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## **Certain Aspects of Understanding Criminal Offense Subject Matter Under Article 191 of the Criminal Code of Ukraine**



**Oleksiy Bogomolov**

The purpose of this study is to highlight certain aspects of the subject matter of criminal offense in crimes involving misappropriation, embezzlement of property or its conversion by malversation. The methodological framework of the study has been developed taking into account general scientific and special methods of scientific inquiry. A number of scientific methods have been applied, including dogmatic, hermeneutic, comparative, extrapolation and analogy. The author proves that the subject matter of misappropriation or embezzlement of somebody else's property, set out in Parts. 1 and 2 of Article 191 of the Criminal Code of Ukraine, is property entrusted to a person or under his/her administration—that is, property over which the person has special authority. Entrusted is property that is transferred to a person for possession or use in accordance with a transaction or in connection with the performance of duties associated with the position held. Evidence that property is entrusted to a person is that this person actually possesses the property and this property is under his/her control. It has been established that property under a person's administration should be understood as property that is not under the physical control of a person, but transferred to him/her by the owner or his/her authorized representative on the terms of granting this person a certain amount of rights to own, use and dispose of this property, which ensures the possibility of operational management of it to achieve a certain goal, determined by the owner or without such, that is, the person is granted a certain authority to manage and dispose of property. The criterion for distinguishing between entrusted property and property under a person's administration is the nature of a legal relationship between the owner and the person: for entrusted property, this is a relationship with the actual possibility of ownership, that is, the person actually possesses property; for property under a person's administration, this is a relationship with the presence of a certain amount of ownership rights over the property, in other words, the person may not physically possess it. It is emphasized that the definition of the subject of the criminal offense under Art. 191 of the CCU is inextricably linked to the establishment of crime subject status. It is noted that an official is a person who has authority under the position held and performs a range of functions consistent with that position, including: administrative and economic functions; organizational and executive functions; and functions as a representative of the government or local self-government.

**Keywords:** appropriation, embezzlement, conversion of property, subject matter of offense, somebody else's property, entrusted property, property under administration, abuse, official, official standing.

**Research Problem Formulation.** Statistics show that misappropriation, embezzlement of property or its conversion by malversation is classified as a fairly common type of criminal offense. This is why law enforcement agencies are increasingly concerned about whether it is possible to clearly define the subject matter of this type of offense pursuant to Art. 191 of the Criminal Code of Ukraine (hereinafter referred to as the CCU). Furthermore, judicial practice also sheds light on a number of issues directly or indirectly linked to the definition of the subject matter of this type of criminal offense. Considering the criminal legislation on the subject matter of offenses against property, Pt. 1 of Art. 191 of the CCU refers to property entrusted to a person

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The author contributed solely to the intellectual discussion underlying this paper, case-law exploration, writing and editing, and accept responsibility for the content and interpretation.

### **DECLARATION OF COMPETING INTEREST**

The author declare that they have no conflict of interest.

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Олексій Богомолів

**ОКРЕМІ АСПЕКТИ РОЗУМІННЯ  
ПРЕДМЕТУ КРИМІНАЛЬНОГО  
ПРАВопорушення  
ЗА СТАТТЕЮ 191  
КРИМІНАЛЬНОГО КОДЕКСУ  
УКРАЇНИ**

Метою дослідження є висвітлення окремих аспектів предмету злочинного посягання у кримінальних правопорушеннях, пов'язаних із привласненням, розтратою майна або заволодіння ним шляхом зловживання службовим становищем. Методологічне підґрунтя дослідження склали загальнонаукові та спеціальні методи наукового пізнання. Застосовано низку наукових методів включно з догматичним, герменевтичним, порівняльним, екстраполяцією та аналогією. Автор доводить, що предметом привласнення та розтрати чужого майна, передбаченого ч.ч. 1, 2 ст. 191 ККУ, є ввірене майно та майно, що перебуває у віданні особи, тобто, щодо якого особа володіє спеціальними повноваженнями. Ввіреним є майно, що передане особі у володіння чи користування відповідно до правочину або у зв'язку із виконанням обов'язків, передбачених займаною посадою. Свідченням про те, що майно ввірене особі є те, що ця особа фактично володіє майном і це майно перебуває під її контролем. Встановлено, що під майном, яке перебуває у віданні, слід розуміти майно, яке не перебуває під фізичним контролем особи, але передане їй власником чи уповноваженим ним суб'єктом на умовах наділення цієї особи певним обсягом прав володіння, користування та розпорядження цим майном, що забезпечує можливість оперативного управління ним для досягнення певної мети, визначеної власником або без такої. Тобто, особа наділяється певною правомочністю управління та розпорядження. Критерієм розмежування ввіреного майна та майна, переданого у відання, визначено характер правовідносин між власником і особою: для ввіреного майна – це відносини з фактичною можливістю володіння; для майна, що передане у відання – це відносини з наявністю певного обсягу правомочностей власності щодо майна, інакше кажучи, особа фактично може і не володіти ним. Акцентовано, що визначення предмета злочинного посягання за ст. 191 ККУ тісно пов'язане зі встановленням статусу

or under his/her administration, while the other parts of this article do not contain any specific reference to the subject matter of this particular criminal offense. However, there is no consensus regarding the interpretation of these concepts or their differentiation, either in academia or in law application practice. Additionally, as a distinct form of criminal offense under Art. 191 of the CCU, there is conversion of property by malversation, as an alternative to embezzlement or misappropriation. The subject matter of this offense is not defined by law and has been insufficiently addressed by scholars. Therefore, the relevance of the chosen research topic is evident.

Analysis of Essential Researches and Publications. The theoretical framework of this study integrates scientific contributions from a number of scientists, including: N. O. Antoniuk, Yu. P. Dziuba, L. M. Demydova, L. V. Dorosh, O. O. Knyzhenko, V. O. Navrotskyi, P. V. Oliinyk, M. I. Panov, M. V. Saprykina, O. A. Slabchenko, V. B. Kharchenko, Yu. L. Shuliak, N. M. Yarmysh, and others. When attempting to define the subject matter (occasionally referred to as “object” to denote a physical property) of the criminal offense set forth in Art. 191 of the CCU— as would be the case with most property-related criminal offenses, whether motivated by financial gain or otherwise—scholars note that the subject matter of these crimes encompasses property of various forms of ownership that exhibits certain features:

– “Legal feature: subject matter of an offense is an element of somebody else’s ownership rights.

