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**PECULIARITIES OF CHANGING AND  
CANCELLING A PREVENTIVE MEASURE IN  
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**ABSTRACT**

The article provides a systematic analysis of the changes made to the criminal procedure legislation after the outbreak of a full-scale war in Ukraine. The main attention is paid to Chapter 18 of Section II "Preventive Measures, Detention of a Person" and Section IX-1 of the CPC of Ukraine "Special Regime of Pre-trial Investigation and Trial under Martial Law". The author examines the issues related to the change of a preventive measure in criminal proceedings in the context of the analysis of national case law. Each issue in the article is supported by references to specific rulings of investigating judges, which made it possible to demonstrate a



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certain trend in the application of the provisions of Articles 200,201 of the CPC of Ukraine and the issue of the special procedure for criminal proceedings under martial law regulated by Article 616 of the CPC of Ukraine.

**Keywords:** martial law, criminal proceedings, preventive measure, change of preventive measure, cancellation of preventive measure

### **1. INTRODUCTION**

On 24 February 2022, Presidential Decree No. 64/2022 introduced martial law throughout Ukraine in connection with the military aggression of the Russian Federation against Ukraine, which was extended

In the context of prolonged full-scale military aggression, law enforcement mechanisms, which the legislator develops and improves based on the challenges of today, play an extremely important role in maintaining the internal stability of the state. The criminal justice system has also undergone changes. In particular, the legislator amended Section IX-1 "Special regime of pre-trial investigation and court proceedings в under martial law" of the Criminal Procedure Code of Ukraine (hereinafter - the CPC), which should ensure effective criminal prosecution of persons under martial law.

Martial law may be introduced on the entire territory of Ukraine or its separate localities for a period determined by the relevant Decree of the President of Ukraine, with the possibility of further extension until the termination or cancellation of martial law. The territorial and temporal effect of the legal regime of martial law also determines the specifics of the provisions of the Criminal Procedure Code of Ukraine in space and time. Pursuant to Article 4(1) of the CPC of Ukraine, criminal proceedings on the territory of Ukraine are conducted on the grounds and in the manner prescribed by this Code, regardless of the place of commission of the criminal offence. At the same time, the territories covered by the provisions of Section 9-1 of the CPC of Ukraine are the areas where martial

law has been introduced. Pursuant to Article 5 of the CPC of Ukraine, a procedural action shall be performed, and a procedural decision shall be made in accordance with the provisions of this Code in force at the time of commencement of such action or making of such decision, and the admissibility of evidence shall be determined by the provisions of the CPC of Ukraine in force at the time of its receipt. At the same time, in cases where criminal proceedings were carried out before the introduction of the martial law regime and continue under the Covenant may derogate from their obligations under the present Covenant only to the extent to the extent required by the exigencies of the situation, provided that such measures are not incompatible with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin...". Article 15(1), (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms also provides that: "In time of war or other public danger threatening the life of the nation, a High Contracting Party may take measures derogating from its obligations under the present Convention only to the extent required by the exigencies of the situation and provided that such measures are not inconsistent with its other obligations under international law" (Hloviuk I., Drozdov O., Teteriatnyk H. et al. 2022).

Certain peculiarities of application of preventive measures under martial law have already been studied by Hloviuk I., Drozdov O., Zavgur V., Mykhailenko V., Rogalska V., Teteriatnyk H., Fomina T. and others. However, a systematic analysis is required of the legislation regulating the procedure for changing a preventive measure, cancelling a preventive measure for military service during mobilisation, for a special period, as well as of the court practice, which is the purpose of this study.



## **2. MATERIALS AND METHODS**

The selected issue is approached using a systematic methodology, incorporating dialectical, formal-logical, and structural-functional methods, along with other standard scientific research techniques. Additionally, specific legal methods such as comparative law and formal law are employed. The study is based on the theory of cognition, particularly the materialist dialectics as its overarching method. The general scientific research methods utilized include formal-logical and systematic approaches.

## **3. RESULT AND DISCUSSION**

On the one hand, according to the Law of Ukraine "On the Legal Regime of Martial Law", courts, bodies and institutions of the justice system act exclusively on the grounds, within the limits of their powers and in the manner prescribed by the Constitution and laws of Ukraine. The powers of the courts, bodies and institutions of the justice system provided for by the Constitution of Ukraine may not be restricted under the legal regime of martial law. According to Article 26 of the Law, justice in the territory under martial law is administered only by the courts. Courts established in accordance with the Constitution operate on this territory. Reduction or acceleration of any form of legal proceedings is prohibited. In case of impossibility to administer justice by the courts operating in the territory where martial law is imposed, the laws of Ukraine may change the territorial jurisdiction of cases considered in these courts or change the location of the courts in accordance with the procedure established by law.

