

## ***The subject of execution of judicial act as a criterion for classifying of court rulings in the civil process of Ukraine***

***Предмет виконання судового акту як критерій класифікації ухвал суду у цивільному процесі України***

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**Key words:**

*execution of court decisions, civil process, subject of execution, legal relations at the stage of execution of a ruling.*

**Ключові слова:**

*виконання ухвал суду, цивільний процес, предмет виконання, правовідносини на стадії виконання ухвали.*

**Relevance of the subject and statement of the problem.** Fair, objective and impartial court proceeding, as a part of the right to a fair trial, guaranteed by p. 1 of Art. 6 of the Convention "On the Protection of Human Rights and Fundamental Freedoms" of 04.11.1950<sup>1</sup>, is ensured, including by means of a court ruling, the legality of which stipulates the development of the process, and the protection of human rights and freedoms by the judicial authorities to a large extent depends on the effectiveness of the execution of court rulings. Determination of the subject of execution of the court ruling and unification of the mechanism for the implementation of certain groups of court decisions create preconditions for the implementation of the principle of obligatory judgments, and a comprehensive legal study of the classification of court decisions contributes to the formation of a homogeneous legal doctrine and legal practice.

**State of research.** The problem of classification of judicial acts finds reflection in works of the leading scientists of the present time (Shcherbak S.V, Fursa S.Ya.) and does not lose relevance among practicing lawyers (Zeykan Ya.P.). The subject of research in this area during past years was as follows: legal aspects of the allotment of court rulings to be enforced (Lysenko L.S.), determination of the forms of implementation of judicial acts (Talan L.G.), powers of the court at the stage of execution of the ruling (Verba – Sydor O.B). At the time of publication the research doesn't cover the legal aspects of determining the forms, methods and order of implementation of decisions, the grounds for classifying the court's judgments in the civil process with regard for the possibility of compulsory enforcement of the specified type of judicial acts.

**Problem statement.** Due to the mentioned above we can formulate the objectives of the research: the implementation of the doctrinal characteristic of the grounds for classifying court decisions in the civil process by the criterion of order, method and subject of execution.

**Statement of the main provisions.** By the time of the research there is no single and comprehensive approach to the criteria for classifying court rulings in the civil process among the sources of legal doctrine. In particular, depending on the task and the bases of court decree some scientists distinguish interim and final decisions (S.Ya Fursa and L.O Tyeryehova)<sup>2</sup>; M.E. Stefan highlights solutions, depending on their consequences, separating (interruptive) interim and final decisions from the decisions, that ensure the development of the process<sup>3</sup>; L.S. Lysenko classifies the decisions depending on the institutional powers of the court, which ruled the decision<sup>4</sup>.

At the same time, none of the proposed methods for classifying decisions is related to the procedure for the implementation of a judicial act. Taking into account the case law of the ECHR in the cases of "Shmalko v.

<sup>1</sup> Convention on the Protection of Human Rights and Fundamental Freedoms: International Convention of November 4, 1950 [Electronic resource]. – Access mode: <http://zakon.rada.gov.ua>. – P. 1.

<sup>2</sup> Fursa S. Ya. The Civil Procedure of Ukraine: Problems and Prospects: scientifically-practical manual / S. Ya. Fursa, S. V. Shcherbak, O. I. Yevtushenko. – K.: Fursa S. Ya., 2006. – P. 128.

<sup>3</sup> Zavorotko P.P. Judicial execution / P. P. Zavorotko, M. I. Shtefan. – K.: Publishing House of Kyiv University, 1967. – P. 91-92.

<sup>4</sup> Lysenko L. S. New Approaches to the Classification of Orders in the Civil Process / L.S. Lysenko // Bulletin of the Taras Shevchenko National University of Kyiv. – 2012. – No. 90. – P. 78-82.

Ukraine"<sup>5</sup>, "Romashov v. Ukraine"<sup>6</sup>, the execution of a judicial act should be considered an integral part of the trial, the right to judicial protection would look illusory if it did not provide for enforcement of court decisions which acquired legal power. Studying the implementation of court decisions in the enforcement proceedings, L. G. Talan points out that the stages of judicial proceedings are functionally aimed at ensuring the feasibility of a future court decision, and a judicial act which can not be executed does not correspond to the characteristics of justice and to the purpose of the proceedings<sup>7</sup>.