– Economic feature: subject matter of an offense has a certain value (price) determining the amount of loss incurred by the owner.

– Physical feature: such objects can be seized, appropriated, consumed, damaged, or destroyed”<sup>1</sup>.

Noteworthy is a conclusion drawn by P. V. Oliinyk when defining the subject matter of crime against property. The researcher notes: “It may be:

– Somebody else’s property, including items, money, and securities that represent monetary value.

– Objects or phenomena equivalent to property, such as: land plots, electrical and thermal energy, natural gas.

– Property rights;

– Actions of a proprietary nature”<sup>2</sup>.

M. I. Panov, who studies offenses against property, claims that “in certain property crimes, the subject matter is both property and the right to property, along with actions of a proprietary nature”<sup>3</sup>.

The social feature of offenses against property has not gone unnoticed by scientists. In the past, O. O. Dudorov and E. O. Pysmenskyi, defining the social aspect of criminal offenses against property, noted that “such an object (or item) must be created through labor or separated from its natural environment”<sup>4</sup>.

Various approaches have emerged in this area of criminal law, and academic opinions remain divided on this issue, demonstrating the need to address certain aspect of the subject matter of the offenses set out in Art. 191 of the CCU.

The Study Purpose is to define specific aspects of the subject matter of criminal offense in crimes involving misappropriation, embezzlement of property or its conversion by malversation.

Research Methods. The methodological framework of the study has been developed using general scientific and special methods of scientific inquiry. Various scientific methods have been applied, including the dogmatic, hermeneutic, comparative, extrapolation, and analogy methods.

Main Content Presentation. Note that in today’s context, investigations into the criminal offenses set forth in Art. 191 of the CCU constitute one of

<sup>1</sup> Кримінальне право України: Особлива частина: підручник/ за ред. В. Я. Тація, В. І. Борисова, В. І. Тютюгіна. 5-те вид., перероб. і допов. Харків : Право, 2015. С. 162..

<sup>2</sup> Олійник П. В. Предмет злочинів проти власності: поняття, види, кримінально-правове значення : монографія. Харків : Право, 2011. С. 81.

<sup>3</sup> Кримінальний кодекс України. Науково-практичний коментар. Т. 2: Особлива частина /Ю. В. Баулін, В. І. Борисов, В. І. Тютюгін та ін. 5-те вид., допов. Харків : Право, 2013. С. 202..

<sup>4</sup> Кримінальне право (Особлива частина). Т. 1: підручник /за ред. О. О. Дудорова, Є. О. Письменського. Луганськ : Елтон-2, 2012. С. 352.



the most common activities of law enforcement agencies. Law enforcement agencies increasingly focus on this category of criminal offenses due to the fact that “according to the comment to Article 45 of the Criminal Code, they are classified as corruption-related criminal offenses only if committed through abuse of office (malversation)”<sup>5</sup>. We are primarily referring to the classification by the pre-trial investigation authority of committed corruption-related offenses pursuant to Pts. 2–5 of Article 191 of the Criminal Code of Ukraine. This classification stems from certain qualifying features. Pt. 1 of Art. 191 of the CCU was excluded from this list because it stipulates only two main *corpora delicti* of these criminal offenses. A criminal offender in these types of crimes is a general subject, meaning any sane person of legal age, and not an official (who is, by definition, a special criminal offender).

Obtaining forensically relevant information regarding a criminal offense is inextricably linked to the extent of available data on the forensic characterization, in which the subject matter of offense plays a central role. V. Ya. Tatsii pointed out that “any object of the material world, certain qualities of which the law considers to be indicative of a criminal offense in a person’s actions, must be regarded as the subject matter of criminal offense”. Accordingly, the subject matter of offense is an optional element of *corpus delicti*, that is, it is mandatory only in those specific offenses where it is directly specified in the legal norm”<sup>6</sup>.

However, other forensic scientists define the subject matter of criminal offense in a much broader sense, including, along with tangible objects, phenomena of objective reality. P. P. Andrushko believes that “the subject matter of crime might not only be physical objects, but also other phenomena of the objective world (intangible objects, such as information or energy) that manifest themselves externally or are capable of doing so, and can be perceived by the human senses. ... The subject matter of crimes specified in individual articles of the Criminal Code of Ukraine are respective intellectual property objects specified in the Dispositions of these Articles”<sup>7</sup>. M. M. Panov holds a slightly different view. The scholar proposes the following: “This category should include not only physical objects (such as items and property), but also those phenomena of the objective world that actually exist, including information. In connection with the existence, creation, or circulation of such things a crime is committed”<sup>8</sup>.

O. M. Zaiets notes: “The issue of subject matter is one of the most acute in the theory of criminal law and criminalistics, and its resolution requires special attention considering the key role this category plays in determining essential elements of the objective aspect and other *corpus delicti* of a criminal offense, and in defining characteristics of those elements”<sup>9</sup>.

Most researchers therefore propose that the subject matter of criminal offense be understood as a rather complex component of social relations surrounding a socially dangerous act. The subject matter of such a criminal offense may be either a tangible object or another asset of an intangible nature.

It shall be noted that a mandatory feature of the *corpora delicti* of the criminal offenses set out in Pts. 2–5 of Art. 191 of the CCU is, *inter alia*, their subject matter — in our case, somebody else’s property. It is generally understood that the subject matter of criminal offense is more narrowly defined in the criminal law sense than in the forensic sense.

суб'єкта злочину. Відмічено, що службовою є особа, яка має повноваження відповідно до займаної посади та виконує відповідно до цієї посади низку функцій, зокрема: адміністративно-господарських функцій, організаційно-розпорядчих функцій; функцій представника влади чи місцевого самоврядування.

Ключові слова: привласнення, розтрата, заволодіння майном, предмет посягання, чуже майно, ввірене майно, майно, що перебуває у віданні, зловживання, службова особа, службове становище.

