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# Ensuring state, public, and personal interests in criminal proceedings under martial law or a state of emergency

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### Abstract

The full-scale invasion of the Russian Federation on the territory of Ukraine led to the need to change and amend the Criminal Procedural Code of Ukraine, specifically its Section IX-1. The purpose of this study was to analyse the development of criminal procedural legislation on the regulation of criminal proceedings under martial law through the lens of state, public, and personal interests of participants in criminal proceedings; analysis of legislative regulation of special procedures for apprehension and detention both in Ukrainian legislation and in the legislation of other countries. This study uses a set of special methods inherent in the study of the phenomena of legal science, namely historical legal, formal legal, comparative legal, and system-structural. It was found that both the title and the text of Section IX-1 of the Criminal Procedural Code of Ukraine have no indication of the specific features of criminal proceedings during other, except for military, special situations in the state that threaten its national security. It was substantiated that when regulating criminal proceedings under martial law, the emphasis on the priority of the interests of the participants in the criminal proceedings shifts towards the benefit of the interests of the state and society. Attention was drawn to the substantial expansion of the prosecutor's powers. The lack of a systematic approach to introducing changes and amendments to the criminal procedural legislation was proved. The procedural form of restriction of the right to freedom and personal inviolability during martial law has undergone substantial changes. An analysis of the criminal procedural legislation of Great Britain, Spain, France, and the United States suggests that these states respond to national security threats by introducing special procedures in the investigation of crimes that caused such threats. These special procedures relate to the period for detaining a person without notifying them of their charge, without bringing them to court. The conducted study allows forming a conceptual approach to the regulation of criminal proceedings, thereby ensuring a reasonable balance of state, public, and personal interests

### Keywords:

apprehension; detention; court; interests of the state and society; interests of participants

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## Introduction

Military aggression against Ukraine forced to adapt the legislation to the new realities of public relations. Criminal procedural legal relations have also changed. This was conditioned by the fact that during martial law, it is objectively impossible to adhere to the general rules for conducting criminal proceedings. Military operations, air alarms or attacks make it impossible to conduct law enforcement intelligence or other procedural actions pursuant to the general procedure established by the criminal procedural legislation for peacetime.

Although the Criminal Procedural Code of Ukraine<sup>1</sup> (CPCU) was supplemented in 2014 with Section IX-1 “Special regime of pre-trial investigation in conditions of martial law, state of emergency or in the area of an anti-terrorist operation”, as of February 2022, this section had only one norm, which consisted of one part, which was formulated in one sentence. Such statutory regulation could not cover the full range of features of criminal procedural legal relations caused by the actions of martial law. Therefore, in fact, three weeks after the full-scale invasion of the Russian Federation on the territory of Ukraine, Section IX-1 of the CPCU<sup>2</sup> was substantially changed and amended.

Discussions immediately arose in the scientific community whether all changes and amendments to the specified section of the CPCU are justified. Said changes introduced a deviation from standard criminal proceedings by substantially expanding the powers of the prosecutor, including restrictions on the constitutional rights of participants in pre-trial or judicial proceedings (Hloviuk, 2022; Glovyuk *et al.*, 2022).

This issue has been investigated by I.V. Glovyuk & V.A. Zavrur (2022), O.V. Kaplina (2014; 2022), O.V. Lazukova (2018), V.K. Matviichuk (2022), O.M. Drozdov, V.V. Mykhailenko, V.V. Rohalska, H.K. Teteriatnyk, T.H. Fomina (2022), R.I. Melnyk & T.P. Chubko (2016), O.V. Oderii & I.S. Klechanovskiy (2017), M.M. Stefanchuk (2022), V.M. Yurchyshyn (2017). However, most of the above studies investigated the issue of special procedures for pre-trial investigation in a state of martial law or state of emergency before the adoption of the new version of Section IX-1 of the Criminal Procedural Code of Ukraine<sup>3</sup> in April 2022.

Regulation of the procedural form of pre-trial investigation and judicial proceedings in a state of martial law or emergency is a complex legislative process that requires considering both the interests of the state and society in the investigation of criminal offences, as well as the rights and legitimate interests of a suspect or

accused. Therewith, it is necessary to ensure a reasonable balance of these interests because on the one hand are the interests of society, which is threatened by terrorist acts or military aggression, and on the other hand are the rights of the individual, which are guaranteed by the Constitution of Ukraine and international regulations.

*The purpose of this study* was to identify the principles for regulating criminal proceedings in circumstances caused by military aggression or other extraordinary events, which will ensure a balance of state, public, and personal interests during pre-trial investigation or judicial proceedings during the implementation of this special procedure of criminal proceedings.