Given that the implementation of the legal order of the judicial act is carried out through its execution, in our opinion, it is advisable to supplement the ways of classifying the court's rulings in the civil process by the criterion of the order and manner of applying for execution. The provisions of the current legislation regulate the procedure for the implementation of court rulings in the context of a particular legal situation. A part of court decisions is implemented within the framework of the enforcement proceedings (for example, the enforcement of a court order to secure a claim, according to p. 9 of Art. 153 of the Civil Procedure Code of Ukraine<sup>8</sup>, is carried out in the order, established for the execution of judgments), the other ones – are executed by the authorities of internal affairs (the ruling on a drive, in accordance with p. 3 of Art. 94 of the Civil Procedure Code of Ukraine, is transmitted for execution to the authority of internal affairs by the place of proceedings in case or by the place of residence, work or study of the person subjected to the drive).

Taking into account that neither the current legislation nor the legal doctrine contains a systematic approach to the regulation of the mechanism for the implementation of court decisions, in order to create the pre-conditions for subsequent research on the implementation of the decision-making process, we propose to distinguish the order, method and subject of execution as criteria for classification of court decisions in civil cases. Taking into account the abovementioned grounds, we propose to distinguish among the court decisions, stated by the rules of the civil process, those execution of which is carried out by the bodies of the State Executive Service of Ukraine or private executors under the rules of the Law of Ukraine "On Enforcement Proceedings"<sup>9</sup>; court orders, execution of which is carried out outside the enforcement proceedings without the participation of officials of State Executive Service and private executives; court orders for which the law does not provide for the stage of execution.

The decisive factor that is the basis for the proposed classification of court decisions is the subject of execution – the aggregate of property and personal non-property rights of subjects of legal relations, the establishment, modification and termination of which is influenced by the implementation of the court decision. As of the time of scientific research, the norm-definition of the term "subject of execution", which would give a description of the given concept among the sources of law, is absent. The current legislation contains references to the concept of "subject of legal proceedings" (p. 2 of Art. 11-1 of the Civil Procedure Code of Ukraine), "subject of the dispute" (p. 2 of Art. 32 of the Civil Procedure Code of Ukraine) and "subject of the claim" (p. 2 of Art. 31 of the Civil Procedure Code of Ukraine). The subject of enforcement of court decisions is directly related to the subject of the claim, which includes the material legal claim of the plaintiff to the defendant. For example, in case of a court judgement, the property rights and obligations of the sides are the object of execution, the decision to recognize and convert entails legal consequences for both property and related personal non-property rights and obligations of sides. The subject of implementation determines the subjects of legal relations, whose rights and duties are influenced by the implementation of the court decision. In particular, the implementation of a court decision on the recognition of property rights creates the relevant entry to a prominent state register for the state registration of real rights to immovable property, execution of a court decision on the collection of funds provides grounds for employees of the bodies of the state executive service to apply measures of forced execution, the execution of the court decision on the satisfaction of the application of a psychiatrist, the representative of a psychiatric institution for the provision of compulsory appropriate psychiatric assistance, gives grounds for rendering medical assistance without the patient's consent. The subject of execution of the court decision, in comparison with the decision, as a type of judicial acts, determines the order, method and subjects

<sup>5</sup> Judgment of the European Court of Justice in the case of "Romashov v. Ukraine" of July 27, 2004 [Electronic resource]. – Access mode: <http://www.echr.coe.int/echr> – P. 11.

<sup>6</sup> Ibid.

<sup>7</sup> Talan L.G. Implementation of court decisions in the enforcement proceedings: dis. ... Candidate of Law: 12.00.03 / L.G. Talan. – Kh., 2012. – P. 54-55.

<sup>8</sup> Civil Procedural Code of Ukraine dated March 18, 2004 No. 1618-IV [Text] // Information from the Verkhovna Rada. – 2003 No. 40-42. – P. 166.

<sup>9</sup> On Enforcement Proceedings: The Law of Ukraine dated 02.06.2016. No. 1404 [Electronic resource]. – Mode of access: <http://zakon.rada.gov.ua> – P. 4.

