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## **ЗАГАЛЬНОДОЗВІЛЬНИЙ ТИП ЮРИДИЧНОГО РЕГУЛЮВАННЯ І ПРАКТИКА ВЕРХОВНОГО СУДУ В УКРАЇНІ: ОСОБЛИВОСТІ ОБ'ЄКТИВАЦІЇ**

**Анотація.** У статті представлено можливі форми реалізації свободи людини у її стосунках із державою, зокрема, через юридичне регулювання загальнодозвільного типу. Мета статті полягає у дослідженні такого типу регулювання на матеріалах практики Верховного Суду в Україні, як одного з найдієвіших органів у сфері забезпечення належного балансу інтересів особи та держави, що формує методологічну основу механізму захисту прав людини. В якості методологічних підходів застосовано антропосоціальний – для встановлення сутнісної основи загальнодозвільного регулювання, що пов'язана з самовираженням особи в межах існуючого правопорядку, та аксіологічний – для забезпечення ціннісної природи права. Виявлено загальнодозвільну основу взаємодії особи та держави, яка обумовлюється законодавчим закріпленням їхніх стосунків за схемою «дозволено все, що не заборонене законом». Зазначену загальнодозвільну основу проаналізовано на базі актів Верховного Суду, що дозволило виявити пряму і непряму об'єктивізацію загальних дозволів як основи досліджуваного типу регулювання. Запропоновано пряму об'єктивізацію пов'язувати з фіксацією у постановках Верховного Суду повної загальнодозвільної конструкції («можна все, за винятком») або її елементів – основних обмежувачів загального дозволу (юридичних заборон і юридичних зобов'язань). Встановлено, що функцію об'єктиватора загального дозволу виконують і спеціальні юридичні дозволи, які адресуються фізичним особам і відображені поняттями «суб'єктивне право» і «законний інтерес». Непряма об'єктивізація констатується за посередництвом спеціальних дозволів, які відображені конструкцією «дозволено прямо передбачене законом». У цьому аспекті набули подальшого розвитку питання дискреції держави

**Ключові слова:** юридичні дозволи, юридичні заборони, юридичні зобов'язування, законні інтереси, дискреція, Верховний Суд

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## **GENERAL TYPE OF LEGALREGULATION AND PRACTICE OF THE SUPREME COURT IN UKRAINE: FEATURES OF OBJECTIFICATION**

**Abstract.** *The article presents possible forms of realisation of human freedom in its relations with the state, in particular, through legal regulation of the general permit type. The purpose of the article is to study this type of regulation based on the case law of the Supreme Court in Ukraine, as one of the most effective bodies in ensuring proper balance of interests of the individual and the state, which forms the methodological basis of human rights protection mechanism. The methodological approaches used are anthroposocial – to establish the essential basis of general regulatory regulation, which is associated with self-expression of the individual within the existing legal order, and axiological – to ensure the value nature of law. The general permissive basis of interaction between a person and the state has been identified, which is conditioned by the legislative consolidation of their relations under the scheme “everything that is not prohibited by law is allowed”. This general permitting basis was analysed on the basis of acts of the Supreme Court, which allowed to identify direct and indirect objectification of general permits as the basis of the studied type of regulation. It is proposed to link direct objectification with the fixation in the decisions of the Supreme Court of the full permit structure (“everything is possible except”) or its elements – the main limiters of the general permit (legal prohibitions and legal obligations). It is established that the function of the objectifier of general permission is performed by special legal permits, which are addressed to individuals and are reflected in the concepts of “subjective right” and “legitimate interest”. Indirect objectification is stated through special permits, which are reflected in the construction “allowed directly provided by law.” In this aspect, the issue of state discretion was further developed*

**Keywords:** *legal permits, legal prohibitions, legal obligations, legitimate interests, discretion, Supreme Court*

### **INTRODUCTION**

The phenomenon of common life of people continues to excite scientists in various fields of knowledge to this day. Such coexistence, according to Aleida Asman, is fragile, constantly balancing on the brink of disaster, carefully drawn red lines washed away by waves of violence, and therefore need to work thoughtfully and carefully with ethical principles, seeking the initial support that will serve to build human relationships [1, p. 4]. According to the practice of the European Commission for Democracy through Law (Venice Commission), the legal field (and not only) as such a fulcrum currently considers human dignity [2] and human rights and freedoms, which allows building relationships between participants in public life as free and equal subjects, to provide them with a proper standard of living [3; 4], and also determines the scheme of relations between man and the state. This scheme is constantly in the field of view of legal science and practice and is studied mainly in two directions.

