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Department of Criminal Procedure, Detective and Search Activities

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CRIMINAL PROCEDURE
Special Part

MANUAL

for law students of National University 'Odessa Law Academy'

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The manual is designed for students of Criminal Procedure course for preparation to lessons and selfstudy. The manual consists of synopsis of the lectures course, seminar programme with questions and reading sections, questions for exam preparation and learning resources. It would be helpful for legal scholars, students, legal practitioners and anyone interested in criminal process of Ukraine.

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CONTENTS

PREFACE	4
COURSE STRUCTURE	4
SYNOPSIS OF THE LECTURE COURSE	6
THEME 1. PRE-TRIAL PROCEEDINGS. PART 1	8
THEME 1. PRE-TRIAL PROCEEDINGS. PART 2	18
THEME 2. COURT'S JURISDICTION. THEME 3. PREPARATORY (PRELIMINARY) PROCEEDINGS	27
THEME 4: TRIAL. PART 1	36
THEME 4: TRIAL. PART 2	48
THEME 4: TRIAL. PART 3	56
THEME 5. REVIEW OF COURT DECISIONS IN THE COURT OF APPELLATE INSTANCE	66
THEME 6. REVIEW OF COURT DECISIONS IN THE COURT OF CASSATION INSTANCE	80
THEME 7. CRIMINAL PROCEEDINGS ON NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES.....	88
THEME 8. SPECIAL PROCEDURES	95
SEMINARE PROGRAMME	116
THEME 1. PRE-TRIAL PROCEEDINGS. PART 1	116
THEME 1. PRE-TRIAL PROCEEDINGS. PART 2	118
THEME 2. COURT'S JURISDICTION. THEME 3. PREPARATORY (PRELIMINARY) PROCEEDINGS	120
THEME 4: TRIAL. PART 1	121
THEME 4: TRIAL. PART 2	123
THEME 4: TRIAL. PART 3	124
THEME 5. REVIEW OF COURT DECISIONS IN THE COURT OF	

APPELLATE INSTANCE	126
THEME 6. REVIEW OF COURT DECISIONS IN THE COURT OF CASSATION INSTANCE	127
THEME 7. CRIMINAL PROCEEDINGS ON NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES.....	128
THEME 8. SPECIAL PROCEDURES	130
QUESTIONS FOR EXAMP PREPARATION	133
LEARNING RESOURCES	136

PREFACE

Constitution of Ukraine proclaims the life and health of a person, their honor and dignity, inviolability and security of the highest social value. Human rights and freedoms are guaranteed by the content and direction of the state's activities. Therefore, the implementation of legal reform in Ukraine as one of the most important aspects of state policy should be inseparably combined with the goal of further humanization of the criminal justice system.

The criminal justice system must be effective since it ensures the protection of human rights and freedoms, democracy, legality, and justice, the construction of a rule-of-law state and civil society.

This course is built within the framework of studying the so-called 'Special part' of the criminal procedure which focuses on the stages of criminal procedure as well as special procedures that may be utilized in the course of the stages.

The goal of the course is to provide students with the knowledge of the current criminal procedural legislation of Ukraine; familiarization with the doctrine of criminal procedural law and practice of applying the norms of criminal procedural legislation taking into account the European Court of Human Rights case law.

The **objectives** of the course are:

- to learn the current criminal procedural law;
- to get familiar with flow of criminal proceedings;
- to get familiar with criminal procedural doctrine;
- to get familiar with law-enforcement practices;

In order to achieve the objectives, the following **tasks** shall be accomplished:

- study and analysis of current criminal procedural law;
- familiarization with research papers on criminal procedure;
- analysis of omissions and legislative gaps of current criminal procedural law;
addressing complex problems occurring in criminal procedure.

