

**SPECIFICS OF REPEAL OF CUSTODIAL RESTRAINT
AND ALTERATION OF RESTRAINT FROM OTHER GROUNDS
UNDER MARTIAL LAW
(article 616 of the Criminal Procedural Code of Ukraine)**

Harkusha A. H.

INTRODUCTION

Article 3 of the Constitution of Ukraine declares that life, health, honor and dignity, inviolability and security of the human are recognized as the highest social value in Ukraine. With the introduction of martial law in Ukraine on February 24, 2022, due to the military aggression of the Russian Federation, a number of significant amendments have been made, both to section IX-1 and to other sections of the Criminal Procedural Code (hereinafter – the CPC of Ukraine). The study of the institution of restraints, in particular, the repeal of a restraint in the form of custody under martial law and the alteration of a restraint in general, is of exceptional importance for criminal procedural legislation. The reveal of the essence of the procedural order for the repeal of a restraint in the form of custody under martial law is difficult and controversial, since there is no mechanism for its practical application.

The deployment of military aggression against Ukraine by the Russian Federation in the legal field became a determinant of numerous amendments to the current regulatory, in particular to CPC of Ukraine. We should note that the hybrid war since 2014, and after February 24, 2022, a full-scale military invasion of the territory of a sovereign state became a catalyst for significant changes in all areas of life without exception. In addition, alterations have also been made to the conduct of certain procedures or the application of measures within the framework of a pre-trial investigation. It's worth to be emphasized that any transformations to the field of law we are investigating are carried out taking into account the possibility of implementing criminal proceedings tasks, stipulated in Art. 2 of the CPC of Ukraine¹.

The purpose of the study is to analyze the provisions of Art. 616 of the CPC of Ukraine in order to reveal the specifics of the repeal of a restraint in

¹ Кримінальний процесуальний кодекс України: Закон України в редакції від 20.05.2022 № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (accessed: 10.02.2023)

the form of custody under martial law. To achieve the set goal within the framework of this research paper, we have defined the following tasks:

- to analyze the concept of «military service» and legal acts regulating its completion;

- to reveal updated provisions within the CPC of Ukraine, in particular Art. 616 of the CPC of Ukraine, which defines the mechanisms for repealing a restraint in the form of custody under martial law;

- to identify and to resolve of problematic aspects in the implementation of Art. 616 of the CHC of Ukraine and the search for effective ways to solve them.

The updated provisions of Art. 616 of the CPC of Ukraine were considered in the studies of I. Hlovyuk, O. Drozdov, T. Fomina, V. Rogalska, G. Teteryatnyk, V. Zatur. Scholars have made a Scientific and Practical Commentary on Section IX-1 of the CPC of Ukraine, which examines the specifics of the analyzed article, which established a special legal procedure for the repeal of a restraint for military service under conscription during mobilization for a special period. Some studies of the repeal of a restraint in the form of custody under martial law in the context of Art. 616 of the CPC of Ukraine were made by E. Pelikhos (unveiled the features of the use of a restraint in the form of custody), L. Udalova (within the framework of the study paid attention to the peculiarities of alteration the restraint in the form of custody), O. Tatarov (paid attention to the peculiarities of ensuring rights and freedoms of the suspect, the accused during the use of a restraint in the form of custody).

The focus of the study of this research paper is Art. 616 of the CPC of Ukraine, according to which the legislator established the specifics of the repeal of a restraint for military service during mobilization, for a special period or alteration the restraint for other reasons during the pre-trial investigation and trial. This rule needs some adjustments taking into account the current legal and political and social situation in order to become ergonomic for use by practitioners, more effective in understanding the principle of inevitability of criminal responsibility and more transparent when it deals with overcoming and fighting corruption, in particular during martial law. There is a reason to talk about the presence of corruption risks of the analyzed article due to the lack of anti-corruption examination, which according to the requirements of Art. 55 of the Law of Ukraine «On Prevention of Corruption» is carried out «with the aim of identifying in current regulatory and draft regulatory factors that contribute or may contribute to the commitment of corruption offenses, to develop recommendations for their elimination»². On the official website of the Verkhovna Rada of Ukraine, a

² Про запобігання корупції: Закон України від 03.08.2022 №1700-VII. URL: <https://zakon.rada.gov.ua/laws/show/1700-18#Text> (дата звернення: 03.02.2023).

card of draft law No. 7149 «On Amendments to the Criminal Procedural Code of Ukraine regarding the procedure for repealing a restraint for conscription for military service during mobilization or its alteration for other reasons» is published, and contains the Conclusion on this project of the Main Scientific expert department, however, there is no information regarding the assessment of corruption risks of the proposed rule. In our opinion, it is necessary to pay attention to them, and they consist in the lack of specifics in the algorithm of actions of the suspect, the accused, who has the right to apply to the prosecutor with a request to repeal the restraint in the form of custody in order to complete military service upon conscription during mobilization, for a special period³.

