective expression of movement – especially a spatial and temporal process. In

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<sup>1</sup> Цвік М. В., Ткаченко В. Д., Богачова, Л. Л. та ін. (2002). *Загальна теорія держави і права*. Харків: Право.

<sup>2</sup> Опанасюк, Н. А. (2003). Право людини на свободу пересування як суб'єктивне право на туризм. *Бюлетень Міністерства юстиції України*, 12, 102.

<sup>3</sup> Чиркин, В. Е. (2003). *Конституционное право России*. 2-е изд., перераб. и доп. Москва: Юристъ, 147-148.

<sup>4</sup> Даль, В. (2000). *Толковый словарь Живого великого языка*. Москва, 114.

the broadest sense, it is an art movement and organize their activities, rational way using, if possible, the most effective means. In a narrow sense, the movement is nothing like moving from one place to another. The process of movement includes the exact destination; choice of methods and means of movement; clarify the necessary resources and sources of support. In addition, the movement can be defined as a way to achieve the goal by moving in space in sequence. Thus, using the term “movement” in the phrase “freedom of movement”, we define the objective side of this concept, where the word “movement” is an independent element and occupies a definite place, indicating which area of social relations extend freedom.

V. Kravchenko, exploring the freedom of movement in a group of constitutional individual rights and freedoms, says that kind of freedom of movement of citizens of Ukraine have the opportunity at any time to leave the territory of Ukraine and easily return to Ukraine<sup>1</sup>.

The individual’s right to freedom of movement was first recorded in Article 13 of the Universal Declaration of Human Rights adopted by the UN General Assembly on December 10, 1948. It became the basis for the development of European standards of freedom of movement and choice of residence.

According to which every person has the right to freedom of movement and residence within each state. In accordance with Part 1 of Art. 2 №4 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees certain rights and freedoms are not provided for in the Convention and in the First Protocol of 16.09.1963 p. Everyone lawfully within the territory of a State shall the right to freedom of movement and free choice of residence within that territory. Part 1 of Art. 12 of the International Covenant on Civil and Political Rights of 12.16.1966 p. Secure to everyone lawfully within the territory of a State shall, within that territory, the right to liberty of movement and freedom to choose his residence. According to Art. 33 of the Fundamental Law of Ukraine, anyone who is legally present on the territory of Ukraine is guaranteed freedom of movement. According to annotated 33 articles of the Basic Law right to freedom of movement includes two incarnation freedom of movement – static and dynamic. It includes both the right to stay in one city, and its change, including the freedom to travel abroad, moving to permanent or temporary residence in another country and without return.

An individual may have several places of residence. Freedom of movement includes freedom to stay at a certain point in the short or long

<sup>1</sup> Кравченко, В. В. (2008). *Конституційне право України*. 6-е вид., випр. і доп. Київ: Атіка.

term without establishing permanent residence there, or the freedom to consolidate the new residence, if not going back to the old. Free movement and choice of residence is an essential guarantee of individual freedom condition for professional and personal development. This right is inalienable and inviolable.

In our country a law of Ukraine “On freedom of movement and choice of residence in Ukraine” dated 11.12.2003. Latest edition of 06/12/2012 p., And in accordance with Art. 3 of the Act freedom of movement – the right of citizens of Ukraine, foreigners and stateless persons lawfully staying in Ukraine, freely and smoothly move at will through the territory of Ukraine in any direction, in any way, in any -what with the exception of restrictions established by law.

As says S. V. Rybchenko: “Speaking of freedom of movement, you should think of the Law of Ukraine” On the Procedure for Exit from Ukraine and entry to Ukraine. “The present regulatory law act confirmed an individual right to freely return to Ukraine, that is no reason for a citizen of Ukraine can not be limited to the right to enter Ukraine”<sup>1</sup>.

The right to freedom of movement is guaranteed by the state through the law of human subjective possibility to move (move) in the required direction, using all possible ways and means, without violating the rights and freedoms of other entities. From this definition it follows a number of features of this law. First and foremost – the subject of law guaranteed by the state the opportunity to move in the right direction for him. In this case, the authorities ensure full enjoyment of the right to freedom of movement, while protecting it from attacks and violations. The second feature is a constraint on the move certain limits. So, by law formalized steps of performing movement in a particular area. The third feature performs a special procedure implementation movement. Expression she got that entity to carry out his plan may use all possible and available, or the most effective means to set limits within the law. These include road, river, sea, cartage, space transport, located in the state (municipal) or private. The fourth thing that distinguishes the freedom of movement of freedom of movement and hence the importance of the considered category – is the presence in business law duties when moving not violate the rights of others. This duty is performed and comply voluntarily or compulsorily. Thus there is a possibility of state coercion to its implementation, as well as the imposition of legal liability for its violation.