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#### EINZELNE ASPEKTE DES VERSTÄNDNISSSES DES TATBESTANDS DER STRAFATAT GEMÄSS ARTIKEL 191 DES STRAFGESETZBUCHES DER UKRAINE

Zusammenfassung. Der Artikel beleuchtet bestimmte Aspekte des Tatbestands der Straftaten gemäß Art. 191 des Strafgesetzbuches der Ukraine. In dem Artikel wird nachgewiesen, dass der Gegenstand der Aneignung und Veruntreuung fremden Vermögens gemäß Abs. 1 und 2 von Art. 191 des Strafgesetzbuchs der Ukraine das anvertraute Vermögen und das Vermögen ist, das sich in der Verwaltung einer Person befindet, d. h. über das die Person besondere Befugnisse besitzt. Als anvertrautes Vermögen gilt Vermögen, das einer Person aufgrund eines Rechtsgeschäfts oder im Zusammenhang mit der Erfüllung der mit ihrer Position verbundenen Pflichten zur Verfügung gestellt oder zur Nutzung überlassen wurde; ein Anzeichen dafür, dass das Vermögen einer Person anvertraut ist, ist die Tatsache, dass diese Person tatsächlich über das Vermögen verfügt und dieses Vermögen unter ihrer Kontrolle steht. Es wurde festgestellt, dass unter in der Verwaltung befindlichem Vermögen solches Vermögen zu verstehen ist, das sich nicht unter der physischen Kontrolle einer Person befindet, sondern ihr vom Eigentümer oder einem von ihm bevollmächtigten Rechtsträger unter der Bedingung übertragen wurde, dass dieser Person ein bestimmter Umfang an Besitz-, Nutzungs- und Verfügungsrechten über dieses Vermögen eingeräumt wird, was die Möglichkeit einer operativen Verwaltung desselben zur Erreichung eines vom Eigentümer festgelegten bestimm-

<sup>5</sup> Дорошенко К. Право на майно як предмет кримінального правопорушення, передбаченого статтею 191 Кримінального кодексу України. *Газета «Юридична практика»* від 20.11.2024. URL: <https://pravo.ua/pravo-na-maino-ia-k-predmet-kryminalnoho-pravoporushennia-predbachenoho-statteiu-191-kryminalnoho-kodeksu-ukrainy/>

<sup>6</sup> Тацій В. Я. Объект и предмет преступления в советском уголовном праве. Харьков : Вища шк., 1988. С. 46-47.

<sup>7</sup> Андрушко П. П. Кримінально-правова охорона прав інтелектуальної власності в Україні. Київ : Форум, 2004. С. 34-35.

<sup>8</sup> Панов М. М. Кримінальна відповідальність за незаконні дії з документами на переказ; платіжними картками та іншими засобами доступу до банківських рахунків : монографія / наук. ред. В. І. Борисов. Харків : Право, 2009. С. 17.

<sup>9</sup> Заець О. М. Поняття та особливості предмету кримінального правопорушення, який вчинено у сфері зберігання. *Південноукраїнський правничий часопис*. 2017. № 1. С. 106.

ten Ziels oder auch ohne ein solches gewährleistet. Es wird darauf hingewiesen, dass ein besonderes Merkmal fremden Eigentums darin besteht, dass das Eigentum auf der Grundlage eines Rechtsgeschäfts, das sowohl in schriftlicher als auch in mündlicher Form erfolgen kann, anvertraut oder zur Verwaltung übergeben werden kann, sofern Letzteres nicht gesetzlich verboten ist. Das Unterscheidungsmerkmal zwischen anvertrautem und zur Verwaltung übergebenem Vermögen ist die Art der Rechtsbeziehung zwischen dem Eigentümer und der Person: Bei anvertrautem Vermögen handelt es sich um eine Beziehung mit der tatsächlichen Möglichkeit des Besitzes; bei zur Verwaltung übergebenem Vermögen handelt es sich um eine Beziehung mit dem Vorhandensein eines bestimmten Umfangs an Eigentumsbefugnissen in Bezug auf das Vermögen. Es wird betont, dass die Bestimmung des Gegenstands der Unterschlagung und der Veruntreuung gemäß Art. 191 des Strafgesetzbuchs eng mit der Feststellung des Status des Täters verbunden ist. Es wird festgestellt, dass eine Person als Amtsträger gilt, die über Befugnisse entsprechend ihrer bekleideten Position verfügt und im Rahmen dieser Position eine Reihe von Funktionen wahrnimmt, insbesondere: administrativ-wirtschaftliche, organisatorisch-verwaltungsbezogene sowie Funktionen als Vertreter der Staatsgewalt oder der lokalen Selbstverwaltung. Es wird festgestellt, dass Gegenstand der Aneignung fremden Vermögens durch Missbrauch der dienstlichen Stellung durch einen Amtsträger das Vermögen ist, das Untergebenen anvertraut ist oder unter deren Verwaltung steht. Es wird darauf hingewiesen, dass Gegenstand der Aneignung bei den entsprechenden Tatbeständen der in Art. 191 des Strafgesetzbuchs vorgesehenen Straftaten nur fremdes Vermögen sein kann, nicht jedoch ein Recht an Vermögen oder Handlungen vermögensrechtlicher Art.

**Schlüsselwörter:** Aneignung, Veruntreuung, Aneignung von Eigentum, Gegenstand der widerrechtlichen Aneignung, fremdes Eigentum, anvertrautes Eigentum, verwaltetes Eigentum, Missbrauch, Amtsträger, Amtsstellung.

The scholars noted that, from a criminal law perspective, the subject matter of the offense under Art. 191 of the CCU is limited to property that was entrusted to the perpetrator or was under his or her lawful administration. That is, such property must have been in the individual's ownership on lawful grounds, and the person exercised all powers over it associated with the disposal, management, delivery, or storage of that property. These provisions state: "When committing a crime punishable under Art. 191 of the CCU, the perpetrator exercises powers (authority) over this property. It is precisely this feature that distinguishes the analyzed type of crime from other property offenses, in which the perpetrator is not directly involved with property, or has access to it exclusively for work-related reasons, or has been entrusted with guarding the property, or the property has been transferred to them for use in production purposes"<sup>10</sup>.