for implementing the resolution, which resolves the issues related to the processing of the case in the court of first instance, petitions and applications of persons participating in the case, the question of the postponement of the case, the break, stop or termination of the proceedings, leaving the application without consideration, as well as in other matters are stipulated by the CPC of Ukraine. For example, the property rights of the subject of legal relations are the subject of an application on taking measures to secure a claim by arresting property or funds belonging to the defendant, the subject of execution of the resolution on the results of the examination of the pointed application, as well as the decisions on temporary seizure of the evidence for examination by the court, leaving of the claim without consideration (in case of distribution of the court costs); the personal non-property right of an individual to freedom of movement and free choice of residence is the subject of execution of a court order on the temporal limitation of the debtor in the right of departure outside Ukraine, the decisions on the application of measures of procedural coercion, decisions on the drive of the witness. In addition, a separate group of court decisions is aimed at forming the grounds and prerequisites for the proper implementation by the subjects of the legal relationship of their own powers (the decision on the appointment of a guardian, the decision to involve a specialist, an interpreter, a person providing legal aid, a decision on the search of the defendant, a decision on the appointment of an examination, a decision about a court assignment, a decision on the search for a debtor or a child). Describing the classification of court decisions in a civil process through the prism of the subject of execution, among the list of court rulings subjected to execution by the bodies of the State Bailiffs Service of Ukraine or private executors, in accordance with the rules of the Law of Ukraine "On Enforcement Proceedings", we shall distinguish a resolution on the securing of a claim, a decision to leave the claim without consideration (in the case of distribution of court costs between the parties), the decision on the turn of the enforcement, the decision on the results of consideration of the complaint about the actions of the ICE or a private executor, the ruling on the restriction of rights and travel abroad, a decree on the deferral, postponement of the execution of a court decision, a ruling on the recognition of an enforcement record as non-enforceable.

The group of court decisions, the subject of implementation of which does not provide for the participation of officials of the bodies of the State Executive Service and private executors, on the author's propose should include the decision on the appointment of a guardian, the decision to search for a defendant, the decision to appoint an expert examination, the decision to apply procedural coercive measures, the decision on the compulsory drive to conduct DNA expertise, the court's decision to remove a participant of the civil process from the courtroom, the decision on the temporary placement of the child in a children's or medical institution, the decision to search for a debtor or a child.

The list of court rulings, which the author proposes to include in the group of decisions, the stage of execution for which is not provided by law, includes the decision on holding a closed court hearing, the decision on the involvement of a specialist, translator, a person providing legal assistance, the decree on temporary seizure of evidence for investigation by the court, the ruling on the judge withdrawal, the ruling on the determination of jurisdiction, the decision on the involvement of a third person, the decision to change the properties of the object of expertise, the decision on the renewal of procedural time limits and other decisions, specified by CPC of Ukraine, the list of which is unexhaustive.

Talan L.G., Zaitsev I.M. indicate the criterion of coercion as the basis for the distinguishing of a group of judicial acts endowed with a sign of "executive".

L.G. Talan in particular distinguishes between the basic (Compulsory execution by the bodies of the State Executive Service of Ukraine) and alternative (execution of decisions by tax authorities, banks, bodies of the State Treasury of Ukraine, guardianship bodies, civil registration authorities, which are not compulsory) forms of execution of court decisions<sup>10</sup>. Admitting the two separate forms of execution of court decisions, we note that this classification does not find its distribution in court rulings.

In particular, including the bodies and institutions, which by virtue of the Law "On Enforcement Proceedings" are not the enforcement authorities, to the subjects of alternative form of the execution of court decisions, L.G. Talan, as well as a legislator does not take into account part of provisions of CPC of Ukraine, which de-facto provide the compulsory execution of the ruling. For example, p. 2 of Art. 289 of the CPC of Ukraine, grants the right in exceptional cases where a person, in respect of whom the proceedings in the case concerning limitation of his/her civil capacity or the recognition of his/her incapacity have been opened, clearly avoids the examina-

<sup>10</sup> Talan L.G. Implementation of court decisions in the enforcement proceedings: dis. ... Candidate lawyer Sciences: 12.00.03 / L.G. Talan. – Kh., 2012. – P. 115.

tion, to make decision on the compulsory referral of an individual for forensic psychiatric examination; p. 3 of Art. 94 of the CPC of Ukraine provides for compulsory enforcement of the decision on the drive by bodies of internal affairs. The given examples show the compulsory enforcement of the court rulings, while the Law of Ukraine "On Enforcement Proceedings" gives the powers of enforcement of court decisions exclusively to the organs of the state executive service. Belousov Yu.V. draws attention to the fact that the procedural law doesn't point to coercion as a feature of a court decision or a decision of another jurisdiction, but on its being obligatory<sup>11</sup>.

In our opinion, this discrepancy in the contextual content of terms is determined by the lack of a legislative separation between the notion of "enforcement proceedings", "enforcement of judgments", "compulsory enforcement", as well as by the substitution of the concepts of "judicial decision" and "court decision".