The first concerns the freedom of the individual and related social mechanisms, such as civil society, socially oriented economy, human rights and their limits [5-7].

The second is devoted to the restriction of such freedom, in connection with which the problem of the limits of state power, the possibilities of its discretion (discretionary powers) is constantly discussed [8-10]. In

particular, as German lawyers point out, the discretionary powers of the administration are as important in German law as in common law or in any legal system today, and are no longer considered incompatible with the notion of a just society. In their view, on the contrary, there is a growing awareness that such powers are necessary to achieve a just social order and turn the rule of law into a positive reality, although this does not mean that administrative bodies should have unlimited or unnecessary discretion and that the administration should be free from all restrictions on the exercise of such powers [11].

The scientific literature also shows that the courts have a leading role in this area, in particular: “autonomy of judges” is called “the main means of protection against poor law or erroneous legislation” [12, p. 52], and judicial control over the exercise of discretion by other bodies is considered the most effective guarantee against an unreasonable decision (i.e. a decision in which the person making it is dishonest, arbitrary, improper, based on irrelevant facts, used its discretionary powers) [13].

The above testifies to the constant search for optimal principles of interaction between the individual and the state. It should be noted that within the Romano-Germanic legal family such interaction (cooperation) was justified from the standpoint of the general type of legal regulation, given the reception of the Roman model of law, in which the legal status of the individual was determined by “everyone's natural ability to do he needs it, if it is not prohibited by force or law” [14, p. 311]. The essence of such regulation is manifested in ensuring the maximum freedom of the individual within the existing legal order, which, in turn, will serve the progress of democracy. As rightly noted by F. Fucuiama, the success of democracy depends not on the optimisation of its ideals, but on the balance – between individual freedom and effective, legitimate state power and legal institutions [15, p. 55].

The question of general legal regulation rose mainly in the context of the corresponding principle of law of the same name, especially in the 90s of XX century, in the transition of post-Soviet states from command-administrative, authoritarian-volitional methods of government to democratic mechanisms of government, from planned economy to market relations, when the institution of private property, personal initiative of citizens and their responsibility for their own destiny and well-being began to acquire leading importance in the worldview scale of values. First of all, socio-economic human rights have acquired a new color. At the same time, there were some reservations about possible “permissiveness”, which would lead to this principle in the weakening of economic, political, spiritual foundations of society and the state, and therefore this principle was not considered universal and fundamental, applicable to all cases of legal life [16; 17]. In this regard, the study of issues of general licensing by type of legal regulation has not received its proper further development.

However, today the active assertion of the rule of law as the rule of natural human rights, the rule of law, i.e. the law that meets the ideals of freedom, social justice and equality as a prohibition of state arbitrariness, the study of this type of regulation becomes very relevant [18]. Since the courts are the most effective bodies in the field of ensuring the proper balance of interests of the individual and the Ukrainian state, whose mission is to ensure respect for constitutional human rights and freedoms [19], such regulation, appropriate social communication in view of the European and Euro-Atlantic course of Ukraine, especially since the model law-abiding and law-enforcement practice of the highest judicial body acquires a source status in Ukraine.

*The purpose of the article* is to search for legal tools for the implementation of the main achievements of natural law in Ukraine, in particular the study of the permissive provision of human rights standards in the jurisdictional practice of the Supreme Court.

## 1. MATERIALS AND METHODS

The methodological basis of the study is a system of scientific approaches and methods of cognition. Among the research approaches used: *axiological* – to ensure the value nature of law, as a normative expression and regulator of individual freedom, free will in the framework of social communication; *anthroposocial* – to establish the essential basis of the studied type of regulation, which is associated with ensuring the maximum possible realization of individual freedom within the existing legal order, *dialectical* – to identify the general basis of interaction between person and state, clarify the substantive characteristics of general type of legal regulation.

Among the methods of cognition used *general and special-scientific*. From a number of general scientific it is possible to allocate: *structural-functional method* by means of which possible communications of the basic ways of legal regulation in the course of development of the general permission as a legal design were found out; *descriptive method*, which directed the research in the direction of identifying the characteristics, immanent properties of the studied type of legal regulation and the main components of the general design, i.e. legal prohibitions, legal obligations and legal permits, their specificity conditioned upon