This concept is further clarified by researchers, who propose defining subject matter as "property entrusted to somebody else, or in their administration, over which a person had certain authority, and the value of which must exceed 0.2 times the non-taxable minimum income or tax social privilege"<sup>11</sup>.

Of particular significance is that forensic scientists analyze the subject matter of criminal offense through a combination of specific features. M. V. Saltevs'kyi believes that "the content of the subject matter of criminal offense is shaped by various physical objects characterized by their aggregate state, intended use, physical and chemical properties, etc."<sup>12</sup>. Concerning the forensic understanding of the subject matter of criminal offense, one must agree with A. F. Volobueiva's statement, who argues that "the subject matter of criminal offenses in criminal law theory can be defined as any physical object, certain features of which criminal law links to specific criminal actions perpetrated by a person; this applies only to cases where the subject matter of criminal offenses is directly specified in the Disposition of the Article of the CCU. The subject matter of embezzlement is property, including money, tangible assets, and some other items"<sup>13</sup>.

Clearly, from a forensic perspective, information on the nature of embezzled property is of fundamental importance for investigating criminal offenses. This is because there are regular patterns of connection between features of misappropriated or embezzled property, circumstances surrounding commission of unlawful acts, and other elements of the mechanism underlying these criminal offenses. The objective aspect of the criminal offense specified in Pts. 2–5 of Art. 191 of the CCU points to two mandatory criteria: unlawful taking of property from the owner or authorized person and use of the property for one's own benefit or for the benefit of others (third parties) — these actions constitute unlawful conduct.

A rather remarkable and worthy-of-support view is that advocated by A. P. Sheremet, who emphasizes that "features pertaining to the subject matter of criminal offense are significant for the purpose of compensating for material damages incurred as a result of a crime, whereas forensic characterization is essential for identifying the perpetrator when:

- The theft of an object (item) implies knowledge of its purpose and potential uses.
- The theft reflects the perpetrator's awareness of the value or special properties of an object being targeted.
- The theft entails the acquisition of objects with special properties.
- The subject matter of criminal offense allows conclusions to be drawn about the specific purpose of appropriation;
- A limited circle of persons has access to the object of criminal offense"<sup>14</sup>.

<sup>10</sup> Авраменко О. В., Висоцька І. Б., Ковальська М. Ю. та ін. Виявлення та розслідування злочинів, пов'язаних із зміною ціни при проведенні державних закупівель : навч. посібник. Львів : ЛьвДУВС, 2018. 104 с.

<sup>11</sup> Мармура О. З., Пасєка О. Ф., Примаченко В. Ф., Сабанюк Т. Р. Кримінально-правова характеристика злочинів проти власності : навч. посібник у схемах. Львів : ЛьвДУВС, 2019. С. 24.

<sup>12</sup> Салтевський М. В. Криміналістика (у сучасному викладі) : підручник. Київ : Кондор, 2008. С. 268.

<sup>13</sup> Волобуєв А. Ф. Розслідування і попередження розкрадань майна в сфері підприємництва : навч. посіб. / за ред. О. М. Бандурки. Харків : Рубікон, 2000. 272 с.

<sup>14</sup> Шеремет А. П. Криміналістика : навч. посіб. Київ : ЦУЛ, 2005. С. 343.



Bohomolov Oleksii

**CERTAINS ASPECTS DE LA  
COMPRÉHENSION DE L'OBJET  
D'UNE INFRACTION PÉNALE  
EN VERTU DE L'ARTICLE 191 DU  
CODE PÉNAL DE L'UKRAINE**

When defining the objective aspect of the criminal offense covered by Art. 191 of the CCU, the subject matter of this category of crime, which constitutes an independent and essential component of its corpus delicti, must be assessed separately. K. Doroshenko observed: "The subject matter of criminal offense is considered to be any objects or physical entities of the material world, as well as intellectual and material values, which, when affected by the offender, cause harm to social relations safeguarded by law. That said, if the target (or subject matter) of an offense is absent, it cannot be misappropriated, and consequently, the objective aspect of the criminal offense stipulated in Art. 191 of the Criminal Code of Ukraine cannot be established, since there is no corpus delicti"<sup>15</sup>. Let us point out that the subject matter of the basic corpus delicti of the crime specified in Art. 191 of the Criminal Code is "somebody else's property".

In the legal encyclopedia, the term property is defined as "objects of the material world owned by a legal entity (a natural person, a legal person, a local community, the State, or the Ukrainian people), including: individual items, a collection of items, property rights and obligations, money and securities, as well as property rights thereto"<sup>16</sup>. International law, specifically the United Nations Convention against Transnational Organized Crime, defines property more comprehensively as "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets"<sup>17</sup>.

Researchers stress that "property may be regarded as 'somebody else's' only if it has not been lawfully possessed by the offender; property entrusted to the offender or under his/her administration cannot be considered somebody else's"<sup>18</sup>. However, the term property, which is commonly used to describe the subject matter in corpora delicti of crimes against property, is interpreted by criminal law scholars from various perspectives<sup>19</sup>.

Since there is no established case law from the Supreme Court of Ukraine (hereinafter referred to as the SCU) regarding the corpus delicti of the offense set out in the relevant part of Art. 191 of the CCU (except for Pt. 1), we consider it appropriate to review these issues through the prism of civil and criminal law in cases where a person has acquired a right to property.

1. Article 179 of the Civil Code of Ukraine (hereinafter referred to as the Civ. CU) defines the term property in a narrow sense as "an object of the material world, in respect of which civil rights and obligations may arise"<sup>20</sup>. General characterization of criminal offenses against property contains the following definition of the term property: it "encompasses objects (items/things) subject to ownership. Property is classified as movable ... and immovable ... and, in any state, may be targeted for embezzlement"<sup>21</sup>.

