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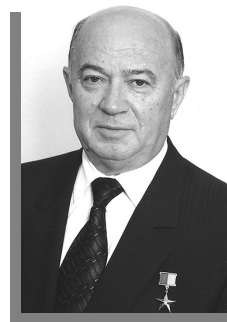
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CRIMINAL–LEGAL SCIENCES

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PROBLEMS OF STABILITY AND DYNAMISM OF THE MODERN CRIMINAL LEGISLATION OF UKRAINE

The world's social life, including the Ukrainian one, has two contradictory development tendencies. From the one hand, it shows the tendency to dynamism which is manifested in a constant search of new forms and methods of providing it, in the

economy innovation, significant transformations in social, informational, cultural, educational and other spheres and in the active development of new technologies and science etc. Yet the social life development includes the aspiration to the preservation of a certain consistency, stability, succession, sustention of the best previous achievements. On the other hand, this is the reason why the society aspires to stability which is manifested in the social demand for certain unchangeability of the fundamental principles and rules, predictability of their content at least for the near future etc. Exactly these tendencies provide sometimes rather stable and gradual and sometimes rather rapid and dynamic development of the society.

Both tendencies in their dialectical interaction and confrontation are also fully manifested in the development of the Ukrainian legislation, including the criminal one. From the one hand, it has been aspiring to certain stability, on the other hand, there is an urgent need in its dynamism, changeability, adjustment for the changing needs of social life and new challenges from the criminal environment. But stability and dynamism of the criminal legislation still remain interconnected and dialectically conditioned by its properties. The life shows that the legislation can't be only stable or only dynamic, because in any given historical period of the society and state development it always features the both tendencies mentioned¹. The other thing is that

¹ Монастирський Д. А. Стабільність закону: поняття, сутність та фактори забезпечення: автореф. дис. ... канд. юрид. наук. – К., 2009. – С. 8–10; Веніславський Ф. В. Співвідношення стабільності та динамізму в кон-

in some periods of country's development its legal regulation is marked with certain stability while in other periods – dynamism which, however, does not necessarily means the loss of experience succession of the previous periods².

It's absolutely obvious that such radical economic, political, social and even cultural and mental changes that are taking place in the Ukrainian society provoked certain dynamism in the development of domestic legislation including the criminal one. The adoption of the effective Criminal Code (CC) of Ukraine in 2001 marked the beginning of a rather radical reform of this sphere of law and reflected the level that was achieved by the Ukrainian science and law-enforcement practice in the sphere of criminal law³. But even

ституційно-правовому регулюванні / Ф. В. Веніславський // Держ. будівництво та місцеве самоврядування. – Х., 2009. – Вип. 18. – С. 17; Суходубова І. В. Стабільність і динамізм законодавства: поняття, співвідношення та засоби забезпечення: автореф. дис. ... канд. юрид. наук. – Х., 2013. – С. 8–10.

² Тацій В. Я., Борисов В. И., Тютюгин В. И. Стабильность и динамизм – необходимые условия эффективности и качества законодательства Украины об уголовной ответственности // Современные проблемы уголовно-правового воздействия: межгосударст. сб. научн. статей / редкол.: Е. А. Письменский (отв. ред.) [и др.]; МВД Украины, Луган гос. ун-т внутр. дел им. Э. А. Дидоренко, Волгогр. гос. ун-т. – Луганск: РИО ЛГУВД им. Э. А. Дидоренко, 2013. – С. 72–75; Баулін Ю. В. Вибрані праці. – Х.: Право, 2013. – С. 823–827.

³ Тацій В. Я., Сташис В. В., Баулін Ю. В. Новий Кримінальний кодекс України в контексті сучасної кримінально-правової думки // Антологія української юридичної думки: в 10 т. – Т. 10. Юридична наука незалежної України. – К., 2005. – С. 591–626

at that period there were no doubts that this Code would remain unchanged during continuous and active changes in our country and society¹. And the real life proved that. For more than fourteen years of the CC enactment (as of 15/12/2015) it was amended and supplemented 666 times. During this period 87 articles were added to the Code, 292 articles were fully or partially altered or redrafted which amounts to more than 65% of its rules. During this period 87 articles were added to the Code. 35 articles were excluded from the Code and 14 of them are those articles that were added to the Code after its enactment. Some prescriptions were altered more than once. For example, Articles 96¹, 364¹, 368³ of the Code (i. e. the Articles recently introduced to the Code) were amended five times while such new Articles as 364¹ and 368² were amended six times. Article 364 of the Code was amended seven times, Article 369 nine times and finally Article 368 ten times. It's obvious that this situation can't be explained solely by the tendency to the dynamism of the legislation based on the real needs for changes in the country and society. An idea inevitably comes to mind that such quick, drastic and frequent changes are not sufficiently connected with the real life needs and thus they are not motivated, systematic, scientifically and practically grounded and they even can be of an arbitrary character.