## Materials and Methods

To fulfil the purpose of this study and ensure the reliability of the results obtained, a set of general scientific and special methods of cognition was used. Specifically, such general theoretical methods of theoretical research as observation, description, comparison, analysis, synthesis, abstraction, generalization, and a systematic approach were used, which allowed to highlight the subject of research, describe the results of observations, compare the norms of criminal procedural legislation, and substantiate the conclusions of the study.

When authoring this study, a set of special methods for investigating the phenomena of legal science was also applied, specifically historical legal, comparative legal, formal legal, and system-structural. The historical legal method allowed tracing the development of Ukrainian criminal procedural legislation and the legislation of certain European countries concerning the regulation of the procedural form of restriction of the constitutional right to freedom and personal inviolability of a suspect in committing crimes against the foundations of national security. The formal legal method was used to analyse the regulations that will determine a special procedure for pre-trial investigation in a state of emergency or martial law. Using the comparative legal method, the statutory regulation on apprehension and detention of individuals suspected of committing terrorist crimes in the legislation of Ukraine, Great Britain, Spain, France, and the United States was studied. The system-structural method allowed identifying the main approaches to improving the criminal procedural legislation of Ukraine in the regulation of criminal proceedings under martial law and determining trends in ensuring state, public, and personal interests during this special procedure of criminal proceedings.

<sup>1</sup>Law of Ukraine No. 1631-VII “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Special Regime of Pre-Trial Investigation in a State of Martial Law, Emergency or in the Area of an Anti-Terrorist Operation”. (2014, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/1631-18#n5>.

<sup>2</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>3</sup>Law of Ukraine No. 2201-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”. (2022, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

These methods were used in conjunction, which enabled a complete and comprehensive study and allowed substantiating the formulated scientific conclusions and proposals.

During the research, the scientific works of proceduralist scientists were analysed, namely I.V. Glovyuk & V.A. Zavtura (2022), O.V. Kaplina (2014; 2022), O.V. Lazukova (2018), O.M. Drozdova, V.V. Mykhailenko, V.V. Rohalska, H.K. Teteriatnik & T.G. Fomina (2022) and others. The regulatory framework of this study included the Convention on the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>, the Constitution of Ukraine<sup>2</sup>, the CPCU<sup>3</sup>, the Laws of Ukraine “On the Legal Regime of a State of Emergency”<sup>4</sup>, “On the Legal Regime of Martial Law”<sup>5</sup>, “On the Fight against Terrorism”<sup>6</sup>, “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”<sup>7</sup>, the legislation of European countries and the decision of the European Court of Human Rights<sup>8</sup>.

## Results and Discussion

When the CPCU was adopted in 2012<sup>9</sup>, it did not contain a separate section that would regulate the specific features of conducting criminal proceedings in special conditions caused by armed aggression against Ukraine. For the first time, the Criminal Procedural Code was supplemented by Section IX-1 pursuant to the Law of Ukraine dated August 12, 2014, which was entitled “Special regime of pre-trial investigation in conditions of martial law, state of emergency or in the area of anti-terrorist operation”<sup>10</sup>. Given that the events in the east of Ukraine from an anti-terrorist operation were reformatted into

an operation of joint forces, the Law of Ukraine dated April 27, 2021 amended the title of Section IX-1 with the words “or measures to ensure national security and defence, repel and deter armed aggression of the Russian Federation in the Donetsk and Luhansk regions”<sup>11</sup>.

In March 2022, the title of this section was corrected, and it was indicated that the special regime concerns not only pre-trial investigation, but also judicial proceedings. Therewith, the title still indicates that the specific features of the proceedings also applied to the state of emergency<sup>12</sup>. In April 2022, both the title of Section IX-1 of the CPCU and its content underwent substantial changes. Pursuant to the Law of Ukraine No. 2201-IX dated April 14, 2022, this section was named “Special regime of pre-trial investigation, trial under martial law”<sup>13</sup>. Both the title and the text of this section removed the regulation of the specific features of an investigation or trial during special situations in a state other than military ones that threaten its national security.

Special situations that require differentiation of criminal procedural legislation can be caused not only by armed aggression of other states, but also by acts of terrorism, an attempt to change the constitutional order, which serves as the basis for introducing a state of emergency in Ukraine pursuant to the Law of Ukraine “On the Legal Regime of a State of Emergency”<sup>14</sup>. Furthermore, the text of the Constitution of Ukraine also speaks in favour of regulating the specific features of criminal proceedings not only during a state of martial law, but also during a state of emergency. Thus, Part 2 of Article 64 of the Constitution of Ukraine<sup>15</sup> states that in the conditions of martial law or state of emergency, separate restrictions of rights and freedoms may be established, specifying the

<sup>1</sup>Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>2</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>3</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>4</sup>Law of Ukraine No. 1550-III “On the Legal Regime of the State of Emergency”. (2000, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1550-14#Text>.