COURSE STRUCTURE

<p style="text-align: center;">Theme 1. Pre-trial proceedings</p>	<ul style="list-style-type: none"> - The notion and structure (system) of pre-trial proceedings. General rules of pre-trial proceedings (institution of criminal proceedings, time limits of pre-trial proceedings, jurisdiction of pretrial investigation bodies, joining and disjoining materials, consideration of motions, review of materials of pre-trial proceedings before its completion, confidentiality of pre-trial investigation). - The notion and system of investigative (search) actions. General rules of conducting investigative (search) actions - The system of open investigative (search) actions. Grounds and procedure of conducting. - The system of covert investigative (search) actions. Grounds and procedure of conducting covert (search) actions that interfere in private communication. - The grounds and procedure of notification of suspicion. The procedure of challenging the notification of suspicion. - The grounds and procedure of suspension of pre-trial proceedings and its renewal. - Forms in which pre-trial proceedings should be completed. - Special pre-trial investigation. - Forms in which pre-trial proceedings shall be completed - Disclosure of the materials of pre-trial proceedings. - The grounds and procedure of challenging decisions, actions, and omissions at pre-trial proceedings.
<p style="text-align: center;">Theme 2. Court's jurisdiction.</p>	<ul style="list-style-type: none"> - The notion and types of court jurisdictions. - Composition of a court. - Referral of criminal proceedings from one court to another.
<p style="text-align: center;">Theme 3. Preliminary proceedings.</p>	<ul style="list-style-type: none"> - The notion and objectives of the preliminary proceedings stage. The procedure of preliminary proceedings, participants of the stage. - Final decisions of the preliminary proceedings stage. - Addressing issues relating to preparation for a trial.
<p style="text-align: center;">Theme 4. Trial</p>	<ul style="list-style-type: none"> - The notion and objectives of trial. General rules governing trial. - Participants in trial. Consequences (implications) of nonappearance of participants and actions to be taken in this case. - Scope of trial. Amendment of charges, bringing additional charges, and dismissal of charges. - The procedure of trial, its phases. Engagement of the defence counsel. Waiver or replacement of the defence counsel. - Other participants in criminal proceedings. Recusals in criminal proceedings. - Preliminary phase. - Trial (presentation and examination of evidence). - Debate and the last word of a defendant. - Deliberations and announcement of the decision. - Types of court decisions. Legality, validity and reasonableness of court decision.

	<ul style="list-style-type: none"> - Types of judgments. The content of a court ruling and a judgment. - Correcting slips and obvious arithmetic mistakes in a judgment. Explaining a court decision. - Simplified procedure for criminal misdemeanors. - Proceedings in trial by jury.
Theme 5. Review of court decisions in the court of appellate instance.	<ul style="list-style-type: none"> - Appeals review stage: general overview, decisions that can be challenged, actors who have the right to appeal. - Procedure for lodging and preliminary review of appellate complaint: time limits, requirements for appellate complaint, preliminary actions. - Appeals review procedure. - Court of appellate instance powers to resolve appellate complaint (final decisions of the appeals review stage).
Theme 6. Review of court decisions in the court of cassation instance.	<ul style="list-style-type: none"> - Cassation review stage: general overview, decisions that can be challenged, actors who have the right to file a complaint to the court of cassation instance. - Procedure for lodging and preliminary review of a cassation appeal: time limits, requirements for a cassation appeal, preliminary actions. - Cassation review procedure. - The court of cassation powers to resolve cassation appeal (final decisions of the appeals review stage). - Referral of a case for hearing to a chamber, joint chamber of the Cassation Criminal Court, and to the Grand Chamber of the Supreme Court.
Theme 7. Criminal proceedings on newly discovered and exceptional circumstances	<ul style="list-style-type: none"> - The concept and general overview of proceedings on newly discovered and exceptional circumstances: courts that review decisions under newly discovered and exceptional circumstances. - Grounds for review of court decisions under newly discovered and exceptional circumstances. - Actors, time-limits and procedure for lodging applications seeking review of court decisions under newly discovered and exceptional circumstances. - The procedure of review of court decisions by a court under newly discovered and exceptional circumstances. Final decisions.
Theme 8. Special procedures	<ul style="list-style-type: none"> - Criminal proceedings based on agreements. - Private criminal proceedings. - Criminal proceedings against (in respect of) minors (underage persons). - Criminal proceedings on enforcement of compulsory measures of medical character.

SYNOPSIS OF THE LECTURE COURSE

THEME 1. PRE-TRIAL PROCEEDINGS. PART 1

LEARNING OUTCOMES

The objective is to provide students with the knowledge on general provisions of pre-trial proceedings of Ukraine as well as familiarize them with the system of investigative (search) actions utilised in the course of pre-trial investigation and inquiry.

QUESTIONS COVERED

1. The notion and structure (system) of pre-trial proceedings. General rules of pre-trial proceedings (institution of criminal proceedings, time limits of pre-trial proceedings, jurisdiction of pre-trial investigation bodies, joining and disjoining materials, consideration of motions, review of materials of pre-trial proceedings before its completion, confidentiality of pre-trial investigation).
2. The notion and system of investigative (search) actions. General rules of conducting investigative (search) actions.
3. The system of 'open' investigative (search) actions. Grounds and procedure of conducting.
4. The system of covert investigative (search) actions. Grounds and procedure of conducting covert (search) actions that interfere in private communication.