On the other hand, despite the armed conflict that has actually been going

on in Ukraine since 2014 (occupation of Crimea and parts of Donetsk and Luhansk regions), the grounds, powers and methods referred to in the law do not correspond to the realities of martial law. Indeed, the Criminal Procedure Code in force at the time of the full-scale invasion of Ukraine by Russian troops was not ready to ensure the proper functioning of criminal justice during the war

accompanies the application of criminal procedure legislation in negatively new and unusual conditions may irrevocably damage a large number of criminal proceedings.

Today, there are two parallel procedures for changing or lifting a preventive measure:

- 1) the general procedure provided for in Articles 200-201 of the CPC of Ukraine;
- 2) special procedure for criminal proceedings under martial law, regulated by Article 616 of the CPC of Ukraine.

According to part 5 of Article 616 of the CPC of Ukraine, at the request of the suspect or accused, the investigating judge or court has the right to decide to change the preventive measure in the form of bail to a personal obligation, if the relevant request is justified by the desire to use the funds transferred as bail (in full or in part) to deposit them into special accounts of the National Bank of Ukraine for the purposes of defence of Ukraine [1, Article 616].

Court decisions aimed at changing bail to personal obligations are widespread, with investigating judges and courts mostly granting the requests. There are two ways to change a bail measure. The first is to change the bail to a personal obligation. The law establishes a condition under which the relevant decision can be made - the use of funds transferred as bail (in full or in part) to deposit them into special accounts of the National Bank for the purposes of defence of Ukraine. The second way is to change the bail measure by reducing it by the amount to be transferred to the needs of the Armed Forces of Ukraine.



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Given that bail can be posted by the suspect, accused or another individual or legal entity (bail provider), and that according to part 11 of Art. 182 of the CPC of Ukraine, bail that has not been forfeited to the state is returned to the suspect, accused, or bailor after the measure of restraint is terminated, the question arises as to whether the measure of restraint can be changed if the bail was posted by the bailor rather than the suspect, accused, or other person or entity.

The statutory wording contained in part 5 of Article 616 of the CPC indicates that a motion to change a preventive measure may be filed by the suspect or accused, and the bailor is not a subject of the motion. The petition should justify the desire to use the funds pledged as bail to deposit them into special accounts of the National Bank of Ukraine for the purposes of defence of Ukraine. Therefore, it is advisable for the pledgor to draw up a statement in which he or she expresses the desire to transfer funds for the purposes of defence of Ukraine (Fomina T., Rogalska V., 2022).

The bail bondsman's request must be verified and confirmed by the original application attached to the criminal proceedings. Under the general procedure, both the suspect, the accused, and his or her defence counsel may apply directly to the court with a request to change the measure of restraint. However, in the wording of the right to apply for a change of measure of restraint in the form of bail to personal obligation, house arrest to personal obligation, such a subject of application as a defence counsel is for some reason absent.

Pursuant to Article 616(6) of the CPC of Ukraine, in the areas of active hostilities, at the request of the suspect or accused, the investigating judge or court has the right to consider changing the measure of restraint in the form of house arrest to a measure of restraint in the form of a personal commitment. At the same time, while in accordance with Article 201 of the CPC of Ukraine, the investigating judge or court is obliged to consider the motion of the suspect or accused, in the application of Part 6 of Article 616 of the CPC of Ukraine, it is the right of the investigating judge or court.

Please note that the possibility of changing the measure of restraint is not provided for throughout Ukraine, but only in places of active hostilities. The list of territorial communities located in the area of military (combat) operations or under temporary occupation, encirclement (blockade) is provided for in the Order of the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine of 25 April 2022 No. 75.

The specifics of the cancellation of a preventive measure are provided for in parts 1-4 of Article 616 of the CPC of Ukraine. In the event of martial law in Ukraine or its separate localities, implementation of measures to ensure national security and defence, repulsion and deterrence of armed aggression of the Russian Federation and/or other states against Ukraine, a suspect, accused person who is held in custody during pre-trial investigation or trial, except for those who are suspected of committing crimes against the foundations of national security of Ukraine, as well as crimes under Articles 115, 146-147, 152-156, 186, 187, 189,

255, 2551 , 257, 258-262, 305-321, 330, 335-337, 401-414, 426-433, 436, 437-

442 of the Criminal Code of Ukraine, has the right to apply to the prosecutor with a request to cancel this measure of restraint for military service during mobilisation, for a special period.