<sup>5</sup>Law of Ukraine No. 389-VIII “On the Legal Regime of Martial Law”. (2015, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19>.

<sup>6</sup>Law of Ukraine No. 638-IV “On Combating Terrorism”. (2003, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/638-15#Text>.

<sup>7</sup>Law of Ukraine No. 2201-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”. (2022, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

<sup>8</sup>Case of Brogan and Others v. the United Kingdom Case Law of the European Court of Human Rights. Decision. Comments. (2001). Retrieved from <http://eurocourt.in.ua/Article.asp?Aidx=430>.

<sup>9</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>10</sup>Law of Ukraine No. 1631-VII “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Special Regime of Pre-Trial Investigation in a State of Martial Law, Emergency or in the Area of an Anti-Terrorist Operation”. (2014, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/1631-18#n5>.

<sup>11</sup>Law of Ukraine No. 1422-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of Certain Provisions in Connection with the Implementation of a Special Pre-Trial Investigation”. (2021, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/1422-20#Text>.

<sup>12</sup>Law of Ukraine No. 2125-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Procedure for Revoking a Preventive Measure for Military Service on Conscription During Mobilization, for a Special Period, or Its Changes on Other Grounds”. (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2125-20#n6>.

<sup>13</sup>Law of Ukraine No. 2201-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”. (2022, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

<sup>14</sup>Law of Ukraine No. 1550-III “On the Legal Regime of the State of Emergency”. (2000, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1550-14#Text>.

<sup>15</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

period of validity of these restrictions. The terms “martial law and state of emergency” are used simultaneously in the regulation of the same rules and in other regulations – Articles 41, 43, 83, 157 of the Constitution of Ukraine<sup>1</sup>.

Part 1 of Article 15 of the European Convention on Human Rights<sup>2</sup> (ECHR) states that the High Contracting Party may take measures deviating from its obligations under this Convention in times of war or other public danger. In other words, the ECHR also refers not only to military events, but also to other events that pose a public danger (e.g., terrorism, a pandemic, etc.).

In connection with the above, the authors of this study believe that Section IX-1 of the CPCU<sup>3</sup> should be called “Special regime of pre-trial investigation, trial in conditions of martial law or state of emergency” and define special procedures for criminal proceedings during the introduction of both martial law and state of emergency.

In April 2022, not only the title of Section IX-1 of the CPCU<sup>4</sup>, but also its content underwent substantial changes. A new wording of Article 615 of the CPCU was presented<sup>5</sup>. In this norm, the legislator defined the specific features of conducting such procedural institutions: the beginning of a pre-trial investigation, search, inspection, and detention of an individual. A separate group should single out innovations related to procedural terms, namely an added reason for stopping the pre-trial investigation and a feature of the procedure for calculating the terms of the pre-trial investigation are defined; the possibility of carrying out certain procedural actions no later than fifteen days after the termination or cancellation of martial law is prescribed; the deadline for notifying a detained person of suspicion has been increased to forty-eight hours; the specific features of extending the terms of detention are determined.

Furthermore, exceptions to the principle of immediacy of court examination of evidence were introduced. According to Part 11 of Article 615 of the CPCU<sup>6</sup>, statements obtained during interrogation can be used in court as evidence, if video recording was used during the interrogation, and the participation of a defence attorney is defined as an added condition for the interrogation of the suspect. As for the participation of a defence attorney, under martial law, their participation can be

remote (using technical means of video and audio communication). Regarding the participation of the interpreter, according to Part 12 of Article 615 of the CPCU<sup>7</sup>, if it is impossible to involve an interpreter for objective reasons, the inquirer, investigator, or prosecutor may personally translate if they speak one of the languages spoken by the suspect or victim.

The above shows that when regulating criminal proceedings under martial law, the priority is shifted in favour of the powers of individuals conducting criminal proceedings, by simplifying certain procedures for conducting procedural actions and making procedural decisions.

In addition to the above, the legislator substantially expanded the powers of the prosecutor, delegating to them certain powers of the investigating judge, the court to make the following decisions: on the application of certain measures to ensure criminal proceedings (pretext, seizure of property, temporary access to things and documents); on conducting law enforcement intelligence actions related to breaking into a person's home or other property, on conducting cover law enforcement intelligence actions; on receiving samples for examination or extension of pre-trial investigation terms (Item 2, Part 1, Article 615 of the CPCU<sup>8</sup>).