LEARNING MATERIAL

1. *The notion and structure (system) of pre-trial proceedings. General rules of pre-trial proceedings (institution of criminal proceedings, time limits of pre-trial proceedings, jurisdiction of pre-trial investigation bodies, joining and disjoining materials, consideration of motions, review of materials of pre-trial*

proceedings before its completion, confidentiality of pre-trial investigation).

Pre-trial proceedings is a stage of criminal proceedings which begins from the moment information on a criminal offence is entered in the Integrated Register of Pre-trial Proceedings (IRPTP) and ends with closure of criminal proceedings or with submission to court of an indictment, a motion on enforcement of compulsory medical or educational measures, a motion on discharge of the person from criminal liability (Art. 3 Para. 1 (5) of Code of Criminal Procedure of Ukraine (hereinafter the CCP)).

However, this provision doesn't reflect the 'correct' initial moment of pretrial proceedings. The Article 214 Para. 3 provides the possibility of carrying out inspection of the place of crime before entering the information in the IRPTP. One more possibility is provided for in Articles 207 and 208 of the CCP that is an apprehension (arrest) of a person. In case a criminal misdemeanour is the subject of pre-trial proceedings to determine the circumstance of the case the following actions may be taken: 1) to question persons of interest; 2) conduct medical examination; 3) receive a specialist report as well as use readouts from devices that have functions of photo or videorecording and/or photo or videorecording equipment, 4) seize means of instruments of a criminal misdemeanour in case of apprehension of a person (arrest), personal search and/or inspections of items (Art. 214 Para. 3 of the CCP).

The pre-trial proceedings is a stage of criminal process and thus possess all characteristics of a stage such as direct objectives; a wide range of actors; procedure (procedural course of action); time-limits and concluding (final) decisions.

As the name of pre-trial proceedings implies, the stage precedes the trial stage and is intended to provide a court with the necessary materials to ensure hearing of the case. Yet the pre-trial proceedings stage has its own goals which stem from Articles 2 and 9 Para. 2 of the CCP, namely for prosecutor, chief of pre-trial investigation agency, investigator, inquirer to examine comprehensively, fully and impartially the circumstances of criminal proceedings; find circumstances both of incriminating and exculpatory nature in respect of the suspect, the accused, as well

as the circumstances mitigating and aggravating their punishment; make adequate legal evaluation thereof and ensure the adoption of lawful and impartial procedural decisions.

Moreover, the pre-trial proceedings stage can be considered as 'independent' as criminal proceedings may be completed at this stage by taking a decision to close criminal proceedings, for instance, in case there is not sufficient evidence to prosecute a suspect (Art. 284 Para. 1 (3) of the CCP).

Pre-trial proceedings can be conducted in two forms: 1) pre-trial investigation and 2) inquiry.

Inquiry is a form of pre-trial proceedings of pre-trial investigation where criminal misdemeanours are investigated (Art. 3 Para. 1(4) of the CCP).

Pre-trial investigation is a form of pre-trial proceedings where crimes are investigated (Art. 3 Para. 1(6) of the CCP).

There are other differences between these two forms of pre-trial proceedings beside the type of criminal offence. They include, inter alia, shorter time-limits to complete inquiry (Art. 219 Paras. 3, 4 and Art. 298-5 of the CCP), the prohibition of conducting covert investigative (search) actions (Art. 300 of the CCP) as well as application of certain preventive measures (Art. 299 of the CCP), simplified procedure of consideration of an indictment in a court (Art. 302), etc¹.

Pre-trial proceedings regardless of the form can be divided into several phases. Although it is a matter for debate², the CCP distinguishes two phases: 1) phase that starts when the information is entered to the IRPTP and lasts to the moment when a person is notified of suspicion and 2) phase from the moment a person is notified of a suspicion and ends with one of the forms of completion of pre-trial proceedings set out in Articles 283 and 474 Para. 1 of the CCP. Such structure of pre-trial proceedings is laid down in Article 219 and has certain

¹ For more distinctions see [Chapter 25 of the CCP](#).