So with all the above we can conclude that the fundamental right to freedom of movement is an opportunity to people freely and smoothly

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<sup>1</sup> Рибченко, С. В. (2004). Законодавче регулювання свободи пересування та вільного вибору місця проживання в Україні. *Приватне право і підприємництво*, 4, 74-76.

move at will through the territory of Ukraine, leave the territory of Ukraine in its sole discretion and at any time to return to Ukraine, with the exception of restrictions prescribed by law.

The right to freedom of movement is complex. On the one hand, it has a stable and objectively necessary connection between the constituent elements of its meaning, “freedom”, “freedom of movement”, “freedom”, which form a total freedom of movement. On the other hand, mentioned categories have independent significance. Thus there is a need for their juristic regulations. Currently, the correct fixing of the right to freedom of movement is essential because the same understanding, equal subordination to him, possible only if there is exactly defined, consistent content standards. After the uncertainty of the law leads to arbitrary, based on a subjective interpretation discretion, recognition and exercise of freedom of movement, leading to the violation of the principle of equality. Established parameters degree of certainty of legal rules as contained in the essential characteristics of legal rules and legal provisions in the form of rules of conduct. When ambiguity of the law governing it is not, and *pravozastosuvacha* discretion.

The individual’s right to freedom of movement is not absolute, and therefore it may be restricted in accordance with the law. As pointed out by Z.V. Romovska, every freedom has its limits, which does not allow it to become a tyranny. Enshrined in law limit freedom, which is equal for all, can be narrowed to specific individuals who are as a general rule, the result of the commission of their illegal behavior<sup>1</sup>. Criminal Procedure and the activity is related to the restriction of rights and freedoms.

A number of international and national legal acts containing norms of restricting rights and freedoms, for example, Art. 29 of the Universal Declaration of Human Rights states that ‘rights may be limited only to ensure recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. In particular limitation of the right to freedom of movement contained in such international legal acts. According to p. 3 and 4. 2 №4 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees certain rights and freedoms are not provided for in the Convention and in the First Protocol of 16.09.1963 p. Implementation on these rights can not be set any restrictions other than those provided by law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, prevention of crime, for the protection of health or morals or for the protection of human

<sup>1</sup> Ромовська, З. (1997). Особисті немайнові права фізичних осіб. *Українське право*, 1, 53.

rights and svobodinshyh people. The right to freedom of movement and free choice residence in the territory of any State may also in certain areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society. Thus, h. 3. 12 of the International Covenant on Civil and Political Rights of 12.16.1966 p. Indicates that the aforementioned rights (right to liberty of movement and freedom to choose his residence) shall not be subject to any restrictions except those provided by law, are necessary to protect public safety, order, health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant.

In addition to the International Covenant on Civil and Political Rights, the right to freedom of movement enshrined in a number of other international instruments. Thus, in Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly on December 21, 1965, contains a provision that guarantees the right to freedom of movement. It established the right to leave any country, including his own, and the right to return to their country back. The purpose of this provision fixing the named paper is not only to achieve equality de jure, but equality and de facto, giving different ethnic, racial and ethnic groups to take advantage of all the same right to freedom of movement. The International Convention for the Suppression of the Crime and Punishment, adopted by the UN General Assembly on November 30, 1973, in Article 2 are defined as inhuman act any legislative measures and other measures aimed at preventing a leave and return to his country.

It should be noted that the scope of freedom of movement in the above normative legal acts have not been established. They have a guaranteed right to freedom of movement.

Commonwealth of Independent States Convention of 26 May 1995 on the rights and fundamental freedoms establishes the right of the test as follows: "Everyone lawfully within the territory of a Contracting Party, shall, within that territory the right to liberty of movement and freedom to choose his residence, (Art. 22 h. 1). Part 3 of that article states: "The rights set forth in claim. 1 and 2 of this Article shall not be subject to any restrictions except those provided by law in the interests of national security or public safety, public order, public health and morals or for the protection of the rights and freedoms of others. "

n addition to these acts norms that guarantee freedom of movement are contained in a number of other documents of the Council of Europe to facilitate the process of movement through the state and mode of entry into the territory of the contracting countries. Thus, according to Article 1 of the European Agreement on the rules governing the movement