¹ Сташис В. В. Актуальні питання системи покарань за Кримінальним кодексом України 2001 р. // Право України. – 2010. – №9. – С. 16–24.

It seems that modern criminal legislation is significantly and not always reasonably affected by political programs, aims and convictions and the difficulties arising today are often settled exclusively by criminal and legal measures of influence. Especially it can be traced in the attempts to resolve complex political, economic, social or even historical and conceptual issues by means of criminal legislation². It's not always taken into account that the means of criminal law are connected with the most significant restrictions of rights and freedoms of the human person and citizen so they should be used solely as *ultima ratio* in countering the most socially dangerous acts which can cause significant damage to social relations safeguarded by the law. That is why the legal realization of criminal policy is to be carried out exclusively on the basis of preliminary fundamental scientific work, it must be scientifically grounded, theoretically modelled, predicted, verified and approved³. Science has to provide and substantiate the strategy and tactics of criminal legislation development and solely the ideas elaborated and spelled out on its basis can become the product that will obtain political support and enactment.

But the Ukrainian criminal and legal thought is developing. Even according

² Баулін Ю. В., Пономаренко Ю. А. Наука. Політика. Закон // Юрид. вісник України. – 2009. – №43. – С. 6.

³ Правова доктрина України: у 5 т. Т. 5: Кримінально-правові науки в Україні: стан, проблеми та шляхи розвитку / В. Я. Тацій, В. І. Борисов, В. С. Батиргарєєва та ін. за заг. ред. В. Я. Тація, В. І. Борисова. – Х.: Право, 2013. – С. 56–71.

to the purely formal indicators such as: the number of theses, published monographs, scientific articles, coursebooks, comments to legislation and its implementation, scientific conferences etc. – there is an onrush of scientific research in the field of criminal law. Sure enough such purely formal (quantitative) indicators not always guarantee high quality of scientific research because this extremely important problem is of another dimension. In any event, the analysis of a huge number of scientific products shows that they bring up and elaborate on the variety of problems of criminal and legal regulation, offering rather contradictory ways of solving them.

It is clear that such a variety of scientific research, conclusions, recommendations and proposals makes it difficult for the legislator not only to choose the idea or direction appropriate for further support, but even to perceive, analyse and systematize all of them. That's why special consultative and deliberative bodies are to carry out the function of a kind of link between scientific research and practical legislation. Some of them, for example, the Legislation Institute of the Verkhovna Rada of Ukraine, work on the permanent basis and perform the role of a certain «filter» which has to prevent low-quality and purely populist bills from reaching the Parliament¹. Others,

such as the Scientific and Consultative Boards of the Committees of the Verkhovna Rada of Ukraine or specially created working groups for the elaboration of the most important bills, work predominantly on a voluntary basis and their possibilities as to the passing of scientific contributions to the Parliament are much more limited.

In any event, the communication and transmission of data is to be organized exactly via these structures and exactly in this direction – from scientists to legislators. The reverse direction of data transmission – from legislators to scientists – is absolutely unacceptable, as in this case the scientists are actually tasked by political forces or the interested groupings to ground or explain, interpret or sometimes even justify the decisions already taken by them. This approach diminishes the role and significance of the legal science, lowers it to the level of a servant who has to catch new trends in proper time and to follow changeable policy. One of our most important tasks is to clearly define and firmly keep to the role and significance of the legal science in relations with the government and to establish the above mentioned links of passing scientific knowledge through political institutes to legislative provisions.