Thus, through the assessment of global national processes, we tried to recreate the model of updating and supplementing the CPC of Ukraine and the causal relationship within it. The rule we are studying on the repeal of a restraint for military service during a draft during mobilization for a special period or alteration a restraint for other reasons is a novelty in the criminal procedure.

1. Formation of legislation under martial law

In our opinion, it is expedient to pay attention to the formation of legislation under martial law. In 2014, the Criminal Procedural Code of Ukraine was supplemented by section IX-1, which, according to the Law of Ukraine from August 12, 2014 No. 1631-VII «On Amendments to the Criminal Procedural Code of Ukraine concerning special regime of pre-trial investigation under martial law, state of emergency or in the area carrying out an anti-terrorist operation», was named «Special regime of pre-trial investigation of martial law, state of emergency or in the area of an anti-terrorist operation»⁴. Subsequently, the Law of Ukraine from April 27, 2021 No. 1422-IX «On Amendments to the Criminal Procedural Code of Ukraine regarding the improvement of certain provisions concerning special Pre-trial investigations» added its title: «Special regime of pre-trial investigation of martial law, state of emergency or in the area of anti-terrorist operation or measures to ensure national security and defense, repulse and deter armed

³ Про внесення змін до Кримінального процесуального кодексу України щодо порядку скасування запобіжного заходу для призову на військову службу під час мобілізації або його зміни з інших підстав: законопроект № 7149. URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/39208> (дата звернення: 10.02.2023).

⁴ Про внесення змін до Кримінального процесуального кодексу України щодо вдосконалення окремих положень у зв'язку зі здійсненням спеціального досудового розслідування: Закон України від 27.04.2021 р. № 1422-IX. URL: <https://zakon.rada.gov.ua/laws/show/1422-20#Text> (accessed: 10.02.2023).

aggression of the Russian Federation in the Donetsk and Luhansk regions»⁵. This name of the section was kept until February 24, 2022, that is, the date of the beginning of the full-scale invasion of the Russian Federation troops on the territory of Ukraine (Tetryatnyk, 2021).⁶

We must note that after February 24, 2022, there were several more amendments to the analyzed section of the CPC of Ukraine, which, in turn, was significantly supplemented with new provisions. Thus, according to the Law of Ukraine from March 15, 2022 No. 2125-IX «On Amendments to the Criminal Procedural Code of Ukraine regarding the procedure for repeal a restraint for military service under conscription during mobilization, for a special period or its alteration for other reasons» it was named: «Special regime of pre-trial investigation, trial under martial law, state of emergency or in the area of anti-terrorist operation or measures to ensure national security and defense, repulse and deter armed aggression of the Russian Federation and/or other states against Ukraine»⁷. As a result of changing the name of the section, a new rule was formed – Art. 616 of the CPC of Ukraine. However, it is appropriate to emphasize that in the future, in April 2022, Art. 615 of the Criminal Procedure Code of Ukraine was significantly amended and a new rule was added – Art. 615-1 of the Criminal Procedural Code of Ukraine (according to the Law of Ukraine from April 14, 2022 No. 2201-IX «On Amendments to the Criminal Procedural Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings in Martial Law»). Due to the effect of this Law, the title of the section has also been changed to «Special regime of pre-trial investigation, trial under martial law».

2. Repeal of restraint for military service under conscription during mobilization

Appropriate amendments to the CPC of Ukraine, which provide for the repeal of a restraint for military service under conscription during mobilization, for a special period or an alteration of restraint for other reasons,

⁵ Про внесення змін до Кримінального процесуального кодексу України щодо порядку скасування запобіжного заходу для проходження військової служби за призовом під час мобілізації, на особливий період або його зміни з інших підстав: Закон України від 15.03.2022 р. №2125-IX. URL: <https://zakon.rada.gov.ua/laws/show/2125-20#Text> (accessed: 10.02.2023).

⁶ Тетерятник К.Г. Кримінальне провадження в умовах надзвичайних правових режимів: теоретико-методологічні та праксеологічні основи: монографія. Одеса: Видавничий дім «Гельветика», 2021. С. 297.

⁷ Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення кримінального провадження в умовах воєнного стану: Закон України від 14.04.2022 р. № 2201-IX. URL: <https://zakon.rada.gov.ua/laws/show/2201-20#Text> (accessed: 10.06.2022).

are in force from March 22, 2022. The rule stipulated in Art. 616 of the CPC of Ukraine, aimed at realizing the right of a suspect, an accused person to apply to the prosecutor with a request for the repeal of a restraint in the form of custody for the purpose of military service during mobilization, for a special period in the event of the introduction of martial law in Ukraine or some of its localities, implementation of measures to ensure national security and defense, repel and deter armed aggression by the Russian Federation and/or other countries against Ukraine.