classification varieties, for further generalisation, and this, in turn, contributed to the presentation of research results in a clearly defined logical sequence; *methods of qualitative and quantitative analysis*, which allowed to form an idea of the content and scope of the general permit as the basis of the relevant type of regulation, determined by the content and scope of relevant legal prohibitions, legal obligations and legal permits, to determine the limits of state discretion and freedom individual, private person, to characterise the relationship between subjective law and legally protected interest; *the method of synthesis* allowed solving the research tasks conditioned upon its application to primary sources, materials of international and Ukrainian normative and judicial practice on important socially resonant issues related to human rights protection, laid the foundation for activation in legal material; *the method of classification* facilitated the differentiation of special permits according to their addressees and functions for the implementation of legal regulation of the general permit type, as well as allowed distinguishing between direct and indirect forms of positivization of such regulation; *socio-deterministic method* has identified causal links between two types of legal regulation – general and special, and thus – between general legal permits and special legal permits, as the main pillars of these types of regulation, served to justify the discretion of other government agencies and subjects of power; *concrete-historical method* allowed to trace the evolution of philosophical and legal interpretation and normative recognition of general legal regulation; *The method of factor analysis* prompted a multifaceted study of possible options for direct and indirect forms of objectification of general permits, taking into account all conditions and means for formalizing such permits, which corresponds to the humanistic orientation of law, its essential orientation.

As special-scientific methods are used: *formal-legal method*, which was used to demonstrate the content and form of the subject, possible ways and specifics of expression of permissive legal phenomena in the national legislation of Ukraine, law enforcement and law enforcement activities of the highest judicial body of Ukraine; *comparative law*, which allowed comparing the legal regulation of certain aspects of the subject at international and national law levels, in particular in view of the jurisdictional practice of the European Court of Human Rights, the Supreme Court of Ukraine, the Constitutional Court of Ukraine, people in Ukraine to their international legal, including European standards, namely, in the field of implementation of the right to housing, the rights of road users, guaranteeing protection from arbitrariness of the state, working to strengthen general legal regulation in the relevant area of public relations. The applied methods allowed obtaining reliable and reasonable conclusions and results.

## 2. RESULTS AND DISCUSSION

### 2.1. General permissive basis of interaction between the individual and the state

The general permissive type of legal regulation is traditionally defined by the formula “*a person is allowed everything that is not prohibited by law*”. It was declared in the French Declaration of the Rights of Man and of the Citizen (Articles 4, 5), through the normative definition of freedom and its limits [20]. Subsequently, in the philosophical and legal doctrine, this idea-principle was substantiated in the context of solving the problem of the limits of state power. Such borders, as the representatives of liberalism emphasised, can be conditioned only by the need “to protect citizens from internal and external enemies”, “and no other goal should violate the freedoms of citizens” [21, p. 49].

With the development of the institute of human rights, the effect of the general permissive principle has shifted to the plane of “restriction of law”, in particular its legality, legitimacy, proportionality, the need for a democratic society. The above mostly reflects the content of general permits new structure provided by the relevant type of legal regulation. However, a more detailed study of the legal scheme of interaction between the individual and the state (on the example of Ukraine) allows tracing other manifestations of this type of regulation. Such a scheme is represented by traditional postulates for democratic societies.

1. *Man, his life and health, honor and dignity, inviolability and security are recognised as the highest social value* (Article 3) [22], which provides for the joint duty of the state and its citizens to show the necessary respect for each person [23]. At the same time, a person's *life is* associated with the right to protect him from unlawful encroachments (Article 27) [22] *by any means not prohibited by law* (Article 281) [24]; b) *the prohibition of “arbitrary deprivation of life”* (Article 27) [22], *the prohibition of “satisfying the request of an individual to terminate his life”* (Article 3) [24], the abolition of the death penalty [25; 26], and thus – b) with the right to human dignity (“the right to life and the right to human dignity determine the possibility of realisation of all other human rights and can be neither restricted nor abolished” (paragraph 6) [27]); d) with the duty of courts in cases of crimes against life and health of a person “to establish the guilt of defendants and assign them the *necessary and sufficient* punishment for their correction and prevention of new crimes” [28] – which traces the consistent assertion of absolute value prohibition of discretion to terminate it.

*Health* is defined in the broadest sense as a state of complete physical, mental and social well-being [29]. Understanding of *dignity* is explained by the recognition of the nature of the individual as a unique biopsychosocial value, and *honor* – a positive social assessment of the person in the eyes of others, based on the conformity of his actions to conventional notions of good and evil [30]. *The inviolability of the person* is identified primarily with the right to liberty and security of person (Article 29) [22], which allows stating one of the options for a narrow understanding of freedom in the legislation of Ukraine. The security of a *person* is the state of his protection from the risk of harm) [31]. At the same time, they discuss the *security of freedom and human development* [32, p. 34], which becomes methodologically decisive for the construction of “national interests of Ukraine” [33].