² See, for example, Кримінальний процес : підручник / за ред.: В. Я. Тацій, Ю. М. Грошевой, О. В. Капліна, О. Г. Шило. Харків : Право, 2013. С. 344-345.; Журавель В. Проблеми періодизації досудового розслідування // Вісник Національної академії правових наук України. 2014. № 2 (77). С. 139-142.

procedural implications.

2. The notion and system of investigative (search) actions. General rules of conducting investigative (search) actions.

Chapter 19 establishes the set of **general rules (provisions) of pre-trial proceedings**. These are the rules that underline the most specific provisions of pre-trial proceedings and formulate the prime requirements apply to actions and decisions taken within the pre-trial proceedings.

Some of them are, 1) institution of pre-trial proceedings (Art. 214), 2) jurisdiction of pre-trial investigation bodies (Arts. 216 and 218), 3) time-limits of pre-trial proceedings (Art. 219), 4) joining and disjoining materials of pre-trial proceedings (Art. 217), 5) consideration of motions (Art. 220), 6) review of materials of pre-trial proceedings before its completion (Art. 221), 7) confidentiality of pretrial investigation (Art. 222). However, the list is not exhaustive³.

As has been stated one of the objectives of pre-trial proceedings is to examine comprehensively, fully and impartially the circumstances of criminal proceedings; find circumstances both of incriminating and exculpatory nature in respect of the suspect, the accused, as well as the circumstances mitigating and aggravating their punishment. And as Art. 93 of the CCP suggests investigative (search) actions are the chief instrument in securing the desired outcome of the stage.

Investigative (search) actions are procedural actions which are aimed at gathering evidence or examination (verification) of already collected evidence within the criminal proceedings. As provided in Art. 223 Para. 2 of CCP availability of sufficient information which shows that the objective of a specific investigative (detective) action can be achieved shall be grounds for the conduct of such action.

Chapters 20 and 21 of CCP regulate the procedure of conducting investigative (search) actions and divide all investigative (search) actions into two groups:

- 1) investigative (search) actions or *open* investigative (search) actions

³ See Кримінальний процес: навчальний посібник / колектив авторів [електронне видання]. Одеса, 2020. С. 291-292. URL: <https://drive.google.com/file/d/1PMtwP--U302TWNkGCN9FAjP7WZsbwrZL/view?usp=sharing>

(Chapter 20), and

2) *covert* investigative (search) actions (Chapter 21).

3. *The system of 'open' investigative (search) actions. Grounds and procedure of conducting.*

Art. 223 sets out general requirements of conducting open investigative (search) actions such as prohibition of conducting investigative (search) actions at night-time (10 p.m. to 6 a.m.), a prosecutor's and an investigator's obligation to ensure participation of a victim, suspect or other person whose lawful interests may be restricted or infringed, obligation to ensure attendance of at least special witnesses in certain investigative (search) actions (Art. 223 Para. 7) and others. In case of conducting any investigative (search) action the course and the results of it shall be reflected in a record and in some cases on a medium (Arts. 103-107).

The Chapter 20 of CCP provides the following system of **'open' investigative (search) actions**:

- 1) questioning (Arts. 224, 225, 226, 227, 232);
- 2) presentation for identification (Arts. 228, 229, 230, 231, 232);
- 3) search (Arts. 233, 234, 235, 236 and 208);
- 4) inspection (Art. 237, 238);
- 5) inspections of a dead body with exhumation (Art. 239);
- 6) investigative experiment (Art. 240);
- 7) examination of an individual (Art. 241);
- 8) expert examination (Arts. 242, 243, 244, 245).

As a general rule conducting open investigative (search) actions do not require a special warrant and can be made by an investigator, inquirer, head of pre-trial investigation agency or prosecutor in case specified in Art. 223 Para. 2. Yet on some occasions the additional authorization is obligatory. These include two groups 1) ones that need an investigative judge ruling and 2) ones that need prosecutor's authorization.

The first group consist of:

- 1) questioning of a witness, victim in the course of pre-trial investigation in

a court session (Art. 225);

- 2) search of a home or any other possession of a person (Art. 244);
- 3) inspection of a home or any other possession of a person (Art. 244);
- 4) inspection of a dead body conducted in a home or any other possession of a person (Art. 244);
- 5) investigative experiment conducted in a home or any other possession of a person (Art. 244);
- 6) expert examination upon a motion of a defence party (Art. 244 and Art. 242 Para. 3);
- 7) obtaining samples for expertise (Art. 245).