It's widely known that such mechanisms proved to be quite reliable and showed their high effectiveness in drafting the effective Criminal Code of Ukraine. The working group, created by the Cabinet of Ministers of Ukraine for drafting a new Criminal Code, studied and elaborated on hundreds of domestic

¹ Швець В. Д., Грицак В. М., Василькевич Я. І., Гацелюк В. О. Законодавча реалізація кримінально-правової політики: аналіз законопроектної діяльності Верховної Ради України V скликання з питань кримінального права / Вступне слово проф. Мельника М. І. – К.: Атіка, 2008. – 244 с.

as well as foreign scientific papers, synopses, theses, dozens of foreign criminal laws, huge practical experience of implementing the previous legislation, and on this basis offered the most optimal solutions to the legislators. In certain instances it also offered to the legislators some alternative proposals that failed to obtain unanimity among scientists and practitioners. And in this case only political decisions implemented either one scientifically grounded idea or another. Unfortunately, at the present legislative stage such mechanisms of work are often being forgotten which results not only into laws containing ideas without adequate scientific grounds and validation, but also laws containing obviously erroneous provisions, serious ambiguities and incongruities. We have to note with regret that neither the Legislation Institute of the Verkhovna Rada of Ukraine nor the Scientific and Consultative Boards of its Committees managed to prevent the approval of such laws by the Parliament. In particular, during the past year several laws of this kind were passed and enacted becoming part of the Criminal Code.

First of all we should mention the Act of Ukraine № 191-VIII of 12/02/2015¹, which contains the revision of the measure of restriction (§ 1, Article 213 of the Criminal Code) imposing imprisonment of «up to one year» as the

most severe punishment out of the several alternative main ones. But under § 2 Article 61 of the Criminal Code one year is the minimal term for this type of punishment. The mistake doesn't seem to be very rude and perhaps the legislator strived to establish an absolutely definite term for this measure of restriction – one year. Potentially this answer could satisfy practitioners if it were not for the provisions of § 2 and 3, Articles 68 and 69¹ of the Criminal Code providing for the obligatory reduction of the maximum term of the most severe type of punishment to one-half or two-thirds of the term correspondingly. Thus, in applying these provisions to the person who has committed an offence provided for in § 1 Article 213 of the Criminal Code, the court will have to order imprisonment for the term of less than one year which is a flagrant violation of § 2 Article 61 of the Criminal Code as well as of a number of prescriptions of the General Part of the Code.

Let's examine one more case. The Act of Ukraine 629-VIII of 16/07/2015² introduced in § 4 Article 220¹, Article 220² and § 1 Article 365² of the Criminal Code the imposition of an additional punishment in the form of deprivation of the right to occupy certain positions or engage in certain activities for a term of up to ten years. In addition, in § 4 Article

¹ Закон України № 191-VIII від 12 лютого 2015 р. «Про внесення змін до деяких законодавчих актів України щодо спрощення умов ведення бізнесу (дерегуляція)» // Відом. Верхов. Ради України. – 2015. – № 21. – Ст. 133

² Закон України № 629-VIII від 16 липня 2015 р. «Про внесення змін до деяких законодавчих актів України щодо вдосконалення системи гарантування вкладів фізичних осіб та виведення неплатоспроможних банків з ринку» // Відом. Верхов. Ради України. – 2015. – № 43. – Ст. 386.

220 of the Criminal Code this punishment was referred to as a “*restriction of the right to occupy certain positions or engage in certain activities*». At the same time, it is known that under § 1 Article 55 of the Criminal Code the maximum term of this punishment in cases when it is an additional one is only three years while such a punishment as “*restriction of the right*» is provided for neither in Article 51 nor Article 55 of the Criminal Code.

Such a «loose» treatment by the legislators of the types and terms of punishments established in the measures of restriction indicates considerable significance of the correlation issue of the prescriptions of the General and Special Parts of the Criminal Code. No doubts that the Articles of the Special Part contain special provisions that define signs of a certain offence and establish certain types and terms of punishments that can be applied for its commission. But sometimes, from such a correct understanding of the role of the Articles of the Special Part, a wrongful conclusion is made that they take precedence over the Articles of the General Part as they seem to correlate with each other as special and general rules. This position causes a reasonable criticism in scientific papers. According to our point of view, the Articles of the Special Part do not correlate with the Articles of the General Part as special and general rules, because for ensuring such a correlation we need an indispensable condition that both general and special rules regulate the same social relations. Although the rules of the General and Special Parts regulate general crim-