2. *Human and civil rights and freedoms are the main criteria of the state*, which determine the content of laws and other regulations (paragraph 1) [34]. The *openness* of the constitutional list of rights and freedoms and *the prohibition of reducing* their content and scope are sanctioned (Article 22) [22].

3. *Man and the state are responsible to each other*, which is *concretised* by the positive and negative responsibilities of the state [35], and the responsibilities of each person to society [36].

4. *The basic principles of domestic policy of the state*, among others, include: freedom and creative self-realization [37]. At the same time, constitutional practice declares a broad understanding of freedom as an inalienable and inalienable constitutional human right, which provides the opportunity to choose their behaviour for free and comprehensive development, act independently according to their own decisions and intentions, set priorities, do everything not prohibited by law, which also means that a person is free in his activities from outside interference, except for restrictions imposed by law [38].

As can be seen from the analysis of Ukrainian legislation, freedom in this – broad – sense is guaranteed, and therefore – and indirectly objectified by the tasks, principles and basic institutions of various branches of law, for example:

– *civil* – through *inadmissibility of arbitrary interference* in the sphere of personal life, *deprivation of property rights*, except in cases provided by the legislation of Ukraine; *freedom of contract*, business activities *that are not prohibited by law*; judicial protection of *civil rights and interests* (Article 3) [24];

– *family* – through the regulation of family relations *only insofar as it is permissible and possible* in terms of the interests of their participants and society, *considering* the right to privacy of their participants, their right to personal liberty and inadmissibility of arbitrary interference in family life, based on of justice, good faith and reasonableness, in accordance with the moral principles of society [39], associated with the rules of conduct established in society based on traditional spiritual and cultural values, ideas of goodness, honor, dignity, civic duty, conscience, justice [40].

5. *The rule of law is based on the principles according to which no one can be forced to do what is not provided by law* (Article 19) [22].

These guidelines for social interaction are aimed at maximizing the freedom of the individual, in particular in its relations with the state. As you can see, this is achieved through objectification:

1) appropriate behavioral model: “everything is possible, not prohibited by law”;

2) legal tools for its provision. For the state, these are various “deterrents” from interfering with a person's freedom, for a person, these are both appropriate opportunities and appropriate restrictions on freedom. In both cases, they are reflected through the main methods of legal regulation. Since *its general permit type* is defined as one *that is based on a combination of general legal permission in the form of recognition of the right with the establishment of certain restrictions (exceptions) through legal prohibitions* [41, p. 140; 42, p. 99], then, accordingly, we will consider legal permits and legal prohibitions as the main legal means of mediating general permissive behaviour. However, only the analysis of legislation in combination with the practice of its interpretation and application from a given angle allows you to comprehensively track how the general permit is formed, which is the basis of this type of regulation, identify possible options for its reflection in legal material identifies possible forms of *objectification of general resolution – direct and indirect*.

We substantiate this with specific examples. The permissive ideology was declared in the Resolution of the Plenum of the Supreme Court of Ukraine “On the Application of the Constitution of Ukraine in the Administration of Justice” [34]. The Resolution emphasised the establishment of the principle of the rule of law proclaimed by the Constitution of Ukraine, and the constitutional rights and freedoms of man and citizen were recognised as directly applicable, determining the content and direction of legislative and executive bodies, local governments and protection of justice. Also, the focus of judicial activity on the protection of constitutional rights and freedoms *from any encroachment* through timely and quality consideration of specific cases, the inexhaustibility of the constitutional list of rights and freedoms (paragraph 1) [34]. Thus, the recognition of the *originality* of constitutional rights and freedoms of man and citizen in Ukraine (in

particular, as a guide and limiter of the legislature), *openness of their list and* guarantee by the court from *any encroachment* is fully consistent with the permissive idea.

Analysis of the activities of the Supreme Court in the judicial system of Ukraine after the reform of 2016 allows stating the consistent implementation of the outlined legal values. Thus, in the decisions of the Supreme Court it is possible to trace the direct use of the general permissive construction – directly or indirectly.

## 2.2. “Everything is allowed, except” as a model of direct embodiment of the general permit design

“Everything is allowed, except” as a model of direct implementation of the general permit structure in the practice of the Supreme Court in Ukraine: 1) is associated with the degree of formalisation of law “if not provided, then...”, “in all cases unless otherwise specified” etc); 2) used when it comes to the realisation of individual rights, features of contractual regulation, the separation of private and public interest.