The second one:

- 1) inspection of a dead body with exhumation (Art. 239), and
- 2) examination of an individual (Art. 241 Para. 2).

4. The system of covert investigative (search) actions. Grounds and procedure of conducting covert (search) actions that interfere in private communication.

The other group of investigative (search) actions is referenced as **covert investigative (search) actions** and is regulated by Chapter 21 of CCP. The notion of covert investigative (search) actions is provided for in Art. 246 Para. 1 of the CCP and are defined as a type of investigative (detective) actions the information on the fact and methods in which they are conducted may not be disclosed save for certain cases. Another key distinction is set in the next paragraph which states that covert investigative (search) actions could be carried out only in case information on a criminal offence and its perpetrator cannot be obtained otherwise.

The other limitation to the use of such types of actions is that their application is limited to criminal proceedings in respect of severe crimes and crimes of special severity (Art. 246 Para. 2). Although, there are two exclusions to this rule, namely 1) collection of information from electronic information systems or parts

⁴ See Витяг із узагальнення "Про практику про практику вирішення слідчими судьями питань, пов'язаних із слідчими (розшуковими) діями". URL: https://kievskiyud.od.ua/images/docs/doc1/vityag_slid.pdf

thereof the access to which is not restricted by the system's owner, possessor or keeper, or is not related to circumventing a system of logical protection (Art. 264 Para. 2), and 2) establishing the location of a radio electronic device (Art. 268).

Similarly, to open investigative (search) actions, covert investigative (search) actions could be divided into several groups depending upon the need of obtaining a warrant to conduct them. Using the criterion there are three groups: 1) those that could be carried upon an investigative judge's ruling, 2) upon a prosecutor's decision, and 3) which could be conducted upon either a decision of a prosecutor or a head of pre-trial agency.

The first group include:

- 1) covert investigative (search) actions that interfere in private communication (Arts. 260-263, and 264 except for Para. 2);
- 2) inspection of publicly inaccessible places, home or any other possession of a person (Art. 267);
- 3) establishing the location of a radio electronic device (Art. 268);
- 4) surveillance of an individual, an object or a place (Art. 269);
- 5) audio or video monitoring of a place (Art. 270);
- 6) covertly obtaining samples, which are necessary for comparative analysis (Art. 274).

The second:

- 1) control of the commission of a crime (Art. 271).

The third:

- 1) carrying out special assignments to expose criminal activities of the organized group or criminal organization (Art. 272).

The information gathered in the result of carrying out covert investigative (search) actions may be used as evidence on the same grounds as the results of other investigative (detective) actions in the course of pre-trial investigation as well as court proceedings. However, as the information on the fact and methods of the conducting of covert investigative (detective) actions, executors thereof, as well as information obtained as a result of the conduct thereof, may not be disclosed by

individuals who took knowledge of such information by way of reviewing the materials as prescribed in Article 290 of CCP. Such prohibition is also backed by the fact that information on the fact and methods of the conducting of covert investigative (detective) actions as well as executors thereof is regarded as a state secret according to the Set of information that contain state secrets⁵ and therefore a prosecutor's, an investigator's decision and motion to conduct covert investigative (search) action as well as an investigative judge's ruling to authorize their conduct shall be classified and consequently declassified after completion⁶.

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THEME 1. PRE-TRIAL PROCEEDINGS. PART 2

LEARNING OUTCOMES

The objective is to provide students with the knowledge on notifying a person of suspicion, the forms in which pre-trial proceedings should be completed and how one may challenge the actions, decisions within it as well as special procedures utilised, such as pre-trial investigation (in absentia).

QUESTIONS COVERED

1. The grounds and procedure of notification of suspicion. The procedure of challenging the notification of suspicion.
2. The grounds and procedure of suspension of pre-trial proceedings and its renewal.
3. Forms in which pre-trial proceedings shall be completed.
4. Disclosure of the materials of pre-trial proceedings.
5. The grounds and procedure of challenging decisions, actions, and omissions at pre-trial proceedings.

LEARNING MATERIALS

1. The grounds and procedure of notification of suspicion. The procedure of challenging the notification of suspicion.

As has been noted in the previous part, under Art. 219 of the CCP pre-trial proceedings are divided into two phases: 1) the phase that starts when information on committed criminal offence has been entered in the IRPTP and continues till a person has been notified on a suspicion, and 2) the phase starts from the moment the person has been notified of a suspicion and lasts till the completion of pre-trial proceedings, that is one of the decisions specified in Arts. 283 and 468 of the CCP. Thus, the notification of a suspicion takes special place at pre-trial proceedings and criminal procedure overall.