2. Part 1 of Article 190 of the Civil Code of Ukraine defines property widely and views property as a special object that is considered to be a separate

Résumé. L'article met en lumière certains aspects des infractions pénales prévues à l'article 191 du Code pénal ukrainien. Il démontre que l'appropriation et le détournement de biens appartenant à autrui, visés aux paragraphes 1 et 2 de l'article 191 du Code pénal ukrainien, concernent les biens confiés et les biens en possession d'une personne, c'est-à-dire ceux sur lesquels elle exerce des pouvoirs particuliers. Un bien est considéré comme confié lorsqu'il est transféré à une personne pour possession ou usage dans le cadre d'une transaction ou de l'exercice des fonctions liées à sa charge. La preuve qu'un bien est confié à une personne réside dans le fait que cette personne en est effectivement propriétaire et qu'elle en a le contrôle. Il est établi qu'un bien sous gestion doit être compris comme un bien qui n'est pas physiquement contrôlé par une personne, mais qui lui est transféré par le propriétaire ou une entité mandatée par lui, moyennant l'octroi de certains droits de propriété, d'usage et de disposition. Cette gestion permet la gestion opérationnelle du bien en vue d'atteindre un objectif précis déterminé par le propriétaire, ou non. Il convient de noter qu'une caractéristique propre aux biens d'autrui est la possibilité de leur confier ou de les transférer à une société par le biais d'une transaction écrite ou orale, sauf si la loi l'interdit. Le critère de distinction entre biens confiés et biens transférés à une société réside dans la nature du lien juridique entre le propriétaire et la personne concernée : pour les biens confiés, il s'agit d'un lien impliquant la possibilité effective de possession ; pour les biens transférés à une société, il s'agit d'un lien impliquant l'existence de certains droits de propriété. Il est important de souligner que la définition de l'auteur du détournement de fonds et du détournement de fonds, telle que prévue à l'article 191 du Code pénal ukrainien, est étroitement liée à la détermination de son statut. Il est précisé qu'un fonctionnaire est une personne investie d'une autorité liée à sa fonction et exerçant diverses fonctions à ce titre, notamment : des fonctions administratives et économiques ; organisationnelles et de gestion ;

<sup>15</sup> Дорошенко К. Право на майно як предмет кримінального правопорушення, передбаченого статтею 191 Кримінального кодексу України. *Газета «Юридична практика»* від 20.11.2024. URL: <https://pravo.ua/pravo-na-majno-ia-k-predmet-kryminalnoho-pravoporushennia-peredbacheno-ho-statteiu-191-kryminalnoho-ko-deksu-ukrainy/>

<sup>16</sup> Юридична енциклопедія : [у 6 т.] / ред. кол.: Ю. С. Шемпученко (відп. ред.) [та ін.]. – Київ : Українська енциклопедія ім. М. П. Бажана, 2001. Т. 3: К М. 792 с.

<sup>17</sup> Конвенція Організації Об'єднаних Націй проти транснаціональної організованої злочинності: Закон України, ратифікація від 04.02.2004 № 995\_789 URL: [https://zakon.rada.gov.ua/laws/show/995\\_789#Text](https://zakon.rada.gov.ua/laws/show/995_789#Text)

<sup>18</sup> Науково-практичний коментар Кримінального кодексу України: Злочини проти власності / За ред. М. І. Хавронюка. Київ: ВД «Дакор», 2017. С. 162.

<sup>19</sup> Харченко В. Б. Майно як предмет злочинів проти власності та предмет суспільних відносин права власності на речі та інші речові права. *Вісник Кримінологічної асоціації України*. 2017. №2 (16). С. 121–131; Демидова Л. М. Майно як предмет злочину. *Вісник Академії правових наук України*. 2010. Вип. 3. С. 267–275.

<sup>20</sup> Цивільний кодекс України : Закон України від 16.01.2003 № 435-IV (зі змінами та доповненнями). *Відомості Верховної Ради України (ВВР)*, 2003, №№ 40-44, ст. 356. URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>

<sup>21</sup> Науково-практичний коментар до Кримінального кодексу України: У 2 т. Т. 1 / За заг. ред. П. П. Андрушка, В. Г. Гончаренка, Є. В. Фесенка. 3-те вид., перероб. та доп. Київ : Алерта; КНТ; Центр учбової літератури, 2009. С. 555.



des fonctions de représentant des autorités ou de l'administration locale. Il est précisé que l'objet de l'appropriation de biens appartenant à autrui par abus de fonction est un bien confié à un subordonné ou placé sous sa garde. Il est indiqué que, pour les éléments constitutifs des infractions pénales prévues à l'article 191 du Code pénal ukrainien, l'objet de l'appropriation ne peut être que le bien d'autrui, et non un droit de propriété ou des actes patrimoniaux.

Mots-clés: appropriation, détournement de fonds, prise de possession de biens, empiètement, propriété d'autrui, biens confiés, biens sous contrôle, abus, fonctionnaire, fonction officielle.

#### Bohomolov Oleksi

#### NIEKTÓRE ASPEKTY ROZUMIENIA PRZEDMIOTU PRZESTĘPSTWA KARNEGO ZGODNIE Z ART. 191 KODEKSU KARNEGO UKRAINY

Streszczenie. Artykuł omawia pewne aspekty przedmiotu przestępstw karnych przewidzianych w art. 191 KКУ. W artykule wykazano, że przedmiotem przywłaszczenia i sprzeniewierzenia cudzego mienia, przewidzianych w ust. 1 i 2 art. 191 KPK, jest mienie powierzone oraz mienie znajdujące się w zarządzie osoby, to znaczy takie, w odniesieniu do którego osoba ta posiada specjalne uprawnienia. Majątkiem powierzonym jest majątek przekazany osobie do posiadania lub użytkowania na podstawie czynności prawnej lub w związku z wykonywaniem obowiązków wynikających z zajmowanego stanowiska, a dowodem na to, że majątek został powierzony osobie, jest fakt, że osoba ta faktycznie posiada ten majątek i znajduje się on pod jej kontrolą. Ustalono, że przez mienie pozostające w zarządzie należy rozumieć mienie, które nie znajduje się pod fizyczną kontrolą osoby, ale przekazane jej przez właściciela lub upoważniony przez niego podmiot na warunkach przyznania tej osobie określonego zakresu praw do posiadania, użytkowania i rozporządzania tym mieniem, co zapewnia możliwość operacyjnego zarządzania nim w celu osiągnięcia określonego celu wyznaczonego przez właściciela lub bez takiego celu.