First of all, it concerns the issue of *appealing in court against decisions, actions or omissions of public authorities, their officials and officials*. Thus, in accordance with Part 3 of Article 392 of the Code of Criminal Procedure of Ukraine, decisions of the investigating judge may be appealed in the cases provided for by this Code. There are no appeals against the decision of the investigating judge to grant permission for an unscheduled inspection. However, based on the conclusion of the Constitutional Court of Ukraine that an appeal against a court decision *is possible in all cases, except when the law prohibits such an appeal* (paragraph 2, item 3.2 [43]), the Supreme Court ruled that the appellate courts are obliged to open appellate proceedings on appeals against the above-mentioned decisions of investigative judges [44].

This Resolution is important in view of the coherence of the positions of the Supreme Court and the Constitutional Court of Ukraine, and even more so in terms of strengthening the guarantee of implementation of decisions of the body of constitutional jurisdiction. It is a question of criminal punishment for intentional non-fulfillment or non-observance by the official of acts of the Constitutional Court of Ukraine (art. 382) [45]; proclamation by the Constitutional Court of Ukraine of its legal positions as direct regulators of public relations [46].

Another example of the general permissive right to appeal is the position of the Supreme Court, according to which “any member of the territorial community whose rights have been violated has the right to appeal the relevant action or decision of the subject of power in court, as violation of local rights self-government inevitably leads to a violation of the rights of every resident of the municipality” [47].

A similar (permissive) approach is used to guarantee *access to justice*. In clarifying the issue of the credentials of the representative of the candidate for President of Ukraine, it was noted that “*it is necessary to avoid too formal attitude to the requirements of the law, as access to justice must be not only factual but also real*”, and the supra-world formalism under the hour of decision nutrition should accept the call to declare also complaint violations of the right to a fair judge's defense [48].

We trace the general permit construction in the Resolutions of the Grand Chamber on:

1) *realisation of the right to professional legal assistance*. It is noted that the inclusion in the costs of legal aid services for the preparation and submission of documents *not expressly provided by the Civil Procedure Code of Ukraine, does not indicate* an artificial increase in the work of a lawyer by submitting such documents. Based on the circumstances of the case, the lawyer independently determines the strategy of protection of the interests of his client and the algorithm of actions to meet the requirements of the latter and his best protection [49];

2) *application of contractual regulation*: provided that if the law and the contract regulate differently the issue of foreclosure on the subject of the mortgage, *the requirements of the contract apply, if such do not contradict the law or are not prohibited by law* [44];

3) *jurisdiction of the dispute*: determined based on Art. 19 of the Civil Procedure Code of Ukraine criteria for delimitation of cases, the Grand Chamber summarised that in civil proceedings *can be considered any case in which at least one party is a natural person, if their decision is not attributed to other types of proceedings* [50].

In the context of the case under investigation, it is important for the European Court of Human Rights to conclude that proceedings classified as part of “public law” under national law may fall within the “civil” part of Article 6 if the outcome of the case is decisive for private rights and responsibilities when it comes to, for example, the sale of land, the management of a private clinic, property interests, the granting of administrative permission in terms of professional practice or a license to serve alcoholic beverages [51-53]. And more and more state intervention in the sphere of everyday life, for example, in the field of social protection, requires the European Court of Human Rights to analyse the characteristics of public and private law before concluding a classification of the claimed right as “civil” [54-56].

### 2.3. *Legal prohibitions and legal obligations as a means of direct objectification of the general permit type of legal regulation*

*Legal prohibitions* are passive legal obligations that are implemented in the form of compliance with relevant legal norms [42, p. 99]. As exceptions to the general permit, such prohibitions define the scope of legal freedom of the individual, serve as “building material” of the general permit type of legal regulation. The study of the nature of such legal prohibitions on the materials of the practice of their interpretation and application by the Supreme Court allows tracing the effect of the whole mechanism of general legal regulation, and hence – the specific features of its external consolidation. Here it is necessary to consider a number of factors determining the following study: 1) the sources of prohibitions, which are only prohibitive rules of law; 2) features of dissemination interpretation; 3) the task of the court in Ukraine.

First of all, we should pay attention to the example of the Supreme Court's *approval of a legal ban* (as a general restriction): “It’s more than the fence of the subject of the state at the night time to decommission the vigilant activity in the uninhabited accommodation, put into a rich apartment booth, in an effective way, to defend the right of the bagger’s booth to win the wet life and calm” [57]. This example is also important in view of ensuring the balance of private interests of different entities that simultaneously exercise their freedom, i.e. there is competition between general permits – the business entity and the occupant of the house.