The analyzed article has established the procedure for repealing the restraint of custody for the completion of military service under conscription during mobilization, for a special period. From the analysis of the provisions of Art. 616 of the CPC of Ukraine, exceptions should be made, because the suspect, the accused is deprived of the right to apply to the prosecutor for the repeal of a restraint in the form of custody for military service in the event of his/her committing crimes, the list of which is specified in Part 1 of Article 616 of the CPC of Ukraine. Among the listed articles of the Law of Ukraine on criminal liability there're rules related to crimes against the foundations of national security, against life and health, in the sphere of property, compliance with security and international legal order, etc. It should be emphasized that the principle of choosing these rules as exceptional by the legislator is unclear, because the first parts of the specified articles do not always provide for the commitment of particularly serious crimes. This is the reason for putting forward a proposal on the regulation of these provisions and the definition of coordinate systems, in which the legislator needs to move in order to modernize the existing rules in a certain way. Undoubtedly, they are not «dead» and are applied under martial law, however, in our opinion, the quality and creation of effective mechanisms for its implementation should be mentioned among the main features of this regulatory act.

In order to implement this rule, the suspect (accused) according to Clause 12, Part 3 of Art. 42 of the CPC of Ukraine has the right to file a motion for procedural actions, one of which is a petition to the prosecutor to repeal a restraint for military service.

Thus, after analyzing Art. 616 of the CPC, in order to implement it we can distinguish a sequence of actions as follows:

- 1) informing the suspect (accused) of the right to apply to the prosecutor with a petition to repeal the restraint for military service under conscription draft during mobilization, for a special period;

- 2) direct application of the suspect (accused) to the prosecutor with the appropriate petition;

3) consideration by the prosecutor of the petition of the suspect, the accused. It should be noted that the legislator has not established a specific term, therefore, in this case, Art. 28 of the CPC of Ukraine should be applied;

4) consideration by the prosecutor of a petition to repeal a restraint for military service under conscription during mobilization, for a special period.

5) in the case of granting the petition of the suspect (accused), the prosecutor in compliance with the requirements specified in Part 1 of Art. 616 of the CPC of Ukraine, submits his/her own request for the repealing of a restraint for military service under conscription during mobilization, for a special period;

6) direct appeal of the prosecutor with the relevant petition to the investigating judge or the court for its further consideration and decision-making;

7) consideration of the relevant petition by the investigating judge, the court;

8) making by the investigating judge, the court of a decision on the repeal of a restraint for further military service for the suspect, accused during the mobilization period, for a special period or on his/her refusal (A. G. Harkusha).

At the same time, the legislator bypassed the definition of certain aspects, in particular regarding: a) the content of the petition of the suspect, the accused to the prosecutor; b) the reasons, in the presence of which the prosecutor determines that it is appropriate to contact the investigating judge, the court; c) the procedure for consideration of the prosecutor's petition by the investigating judge, the court; d) grounds, in the presence of which the investigating judge or the court has the right to repeal the preventive measure (part 2 of Article 616 of the CPC in this regard uses the evaluative concept «if there are sufficient grounds (Fomina T., Rogalska V., 2022).

For the completeness of the study, we referred to the Law of Ukraine «On Military Duty and Military Service». According to Art. 2 of this Law «Military service is a public service of a special nature, which consists in the professional activity of Ukrainian citizens suitable for it in terms of health and age (with the exception of cases specified by law), foreigners and stateless persons, related to the defense of Ukraine, its independence and territorial integrity». From this definition, the main components of military service should be singled out: this activity can be carried out by persons who are fit for health and age, etc. This legal act is closely related to provisions on mobilization and selection for military service in the Armed Forces. Under martial law this provision became relevant in view of the need to expand the personnel of the Armed Forces. We note that the amending the CPC of Ukraine and other legal acts regulating this activity took place without fully taking into account all existing provisions and