inal and legal relations, these relations are different in their content. While the rules of the General Part provide the main provisions on the criminality of acts, criminal liability and punishability for committing them, the rules of the Special Part regulate certain criminal and legal relations arising under the commission of certain crimes. That is why these rules correlate not as a general and special one, but rather as a general and individual one. In addition, in order not to go beyond the borders of the general rule, the individual rule has to be fully covered by the general one and not to conflict with it. Otherwise, the individual rule, having gone beyond the borders established by the general rule, has to be included into the set of other general rules or to stay outside any general rules of regulation. Taking this into account, in case of conflict between the general rules of the criminal law (rules of the General Part) and its individual prescriptions (rules of the Special Part), the absolute precedence must be given to the rules of the General Part. This basic rule is followed not only by scientists¹. It is also stated and approved in legal conclusions of the Supreme Court

¹ Пономаренко Ю. А. Положення Загальної частини Кримінального кодексу України, що регулюють діяльність законодавця // Нове законодавство України та питання його застосування: Тези доп. та наук. повідом. учасників наук. конф. молодих учених та здобувачів (м. Харків, 26–27 груд. 2003 р.) / За ред. М. І. Панова. – Х.: Нац. юрид. акад. України, 2004. – С. 117–119; Тютюгин В. И. Соотношение норм Общей части УК Украины о наказании и санкций статей Особенной части // Проблемы законности: Респ. міжвідом. наук. зб. □

of Ukraine which are mandatory for all subjects of the power structures using in their activities the corresponding legal rule and for all courts of general jurisdiction. The Supreme Court of Ukraine states explicitly that the rules of the Special Part of the Criminal Code shall be based on the rules of the General Part of this Code, that's why any rule of the Special Part which is in conflict with the rules of the General Part shall not be applied¹.

Taking into account the above mentioned information, the conflicts described above that were caused by the legislation novels of 2015, can be decided in the following way. In the restriction measure in § 1 Article 213 of the Criminal Code of Ukraine the words «or imprisonment for a term of up to one year» shall not be applied as being in conflict with § 2 Article 61 of the Criminal Code of Ukraine. So the offence provided for by the rule (the main constituent elements of violation of procedures related to operations with scrap metal) shall be punishable by «a fine of 1,500 to 2,000 tax-free minimum incomes, or correctional labour for a term of up to two years». As for the measures of restriction of § 4 Article 220¹, Article 220² and § 1 Article 365² of the Criminal Code of Ukraine, taking into account the provisions of § 1 Article 55 of the General Part of the Criminal Code of Ukraine, they establish additional punishment in the form of deprivation (not restriction) of the right to occupy certain

positions or engage in certain activities for a term of up to three (not ten) years.

It is clear enough that our conclusions are mainly recommendations for the courts. That's why, we believe that today we can and have to bring up the issue concerning the possibility of using this rule in the criminal legislation application as well as the issue concerning its direct introduction to the Criminal Code of Ukraine. We suggest introducing it in the form of a new paragraph of Article 3 of the Criminal Code of Ukraine spelling it out in the following way: «6. In case of conflicts between the provisions of the General and Special Parts of this Code, the provisions of its General Part shall be applied».

We should also mention one of the newest laws on amending the Criminal Code of Ukraine which has already caused a significant social response. We speak about the revision of § 5 Article 72 of the Criminal Code of Ukraine², under which «A court shall merge the pretrial detention into the term of punishment, in case of sentencing to imprisonment for the same crime, basing on the following proportion: one day of pretrial detention is equal to two days of imprisonment». If the court orders any punishment other than imprisonment, merging of the pretrial detention into the term of punishment for the same crime

¹ Рішення Верховного Суду України від 04.04.2011 р. // Вісник Верховного Суду України. – 2011. – № 8. – С. 9–11.

² Закон України № 838-VIII від 26 листопада 2015 р. «Про внесення зміни до Кримінального кодексу України щодо удосконалення порядку зарахування судом строку попереднього ув'язнення у строк покарання» // Голос України від 23 грудня 2015 р. – № 242. – С. 3

is carried out under the following procedure. First of all, the term of the pretrial detention is converted into the term of imprisonment under the same proportion (one day of pretrial detention is equal to two days of imprisonment). Then the term of imprisonment calculated in this way is converted into the ordered type of punishment according to the proportions established in § 1 Article 72 of the Criminal Code of Ukraine (one day of imprisonment equals to: one day of arrest or custody in a penal battalion; two days of restraint of liberty; three days of correctional labor etc). If the court orders such a primary punishment which cannot be converted into imprisonment (a fine or deprivation of the right to occupy certain positions or engage in certain activities), it shall discharge the convicted person from serving the sentence imposed.