The Supreme Court also determines *the content and scope of the ban*. An illustration here is the legal position on determining the *content and scope of the ban* on the alienation of agricultural land in a way other than “share-by-share” [58]. In this context, we consider the Resolution, which contains an interpretation of the prohibitions provided by the Rules of the Road [59]. The position on the effect of the sign “stopping is prohibited” on the whole road (the side of the road where the sign is installed), the element of which is the sidewalk, led to the conclusion that the plaintiff's actions were to leave the car on the sidewalk in the area of the road sign 3.34 “Stopping is prohibited” constitute the objective side of the administrative offense provided for in part one of Article 122 of the Code of Ukraine on Administrative Offenses [60].

Ensuring freedom of campaigning in the election of the President of Ukraine, the Supreme Court pointed to the rebuttal of the plaintiff's representative (according to which the President of Ukraine cannot be a candidate for President of Ukraine and perform his functions or powers) and stressed that “campaigning does not include official notification during the election process about the actions of candidates for President of Ukraine related to the performance of their official (official) powers under the Constitution or laws of Ukraine” [48], which defended the general type of legal regulation of public relations by *establishing the content and scope of the ban*.

In the practice of the Supreme Court there is an indication of the *specific features of the application of legal prohibitions*, for example, as restrictions: 1) business activity: “To qualify the actions of a person under Art. 213 of the Criminal code of Ukraine it is necessary to establish, whether activity which is carried out by the person, business or other economic, whether it is systematic” [61]; 2) the right to privacy: “In deciding on the application of a restrictive provision, the court... must assess the proportionality of the service of the rights and freedoms of the person, considering that these measures are related to the wrongful conduct of such person.”

Equally important is the Supreme Court's *finding* that there is *no prohibition*, which automatically leads to an increase in freedom and, consequently, the recognition of a generally permissible type of regulation in this area of public relations: “The law does not prohibit the agreement provided by Articles 407-412 of the Civil Code of Ukraine and Article 102-1 of the Land Code of Ukraine” [63]; “Current legislation does not establish prohibitions and conditions for the use of the owner of a residential building, apartment for business activities, trade activities” [64]. In this context, it is important to mention the Resolution of the Grand Chamber of the Supreme Court, which declares the norm unconstitutional to decriminalise the act, namely, the official statement of inconsistency with the Constitution of Ukraine annuls its legal force, what is behind the change is equal to the inclusion of such a norm on the legislator's level [65].

*Legal obligations*, which are an active form of a person's legal obligation, also perform the functions of a general permit limiter. The point is that the limits of a person's legal freedom are set not only by prohibitive principles and norms of law, but also by principles and norms of a binding nature.

This broad approach to understanding the limiters of general permission is quite consistent with one of the proposed in legal doctrine definitions of “type of legal regulation”, namely, as the most important type of combinations (combinations) of basic methods of such regulation – prohibitions, obligations, permits [66, p. 308].

In the practice of the Supreme Court we find examples:

– *approval of a legal obligation*, and at the same time an example of protection of the general permit type of legal regulation. This is the conclusion on setting the amount of monthly installments for the

maintenance of an apartment building: “given the lack of an imperative rule on the establishment of the same amount of contribution for owners of apartments and non-residential premises, the decision of the general meeting of the association of co-owners of an apartment building to establish a contribution to the owners of non-residential premises in a larger amount than to the owners of apartments, does not contradict the law” [67];

– *determining the content and scope of legal obligations* as restrictions on legal freedom. In particular, this is a legal position according to which, although a pet is not a source of increased danger, its owner must fully compensate the damage caused to another person or his property in accordance with Article 12 of the Law of Ukraine “On Protection of Animals from Cruelty” [68]. In the context of determining the content and scope of the legal obligation as a limiter of the general permit, we assess the position of the Supreme Court that enforcement of the obligation to submit an electronic declaration of a person authorized to perform state or local government functions alternatives to the right to choose to file such a declaration by a believer violates his rights and freedoms [69].

An example of *the absence of legal obligation* is the legal position on the lack of legal obligation of the new apartment owner to pay the debts of previous owners (tenants) of the apartment for their previously received housing and communal services, unless provided by the contract of sale [70].

#### 2.4. *Special permits as a means of objectification of the general permit type of legal regulation*

Special permits as a means of indirect objectification of the general permit type of legal regulation are associated with providing subjects with opportunities to take certain positive actions or refrain from them. Such permits form the basis of another type of legal regulation, which is reflected in the formula: “Only what is expressly permitted by law is allowed”, which means that they are logically related to general prohibitions and are exceptions – limiters of the general prohibition. The analysis of the described legal permits in the practice of the Supreme Court allows tracing the trends in the implementation of permissive ideas, among which the following.