The **grounds and procedure of notification of suspicion** are provided for by Chapter 22 (Arts. 276-279) of the CCP.

Article 276 Para. 1 of the CCP provides the **grounds for notification of suspicion** which comprises two cases⁷:

- 1) apprehension of an individual at the scene of criminal offence or immediately after the commission of criminal offence;
- 2) availability of sufficient evidence to suspect a person of having committed a criminal offence.

Whether there is sufficient evidence in a particular case is up to an inquirer, an investigator, and a prosecutor, however due to the procedure of challenging notification of suspicion provided for in Art. 303 Para. 1 (10) of the CCP the issue is subject to a judicial control of an investigative judge. Sufficiency of evidence to notify of a suspicion is commonly regarded as a part of a broader concept, concept of a 'reasonable suspicion' which is used in Art. 132 Para. 3 (1) of the CCP and was addressed by the European Court of Human Rights (ECtHR) in its numerous decisions⁸. The ECtHR states that 'a "reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence'⁹ and that 'facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which

⁷ In actuality, the mentioned paragraph has the additional provision, namely in case a measure of restraint has been enforced against an individual, but it contradicts with procedure of enforcement of a preventive measure and thus could be not used as ground to notify a person of a suspicion. Under [Art. 177 Para. 1 of CCP](#) any preventive measure could be imposed against either a suspect or an accused person, thus notification of a suspicion precedes enforcement of a preventive measure and not vice versa.

⁸ See inter alia *Fox, Campbell and Hartley*, Judgment of 30 August 1990, App. nos. 12244/86; 12245/86; 12383/86 // HUDOC database. URL: <http://hudoc.echr.coe.int/eng?i=001-57721>; *Murray v. the United Kingdom*, Judgment of 28 October 1994, App. no. 14310/88 // HUDOC database. URL: <http://hudoc.echr.coe.int/eng?i=001-57895>; *Nechiporuk and Yonkalo v. Ukraine*, Judgment of 21 April 2011, App. no. 42310/04 // HUDOC database. URL: <http://hudoc.echr.coe.int/eng?i=001-104613> or https://zakon.rada.gov.ua/laws/show/974_683 (Ukrainian version); *Ilgar Mammadov v. Azerbaijan*, Judgment of 22 May 2014, App. no. 15172/13 // HUDOC database. URL: <http://hudoc.echr.coe.int/eng?i=001-144124>;

⁹ See for example [Fox, Campbell and Hartley](#), § 32.

comes at the next stage of the process of criminal investigation¹⁰.

The notification of a suspicion has a **complex character** which presupposes two phases: 1) drafting phase - i.e., drawing up a notice of suspicion and its approval by a competent prosecutor, and 2) service phase - i.e., to hand the notice to a person concerned by an investigator or a prosecutor (Art. 278 Para. 1 of the CCP)¹¹.

Articles 277 and 278 establish the content of the written notice of a suspicion and the procedure of serving it to a particular person respectively. Articles provide for specific requirements such as a prosecutor's and an investigator's obligation to notify a person of a suspicion in 24 hours from the moment it has been drafted or approved by a prosecutor as well as from the moment a person has been apprehended. There is also a possibility of changing the notice of a suspicion or notifying of a new suspicion (Art. 279).

However, the CCP provides for a mechanism of recognizing a person as a suspect even in case a notification of a suspicion was not handed to the person. Under Art. 42 Para. 1 and Art. 278 Para. 1 of the CCP a person may be regarded as a suspect in case the person in whose regard a notice of suspicion has been compiled but it has not been delivered because of failure to establish the whereabouts of the person, provided all means have been used as specified by this Code to deliver a notice of suspicion. Such means include serving notifications as provided for in Arts. 111, 133, 135, 136 of the CCP.

It should be noted that there are specific requirements of notification of a suspicion in respect of a special category of individuals provided for in Art. 481 of the CCP¹².

2. The grounds and procedure of suspension of pre-trial proceedings and

¹⁰ *Murray v. the United Kingdom*, § 55.