Wskazano, że odrębną cechą cudzego mienia jest to, że może

thing, a set of things, as well as property rights and obligations [20]<sup>22</sup>. This approach is set out in the Resolution of the Plenum of the Supreme Court of Ukraine (para. 1, cl. 2 of the Resolution): "The subject matter of crimes committed against property is property of a certain value that does not belong to the offender: items (movable and immovable), money, precious metals, securities, etc., as well as rights to property and actions of a proprietary nature, and electrical and thermal energy"<sup>23</sup>. These considerations gave rise to an approach under which the concepts of property and property rights are treated as general and specific categories of Ukrainian civil and criminal law, since the understanding of property in civil law is equated with its understanding under criminal law<sup>24</sup>.

3. When referring to subject matter as part of *corpus delicti* of an offense, the concept of property deviates from the concept of property set forth in Art. 190[1] of the Civ. CCU. In this regard, legal scholars propose<sup>25</sup> the following criminal law definition of property be formulated based on a number of criteria constituting features of property in the criminal law sense, namely: social; physical; economic; and legal. Taking these criteria into account, along with the specific features of the offense mechanism, meant that in some cases the legislature included several objects in the construct of offense *corpus delicti*. These objects differed in their economic, social, or legal nature, while in other cases only a single object was included.

4. The term property, which refers to subject matter in the context of *corpus delicti* of criminal offense against property, is defined in conformity with the requirements of the Law of Ukraine: On Appraisal of Property, Property Rights and Professional Appraisal Activity in Ukraine, namely:

- "Property subjected to appraisal shall include tangible property, buildings and structures (including their constituent parts), construction-in-progress, future real estate properties, machinery, equipment, vehicles, etc.; land shares, securities; intangible assets, including intellectual property assets; integral property complexes of all forms of ownership;

- Property rights that may be appraised shall be recognized as any rights pertaining to property other than ownership, including rights that constitute components of ownership (the right of possession, disposal, and use). A special property right to an unfinished construction project, to a future real estate facility, as well as other specific rights (the right to conduct business activities, use natural resources, etc.) and the right of claim (Pt. 2 of Art. 3 of the Law)<sup>26</sup>.

Of particular note is that the mechanism of offense is determined by what the legislator has specified in some criminal provisions as the subject matter of offense *corpus delicti*: somebody else's property, rights thereto, and acts of a proprietary nature (Sec. 1 of Art. 189 of the CCU). Others, however, refer only to somebody else's property (Pts. 1 and 2 of Art. 191 of the CCU). Furthermore, since the legislature has not specified any differences in the subject matter of offenses involving embezzlement, misappropriation, and unlawful appropriation (Pt. 2 of Art. 191 of the CCU), it is necessary to recognize differences in the mechanism by which such acts are committed. Thus, unlike conversion, the acts of embezzlement or misappropriation are only possible in relation to someone else's property that has been entrusted to a person or is under his/her administration (as set out in Art. 191[1] of the CCU).

<sup>22</sup> Цивільний кодекс України: Закон України від 16.01.2003 № 435-IV (зі змінами та доповненнями). Відомості Верховної Ради України (ВВР), 2003, №№ 40-44, ст. 356. URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>

<sup>23</sup> Про судову практику у справах про злочини проти власності. Постанова Пленуму Верховного Суду України № 10 від 6 листопада 2009 року. URL: <https://zakon.rada.gov.ua/laws/show/v0010700-09#top>

<sup>24</sup> Харченко В. Б. Майно як предмет злочинів проти власності та предмет суспільних відносин права власності на речі та інші речові права. Вісник Кримінологічної асоціації України. 2017. № 2 (16). С. 128.

<sup>25</sup> Олійник П. В. Щодо визначення поняття «право на майно» як предмета злочинів проти власності. Проблеми законності: зб. наук. пр. 2014. Вип. 126. С. 146-147.

<sup>26</sup> Про оцінку майна, майнових прав та професійну оціночну діяльність в Україні: Закон України від 12.07.2001 № 2658-III (зі змінами та доповненнями). Відомості Верховної Ради України (ВВР), 2001, № 47, ст. 251. URL: <https://zakon.rada.gov.ua/rada/show/2658-14#Text>



This approach corresponds to the provisions of Resolution No. 10 of the Plenum of the Supreme Court of Ukraine: “The subject matter of embezzlement and misappropriation is limited to somebody else’s property that has been entrusted to the offender or has been in their lawful administration, that is, property held by this person on lawful grounds and over which he/she exercised powers of disposal, management, delivery, use, or storage, etc.” (para. 2 of Art. 23 of Resolution No. 10 of the Supreme Court of Ukraine), and “conversion of property by malversation is unlawful misappropriation of somebody else’s property for one’s own benefit or for the benefit of third parties through misuse of official authority against the interests of office (para. 3 of Art. 23 of Resolution No. 10 of the Supreme Court of Ukraine)<sup>27</sup>. In light of this guidance from the Supreme Court of Ukraine, when interpreting paragraphs 2–5 of Article 191 of the Criminal Code of Ukraine, one must take into account provisions of paragraph 1 of this Article, which address specific features of the subject matter of misappropriation and embezzlement, namely whether somebody else’s property has been entrusted to a person or is under his/her administration.

Therefore, the subject matter of conversion in the relevant corpora delicti of the offenses stipulated in Art. 191 of the CCU shall not be the right to property or acts of a proprietary nature, rather, it can only be somebody else’s property, and this is consistent with the legislature’s stance that the right to property can only be acquired, and one can only take possession of somebody else’s property. The mechanisms for taking possession of property and acquiring a right to property also vary.

When defining the subject matter of misappropriation, embezzlement of property and its conversion by malversation, it is advisable to define features of somebody else’s property.

