

**ОКРЕМІ АСПЕКТИ ЗАБЕЗПЕЧЕННЯ ПРАВА НА СПРАВЕДЛИВИЙ СУД
В УМОВАХ ВОЄННОГО СТАНУ В УКРАЇНІ¹****CERTAIN ASPECTS OF ENSURING THE RIGHT TO A FAIR TRIAL
UNDER MARTIAL LAW IN UKRAINE**

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The article examines certain aspects of ensuring the right to a fair trial under martial law in Ukraine. The main areas of research are such components of the right to a fair trial as a fair trial and the right to defense, since their proper implementation is complicated under martial law.

In the framework of the study of the right to a fair trial, the author analyzes the issues of court composition, inadmissibility of repeated participation of a judge in criminal proceedings, and conducting procedural actions via videoconference during court proceedings. With regard to the composition of the court, the author emphasizes the peculiarities of criminal proceedings in a court of first instance for crimes punishable by imprisonment for a term exceeding ten years. The author concludes that in this case, it is necessary to be guided by the established practice of the Supreme Court, according to which in this case, regardless of the accused's request, criminal proceedings should be conducted by a collegial court consisting of three judges. The author emphasizes that any participation of a judge in criminal proceedings during the pre-trial investigation excludes his/her participation in the same proceedings in the court of first instance, appeal and cassation, which is confirmed by the court practice.

The article analyzes the peculiarities of conducting procedural actions via videoconference during court proceedings. The author highlights important issues that arise in practice in connection with remote court proceedings.

Another aspect of the right to a fair trial under martial law – the right to defense – is studied. In the framework of this right, the author analyzes the peculiarities of defense counsel's participation in court proceedings in terms of observance of human rights and fundamental freedoms and guarantees of their protection. The author emphasizes the problematic issues of engaging a defense counsel in criminal proceedings under martial law. The author examines the peculiarities of defense counsel's participation in videoconferencing during court proceedings. It is concluded that despite the absence of a direct indication in Article 615 of the CPC of Ukraine of the court's obligation to ensure the participation of a previously appointed defense counsel via videoconference or a defense counsel engaged for a separate procedural action, such participation must be ensured by the court, which directly complies with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Key words: criminal proceedings, right to a fair trial, fair hearing, right to defense, trial under martial law.

У статті розглядаються окремі аспекти забезпечення права на справедливий суд в умовах воєнного стану в Україні. Основними напрямками дослідження обрано такі складові права на справедливий суд, як справедливий розгляд справи та право на захист, оскільки їх належна реалізація ускладнюється в умовах воєнного стану.

У межах дослідження права на справедливий розгляд справи аналізуються питання щодо складу суду, недопустимості повторної участі судді у кримінальному провадженні, а також проведення процесуальних дій у режимі відеоконференції під час судового провадження. Щодо складу суду звертається увага на особливості кримінального провадження в суді першої інстанції щодо злочинів, за вчинення яких передбачено покарання у виді позбавлення волі на строк більше десяти років. Підсумовується, що у даному випадку необхідно орієнтуватися на сталу практику Верховного Суду, відповідно до якої у наведеному випадку незалежно від клопотання обвинуваченого кримінальне провадження має здійснюватися колегіально судом у складі трьох суддів. Акцентується увага на тому, що будь-яка участь судді в кримінальному провадженні під час досудового розслідування виключає його участь у цьому ж провадженні в суді першої, апеляційної і касаційної інстанцій, що підтверджується судовою практикою. Аналізуються особливості проведення процесуальних дій у режимі відеоконференції під час судового провадження. Виокремлюються важливі питання, що постають на практиці у зв'язку зі здійсненням дистанційного судового провадження.

Досліджується інший аспект права на справедливий суд в умовах воєнного стану – право на захист. У межах дослідження цього права аналізуються особливості участі захисника у судовому розгляді в аспекті дотримання прав і основоположних свобод особи та гарантій їх забезпечення. Акцентується увага на проблемних питаннях залучення захисника у кримінальному провадженні в умовах воєнного стану. Розглядаються особливості участі захисника у режимі відеоконференції під час судового провадження. Висновок, що незважаючи на відсутність у ст. 615 КПК прямої вказівки на обов'язок суду забезпечити участь раніше призначеного захисника в режимі відеоконференції або залученого для окремої процесуальної дії, така участь повинна бути забезпечена судом, що прямо відповідає статті 6 Конвенції про захист прав людини і основоположних свобод.

Ключові слова: кримінальне провадження, право на справедливий суд, справедливий розгляд справи, право на захист, судовий розгляд в умовах воєнного стану.

Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the ECHR, the Convention) provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall determine the rights and obligations of a civil nature or the validity of any criminal charge against him.