ensuring correlation. This makes it necessary to analyze the specifics of the legislative regulation of military service. However, no less important within the framework of Art. 616 of the CPC of Ukraine is the compliance of its provisions with part 14 of Article 17 of the Law of Ukraine «On Military Duty and Military Service», which states that «a deferment from conscription for term military service is granted to conscripts who have been notified of suspicion of committing a criminal offense or in respect of whom a criminal case is being considered by a court – until the making of the relevant decision»⁸. This contradicts the provisions of Art. 616 of the CPC of Ukraine, because the suspect, the accused, having a reprieve, cannot be involved in military service, which makes it necessary to harmonize the provisions of this Law and the CPC of Ukraine, in particular Art. 616. Analyzing the regulatory on military service, we found out a number of problematic aspects that do not correlate with Art. 616 of the CPC of Ukraine. Thus, the issue of sending the suspect to undergo a military medical examination in the event that he submits a petition to repeal the restraint in the form of custody and military service is unclear. The situation is complicated by his stay in custody, because in order to determine the suitability of the suspect, the accused for military service, there is a need to transfer him to the relevant institutions. However, the question is also whether the suspect, the accused can be sent to undergo a military medical examination. According to the Regulation on military medical examination in the Armed Forces of Ukraine, «medical examination of conscripts is carried out by the military medical committee of military commissariats by decision of the military commissar». It follows from this provision that the referral for a medical examination can be carried out by officials of staffing bodies. Based on the provisions of clause 3.8. Regulations on military medical examination in the Armed Forces of Ukraine, approved by the Order of the Minister of Defense of Ukraine dated 14.08.2008 No. 402 the Schedule of Diseases provides for individual determination by the military medical commission of ability for military service and military specialty of conscripts who are called up for military service or accepted for military service voluntary under a contract⁹.

At present, the judicial practice is ambiguous regarding making a decision regarding the suitability of a suspect or accused person for military service. Some decisions contain an indication of eligibility without citing sources, others contain a reference to the fact that the person has completed military

⁸ Про військовий обов'язок і військову службу: Закон України в редакції від 23.04.2022 р. № 2232-XII. URL: <https://zakon.rada.gov.ua/laws/show/2232-12#Text> (accessed: 10.06.2022).

⁹ Положення про військово-лікарську експертизу в Збройних Силах України, затверджене наказом Міністерства оборони України від 14.08.2008 № 402. URL: <https://zakon.rada.gov.ua/laws/show/z1109-08#Text> (accessed: 10.06.2022).

service and is conscripted and is on the military register and is subject to conscription for military service during mobilization, which is confirmed by a copy of the military ticket^{10,11}.

Thus, in the ruling of the Lutsk City and District Court of the Volyn Region dated 07.07.2022, case No. 161/8386/22, fitness for military service is substantiated, namely: «The suspect PERSON_1 has undergone military service since November 20, 2003, is conscripted and is on military registration since 05/27/2005, ability for military service, subject to conscription for military service during mobilization, which is confirmed by a copy of the military ticket series NUMBER_1. He also ... noted that he has a military accounting specialty as an artilleryman, has the intention, experience and ability to defend the Motherland, sovereignty, independence and integrity of the country, to carry out measures to ensure national security and defense, repulse and deter armed aggression of the Russian Federation of Ukraine, received a summons to military commissariat». Also, the suitability of the accused was «deduced» from the following circumstances: «the accused has been performing his official duties since the moment of being drafted into military service, has undergone, in accordance with the order of the military unit... from May 7, 2022 No. 109, the necessary professional training and received a certificate of completion of the training course for specialist service number ZU 23-2 VOS-156, ready to selflessly fulfill his military duty to protect Ukraine during a full-scale aggression of the Russian Federation in any place designated by the military command to carry out tasks as assigned together with his unit, is an active serviceman of the military unit ... and in this regard is able for military service under martial law»¹².

For its part, one of the gaps in the analyzed rule is the uncertainty of the term of consideration by the prosecutor of the petition of the suspect, the accused to undergo military service, which can become a determinant of delay for the purpose of obtaining an illegal benefit by an official or achieving other goals to satisfy a private interest. Similarly, no term has been defined for passing a military medical examination, the conclusion of which is the basis for making a decision to repeal a restraint in the form of custody for military service, which also has corruption components even without specifying a special term. In view of the current conditions, this rule should be reviewed and the time limits for the consideration of the petition by the prosecutor, the

¹⁰ Ухвала слідчого судді Київського районного суду м. Полтави від 16.06.2022, справа № 552/1213/22 URL.: <https://reyestr.court.gov.ua/Review/104902031>

¹¹ Ухвала Подільського районного суду м. Києва від 18.04.2022, справа 7584/4796/21 URL: <https://reyestr.court.gov.ua/Review/103981933>

¹² Ухвала Луцького міськрайонного суду Волинської області від 07.07.2022, справа № 161/8386/22. URL: <https://reyestr.court.gov.ua/Review/105128177>

passing of a military medical examination by the suspect, the accused who submitted the relevant petition should be determined. At the moment, in the case of submitting a petition to the prosecutor to repeal a restraint in the form of custody for military service during the mobilization period, for a special period, the prosecutor must proceed from the general principles of criminal proceedings, i.e. Art. 28 of the CPC of Ukraine, which stipulates that «during criminal proceedings every procedural action or procedural decision must be performed or made within a reasonable time (Teteryatnyk, 2021).