In the context of the provisions of Art. 208 of the CPC of Ukraine, according to the norms of which the court decisions are laid out in the form of decisions, decrees and rulings, the legal term "judicial decision", in contrast to the concept of "court decision" includes, court orders as well. In accordance with the requirements of p. 2, 3, Art. 208 of the CPC of Ukraine, the trial of the case ends with the adoption of a court decision, while issues related to the processing of the case in the court of first instance, the petition and applications of the persons involved in the case, the adjournment of the consideration of the case, the announcement of a break, the suspension or closure of the proceedings, leaving of the claim without consideration, as well as in other cases provided by the CPC, shall be resolved by means of court rulings.

In our opinion, the classification of forms of coercive and voluntary execution of court decisions, proposed by separate lawyers does not fully correspond to the execution of court rulings in the civil process, as the procedure for the execution of a number of judicial acts of the specified group, the implementation of which is carried out by the law by authorized agents, can not be considered neither compulsory nor voluntary (the decision on a judge withdrawal, the resolution of the court order, a decision on the temporal limitation of the debtor in the right to travel abroad). Understanding, that the enforcement of court decisions means the activities of state authorities and their officials in order to implement or legitimize the provisions, specified by court decisions, which include the possibility of applying the measures of state coercion to ensure the objective implementation of the legal order, determined by court decisions, we note that the characteristic of the enforced execution is true only for a part of court decisions (a decision on recovery, a decision on the turn of execution, a decision on removal from the courtroom, etc.). Comparing the classification of court decisions by the criterion of the order and method of implementation proposed by the author, with the differentiation of the compulsory and voluntary form of execution of judicial acts, we note that the category of application of coercive measures is typical for substantiating the procedure for executing court decisions by the bodies of the state executive service by opening the enforcement proceedings and part of court decisions, which are carried out by law enforcement agencies. One of the ways of compulsory implementation of a court decision, along with others, is its implementation within the framework of enforcement proceedings.

Thus, the current normative and theoretical basis of Ukraine in the field of classification of court rulings in the civil process contains a considerable part of the shortcomings and gaps, the legal doctrine establishes the directions of discussion on the criteria for classification of judicial acts, while eliminating the shortcomings of legislation by systematizing and generalizing the postulates of the civil process as a science, creates preconditions for the unification of judicial practice and the provision of proper law enforcement.

According to the results of the research of the subject of execution of the ruling, as a criterion for the classification of court decisions, with taking into account the mechanism for their implementation envisaged by the legislation, we can draw the following conclusions:

Contemporary legal studies of the classification of judicial acts, being focused on the content of a judicial act, lower the order, method and subject of execution, as criteria for the classification of court decisions in the civil process.

The norms of the current legislation, as regards the legal regulation of execution of court decisions in the civil process, provide for the implementation of court decisions both within the framework of enforcement proceedings and through the exercise of powers by other bodies of state power and local self-government (bodies of internal affairs, bodies of guardianship, bodies of border control) or do not establish a subject and procedures for implementation, creating a gap in the legal regulation system.

<sup>11</sup> Belousov Yu.V. Civil process: a manual / A.V. Andrushko, Yu.V. Belousov, R.O. Stefanchuk, O.I. Ugrinovskaya and others. – K.: Precedent, 2005. – P. 37.

In order to unify the provisions of the legal doctrine, legal acts and legal practice, we propose:

To distinguish, according to the criterion of the subject of execution, the court orders, execution of which is carried out by the bodies of the State Bailiffs Service of Ukraine according to the rules of the Law on "On Enforcement Proceedings"; court rulings, execution of which is carried out outside the enforcement proceedings without the participation of officials of State Bailiffs Service of Ukraine; court rulings for which the law does not provide for the stage of execution.

To ensure the legislative separation between the notion of "enforcement of court decisions" (procedure for the implementation of a judicial act), "enforcement proceedings" (one of the methods of enforcing of judicial acts) and "compulsory enforcement" (enforcement of coercive measures in the course of a judicial act).

### Summary

The paper highlights the actual issues of executing a court order in the civil process, analyzes the situation of the current legislation of Ukraine and provides a general description of legal relations at the stage of execution of court rulings in the civil process of Ukraine, defines ways of optimizing legislation in this area.

### Анотація

У роботі висвітлено актуальні питання виконання ухвали суду у цивільному процесі, проаналізовано положення чинного законодавства України та здійснено загальну характеристику правовідносин на стадії виконання ухвал суду у цивільному процесі України, визначено шляхи оптимізації законодавства у вказаній сфері.

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