between states – members of the Council of 13 December 1955 h.64, each contracting state promotes entry into its territory of nationals of other States Parties and enables them to entry temporary travel and free movement within their territory. Exceptions identified those cases where it is contrary to the interests of public order, public safety, public health and morality. Then immediately specified obligations of the parties, namely each state to the extent which allows economic and social conditions conducive to long-term or permanent residence in its territory of nationals of other countries. Nationals of a Contracting Party, regardless of where they live may enter the territory of another through any border on the basis of a valid passport or identity if stay in the territory of that State does not exceed three months. However, agreement, like most other international legal instruments, does not establish mechanisms of control over the states that signed it, as to whether they realized it fixed position, what, in fact, is allowed to retreat from that line states that it proclaimed. Vidpovidno the European Convention on the legal status of migrant workers from November 24, 1977, 65 States that have signed it, undertake to issue a residence permit in order to migrant workers and members of their families authorized to engage in paid employment activities in one of the states – participants. A residence permit is issued for the period of the work permit. If the employee no longer works due to temporary disability due to illness or accident, or due to involuntary unemployment, he was allowed to remain in the state for at least five months. Considered the Convention provides for the right of workers to freely leave the country and be admitted to the country of employment after obtaining all necessary permits. According to a document called the right to freedom of movement may be restricted in accordance with the law in order to protect public safety, order, health or morals.

Limitation of rights contained in the Ukrainian laws and directly in the Constitution of Ukraine. It should be noted that Art. 33 and 64 indicate a restriction on freedom of movement. Art. 33 of the Basic Law regulates “... with the exception of restrictions established by law” komentirovan article notes that freely leave the territory of Ukraine may be limited in the interests of national security or public safety, for the maintenance of public order, prevention of crime, for the protection of health or morals or for the protection of the rights and freedoms of others and only by law, but not regulations and art. 64 “Constitutional rights and freedoms of man and citizen may be limited, except as provided in the Constitution. In a state of war or a state of emergency may be set specific restrictions on rights and freedoms of those mentioning the limitations. “

In Ukraine until 2001 significantly restricted freedom of movement, as in force the Council of Ministers of the USSR on August 27, 1974

“On some rules of registration of citizens.” It was found that in cities and towns citizens prescribed regardless of the size of living space. More October 26, 1990 USSR Constitutional Review Committee, considered on its own initiative, decide on the compatibility of the legislation on registration laws and international acts on human rights, and found that the provision of registration substantially limit citizens freedom of movement and choice of residence. And in 2001, the Constitutional Court of Ukraine ruled unconstitutional registration. Registration of citizens of the place of residence does not contradict the generally accepted norms of international law<sup>1</sup>.

Laws that restrict freedom of movement while introducing special legal regimes in some areas of the territory; criminal procedural law connected with the right to freedom of movement; and other laws of Ukraine.

The first group of laws are: Law “On legal regime of martial law” from 06.04.2000 y. This Act outlines the limitations and special exercise of the right to freedom of movement when input throughout or in specific areas of special legal regime caused by armed aggression or threat of attack. Similarly, a limitation in the Law “On legal regime of the state of emergency” on 16.03.2000. In Art. 16 provides for restrictions on freedom of movement within the territory in which we introduce a state of emergency. As emphasized Punda O.O. that one of the most regulated in detail complex constraints in the implementation of the right to freedom of movement in the Law of Ukraine “On protection of population against infectious diseases” of 04.06.2000<sup>2</sup>.

The group of criminal procedure law that limits the right to freedom of movement in the first place is the Criminal Procedure Code of Ukraine of 19.11.2012. It contains a number of provisions on the limitation of the right to freedom of movement. The provision relating to the measures to ensure the criminal proceedings, in particular precautions. Because they are focused on the timely and full disclosure of crimes that whoever committed the criminal offense was prosecuted as guilty and no innocent has not been charged or convicted. But more about the right to freedom of movement in the application of preventive measures will be disclosed in the second and third chapters. Limitation of rights provided in the Criminal Procedure Code of Ukraine. For example, according to ch. 1 tbsp. And 37 h. 6 c. 41 CEC during the execution of a sentence of community or correctional labor convicted shall inform the penal authority of a change of residence.

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<sup>1</sup> Максименко, С. В. (2002). Питання щодо свободи пересування та вибору місця проживання в Україні та Російській Федерації: від інституту прописки до реєстрації. *Актуальні проблеми політики*, 15, 221-226.

<sup>2</sup> Пунда, О. О. (2006). *Право на свободу*. Хмельницький: ТОВ «Еврика».