During martial law, servicemen suspected of committing certain crimes are subject to detention as a preventive measure only.

On 10.09.2022, the law on the imposition of a preventive measure on servicemen who committed war crimes during martial law came into force.

This applies to the following criminal offences under Chapter XIX of the Criminal Code of Ukraine:

- disobedience (Article 402 of the Criminal Code of Ukraine);
- failure to comply with an order (Article 403 of the Criminal Code of



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Ukraine);

- resistance to a superior or forcing him to violate his official duties (Article 404 of the Criminal Code of Ukraine);

- threats or violence against a superior (Article 405 of the Criminal Code of Ukraine);

- unauthorised leaving of a military unit or place of service (Article 407 of the Criminal Code of Ukraine);

- desertion (Article 408 of the Criminal Code of Ukraine);

- unauthorised abandonment of the battlefield or refusal to use weapons (Article 429 of the Criminal Code of Ukraine).

Conventionally, the procedural procedure for the cancellation of a preventive measure for military service during mobilisation or for a special period can be described in the following order:

1. A suspect or accused person files a petition with the prosecutor.
2. Consideration by the prosecutor of a suspect's or accused's motion.
3. The prosecutor draws up a motion to cancel the preventive measure and appeals to the investigating judge or court considering the criminal proceedings.
4. Immediate consideration by the investigating judge or court of the prosecutor's motion to cancel the preventive measure
5. Decision by the investigating judge or court, if there are sufficient grounds, to cancel the preventive measure.

It is the prosecutor who has the right to apply to the investigating judge or court considering the criminal proceedings with a request to cancel the detention for military service during mobilisation for a special period (Chernichenko I., 2022).

However, an important point that draws attention when studying the court practice related to preventive measures during the war is a significant number of court decisions issued following the consideration of motions (mainly by the defence) to change the previously applied preventive measure. The analysis mainly appeals to 1) the intention of the suspect or accused to defend their homeland and 2) the danger of the preventive measure to the life and health of the suspect or accused under martial law. A large number of court decisions are made up of court decisions to change the measure of restraint in the form of bail to a personal obligation and reduce the amount of the previously posted bail. In this case, investigating judges and courts are much more likely to grant the petitions, provided that the bail or the amount by which it is reduced is transferred to a special account of the Armed Forces of Ukraine.

It should be noted that Art. 616 of the CPC of Ukraine, which provides for the cancellation of a preventive measure for military service during mobilisation, for a special period, or a change of preventive measure for other reasons, came into force only on 22.03.2022 (almost a month after the start of the full-scale invasion). At the same time, the High Anti-Corruption Court and some other courts ruled to change the measure of restraint based on the intention of the suspect or accused to take measures to ensure national security and defence, to repel and deter the armed aggression of the Russian Federation against Ukraine and to use the funds pledged as collateral for the purposes of defence of Ukraine, even before this became a legislative mainstream. Thus, in this matter, we can speak of those rare cases when legislation picks up on current practical trends and follows the case law, and not vice versa (Mykhailiuk V., 2022). received a call to the military commissariat, 6) compliance with the conditions of the preventive measure, etc.

The court critically assesses the references of the accused and his counsel to the possible participation of the accused in the defence of Ukraine under martial law by joining the Armed Forces of Ukraine or the territorial defence. The



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accused did not provide the court with any evidence of his appeal to the relevant authorities regarding his enrolment in the territorial defence or mobilisation to the Armed Forces of Ukraine (Kosiv District Court of Ivano-Frankivsk Region,

At the court hearing, the defendant's defence counsel requested that the motion be granted and that her client be allowed to join the Armed Forces of Ukraine and participate in the defence of the state under martial law. At the same time, the court received information from the defence counsel that the accused was not liable for military service and had not previously served in the armed forces (decision of the Kivertsi District Court of Volyn Region of 04.03.2022 in case No. 158/355/20). hologically and physically was not in custody and properly fulfilled his procedural duties. It was only during the trial that he failed to appear in court, was put on the wanted list, and after his detention, his preventive measure was changed to a more severe one - detention. According to the court, the risks and circumstances that were established at the stage of the trial, during the introduction of martial law, with active hostilities on the outskirts of Kyiv, taking into account the personality of the accused, the time of his detention, in this criminal proceeding cannot be a sufficient basis for extending the measure of restraint in the form of detention, and therefore this measure is subject to change to a personal commitment with the imposition of appropriate obligations (decision of the Holosiivskyi District Court of Kyiv of 31.03.2022 in case No. 752/6269/21).