One of the principles of criminal proceedings is access to justice and binding nature of court decisions. Thus, in accor-

dance with Part 1 of Article 21 of the Criminal Procedure Code of Ukraine (hereinafter – the CPC), everyone is guaranteed the right to a fair hearing and resolution of the case within a reasonable time by an independent and impartial court established by law.

At the same time, in the context of martial law in Ukraine, the exercise of the right to a fair trial has its own peculiarities, both objective and subjective. The issues of court composition, inadmissibility of repeated participation of a judge in

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criminal proceedings, as well as conducting procedural actions via videoconference during court proceedings should be considered relevant. Let us consider these issues in more detail.

The composition of the court

According to part 2 of Article 31 of the CPC, criminal proceedings in the court of first instance for crimes punishable by imprisonment for a term exceeding ten years shall be conducted by a collegial court consisting of three judges only at the request of the accused.

As can be seen, the legislator provides for a condition for consideration of criminal proceedings by a three-judge panel – the accused's motion. At the same time, in criminal proceedings concerning a particularly serious crime punishable by life imprisonment, the decision on this issue should be guided by the established practice of the Supreme Court.

Thus, in its ruling of 07.11.2023, the Supreme Court concluded that criminal proceedings in a court of first instance regarding a particularly serious crime punishable by life imprisonment should be conducted by a collegial court consisting of three judges, regardless of the petition filed by the accused and the stage of the crime. In support of this position, the Supreme Court noted that in this case, the person was accused of committing a criminal offense for which life imprisonment is provided, and therefore, in accordance with the established practice of the Supreme Court, regardless of the stage of the commission of a particularly serious crime and the petition filed by the accused, criminal proceedings under Part 3 of Article 31 of the CPC in the court of first instance should have been carried out by a collegial court consisting of three judges [1].

Inadmissibility of repeated participation of a judge in criminal proceedings

According to part 1 of Art. 76 of the CPC of Ukraine, a judge who participated in criminal proceedings during the pre-trial investigation is not entitled to participate in the same proceedings in the court of first instance, appeal and cassation, except in cases of appellate review of the decision of the court of first instance to impose a preventive measure in the form of detention, to change another preventive measure to a preventive measure in the form of detention or to extend the term of detention, which was issued during the trial in the court of first instance before the decision of the court of appeal.

In general, it should be noted that this aspect of the proper composition of the court is quite relevant, which necessitated the formulation of a legal position by the Supreme Court. Thus, in its ruling of 11.08.2022, the Supreme Court drew attention to the need to comply with these legislative provisions. In particular, in this case, the judge-rapporteur in the court of appeal participated in the consideration of the same proceedings during the pre-trial investigation, namely, as part of the panel of judges, she considered the suspect's appeal and issued a ruling.

Considering this criminal proceeding, the Supreme Court emphasized that any participation of a judge in criminal proceedings during the pre-trial investigation excludes his participation in the same proceedings in the court of first instance, appeal and cassation (Article 76 of the CPC). The fact that the panel of judges of the Court of Appeal overturned the decision of the investigating judge solely on procedural grounds cannot be considered a ground for derogation from the requirements of the law, which does not make the inadmissibility of a judge's repeated participation dependent on the grounds for making a court decision [2].

Conducting procedural actions via videoconference during court proceedings

The conduct of criminal proceedings under martial law has particularly actualized the issue of conducting procedural actions via videoconference during court proceedings. Thus, the impossibility of administering justice due to the temporary occupation of the territories, destruction and damage to court premises, as well as the need to ensure the safety of individu-

als and other factors necessitate remote court proceedings. Obviously, the use of the respective means has both positive and negative aspects, and in this regard, attention should be paid to some topical issues arising in the course of criminal proceedings.

Thus, in accordance with Part 2 of Article 336 of the CPC, the court decides to conduct a remote court proceeding on its own initiative or at the request of a party or other participants to the criminal proceedings. If a party to the criminal proceedings or the victim objects to the conduct of remote court proceedings, the court may decide to conduct them only by a reasoned ruling, justifying the decision in it.

The court has no right to decide on remote court proceedings in which the accused is outside the courtroom if he or she objects to it, except in cases of remote court proceedings under martial law.

An analysis of these legislative provisions and their application practice allows us to identify several important issues facing law enforcement.

The position of the defense regarding the conduct of remote court proceedings

When examining this issue, attention should be paid to the peculiarities of the legal regime under which the trial is conducted. Thus, the requirement to take into account the opinion of the accused regarding the decision to conduct a remote trial is relevant for all cases, except for the conduct of remote trial under martial law. This was emphasized by the Supreme Court in the decision of the Joint Chamber of 21.11.2022. In particular, taking into account the provisions of Part 2 of Art. 336 of the CPC, the court's decision to conduct a remote trial in which the accused is outside the courtroom and has filed a motion for direct participation in the trial, except in cases of remote trial under martial law, in accordance with the provisions of Art. 412 of the CPC, is a significant violation of the requirements of the criminal procedure law [3].