Pt. 1 of Art. 191 of the CCU lists the following features of somebody else’s property: property entrusted to a person or under his/her administration. With regard to the subject of embezzlement and misappropriation, the Plenum of the Supreme Court of Ukraine, interpreting the provisions of Art. 191 of the Criminal Code, stated that such somebody else’s property must be held by a person on legal grounds and that this person is authorized to exercise certain powers over such property. Nevertheless, this guideline does not fully clarify how to interpret the subject matter of criminal offense falling under this category. At the same time, the interpretation of the concepts of entrusted property and property under a person’s administration is rarely encountered in the practice of the Supreme Court of Ukraine. These concepts are primarily addressed in research papers, where generalized definitions of such property are also provided.

Note that entrusted property refers to somebody else’s property that is lawfully transferred into a person’s possession, use, or physical control (e.g., for storage, transportation, management, etc.). Lawful grounds may include a contract, an order, or performance of official duties. The person is liable for the transferred property. This is why O. I. Tsyvinskyi noted that “when defining the concept of entrusted property, obviously, one should proceed from the provisions of civil law regarding property rights over somebody else’s property, including the right of possession and the right to use property. From this perspective, entrusted property is property transferred by the owner or another authorized individual into the possession or use of the trustee in accordance with the requirements of the Civil Code”<sup>28</sup>. Following this statement by the scholar, possession should be understood as physical control over an object, and use as taking advantage of an object’s useful properties to satisfy one’s needs.

The term property under administration refers to property belonging to others, where a person or institution has been granted the authority

ono zostać powierzone lub przekazane do dyspozycji na podstawie czynności prawnej dokonanej zarówno w formie pisemnej, jak i ustnej, o ile ta ostatnia nie jest zabroniona przez prawo. Kryterium rozróżnienia między mieniem powierzonym a mieniem przekazanym do zarządzania jest charakter stosunków prawnych między właścicielem a osobą: w przypadku mienia powierzonego są to stosunki z faktyczną możliwością posiadania; w przypadku mienia przekazanego do zarządzania – są to stosunki z istnieniem określonego zakresu uprawnień własnościowych w odniesieniu do mienia. Podkreślono, że określenie przedmiotu przywłaszczenia i sprzeniewierzenia, przewidzianych w art. 191 KPK, jest ściśle związane z ustaleniem statusu podmiotu przestępstwa. Zauważono, że osoba pełniąca funkcję publiczną to osoba, która posiada uprawnienia wynikające z zajmowanego stanowiska i wykonuje zgodnie z tym stanowiskiem szereg funkcji, w szczególności: administracyjno-gospodarcze; organizacyjno-zarządcze; funkcje przedstawiciela władzy lub samorządu lokalnego. Stwierdzono, że przedmiotem przywłaszczenia cudzego mienia poprzez nadużycie stanowiska przez osobę pełniącą funkcję publiczną jest mienie powierzone lub znajdujące się w zarządzie podwładnych. Wskazano, że przedmiotem przywłaszczenia w odpowiednich składkach przestępstw przewidzianych w art. 191 Kodeksu karnego Ukrainy może być wyłącznie cudze mienie, a nie prawo do mienia lub czynności o charakterze majątkowym.

Słowa kluczowe: przywłaszczenie, sprzeniewierzenie, przywłaszczenie mienia, przedmiot naruszenia, cudze mienie, mienie powierzone, mienie pozostające w zarządzie, nadużycie, osoba sprawująca urząd, stanowisko służbowe.

<sup>27</sup> Про судову практику у справах про злочини проти власності: Постанова ВСУ від 06.11.2009 № 10. URL: <https://zakon.rada.gov.ua/laws/show/v0010700-09#Text>; Берзін П. С., Волинєць Р. А., Хоменко М. М. Право на майно та майнове право як предмети заволодіння, що вчиняється шляхом зловживання службовою особою своїм службовим становищем (ч. 2 ст. 191 КК України). *Вісник Асоціації кримінального права України*, 2021, № 1(15). С. 126-149.

<sup>28</sup> Цивільський О. І. Основні проблеми визначення предмета привласнення, розтрати майна або заволодіння ним шляхом зловживання службовим становищем. *Право і суспільство*. 2022. № 5. С. 231. DOI <https://doi.org/10.32842/2078-3736/2022.5.34>

to manage, dispose of, or use such property, but which is not under their complete physical control. Such property is most often lawfully transferred to individuals so that they can perform their official duties, conduct business activities, or for storage purposes. L. V. Dorosh draws attention to the property's special status that is the subject matter of criminal offense falling under this category, noting that "a person exercises operational management authority regarding property, and such authority presupposes: determination of a procedure for its use, transfer of property to other institutions or organizations, and disposal of it"<sup>29</sup>. Following this approach, property transferred to a person's administration ought to be viewed as property that is under this person's management or disposed of by him/her to their subordinates.

V. A. Oleksiienko's definition of the concept of property under administration should be considered quite comprehensive: "This refers to property transferred by the owner or their authorized representative on the condition that the transferee is granted certain rights of possession, use, and disposal of such property, thereby facilitating its effective management to achieve a specific objective set by the owner—or, in the absence of such an objective, to fulfill the terms specified in a contract or by law"<sup>30</sup>.

The criterion for distinguishing between the concepts of entrusted property and property under administration is the nature of the legal relationship between the owner and the person: entrusted property implies a relationship with the actual possibility of possession; property under a person's administration involves a relationship where the person has a certain scope of proprietary rights over property, meaning the person may not physically possess property. Ownership powers may derive from civil law relationships, contractual relationships, special mandates, or official authority, and shall be based on a document such as a lease contract, a contract for services, a commission contract, a rental contract, etc.

The second part of Art. 191 of the CCU stipulates liability for committing the relevant acts (misappropriation, embezzlement of property or its conversion) committed through abuse of office, with no clarification of the status of such property. Partial explanation can be found in the Resolution of the Panel of Judges of the Second Judicial Chamber of the Criminal Cassation Court (CCC) within the Supreme Court of Ukraine, which specifies that "specific nature of misappropriation of property and its conversion by malversation lies in the fact that property which the offender takes possession of is not entrusted to them, is not under their direct administration, however, the perpetrator of a crime has the right to exercise operational control over this property by virtue of their official standing"<sup>31</sup>.