In this case the legislator has interpreted the term «pretrial detention» too loosely because it extends to cover not only the time of imposing this preventive measure but also the time of detaining a person in custody without the permission from the investigating magistrate, court; the time of detaining a person in custody under the permission for detention from the investigating magistrate, court; the time spent by a person in the appropriate hospital for conducting forensic medical or forensic psychiatric examination; the time spent by a person, who serves his/her sentence in the establishments for serving previous terms, for conducting investigating actions or taking part in the court proceedings in the criminal case.

It's absolutely obvious that this prescription, improving the state of a person who has committed an offence, is a retroactive law (§ 1 Article 5 of the Criminal Code of Ukraine). Thus it affects all persons who committed appropriate acts prior to the enactment of the aforementioned law, including those persons who are serving their sentences. It places an additional burden on the Ukrainian courts to review all sentences of the persons to whom during the pretrial investigation or during the court hearings they applied for at least a day the preventive measure in the form of pretrial detention or who were detained in the form which the legislator sets equal to the pretrial detention. After converting the term of the pretrial detention into the term of imprisonment or other type of punishment, the part of the punishment that de facto has already been served by the person is to be de jure increased and the rest of the term is to be decreased correspondingly. We should also focus attention on the fact that if after this conversion it will turn out that, taking into account the pretrial detention, the person has de jure served a term of punishment longer than ordered by the court sentence, this person isn't entitled to compensation from the state for the «overserved term». This situation can be explained by the fact that the person is entitled to compensation only for damage inflicted by unlawful conviction (item 2, § 2 Article 1167, Article 1176 of the Civil Code of Ukraine) while in our case before the enactment of the Act № 838-VIII of 26/11/2015 the execution of the sentence was carried out on the

basis of a lawful sentence, imposed and executed under the legislation effective at that period of time.

At the same time we believe that the law contains a serious drawback which provides the opportunity for corrupt practices. We speak about the provisions contained in sub-paragraph 5, § 2 Article 72 of the Criminal Code of Ukraine under which «In imposing primary punishment not specified in paragraph 1 of this Article, a court shall discharge the convicted person from serving this primary punishment». It means that if pre-trial detention (in a broad sense of this term as it is described above) was applied to the person convicted by the court to punishments which under § 1 Article 72 of the Criminal Code of Ukraine can't be converted into the term of imprisonment, the convicted person shall be unconditionally fully discharged of serving this punishment. Such punishments include a fine and deprivation of the right to occupy certain positions or engage in certain activities. Thus, if a person has committed an offence for which the primary punishment is a fine (after the reform in 2011 their number increased significantly), the application to this person of pretrial detention for at least a day will provide the basis for discharging him/her from paying the fine regardless of its amount. We conclude that this provision is in conflict with the generally positive tendency in the development of our legislation in the direction of extending possibilities of applying a fine as the main punishment and it is also a significant factor that promotes corruption.

It's obvious that such rude mistakes in the criminal legislation could be easily avoided provided that the abovementioned mechanisms of coordinating legislative decisions with scientific research were applied. These mistakes are detected, scientists and practitioners have attracted attention to them and they are actually easy to correct. That's why the question «Who is guilty?» isn't pressing at the moment as opposed to the question «What shall we do to avoid such situations in future?»

We should also attract attention to the drawbacks of both the enacted laws and the bills, the enactment of which has been persistently lobbied recently. In particular it applies to the introduction of the so-called criminal misdemeanour to the criminal legislation.

It is known that the introduction of the criminal misdemeanour to the national criminal legislation of Ukraine, that remained quite a debatable issue of the science for several decades, obtained its political and legal solution in the Code of Criminal Procedure of Ukraine of 2012 that draws a principal distinction between the two criminal offences: crimes and misdemeanours. We do not bring up the issue on the extent of impact of the procedural legislation on the content of the material (criminal) one and we do not doubt the position of the legislator as for the introduction of the liability for the misdemeanour, but we consider necessary to draw attention to the ways of implementing this concept into the legislation.