According to Art. 616 of the CPC of Ukraine, the prosecutor has the right to apply to the investigating judge or the court considering the criminal proceedings with a petition to repeal the restraint in the form of custody for military service upon conscription during mobilization, for a special period, which must contain:

1) a statement of the circumstances that indicate that a person is subject to military service under conscription during mobilization, for a special period, and a conclusion on the person's ability for military service under martial law;

2) a statement of the circumstances that indicate that there are no risks stipulated in the first part of Article 177 of this Code, as well as the risk of evasion of the person, in respect of whom it is proposed to repeal the restraint in the form of custody, from completing military service upon conscription during mobilization, for a special period¹³.

At the same time, the items that should be contained in the petition are devoid of objectivity and justification. We propose to slightly expand their list, in particular by adding an item about the possibility of military service for suspects, accused persons, given their professional skills and abilities, education, competence, experience (the presence of military experience will be especially valuable). In addition, it's necessary to analyze the need for specialists of this profile in the Armed Forces. In our opinion, this information should be confirmed by relevant conclusions or references from the relevant territorial recruitment and social support center. Given the martial law and the presence of temporarily occupied territories, this document can be taken not only at the registration place. Thus, the introduction of this item to the requirements regarding the content of the petition will provide an opportunity to assess the need of the Armed Forces of Ukraine to send the suspect, the accused to the relevant recruitment units. In our opinion, the establishment of such a requirement will guarantee the inviolability of the principle of inevitability of criminal liability, because a person will not have the opportunity to evade responsibility through desertion or collaboration. In

¹³ Кримінальний процесуальний кодекс України: Закон України в редакції від 06.11.2022 № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (дата звернення: 10.06.2022)

addition, the legislator must also assess the prospects of speculation by the suspect, the accused in state interests for the sake of their own goals, in order to avoid further punishment «for the fulfillment of public duty» (Merimerina, 2021; Drozd, Klimchuk, 2016; Yeni, 2016)^{14,15,16}.

Within the framework of this study, we believe that Clause 2 of Part 1 of Art. 616 of the CPC of Ukraine deserves the most attention. It states the need to assess the risks stipulated in Part 1 of Art. 177 of the CPC of Ukraine in the petition for the repealing of a restraint in the form of custody for military service under conscription during mobilization, for a special period. Considering that clause 2 of part 3 of Art. 616 of the CPC of Ukraine contains an indication that the petition must contain information about the absence of risks stipulated in part 1 of Article 177 of the CPC of Ukraine, then the logical question arises about the validity of the restraint applied to the person, the court decision by which this restraint was applied, or the expediency of repealing a restraint according to the general rules of the CPC of Ukraine. In addition, the risk of evasion of a person, in respect of whom it is proposed to repeal the custody restraint, from completing military service under the draft during mobilization, for a special period (which is referred to in Part 1 of Article 616 of the CPC of Ukraine) is generally very difficult to assess from in view of the requirement to substantiate the risks with certain factual circumstances and not with assumptions. In our opinion, risk assessment in the case of application of the provisions of Art. 616 of the CPC of Ukraine seems not only difficult, but impossible in view of the repeal of any restraint. Completion of military service under conscription during mobilization, for a special period, in principle, is not a restraint, and therefore consideration of the presence of risks should be carried out during consideration of a request for the application of a custody or any other restraint. Based on this, we consider it impossible to state the circumstances indicating the absence of risks in the request for military service, because at the stage of making a decision, based on the available documents, about the suspect, accused

¹⁴ Мерімеріна І. О. Прокурор як суб'єкт доказування при обранні, зміні, скасуванні заходів забезпечення кримінального провадження слідчим суддею, судом. Кваліфікаційна наукова праця на правах рукопису. Дисертація на здобуття ступеня доктора філософії за спеціальністю 081 – «Право». Національний університет «Одеська юридична академія», Одеса, 2021. С. 228-234.

¹⁵ Drozd V.G., Klimchuk V.P (2016). Grounds and procedure for applying non-isolation preventive measures. *Science and law enforcement*, 1, 251-257. DOI:10.32842/2078-3736/2020.2-3.29

¹⁶ Yeni O.V (2016). Activities of the prosecutor in the preparation of motions for the application of precautionary measures. *Bulletin of the Prosecutor's Office*, 5, 50-59.

person's military service, it is important to highlight the possibility of military service upon conscription during mobilization, for a special period¹⁷.

Despite this, it seems to be effective enough to enshrine in Article 616 of the CPC of Ukraine the obligation of a person in respect of whom a custody restraint has been revoked, immediately, but no later than 24 hours, to arrive at the corresponding territorial recruitment and social support center at the place of registration. However, compliance with this deadline can be influenced not only by the wishes of the person himself, but also, for example, by the place of custody, as well as the ability to reach the appropriate territorial recruitment and social support center in a certain period. The reasons for non-arrival or untimely attendance may be different: lack of transport, travel funds, emergency situations. Control over the fulfillment of this requirement rests with the prosecutor and is essential to prevent violations by the suspect or the accused.