Before the changes introduced by the Law of Ukraine dated July 27, 2022<sup>9</sup>, the head of the prosecutor's office was also authorized to decide on detention for pretext (Articles 187, 189, 190), choosing a preventive measure in the form of detention for a period of up to thirty days to individuals suspected of committing crimes prescribed in Articles 109–115, 121, 127, 146, 146–1, 147, 152–156-1, 185, 186, 187, 189–191, 201, 255–255-2, 258–258-5, 260–263-1, 294, 348, 349, 365, 377–379, 402–444 of the Criminal Code of Ukraine<sup>10</sup>, and in exceptional cases – also in the commission of other serious or particularly serious crimes, if there are added risks of loss of evidence or escape of the suspect<sup>11</sup>.

However, these powers of the prosecutor to restrict the constitutional right to freedom and personal inviolability during apprehension and detention during martial law have been substantially criticized by both scientists and human rights defenders. After all, they contradict the provisions of Article 29 of the

<sup>1</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>2</sup>Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>3</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>4</sup>Law of Ukraine No. 2201-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”. (2022, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

<sup>5</sup>Ibidem, 2022.

<sup>6</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>7</sup>Ibidem, 2012.

<sup>8</sup>Ibidem, 2012.

<sup>9</sup>Law of Ukraine No. 2462-IX “On Amendments to the Criminal Procedural Code of Ukraine Regarding the Improvement of Certain Provisions of Pre-Trial Investigation Under Martial Law”. (2022, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2462-20#n59>.

<sup>10</sup>Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

<sup>11</sup>Law of Ukraine No. 2201-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”. (2022, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

Constitution of Ukraine<sup>1</sup>, which declares the obligation of judicial control when deciding on arrest or detention.

Therefore, in July 2022, another Law of Ukraine “On Amendments to the Criminal Procedural Code of Ukraine Regarding the Improvement of Certain Provisions of Pre-Trial Investigation Under Martial Law”<sup>2</sup> was adopted, which cancelled the power of the prosecutor as a party to the prosecution to decide on the restriction of the constitutional right to freedom or personal integrity during martial law.

The above shows that the regulation of the procedural form of pre-trial investigation and judicial proceedings under martial law is a complex legislative procedure that requires considering the interests of the state and society regarding the investigation of criminal offences and the interests of the suspect, accused as a participant in criminal proceedings. Therewith, as H.K. Teteriatnyk (2022) notes that “in such conditions, a complex issue is being resolved to ensure a reasonable balance of state and public interests and create guarantees of the rights and legitimate interests of a person as the highest social value in the conditions of their forced restriction”.

Along with this, the above-mentioned provisions suggest the unsystematic and situational nature of the introduction of individual changes and amendments to the CPCU<sup>3</sup> during the regulation of the procedural form of criminal proceedings under martial law. Such an approach to the improvement of criminal procedural legislation allows solving only the problems that arise in the particular situation that has developed at the moment. But the code is not a one-time rule, it is a norm that should be characterized by formal certainty and stability. The same cannot be said about Section IX-1 of the CPCU<sup>4</sup>, which was changed or amended five times during 2021-2022 alone. Moreover, such changes not only introduced new rules of conduct, but also cancelled those that were introduced by previous laws.

The procedural form of restriction of the right to freedom and personal inviolability in the context of martial law or a state of emergency has undergone the greatest transformations. Specifically, from August 2014 to

April 2022, during the investigation of terrorist crimes, the prosecutor could decide to detain an individual in custody for up to 30 days<sup>5</sup>; from April 2022 to August 2022, the head of the prosecutor's office was authorized to make such a decision, and the term of detention of an individual without a decision of an investigating judge or court was increased from 72 to 216 hours<sup>6</sup>. Since August 2022, all these special procedures for apprehension and detention during martial law have been abolished<sup>7</sup>. The specific features of the procedural form of detaining an individual during the period of martial law are still the extension of the period of notice of suspicion to the detained individual (not 24 hours, as prescribed in the general procedure, but 48 hours), determination of an added reason for detention (possible escape for evading criminal responsibility), the possibility of remote participation of the detained individual in the consideration of the request for the selection of a preventive measure (using available technical means of video communication) (Part 7 and Clause 6 of Part 1 of Article 615 of the CPCU<sup>8</sup>).

Notably, the prosecutor was empowered to decide to detain an individual for up to thirty days not in March 2022, but in August 2014, when Chapter IX-1 was first added to the CPCU<sup>9</sup>. And such powers concerned only cases when an individual was suspected of committing a limited range of criminal offences, namely terrorist crimes, crimes against the foundations of national security of Ukraine, public order, peace, security of humanity, and international law and order.