*Determining the content and scope of individual legal permits* “works”, on the one hand, to narrow the capacity of subjects of power and other entities that fall within the scope of special legal regulation, and on the other – to expand the legal freedom of the individual, and therefore – and the general type of legal regulation.

For example, it is possible to observe restrictions of the special permission for termination of the employment contract at the initiative of the employer with separate categories of workers. This is a Resolution stating that “the publication of a work of art by a researcher and pedagogical worker, regardless of its content and individual perception of this work by others, cannot be considered an immoral misdemeanor and therefore cannot be grounds for his dismissal under paragraph 3 of part one. Article 41 of the Labour Code of Ukraine” [71]. Another example of narrowing the special permit is the legal position that “the presence of an act of examination by a commission of psychiatrists on signs of mental disorder in a patient, in the absence of other relevant and acceptable evidence of appropriate health, is insufficient to decide on involuntary hospitalisation of such a person to a psychiatric institution without his or her informed consent” [72].

No less important in the context of special permits is the problem of state discretion (discretionary powers). The Constitutional Court of Ukraine connects them primarily with the principle of legal certainty as an important component of the rule of law, which “does not preclude the recognition of public authority certain discretionary powers in decision-making, but in this case there should be a mechanism to prevent abuse” [73]. Such considerations of the Constitutional Court of Ukraine are fully consistent with international legal standards, the sources of which are, in particular, the Report on the Rule of Law approved by the European Commission for Democracy through Law (paragraphs 41, 45) [74]. The conclusion that the constitutional principle of the rule of law requires legislative consolidation of the mechanism to prevent arbitrary interference of public authorities in the exercise of their discretionary powers in the rights and freedoms of the individual [73], corresponds to paragraph 52 of the Report.

The European Court of Human Rights has not overlooked the issue of the exercise of discretionary powers. The Decisions “Chorherr v. Austria”, “Kokkinakis v. Greece” note that “Contracting States enjoy a degree of discretion in determining the existence and limits of necessary intervention, but it is inextricably linked to European oversight of both law and law” [75], “adopted by independent courts. The task of the European Court of Human Rights is to determine whether a measure applied at national level is justified in principle and whether it is proportionate to a legitimate aim” [76]. As you can see, the European Court of Human Rights draws attention to the limits of state power in carrying out all types of legal activities of the state, including legislative.

The Supreme Court also examined state discretion. The “Scientific Opinion on the limits of discretion of the subject of power and judicial control over its implementation” sets out a number of theoretical provisions that may claim the role of doctrinal, concerning the nature of discretion as: 1) power not related to the concept

“Subjective right”, and therefore – not applicable to individuals, but only to the relevant competent authorities; 2) “legal obligation”, which can and/or should be realised in the public interest. It consists in choosing a certain action or omission, and in choosing a solution or action among the options that are directly or indirectly enshrined in law. The formal basis of such authority is a relatively defined rule of law (alternative rule or rule with evaluative concepts) [77].

For our study, the considerations in the Conclusion constitute an important methodological basis, as they allow: 1) to distinguish the discretion of a person within the general resolution: “can be directly prohibited” (outlined by relevant legal prohibitions and legal obligations), powers under the general prohibition: “only the permitted is permissible” (although this permission will be relatively definite); 2) to analyse the practice of the Supreme Court from the standpoint of explaining valuation concepts as formal grounds for discretion and, consequently, proper exercise of such powers in accordance with the requirements of ensuring the content of constitutional rights and freedoms of a person, which is a kind of protection (objectification) of the general permit type of legal regulation. As an illustration, we can mention the provisions of the Supreme Court's rulings on the content of the concept of “sincere repentance” [78], “pardon” [79], the principles of less lenient punishment than provided by law [80], the definition of “abuse of procedural rights” [81].

It should be noted that the Supreme Court, exploring the limits of discretionary powers, uses the concept of “legally protected interest”, and at the same time relies on the relevant decision of the Constitutional Court of Ukraine. Interestingly, this Decision establishes a methodology for understanding both “subjective law” and “related interest” *as permits*. But the first, according to the Constitutional Court of Ukraine, is a special permit, i.e. a permit reflected in the well-known formula: “All that is provided by law is allowed”, and the second – a simple permit, i.e. a permit to which no less well-known rule can be applied: “Everything that is not prohibited by law is allowed” [82]. Thus, we get for analysis another kind of special permission, namely, in the form of subjective rights of the person, including the category of “legitimate interest” as the embodiment of the general permissive idea. When analysing special permits, it is necessary to keep in mind their differentiation according to the addressee (subjects of power; subjects covered by the rule “allowed only expressly provided by law”; individuals, reflected in the concept of subjective law), as this will determine their ability to provide a general type of legal regulation.