3. Alteration of restraint

In Art. 616 of the Criminal Code of Ukraine provides for exceptions, because in addition to the right for the suspect, the accused, to submit to the prosecutor a petition to repeal the custody restraint «at the request of the suspect, the accused, the investigating judge, the court has the right to make a decision to alter the restraint in the form of bail to a personal bond» payment, if the corresponding request is justified by the desire to use the funds pledged (in full or in part) for depositing into special accounts of the National Bank of Ukraine for the purposes of the defense of Ukraine»; «in places of active hostilities, at the request of the suspect, the accused, the investigating judge, the court has the right to consider the issue of alteration the restraint in the form of house arrest to the restraint in the form of a personal commitment»¹⁸. At the same time, the investigating judge, the court must take into account the ownership of the funds by the suspect or the accused. Voluntary transfer of funds to a special account of the Armed Forces is also of leading importance for the implementation of this rule. We positively assess the fact that there is currently an opportunity to provide material assistance to the Armed Forces of Ukraine with funds that were deposited as collateral. We also believe that it would be appropriate to more clearly formulate in the Law the conditions to which the investigative judge, the court should pay attention when considering

¹⁷ Кримінальний процесуальний кодекс України: Закон України в редакції від 20.05.2022 № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (дата звернення: 10.06.2022)

¹⁸ Кримінальний процесуальний кодекс України: Закон України в редакції від 06.11.2022 № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (дата звернення: 10.06.2022)

the issue of alteration the restraint. We see in these provisions the legislator's desire to make Art. 616 of the Criminal Procedure Code of Ukraine as a special rule for martial law conditions as flexible as possible, having made attempts to individualize the assignment and repealing individual restraints and dependence on the existing situation (Hlovyuk, Drozdov, Teteryatnyk, Fomina, Rogalska, Zavtur, 2022; Zaverstaylo, 2015).^{19 20}

Under martial law the legislator in parts 5 and 6 of Art. 616 of the CPC of Ukraine provides for the procedure for alteration restraints, in particular, the procedures for alteration bail or house arrest to a personal commitment have been proposed. We should emphasize that the alteration of a pledge restraint for a personal commitment is conditional, since under martial law it can take place only on the condition that funds are deposited into special accounts of the National Bank for the purposes of the defense of Ukraine. Judicial practice has already been formed on this issue, in particular, separate explanations are provided in paragraph 10 of the letter of the Supreme Court «Concerning certain issues of criminal proceedings under martial law» from 03.03.2022 No. 1/0/2-22. It is also worth noting that the provision we have analyzed does not regulate the content of the motion to alter the restraint. In our opinion, the following criteria should be reflected in the request:

- a change in the circumstances that were taken into account when applying a preventive measure (detection of the suspect's desire to participate in the defense of the freedom and independence of Ukraine);
- the need for immediate financial assistance of the Armed Forces, which was contributed by the mortgagor.

The investigating judge, the court, at the petition of the suspect, the accused, decides on the issue of alteration the restraint in the form of house arrest to the restraint in the form of personal commitment, however, the possibility of alteration the preventive measure is not provided for in the entire territory of Ukraine, but only in places of active hostilities. Let's note that the problematic aspect in terms of the analyzed part of Art. 616 of the CPC of Ukraine is the assignment of a certain territory to the zone of active hostilities.

Also according to Clause 6 of Art. 616 of the CPC of Ukraine «in places of active hostilities, at the petition of the suspect, the accused, the investigating

¹⁹ Гловюк І., Дроздов О., Тетерятник Г., Фоміна Т., Рогальська В., Завтур В. Особливий режим досудового розслідування, судового розгляду в умовах воєнного стану: науково-практичний коментар Розділу IX-1 Кримінального процесуального кодексу України. Видання 2. Електронне видання. Дніпро–Львів–Одеса–Харків, 2022. Станом на 03 травня 2022. 58 с.

²⁰ Завертайло І. О. Процесуальні порушення під час складання обвинувального акта і підстави повернення його судом для усунення недоліків, в тому числі з угодою (погляд практичного працівника). Вісник Академії митної справи. Серія : Право. 2015. № 1 (14). С. 127-133.

judge, the court has the right to consider the issue of alteration a restraint in the form of house arrest to a preventive measure in the form of a personal commitment»²¹. In this provision, the key term can be considered to be the concept of «places of active hostilities», the list of which is formed and approved with the approval of the Ministry of Defense on the basis of the proposals of the relevant regional and Kyiv city military administrations. At the same time, it is necessary to understand by what criteria a specific territory is classified as a place of active hostilities in the sense of procedural legislation. The criminal procedural law itself does not provide for a list or criteria by which certain territories are identified as those where active hostilities are taking place. So, the territories where active hostilities are taking place are describes as follows:

- these territories are temporarily occupied;
- territories are surrounded (blocked);
- active hostilities continue in the territories, related to the implementation of offensive operations, counter-offensives, the use of military equipment, etc.²².