The Supreme Court expressed a similar position in its ruling of 22.12.2022, noting that the holding of a court of appeal during martial law in Ukraine with the participation of the accused in a video conference, even if the accused requested direct participation in the court hearing, does not violate the right to defense of the accused and is consistent with the provisions of Part 2 of Article 336 of the CPC [4].

The need to make a court decision on remote proceedings in the form of a ruling.

In case No. 225/127/17, the Supreme Court found that during the review of this criminal proceeding, the appellate court decided to hold a court hearing remotely without issuing a relevant ruling. It was stated that the appellate court did not comply with the requirements of Part 2 of Art. 336 of the CPC regarding the need to make a court decision on remote court proceedings, since according to this rule, the court, when deciding to hold a court hearing by video conference, must issue a ruling [5].

The need to provide reasons for a court decision to hold a court hearing via videoconference under martial law in case the accused objects to it.

In case No. 317/1524/15-к, the Supreme Court concluded that when deciding to hold a court hearing via videoconference under martial law in case the accused objects to it (part 2 of Article 336 of the CPC), the court must issue a relevant ruling providing justifications and motives, in particular, regarding the circumstances that prevent the accused from directly participating in the court hearing in the courtroom [6].

Participation of the defense counsel in the conduct of procedural actions via videoconference during the trial

In the course of remote court proceedings, it is of particular importance to ensure the accused's right to defense. This was emphasized by the Supreme Court in case No. 225/127/17. In particular, in this criminal proceeding, despite the defense counsel's notification that for technical reasons he could not participate in the court hearing via videoconference,

the appellate court held a hearing with the participation of the defense counsel by phone call, since his participation in this criminal proceeding is mandatory, and in the decision to uphold the verdict, he noted the participation of the defense counsel via videoconference. According to the Supreme Court, the CPC does not provide for holding a court hearing by phone call. In this way, the Court of Appeal could not properly identify the person participating in the court proceedings and properly explain his or her rights.

By considering the proceedings via a telephone call, the appellate court did not comply with Articles 46 and 52 of the CPC, as it considered the proceedings without the participation of a defense counsel, which violated the convict's right to defense. As a result, the Supreme Court concluded that holding a court hearing with a defense counsel, whose participation is mandatory, by telephone is not provided for by the CPC, prevents the court from properly identifying the party to the proceedings, explaining rights and obligations, and violates the accused's right to defense [5]. Other aspects of ensuring the right to defense will be discussed further in this article.

Participation of defense counsel in court proceedings under martial law in terms of ensuring the right to a fair trial

In the context of martial law in Ukraine, criminal proceedings are carried out with a number of peculiarities provided for in Article 615 of the CPC both during the pre-trial investigation and during the trial.

Its provisions require a separate analysis in terms of observance of fundamental rights and freedoms of a person and guarantees of their ensuring, their compliance with the provisions of the ECHR, in particular, the right to a fair trial.

Thus, in accordance with part 12 of Article 615 of the CPC, the investigator, investigator, prosecutor ensures the participation of a defense counsel in a separate procedural action, including in case of impossibility of the defense counsel's appearance – with the use of technical means (video, audio communication) to ensure remote participation of the defense counsel.

Thus, the legislator has established the obligation of the prosecution at the pre-trial investigation stage to ensure the possibility of exercising the right to defense for a person held criminally liable, in particular, in terms of the right to legal assistance of a lawyer, which corresponds to subparagraphs c, paragraph 3, Article 6 of the ECHR.

At the same time, Article 615 of the CPC does not provide for a procedural procedure for the court to engage a defense counsel during court proceedings if his participation is impossible due to martial law. This, accordingly, creates a risk of violation of the right to defense and, as a result, the right to a fair trial.

The Guidelines on conducting court proceedings by videoconference, approved by the European Commission on the Efficiency of Justice (CEPEJ) at its 36th plenary session (June 16–17, 2021), note that all fair trial guarantees provided for in the ECHR apply to remote hearings in all court proceedings.

States should establish legislative regulation that provides clear grounds for courts to hold remote hearings in court proceedings. It is for the court to decide, within the framework of the applicable law, whether a particular hearing should be held remotely to ensure the overall fairness of the proceedings. The court must ensure that the party's right to effective assistance of counsel is respected in all court proceedings, including the confidentiality of their communications.