The possibility of apprehension and detention without a court decision for up to 30 days is currently prescribed in Article 15-1 of the Law of Ukraine “On Combating Terrorism”<sup>10</sup>, which states that in case of reasonable suspicion that an individual has committed terrorist activity, the term of preventive detention cannot exceed thirty days. Such detention is applied without a decision of the investigating judge but based on a decision of the head of the Main Department of the Security Service of Ukraine or the head of the territorial body of the National Police with the prosecutor's approval.

Although this law stipulates that preventive apprehension of individuals involved in terrorist

<sup>1</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>2</sup>Law of Ukraine No. 2462-IX “On Amendments to the Criminal Procedural Code of Ukraine Regarding the Improvement of Certain Provisions of Pre-Trial Investigation Under Martial Law”. (2022, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2462-20#n59>.

<sup>3</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>4</sup>Ibidem, 2012.

<sup>5</sup>Law of Ukraine No. 1631-VII “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Special Regime of Pre-Trial Investigation in a State of Martial Law, Emergency or in the Area of an Anti-Terrorist Operation”. (2014, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/1631-18#n5>.

<sup>6</sup>Law of Ukraine No. 2201-IX “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Improvement of the Procedure for Conducting Criminal Proceedings Under Martial Law”. (2022, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

<sup>7</sup>Law of Ukraine No. 2462-IX “On Amendments to the Criminal Procedural Code of Ukraine Regarding the Improvement of Certain Provisions of Pre-Trial Investigation Under Martial Law”. (2022, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2462-20#n59>.

<sup>8</sup>Ibidem, 2022.

<sup>9</sup>Law of Ukraine No. 1631-VII “On Amendments to the Criminal Procedural Code of Ukraine Concerning the Special Regime of Pre-Trial Investigation in a State of Martial Law, Emergency or in the Area of an Anti-Terrorist Operation”. (2014, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/1631-18#n5>.

<sup>10</sup>Law of Ukraine No. 638-IV “On Combating Terrorism”. (2003, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/638-15#Text>.

activities for more than 72 hours must be carried out pursuant to the criminal procedural legislation, there is no norm in the CPCU that would indicate the specific features of detaining such individuals<sup>1</sup>. The authors of this paper believe that the CPCU does not necessarily have to have a separate article that would define the procedure for carrying out preventive apprehension. However, a blanket rule that would indicate the possibility of such detention and its regulation by a separate law should be prescribed in CPCU.

The above analysis of criminal procedural legislation shows the unsystematic nature of law-making activities during the regulation of criminal procedural legal relations in the conditions of martial law, which in turn causes the legal uncertainty of the legislation and the difficulties of law enforcement. Among the reasons for such a law-making process, it is worth mentioning the lack of a fundamental, conceptual vision of the regulation of the criminal procedural form in circumstances caused by military aggression or other extraordinary events.

To determine the most balanced and optimal approach to regulating the criminal procedural form of criminal proceedings under martial law, it is advisable to analyse the criminal procedural legislation of other countries. Although it is worth noting that after the end of World War II, most countries in Europe and the world did not face direct military aggression. However, many countries have dealt with terrorist wars, which also necessitated the adaptation of criminal procedural legislation to the specific features of investigating and bringing to justice those who committed terrorist acts.

The practices of Great Britain should be considered, where since 1969, 2,646 people died directly as a result of terrorist activities, and 30,658 were maimed or injured, while 43,649 attacks were carried out using explosives and firearms (Case of Brogan..., 2001). Comparable cases have occurred in Spain, France, and the United States, particularly after the September 11, 2001 terrorist attacks.

A series of terrorist acts in Great Britain led to the adoption of the Prevention of Terrorism Act<sup>2</sup> in 1974, which was subject to parliamentary review every six months. Under that Act, the police were given special powers of arrest. Specifically, an individual suspected of committing terrorist acts could be arrested by a constable without a court decision. As a general rule, the period of detention could not exceed forty-eight hours. In case of reasonable suspicion of committing terrorist crimes, the minister was granted the right to extend the period of detention for another five days (Case of Brogan..., 2001).

That is, in the UK, under the Prevention of Terrorism Acts, the police were granted the right to keep

an individual in custody without bringing them to court for seven days. Therewith, the purpose of increasing the period of detention without a court decision was to ensure the secrecy of the investigation, since the hearing of the case in court would determine the publicity of the investigation methods.

The decrease in the number of terrorist acts and the number of deaths from these crimes since the mid-1980s was explained, among other things, by the presence of such detentions. Therefore, during the extension of these laws, it was noted that proposals to transfer the court's authority to decide on the extension of detention were rejected for reasons of confidentiality of information on the grounds of detention (Case of Brogan..., 2001).

That is, the fact of increasing terrorism in the UK has necessitated the protection of the interests of society and the state as a matter of priority, including by granting added powers to investigative bodies to restrict the right to freedom and personal inviolability of individuals suspected of committing terrorist acts.