CONCLUSIONS

So, summarizing the made research, based on the analysis of doctrinal approaches to the institution of the repeal of a preventive measure in the form of detention under martial law in the context of Art. 616 of the CPC of Ukraine, we can conclude that today, despite, so to speak, the legally defined procedure for the repeal of a custody restraint, there is quite a problem with the implementation of the analyzed rule. Attention should be paid to the analysis and consideration of amendments to the criminal procedural legislation in order to implement the tasks of the criminal procedure. We have analyzed the provisions of Art. 616 of the CPC of Ukraine in order to reveal the specifics of the repeal of custody restraint under martial law; an analysis of the concept of «military service» and legal acts regulating its completion has been made. In particular, from the definition of «military service» given in the Law of Ukraine «On Military Duty and Military Service», the main components of military service should be singled out: this activity can be carried out by persons suitable in terms of health and age, etc., however, amendments to the CPC of Ukraine and other normative legal acts regulating this activity took place without fully taking into account all existing provisions and ensuring correlation. In the

²¹ Кримінальний процесуальний кодекс України: Закон України в редакції від 06.11.2022 № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (дата звернення: 10.06.2022)

²² Перелік територіальних громад, які розташовані в районі проведення воєнних (бойових) дій або які перебувають в тимчасовій окупації, оточенні (блокуванні) станом на 23 жовтня 2022 року, затверджений наказом Міністерства з питань реінтеграції тимчасово окупованих територій України від 25 квітня 2022 року № 75

framework of this research paper, the updated provisions of the CPC of Ukraine have been highlighted, in particular, Art. 616 of the CPC of Ukraine, which defines the mechanisms for repealing a custody restraint. We also identified problematic aspects in the implementation of Art. 616 of the Criminal Procedure Code of Ukraine, among which should be mentioned the presence of a corruption component, the solution to the issue of adjournment on the condition that there is a notification of suspicion, the uncertainty of the term of consideration by the prosecutor of the request for the repealing of a custody restraint and the need to assess the risks that were previously assessed when choosing a restraint. Attention should be focused, first of all, on the suspect's ability to complete military service and his coefficient of effectiveness in the ranks of the Armed Forces. We also suggest slightly expanding the list of items in the petition, in particular by adding a point about the possibility of military service for the suspect, the accused, taking into account his professional skills and abilities, education, competence, experience (the presence of military experience will be especially valuable). In addition, it's necessary to analyze the need for specialists of this profile in the Armed Forces. In our opinion, this information should be confirmed by relevant conclusions or certificates from the relevant territorial center of recruitment and social support. At the moment, in the CPC of Ukraine the legislator does not provide a mechanism for the practical implementation of the analyzed provision, which raises many questions in this aspect.

SUMMARY

The research paper highlights the current amendments to the Criminal Procedural Code of Ukraine, which were introduced into the codified law as a result of the introduction of martial law. The author has studied peculiarities of the repealing custody restraint under martial law in the context of Art. 616 of the CPC of Ukraine. With the introduction of martial law in Ukraine on February 24, 2022 related the military aggression of the Russian Federation, a number of significant amendments were made to both Section IX-1 and other sections of the CPC of Ukraine. The author has revealed the essence of the procedure for repealing and alteration a custody restraint under martial law, namely, it was clarified that this process is complex and contradictory, since there is no clear mechanism for practical application. The deployment of military aggression by the Russian Federation against Ukraine in the legal field became a determinant of numerous changes to the current legal acts, in particular the CPC of Ukraine. The rule enshrined in Art. 616 of the CPC of Ukraine, aimed at realizing the right of a suspect, an accused person to apply to the prosecutor with a petition for the repealing a custody for the purpose of military service during mobilization, for a special period in the event of the

introduction of martial law in Ukraine or some of its localities , implementation of measures to ensure national security and defense, repel and deter armed aggression by the Russian Federation and/or other states against Ukraine. It is important to highlight the indeterminacy of the term of consideration by the prosecutor of the request of the suspect, the accused to complete military service, which may cause delay in order to obtain an undue benefit by an official or to achieve other goals for the satisfaction of private interest. The author has also paid attention to the fact that a custodial restraint was applied to the person who submitted the relevant petition, which in a certain way complicates the procedure of passing a military medical examination to determine his suitability for military service. She has clarified problems of implementing this norm, which is indicated by some of its imperfections, in particular, the lack of a temporal definition, the requirement of the legislator to highlight in the request items related to risk analysis.