According to paras. 27–30, the accused must have effective access to legal representation before and during the remote hearing, including the right to communicate confidentially with his or her defense counsel before the hearing.

The court should postpone or suspend the remote hearing in the absence of the defendant's counsel. In such a case, the court must take all necessary measures to ensure that the accused's right to defense is respected, including

the possible appointment of an ex officio defense counsel [7, p. 2–5].

In the context of the issue under consideration, the decision of the Central District Court of Mykolaiv (Case No. 490/696/19) of February 9, 2023, which postponed consideration of the issue of extending the term of detention of the accused on the grounds that his defense counsel did not appear at the court hearing, the court explained to the accused the possibility of engaging another defense counsel by appointment, but the latter refused, so the consideration of this issue was postponed until the previously appointed defense counsel could arrive [8].

Thus, in fact, the term of detention was automatically extended, which directly contradicts the guarantees of Article 5 of the Convention and the position of the European Court of Human Rights (hereinafter – the ECHR) on this issue.

Thus, on the one hand, the court ensured the guarantees of the right to defense of a person, and on the other hand, it violated the provisions of Article 5 of the ECHR. Whereas, in our opinion, given that detention is a measure that significantly restricts the constitutional rights and freedoms guaranteed by the Convention, in this situation it would be advisable to ensure the participation of a defense counsel via videoconference, which is expressly provided for in Article 336 of the CPC, in particular during martial law. In addition, according to the Letter of the Supreme Court of 03.03. 2022 No. 1/0/2-22 “On Certain Issues of Criminal Proceedings under Martial Law”, paragraph 7 of which states that if, due to objective circumstances, a participant in a criminal proceeding cannot participate in a meeting by video conferencing using technical means specified by the CPC, as an exception, such a participant may be allowed to participate in a video conferencing session by other means, while paying attention to explaining to such a participant his procedural rights and obligations [9].

The correctness of this conclusion is confirmed by the position of Jeremy McBride, an international expert of the Council of Europe, who noted that the ECHR always considers a specific situation and in many cases insists on compliance with the formality of legislative provisions to avoid violations of human rights. When postponing a case, it is necessary to take into account how the rights of both the accused and the victims are ensured. Therefore, if we talk about the absence of a defense counsel and a delay in the proceedings, we must take into account how this will affect the observance of the rights of victims [10].

In addition, as Supreme Court Judge Serhii Fomin rightly emphasizes, judges are now interested in other procedural issues. For example, one of the most common is the question of what to do if a defense counsel is drafted into the Armed Forces or serves in the military.

Pursuant to Article 7 of the Law of Ukraine “On the Bar and Practice of Law” (No. 5076-VI of July 5, 2012), military service is incompatible with the practice of law. In the event of incompatibility, the advocate must submit an application for suspension of the practice of law to the regional bar council at the address of his or her workplace within three days from the date of occurrence of such circumstances.

However, not all advocates file such an application. At the same time, it is not the business of the court to find out why the advocate did not file an application for suspension of the practice of law.

Only after analyzing each specific case should the court decide whether to postpone the criminal proceedings or engage another defense counsel, even if the accused does not want to do so. Of course, if there is a need for urgent procedural actions, such as extending the term of detention, then, of course, another defense counsel should be involved.

If judges have fears that due to the postponement of the criminal proceedings due to the absence of a defense counsel who is in the AFU or TRU, the proceedings will be

considered beyond reasonable time, then in this situation it is worth remembering the criteria for the reasonableness of the time provided for in Article 28 of the CPC, which fully comply with the ECHR criteria. Thus, one of the criteria for determining the reasonableness of the criminal proceedings is the behavior of the participants in the criminal proceedings (including the accused) [10].

The same position is set forth in the decision of the panel of judges of the Second Judicial Chamber of the Criminal Court of Cassation of the Supreme Court of 16.02.2023 in case No. 748/479/20.

Thus, the court stated the following. The provisions of Art. 335 of the CPC provide for the suspension of court proceedings only in cases where only the accused was called up for military service during mobilization, so the appellate court explained to him his right to conclude an agreement with another

defense counsel and provided time for this. However, the convict did not use this opportunity, did not conclude an agreement with any defense counsel, and did not provide the court with evidence to confirm that he had indeed made a preliminary agreement with a particular defense counsel. In such circumstances, the appellate court complied with the requirements of the law and appointed a defense counsel from the Regional Center for Free Secondary Legal Aid, who directly participated in the court hearing in the court of appeal [11].

Summarizing, it should be noted that despite the absence in Art. 615 of the CPC of a direct indication of the court's obligation to ensure the participation of a previously appointed defense counsel in a videoconference or engaged for a separate procedural action, such participation must be ensured by the court, which directly complies with the guarantees of Article 6 of the ECHR.

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