The other side of this issue is the need to guarantee the inadmissibility of abuse of the right to long-term detention without a court decision. British judicial practice knows the cases called "Guildford Four" and "Maguire Seven" – the collective names of two groups whose charges in English courts in 1975 and 1976 for explosions in Guildford pubs were overturned after long campaigns for justice. The Guildford Four were wrongly convicted of explosions carried out by the IRA (Irish Republican Army), and the Maguire Seven – for manufacturing and storing explosives found during the investigation of the explosions. The charges against both groups were found unsatisfactory and overturned after the individuals served 15–16 years in prison (Alastair Logan..., 2022).

One of the reasons for issuing such an unfair court decision is the possibility of detention for seven days without being brought to court because during this period the detainees were put under pressure to confess, on which all further accusations were based. After the review of the court decision and the acquittal of the convicted individuals, three police officers were charged with conspiracy to pervert the course of justice, but their guilt was not proven.

In 2000, the UK passed a new Terrorist Act<sup>3</sup>, according to which the police have the right to detain suspects for no more than 48 hours, and after every 12 hours the appropriateness of further detention is reviewed by a higher-level officer, based on a written report on the reasons leaving the detainee in custody. After 48 hours, any extension of the detention period shall be authorized by a High Court judge based on appropriate explanations indicating which

<sup>1</sup>Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup>Scorer, C. (1980). The United Kingdom Prevention of Terrorism Acts, 1974 and 1976. *JSTOR*, 10(1), 105-111. Retrieved from <https://www.jstor.org/stable/40469875>.

<sup>3</sup>Terrorism Act 2000. (2000). Retrieved from <https://www.legislation.gov.uk/ukpga/2000/11/contents/enacted>.

investigative actions have not yet been completed, what results of these investigative actions are expected during the added time of detention, and to clarify which issues the detainee will be questioned at that time. On good grounds, a detainee may be denied access to a lawyer of their own choosing, but in such cases, another lawyer must be provided immediately (Overview of Terrorism..., 2010).

The above-mentioned changes have struck a fair balance between the public interest in countering terrorist activities and the interest in protecting the fundamental rights of an individual suspected of committing such crimes.

In Spain, which has also suffered from terrorist acts for a long time, the specific features of the detention of individuals suspected of committing terrorist crimes are regulated by criminal procedural legislation (Overview of Terrorism..., 2010). According to the provisions of the Criminal Procedural Code of Spain<sup>1</sup>, during the investigation of any criminal offence, the court may authorize the detention of suspects in incommunicado for the minimum period necessary to take immediate measures to prevent the risks of evading responsibility, harming the rights of the victim, hiding, changing, or destroying material evidence or committing new crimes. A detainee must be released or brought before a judge no later than 72 hours after the arrest (Articles 509 and 520 of the Criminal Procedural Code of Spain<sup>2</sup>).

Therewith, in cases involving armed gangs, terrorist groups or rebels, the period of detention may be extended for the time required to conduct an investigation, but not more than 48 hours. Detention of an individual without a court decision may not last longer than 5 days. There were attempts to extend this period to 10 days, but the Constitutional Court limited the time of detention by a police decision without the involvement of a court to 5 days. If the case concerns terrorism or organized crime, this period is additionally extended by the court for no more than five days. Exclusively for terrorism cases, it is possible to repeatedly deprive the suspect of contacts with the outside world by court decision for a period not exceeding 3 days from the moment when the investigation considers it appropriate. The permissible cumulative period of incommunicado detention, which is 13 days, includes 5 days during which a suspect can be held by the police (Overview of Terrorism..., 2010).

The right of a detainee to a medical examination is defined as the guarantee of prevention of abuse and ill-treatment (Article 520 of the Criminal Procedural

Code of Spain<sup>3</sup>). Therewith, an individual detained on suspicion of terrorism and held in solitary confinement by order of a judge is entitled to consult only with a lawyer appointed to them, but cannot choose a lawyer independently, and also cannot have contact with other individuals during the initial period of detention (Article 527 of the Criminal Procedural Code of Spain<sup>4</sup>).

Notably, the ban on the involvement of private lawyers at the initial stage of detention was recognized by the international human rights organization "Human Rights Watch" as justified in the light of the fact that the arrested members of the terrorist organization ETA were provided with legal aid by lawyers associated with this organization, which was detrimental to the investigation (Overview of Terrorism..., 2010).