At present, a new bill of Ukraine «On Amendments to Certain Legislative Acts

of Ukraine Regarding Introducing Criminal Misdemeanours» of 19/05/2015, reviewed of 03/06/2015, is presented to Parliament by a group of Ukrainian deputies. The analysis of this bill and documents accompanying it provides grounds for the generally negative conclusions. And although this bill is another attempt to implement the provisions of the Concept of Criminal Justice Reform approved by the Decree of the President of Ukraine № 311/2008 of 08/04/2008 on the introduction of the criminal misdemeanor to the Ukrainian legislation, it has considerable conceptual drawbacks and it is in conflict with Article 22 of the Constitution of Ukraine, the determinant provisions of the Concept and the principle of humanization of the criminal liability.

As we can see from the explanatory note to the bill, the implementation of the state policy of humanization of the criminal liability constitutes the aim of this bill. Nevertheless, the analysis of this bill shows a significant expansion of the borders of criminalization of acts as it recognizes as criminal offences more than 100 acts which today constitute administrative offences, provided for in the Code of Ukraine on Administrative Offences and the Customs Code of Ukraine, but which are not administrative violations that encroach on the established order of management (involving trespass against health of a person, social order and other values which are not connected with administrative procedures). According to the proposal of the authors of the bill, the person who has committed such violations which are not criminal

today will be criminally liable and the court will have to render a sentence imposing punishment. Leaving alone any insignificant information, we should state that this decision per se means distinguishing one more category of offences (in addition to minor, medium grave, grave and special grave offences) within the scope of the Criminal Code and providing the status of an offence, but only under a new term criminal misdemeanor to those acts which today constitute administrative violations. Thus, the bill is another attempt to resolve the issue of establishing the concept of criminal misdemeanor at the expense of practically absolute destruction of the criminal legislation as a system, built on the basis of implementation of the most socially important, reliable scientific and legal conceptual provisions proved by the many years of their effective application.

The bill mentioned above is almost identical to the Bill № 4712 of 16/04/2014 «On Amendments to Certain Legislative Acts of Ukraine on Implementing the Provisions of the Code of Criminal Procedure of Ukraine»¹ with some differences which, nevertheless, do not change the general conceptual basis of these bills. The bills of 2014 as well as of 2015 aim to introduce to the Gen-

¹ This bill has already been criticized in details. It has also been criticized by the authors of this paper (Тацій В., Тютюгін В., Капліна О., Гродецький Ю., Байда А. Концепція впровадження проступку шляхом прийняття Закону (Кодексу) України про проступки (Проект для обговорення) // Юрид. Вісн. України. – 2014. – № 21. – С. 12–13; № 22. – С. 12–13; № 23. – С. 12–13).

eral and Special Parts of the effective Criminal Code of Ukraine a number of other amendments which deal with the fundamental basis of the criminal law (signs of a socially dangerous act, forms of its guilt etc) and, in our opinion, such bills are to be drafted and discussed involving scientists, practitioners and the whole judicial community of Ukraine. One can make us confident that such novels are useful and necessary only by means of providing conceptual basis for such changes, substantial, detailed reasoning of their appropriateness, broad discussions of the proposed novels by scientists and practitioners¹. Rashness in such cases isn't a necessity for building an effective legal system, it becomes rather a ruining factor.

In conclusion we should note that, in our opinion, today the criminal legislation of Ukraine faces a real threat of its uncontrolled and unsystematic reformation which may result in both its further encumbering with scientifically groundless and unnecessary provisions and violating the principles on which it is built, system interconnections and interdependencies of its prescriptions that, in its turn, will entail essential decrease in effectiveness of measures of criminal and legal influence on the crimes. Taking all this into account, we would like to emphasize that legislative responses to the challenges of the modern life can't take an exclusively political form, they are to have a scientific basis.

¹ We should mention that some authors of this paper took part in drafting conceptual model of rendering liability for misdemeanours in the Ukrainian legislation, which is based on the grounds different from those of the mentioned bills, and it was published for a broad discussion by the judicial community (*Тацій В. Я., Тютюгин В. И., Каплина О. В., Гродецкий Ю. В., Байда А. А.* Концептуальная модель установления ответственности за проступок в законодательстве Украины (Проект для обсуждения) // Проблемы законности: сб. науч. тр. / отв. ред. В. Я. Тацій. – Х.: Нац. юрид. ун-т имени Ярослава Мудрого, 2014. – Вып. 125. – С. 7–31).