As of the day the accused filed the motion and the day of its consideration, there were no active hostilities in Cherkasy and Cherkasy region. At the same time, a curfew is in force in Cherkasy and Cherkasy region from 20.00 to 06.00. During this time, it is forbidden to be on the street and in other public places, except for the alarm. In such circumstances, moving to the shelter during the air raid alarm is a necessary security measure and cannot be regarded as a violation of the house arrest measure. At the same time, the accused did not provide the court with any supporting evidence that he was recruited to the territorial defence and,

due to his stay under night house arrest, he was restricted in performing the relevant military and special tasks assigned by the territorial defence command to ensure the national security and defence of Ukraine (decision of the Prydniprovskiy District Court of Cherkasy of 16.03.2022 in case No. 711/5885/21).

Often, the defence points only to the mere existence of martial law. However, in the overwhelming majority of cases, this is not recognised as a ground for changing the preventive measure. The investigating judge draws attention to the fact that the court hearing did not refute the validity of the currently reported suspicion and did not provide relevant evidence to show that there are currently no risks that were taken into account by the court when applying a preventive measure in the form of detention to the suspect. Thus, the defence did not provide any new evidence to substantiate the circumstances that had not been investigated by the investigating judge when applying the preventive measure in the form of detention. In addition, the investigating judge draws attention to the fact that the introduction of martial law in Ukraine is not a ground for releasing the suspect from custody (decision of the investigating judge of the Kyiv District Court of Odesa of 09.03.2022 in case No. 947/15792/21)

The next stage is the immediate consideration of the relevant motion by the investigating judge or court. Based on the results of the consideration, if there are sufficient grounds, a decision may be made to cancel the preventive measure for the suspect or accused to continue military service during mobilisation for a special period. In such a case, the suspect or accused in respect of whom the custody has been cancelled must immediately, no later than 24 hours, report to the relevant territorial recruitment and social support centre at the place of registration. In case of failure to appear, the prosecutor submits a motion to impose a preventive measure in the form of detention on the suspect or accused. It should be noted that the legislator in part 1 of Art. 616 of the CPC provided an exhaustive list of articles of the Criminal Code of Ukraine under which the



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suspect or accused in custody cannot be subject to cancellation of a preventive measure for military service during mobilisation (Articles 115, 146-147, 152-156, 186, 187, 189, 255, 2551 , 257, 258-262, 305-321, 330, 335-337, 401-414, 426-433, 436, 437-442 of the Criminal Code of Ukraine).

Other measures of restraint, not only the most severe one, as provided for in part 4 of Article 616 of the CPC of Ukraine, may also be cancelled. A suspect or accused person has the right to apply to the prosecutor for the cancellation of a preventive measure for military service during mobilisation or for a special In particular, the law provides for the possibility of changing the measure of restraint in the form of bail to a personal obligation, house arrest to a personal obligation.

### **4.-CONCLUSIONS**

Therefore, since a significant number of court decisions relate to the change of preventive measures to personal obligation and reduction of the amount of bail previously paid, we believe it is appropriate to improve the provisions of the CPC of Ukraine regulating this issue by transferring bail or reducing the amount to a special account of the Armed Forces of Ukraine. We propose to supplement Article 616(5) of the CPC of Ukraine with the following provision: "Participation in the court hearing of a suspect or accused person regarding the change of a both the suspect, the accused and his or her defence counsel may apply directly to the court with a petition to change the preventive measure. As for the extraordinary procedure for the cancellation of a preventive measure for military service during mobilisation, for a special period, the relevant motion of the suspect or accused must be addressed to the prosecutor, who has the right (but not the obligation) to apply to the investigating judge or court with a motion to cancel the preventive measure. Furthermore, both custody (only under the conditions set out in part 1 of Article 616 of the CPC of Ukraine) and other preventive measures (part 4 of

Article 616 of the CPC of Ukraine) may be cancelled.

Thus, the conduct of criminal proceedings under martial law, given the specifics of the regulatory framework for this process, requires the establishment of certain special procedures. Numerous legislative changes that have taken place since the introduction of martial law in Ukraine, on the one hand, indicate the need to regulate many issues that have arisen, and on the other hand, do not contribute to the established law enforcement practice.

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