According to French procedural legislation, detention after the first two days is authorized by a judge after hearing the detainee. If the case concerns terrorism, the period of detention without charge can be extended up to 6 days. This provision applies in emergency situations with the permission of the judge who decides on personal freedoms and detention. Until 2005, it was allowed to extend detention by a court decision to no more than 96 hours (4 days). But after the bombings in Madrid and London in 2005, the maximum period of detention of suspects by the police for questioning was increased to 6 days. The prosecutor and investigating judge must also provide the detainee with access to a doctor and lawyer, who may be prohibited from disclosing information about the meeting with the detainee (Overview of Terrorism..., 2010).

In the United States, special detention procedures are declared in the Constitution<sup>5</sup>, which states that no one can be deprived of the privilege granted by the law "Habeas Corpus", except in those cases when public safety requires it during a rebellion or attack (Item 2 of Section 9 of Article 1). The Habeas Corpus rule prescribes that only the court exercises control over the legality of detention of individuals suspected of committing crimes. The decision to suspend the "Habeas Corpus Act" was first adopted by US President Lincoln in 1863 in the cases of individuals accused of war crimes (President Lincoln's..., 2022).

The repeated need to limit the rule of habeas corpus in the USA arose after the terrorist acts of September 11, 2001 (Attack..., 2022).

Congress adopted the Military Commission Act according to which foreign fighters were deprived of the right to "Habeas Corpus"<sup>6</sup>. However, in *Boumediene v.*

<sup>1</sup>C Ley de enjuiciamiento criminal. (1882). Gaceta de Madrid, 260. Retrieved from <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036>.

<sup>2</sup>Ibidem, 1882.

<sup>3</sup>Ibidem, 1882.

<sup>4</sup>Ibidem, 1882.

<sup>5</sup>Constitution of the United States of America. (1789). Retrieved from [http://lib.rada.gov.ua/static/LIBRARY/catalog/law/usa\\_const.htm#%D1%81%D1%821](http://lib.rada.gov.ua/static/LIBRARY/catalog/law/usa_const.htm#%D1%81%D1%821).

<sup>6</sup>Military Commissions Act of 2006. (2006). Retrieved from <https://www.govinfo.gov/content/pkg/BILLS-109s3930es/pdf/BILLS-109s3930es.pdf>.

Bush, the Supreme Court<sup>1</sup> declared this law unconstitutional, on the basis that it does not comply with the rule of admissibility of suspension of this right. Furthermore, after the terrorist attacks of September 11, 2001, the Federal Patriot Act (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act”) was passed in the United States<sup>2</sup>, which was valid until 2015. This law gave the government and law enforcement agencies broad powers to monitor citizens, including expanding the FBI’s wiretapping and electronic surveillance powers, which many advocates considered a violation of the Fourth Amendment to the Constitution<sup>3</sup>.

The lack of a proper mechanism for countering the abuse of the broad powers granted to them by investigative bodies is evidenced by the story of Mohamed Ould Slahi, who was held in the Guantánamo Bay prison without charges for 14 years (from August 2002 to October 2016) (Mohamedou Ould Slahi..., 2015).

The above shows that when determining the balance between the interests of society, which suffers from terrorist crimes, and the interests of an individual who is suspected of committing such crimes, priority is given to the interests of society and the state.

Notably, the possibility of deviating from the observance of human rights, guaranteed by both the constitutions and the ECHR<sup>4</sup>, is prescribed by international standards. Specifically, pursuant to Part 1 of Article 15 of the ECHR<sup>5</sup>, during war or other public danger that threatens the life of the nation, it is allowed to take measures to deviate from the assumed obligations, but only to the extent required by the urgency of the situation.

Ukraine took advantage of this right and as early as May 2015, the Verkhovna Rada of Ukraine adopted a resolution “On the withdrawal of Ukraine from certain obligations defined by the International Covenant on Civil and Political Rights and the Convention on the Protection of Human Rights and Fundamental Freedoms”<sup>6</sup>, where it indicated that such a withdrawal is implemented to ensure the vital interests of society and the state in conditions of armed aggression (item 4).

Therewith, withdrawal from the provisions of the Convention is not absolute. After all, the possibility to withdraw does not concern all rights. According to Clause 2 of Art. 15 of the ECHR<sup>7</sup>, this provision cannot serve as a basis for derogating from the right to life, the prohibition of torture and ill-treatment, the prohibition of slavery and forced labour or from punishment without law. Furthermore, the European Court of Human Rights has repeatedly considered the issue of the legitimacy of derogation from obligations in the decisions “Lawless v. Ireland”<sup>8</sup> dated June 1, 1961, “Ireland v. United Kingdom”<sup>9</sup> dated January 18, 1978, “Brogan and others v. United Kingdom”<sup>10</sup> dated May 27 and October 28, 1988.