In the case law of the Supreme Court, there are examples of *approval* (with subsequent development) of such *special permits*, such as: within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and therefore its subsequent eviction from the relevant housing is an unjustified interference in the private sphere, a violation of the right to respect for housing [83]. As you can see, here the understanding of the concept of “housing” is expanded, and thus – the scope of legal freedom of the individual. In its position on this issue, the Supreme Court facilitated the implementation of the European standard of housing law set out in the judgment of the European Court of Human Rights in “Chapman v. The United Kingdom” [84], and also strengthened the general legal type of legal regulation in a certain area of public relations.

One can also trace the Supreme Court's *finding* that *special permits are not required*, as a result of which it directly defends the general permit type of legal regulation. Thus, defending the general permit regime in the field of public relations introduced by the Civil Code of Ukraine under part two of Article 383 “Rights of the owner of a house, apartment”, the Supreme Court pointed out that “the person's redevelopment of the apartment owned by him, which does not involve interference in the structural elements of the building, does not require obtaining appropriate permits for such work” [64].

Otherwise, the Supreme Court ruled that there was no special permit, which should signal the existence of an obstacle to the exercise of a person's right, the realisation of his legitimate expectations: “The legislation of Ukraine does not contain a special procedure for compensation for damage to non-residential real estate damaged during the anti-terrorist operation, therefore, Article 19 of the Law of Ukraine “On Combating Terrorism” does not create a legitimate expectation of receiving such compensation from the State of Ukraine, regardless of the territory – controlled or uncontrolled Ukraine – the act took place” [85].

The category of “legitimate interest” is understood by the Supreme Court in view of its “permissive interpretation” by a body of constitutional jurisdiction. In addition, the Supreme Court formulated the definition of interest as an object of judicial protection in administrative proceedings, which in addition to the general features of interest, must contain special, defined by the Code of Administrative Procedure of Ukraine [86]. If the first group of features is necessary for the assignment of a category to the “interest”, the second – allows qualifying such an interest as an object of judicial protection in administrative proceedings.

It is emphasised that since it is a question of restricting the right of access to justice, the obviousness of the plaintiff's lack of legitimate interest must be beyond reasonable doubt. If there is such doubt, it must be

interpreted in favour of the plaintiff, and therefore the court must consider the case on the merits. This issue should be decided, first of all, by the court of first instance, which has a wide discretion [86]. The above illustrates that the Supreme Court has declared an understanding of the legitimate interest in the context of the general permit structure, as well as the scope of the court's discretion. This understanding of the legitimate interest is consistently reproduced and developed by the Supreme Court in its further work [87].

## CONCLUSIONS

From the above it can be seen that the general permit structure (“everything is allowed, not prohibited by law”) is conditioned by the legislative enshrinement of the basic principles of building human-state relations and potentially forms the methodological basis of state human rights and freedoms. In the practice of the Supreme Court as a component of the system of the most effective guarantees of human rights in Ukraine, such a construction is associated with certain features of the formalisation of law and is objectified:

– *directly* (with the help of legal tools to mediate the general permit as a basis for the relevant type of regulation (we are talking about the implementation of certain rights, in particular, the right to protection, features of contractual regulation, separation of private and public interest) and/or its limiters – legal prohibitions and legal obligations);

– *indirectly* (through special permits, the addressees of which are entities that are “obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine”).

As the practice of the Supreme Court demonstrates, the following issues are of great methodological importance for the study of the legal implementation of general permits:

1) *discretionary powers*, which allows: a) distinguishing the discretion of the person within the general permit from the discretion of the subject of power within the general prohibition; b) analysing the legal interpretation of Ukraine in terms of explaining valuation concepts as formal grounds for discretion, and hence the proper exercise of such powers, in accordance with the requirements of ensuring the content of constitutional rights and freedoms, which is a kind of protection of general legal regulation;

2) *special permits related to the subjective right of a person* (from the standpoint of the general permissive type of legal regulation, the degree of possible – from the point of view of law – a person's behaviour seems to be determined not only by the negative aspect (“everything but”), but also by the positive aspect (“everything, namely”). Accordingly, such special permits are able to “strengthen”, guarantee the permissive nature of human rights, promote its establishment. Since this is a sphere of realisation of human rights and freedoms, such permits cannot be essentially within the framework of the construction of a general prohibition, on the contrary, they must “function” in the area of a general permit;

3) *legitimate interests*, which, on the one hand, serves as a direct form of implementation of the general permit, and on the other – determines the limits of state discretion.

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