Considering the criminal liability under Pt. 2 of Art. 191 of the CCU for embezzlement or conversion of property by malversation, it is possible to single out a number of qualities characteristic of the perpetrator:

- Obtains property in his or her capacity as an official of an institution owning the property.
- Vested with administrative and economic functions that grant him/her authority over the economic administration, disposal, and operational management of property, etc.
- Has legitimate reasons, acting in the interests of service, to decide on the transfer of property to other individuals or legal persons for temporary use, as well as to dispose of property and determine the price and other terms of its sale.

This shows that determining the subject matter of embezzlement and misappropriation, as set out in Art. 191(2) of the CCU, is strongly associated with defining a person's status as a perpetrator of a crime, whereas an offense against property that is not within the scope of official administration constitutes a separate criminal offense.

When analyzing this specific type of criminal offense under Pt. 2 of Art. 191 of the CCU—namely, conversion or property by malversation—it is advisable to determine whether such property possesses any additional features. Note that only a person who holds the appropriate status and authority can abuse their official position, and they can only take such actions with respect to property that falls within their jurisdiction. Therefore, only property over which the official has been granted authority, and which has been entrusted to them or is administered by their subordinates qualifies as such.

Looking at the last statement, let us focus on the fact that an official exercises powers commensurate with their office and the functions carried out pursuant to such office, specifically: administrative and economic functions; organizational and executive functions; and functions as a representative of the government or local self-government. The latter are distinguished by the right to set requirements and make decisions that are binding for a wide range of non-subordinate individuals, and, we believe, the exercise of this right is unlikely to involve conversion of somebody else's property. Administrative and economic functions entail the management and disposal of somebody else's property and cover authority over entrusted property and over property under one's administration, which may be subject to misappropriation or embezzlement. Performance of organizational and executive functions is aimed at staff management; in this case, property

<sup>29</sup> Дорош Л. В. Щодо ефективності застосування законодавства про кримінальну відповідальність за привласнення, розтрату майна або заволодіння ним шляхом зловживання службовим становищем. *Питання боротьби зі злочинністю*. Збірник наукових праць. 2008. Вип. 16. С. 27.

<sup>30</sup> Олексієнко В. А. Особливості кримінально-правової характеристики злочину, передбаченого ст. 191 Кримінального кодексу України. URL: [http://elar.naiu.kiev.ua/jspui/bitstream/123456789/17708/1/\\_%D0%97%D0%91%D0%A0%D0%9D%D0%98%D0%9A\\_%D0%BA%D1%80%D0%B8%D0%BC%D0%B8%D0%BD%D0%BE%D0%BB%D0%BE%D0%B3%D0%B8%D1%8F\\_2020\\_%D0%A7.2\\_pdf\\_p86-88.pdf](http://elar.naiu.kiev.ua/jspui/bitstream/123456789/17708/1/_%D0%97%D0%91%D0%A0%D0%9D%D0%98%D0%9A_%D0%BA%D1%80%D0%B8%D0%BC%D0%B8%D0%BD%D0%BE%D0%BB%D0%BE%D0%B3%D0%B8%D1%8F_2020_%D0%A7.2_pdf_p86-88.pdf).

<sup>31</sup> Постанова колегії суддів Другої судової палати Касаційного кримінального суду Верховного Суду у справі № 456/1181/15-к від 28 лютого 2019 року. Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/80181431>



entrusted to or under the administration of subordinates may be the subject matter of conversion of somebody else's property by malversation.

The above considerations lead to the following conclusions:

– Establishing the official's authority over property that is converted to the benefit of the offender or other persons by means of misappropriation, embezzlement of property or its conversion by malversation shall constitute the subject matter of proof in criminal proceedings under Pts. 2–5 of Art. 191 of the CCU.

– Any offense against property administered by other public officials, committed by exploiting one's official standing or professional authority, shall be classified as incitement of persons to commit criminal acts under Pt. 2 of Art. 191 of the CCU.

– Offenses in which property falls outside the scope of official administration do not constitute offenses pursuant to Pt. 2 of Art. 191 of the CCU, as they should be classified as other criminal offenses—for example, an investigator's conversion of property during a search shall be qualified as an offense under Arts. 185, 186, or 190 of the CCU, while an investigator's conversion of property previously seized during a search constitutes a criminal offense that should be qualified according to Pt. 2 of Art. 191 of the CCU.

**Conclusions.** The author proves that the subject matter of misappropriation or embezzlement of somebody else's property, set out in Pts. 1 and 2 of Art. 191 of the CCU, is property entrusted to a person or under his/her administration—that is, something over which the person has special authority. Entrusted is property that is transferred to a person for possession or use in accordance with a transaction or in connection with the performance of duties associated with the position held. In other words, property is deemed to be entrusted when a person has lawfully received it in order to use it in the interests of the property owner, based on relevant documents that detail: quantitative and qualitative characteristics of property, its value, and the person's authority over it. Evidence that property is entrusted to a person is that this person actually possesses the property and this property is under his/her control.

It has been established that property under a person's administration should be understood as property that is not under the physical control of a person, but transferred to him/her by the owner or his/her authorized representative on the terms of granting this person a certain amount of rights to own, use and dispose of this property, which ensure the possibility of operational management of it to achieve a certain goal, determined by the owner or without such, that is, the person is granted a certain authority to manage and dispose of it.

It is noted that a distinctive feature of another person's property is that such property may be entrusted or transferred to the administration of another person on the basis of a legal transaction, whether in written or oral form, provided that the latter is not prohibited by law. The criterion for distinguishing between entrusted property and property under a person's administration is the nature of a legal relationship between the owner and the person: for entrusted property, this is a relationship with the actual possibility of ownership, that is, the person actually possesses property; for property under a person's administration, this is a relationship with the presence of a certain amount of ownership rights over the property, in other words, the person may not physically possess it.

It is emphasized that the definition of the subject matter of the criminal offense set out in Art. 191 of the CCU is inextricably linked to the establishment of crime subject status. Whereas offenses where property falls outside the scope of official administration constitute a separate criminal offense. It is noted that an official is a person who has authority under the position held and performs a range of functions consistent with that position, including: administrative and economic functions; organizational and executive functions; and functions as a representative of the government or local self-government.

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