## Conclusions

The study analysed the development of criminal procedural legislation regarding the regulation of criminal proceedings under martial law through the lens of state, public, and personal interests of the participants in criminal proceedings. A comparative analysis of the legislative regulation of special procedures for restricting the right to freedom and personal integrity was carried out both in Ukrainian legislation and in the legislation of other European countries (Great Britain, France, Spain). The approaches of the case law of the European Court of Human Rights regarding the extension of the general terms of detention of suspects of committing terrorist crimes have been determined.

The analysis of changes and amendments to the Criminal Procedural Code of Ukraine regarding the regulation of the procedural form of criminal proceedings in the conditions of martial law or state of emergency shows that they are unsystematic. This allows solving only situational problems, which in the absence of a fundamental approach to the regulation of the criminal procedural form in circumstances caused by military aggression or other extraordinary events, will undergo permanent changes and amendments.

The criminal procedural legislation of other countries that have dealt with systematic terrorist acts responds to threats to national security by introducing

<sup>1</sup>Boumediene v. Bush No. 05-5062. (2007, February). Retrieved from <https://casetext.com/case/boumediene-v-bush-7>.

<sup>2</sup>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act dated 2001. (2001, October). Retrieved from <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf>

<sup>3</sup>Ibidem, 2001.

<sup>4</sup>Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>5</sup>Ibidem, 1950.

<sup>6</sup>Resolution of the Verkhovna Rada of Ukraine No. 462-VIII “On The Withdrawal of Ukraine from Certain Obligations Defined by the International Covenant on Civil and Political Rights and the Convention on the Protection of Human Rights and Fundamental Freedoms”. (2015, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/462-19#Text>.

<sup>7</sup>Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004](https://zakon.rada.gov.ua/laws/show/995_004).

<sup>8</sup>Case of “Lawless v. Ireland” No. 332/57. (1961, July) Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57518%22%5D%7D>.

<sup>9</sup>Case of “Ireland v. the United Kingdom” No. 5310/71. (1978, January). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D>.

<sup>10</sup>Case of Brogan and Others v. the United Kingdom Case Law of the European Court of Human Rights. Decision. Comments. (2001). Retrieved from <http://eurocourt.in.ua/Article.asp?AIdx=430>.

special procedures in the investigation of such crimes, which relate to increasing the terms of detention of an individual without notice of their charge or without bringing them to court and the procedure for involving a defence attorney. Therefore, when determining the balance between the interests of a society suffering from

terrorist crimes or military aggression and the interests of an individual suspected of committing such crimes, priority should be shifted in favour of the interests of society and the state, while ensuring that the expanded powers of individuals conducting pre-trial investigations are not abused.

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# Забезпечення державних, суспільних та особистих інтересів під час кримінального провадження в умовах воєнного чи надзвичайного стану

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## Анотація

Повномасштабне вторгнення Російської Федерації на територію України зумовило потребу у внесенні змін і доповнень до Кримінального процесуального кодексу України, зокрема до розділу IX-1. Метою роботи є аналіз розвитку кримінального процесуального законодавства щодо регламентації кримінального провадження в умовах воєнного стану крізь призму державних, суспільних та особистих інтересів учасників кримінального провадження; законодавчого регулювання особливих порядків затримання й тримання під вартою як в українському законодавстві, так і в законодавстві інших країн. У статті використано комплекс спеціальних методів, притаманних дослідженню явищ правової науки, зокрема: історико-правовий, формально-юридичний, порівняльно-правовий і системно-структурний. Визначено, що як у назві, так і в тексті розділу IX-1 Кримінального процесуального кодексу України відсутня вказівка на особливості кримінального провадження під час інших, окрім воєнних, особливих ситуацій у державі, які загрожують її національній безпеці. Обґрунтовано, що в разі регламентації кримінального провадження в умовах воєнного стану акцент у пріоритетності інтересів учасників кримінального провадження зміщується на інтереси держави й суспільства. Акцентовано на суттєвому розширенні повноважень прокурора. Доведено відсутність системного підходу під час внесення змін і доповнень до кримінального процесуального законодавства. Суттєвих змін зазнала процесуальна форма обмеження права на свободу й особисту недоторканність під час дії воєнного стану. Аналіз кримінального процесуального законодавства Великої Британії, Іспанії, Франції та США дозволяє стверджувати, що вказані держави реагують на загрози національній безпеці шляхом запровадження особливих процедур під час розслідування злочинів, які спричинили такі загрози. Ці особливі процедури стосуються строків затримання особи без повідомлення їй обвинувачення, без доставляння її до суду. Проведене дослідження дозволить сформулювати концептуальний підхід до регламентації кримінального провадження, який забезпечить розумний баланс державних, суспільних та особистих інтересів

## Ключові слова:

затримання; тримання під вартою; суд; інтереси держави та суспільства; інтереси учасників