References

1. Гловюк І.В. Загальні правила застосування заходів забезпечення кримінального провадження: питання системності. Вісник Південного регіонального центру Національної академії правових наук України № 12 (2017). С. 87-92.
2. Хабло О.Ю. Обґрунтування підстав застосування запобіжних заходів: конвенційні стандарти та вітчизняна практика. Право і суспільство. № 4/2020. С. 270-278.
3. Тищенко О.І. Зміна запобіжного заходу у кримінальному провадженні: окремі питання. Юридичний науковий електронний журнал. № 5/2019. С. 325-328.
4. Фоміна Т. Сутність процесуального порядку застосування запобіжного заходу. Підприємство, господарство і право. № 2/2018. С. 207-211.
5. Мерімеріна І. О. Прокурор як суб'єкт доказування при обранні, зміні, скасуванні заходів забезпечення кримінального провадження слідчим суддею, судом. Кваліфікаційна наукова праця на правах рукопису. Дисертація на здобуття ступеня доктора філософії за спеціальністю 081 – «Право». Національний університет «Одеська юридична академія», Одеса, 2021. С. 228-234.
6. Завертайло І. О. Проблемні аспекти застосування норм КПК України в практичній діяльності при обранні запобіжного заходу у вигляді тримання під вартою та постановлення ухвали про дозвіл на затримання з метою приводу. Науковий вісник Ужгородського національного університету. Серія : Право. 2015. Випуск 34 (3). С. 79-83.

7. Дрозд В.Г., Климчук В.П. Підстави та порядок застосування неізоляційних запобіжних заходів. Наука і правоохорона. 2016. № 1. С. 251-257.

8. Єні О.В. Діяльність прокурора при підготовці клопотань про застосування запобіжних заходів. Вісник прокуратури. 2016. № 5. С. 50–59.

9. Завертайло І. О. Процесуальні порушення під час складання обвинувального акта і підстави повернення його судом для усунення недоліків, в тому числі з угодою (погляд практичного працівника). Вісник Академії митної справи. Серія : Право. 2015. № 1 (14). С. 127-133.

10. Завертайло І. О. Роль прокурора в доказуванні обставин під час затримання підозрюваного та обрання запобіжних заходів під час досудового розслідування. Кримінальний процесуальний кодекс 2012 року: ідеологія та практика правозастосування: колективна монографія / за заг. ред. Ю. П. Аленіна; відпов. за вип. І. В. Гловюк. Одеса : Видавничий дім «Гельветика», 2018. С. 551-573.

11. Гловюк І., Дроздов О., Тетерятник Г., Фоміна Т., Рогальська В., Завтур В. Особливий режим досудового розслідування, судового розгляду в умовах воєнного стану: науково-практичний коментар Розділу IX-1 Кримінального процесуального кодексу України. Видання 2. Електронне видання. Дніпро– Львів-Одеса-Харків, 2022. Станом на 03 травня 2022. 58 с.

12. Гловюк І.В. Завтур В.А. Новели здійснення кримінального провадження в умовах воєнного стану: зміни КПК України від 03 березня 2022 року та роз'яснення Верховного Суду. URL: <https://www.hsa.org.ua/blog/novely-zdijsnennya-kryminalnogo-provadhennya-v-umovah-voyennogo-stanu-zminy-do-kpk-ukrayiny-vid-03-bereznya-2022-ta-roz-yasnennya-verhovnogo-sudu/> (дата звернення: 30.05.2022).

13. Тетерятник К.Г. Кримінальне провадження в умовах надзвичайних правових режимів: теоретико-методологічні та праксеологічні основи: монографія. Одеса: Видавничий дім «Гельветика», 2021. С. 297.

14. Гловюк І., Дроздов О., Тетерятник Г., Фоміна Т., Рогальська В., Завтур В., Особливий режим досудового розслідування, судового розгляду в умовах воєнного стану: науково-практичний коментар Розділу IX-1 Кримінального-процесуального кодексу України. Видання 3. Електронне видання. Дніпро-Львів-Одеса-Харків, 2022. Станом на 25 серпня 2022. 78 с.

15. Фоміна Т. Рогальська В. Особливий режим слідства. Запобіжні заходи в умовах воєнного стану: що змінилось. URL:

https://zib.com.ua/ua/151472-zapobizhni_zahodi_v_umovah_voennogo_stanu_scho_zminilos.html

16. Гаркуша А. Г. Скасування запобіжного заходу у вигляді тримання під вартою в умовах воєнного стану в контексті ст. 616 КПК України. *Право і безпека*. 2022. № 3 (86). С. 37–47.

Information about the author:

Harkusha Alina Hryhorivna,

Candidate of Legal Sciences, Associate Professor,
Associate Professor at the Department of Criminal Procedure,
Educational and Scientific Institute of Law and Training of Specialists
for Units of the National Police
Dnipropetrovsk State University of Internal Affairs
26, Gagarin Avenue, Dnipro, 49005, Ukraine
<https://orcid.org/0000-0002-3299-8405>