¹¹ See Постанова Великої Палати Верховного Суду від 11 грудня 2019 року (Справа № 536/2475/14-к; Провадження № 13-34кс19). URL: <http://www.reyestr.court.gov.ua/Review/86365236>

¹² See Постанова Великої Палати Верховного Суду від 11 грудня 2019 року (Справа № 536/2475/14-к; Провадження № 13-34кс19). URL: <http://www.reyestr.court.gov.ua/Review/86365236>

its renewal.

Suspension of pre-trial proceedings is a measure taken by a prosecutor or an investigator upon prosecutor's authorization to temporarily stop criminal proceedings under certain circumstances and prevent further investigation.

Suspension of pre-trial proceedings is provided for in Chapter 23 of the CCP and establishes four grounds to take such a decision. These include:

- 1) if the suspect falls seriously ill¹³, which precludes him from participating in criminal proceedings, provided his illness is confirmed by the corresponding medical report;
- 2) in case a suspect is put on wanted list;
- 3) the investigative judge rejected the motion for conducting special pre-trial proceedings (investigation);
- 4) if there is a necessity to carry out procedural actions within the framework of international cooperation.

In case the whereabouts of a suspect are unknown or is outside of the country and fails to appear before an official who issued a notice to appear (under Art. 133), an investigator or a prosecutor may put the suspect on a wanted list (announce the search) as prescribed in Art. 281 of the CCP.

The decision to suspend pre-trial proceedings may be taken by a prosecutor or an investigator (inquirer) with a prosecutor's authorization (Art. 280 Para. 4) and may be challenged during pre-trial proceedings by filing a complaint to an investigative judge under Art. 303 Para. 1 (2). Prior to suspension of pre-trial proceedings an investigator, an inquirer has to carry out all investigative (search) actions and other procedural actions necessary as well as all actions required to establish the whereabouts of the person if it is necessary to suspend criminal proceedings (Art. 280 Para 2).

Upon suspension of the pre-trial proceedings, no investigation (search) actions shall be allowed except for those aimed at establishing the whereabouts of

¹³ There is no list nor reference in the CCP as to what may be regarded as 'seriously ill' and shall be considered by a prosecutor and an investigator whether a suspect condition precludes one from participating in criminal proceedings.

the suspect (Art. 280 Para. 5). However, it is possible to disjoin criminal proceedings before taking a decision to suspend pre-trial proceedings in case, for example, there are several suspects and only one of them has been put on wanted list, thus continuing pre-trial proceedings against other suspects (Art. 217 Para. 3 and Art. 280 Para. 4).

The suspended pre-trial proceedings shall be renewed by a decision of the investigator or public prosecutor where the reasons for its suspension no longer exist (the suspect has recovered from the illness, his whereabouts have been established, the procedural actions within the framework of international cooperation have been completed), as well as in case it is necessary to carry out investigative (detective) or any other procedural actions. The suspended pre-trial proceedings shall also be renewed in case the investigating judge revokes the decision on suspension of the pre-trial proceedings (Art. 282).

3. Forms in which pre-trial proceedings shall be completed.

Pre-trial proceedings shall be completed within the reasonable time and time-limits laid out in Art. 219 of the CCP by taking one of the below mentioned **forms**:

- 1) closure of criminal proceedings;
- 2) submitting an indictment to a court;
- 3) submitting a motion to impose compulsory medical or educational measures to a court;
- 4) submitting a motion to release a person from criminal liability to a court;
- 5) submitting an agreement between the parties to a court (Art. 474 Para.

1). Each form of completion of criminal proceedings has specific rules regulating grounds and procedure of it and are placed within the Chapter 24 of the CCP. Certain forms of completion are regulated by specific provision of the Criminal Code of Ukraine (hereinafter the CC), like imposition of compulsory medical or educational measures (Arts. 92-95, 105), release from criminal liability ([Chapter IX](#)). Thus, it depends on various factors of procedural and substantive nature.

However, procedural decisions which are taken to complete pre-trial

proceedings are not mutually exclusive, i.e., in case of submitting a motion to release a person from criminal liability does not preclude drafting an indictment, as well as in case of reaching an agreement between the parties. Moreover, along with an indictment shall be drafted the register of materials of pre-trial proceedings which is nothing but a list of all procedural decisions taken and all actions conducted as well as materials gathered in course of pre-trial proceedings (Art. 109).

4. Disclosure of the materials of pre-trial proceedings.

After a prosecutor or an investigator (inquirer) upon prosecutor's authorization decides that there is enough evidence gathered for drafting an indictment, a motion to enforce compulsory medical or educational measures the defence party shall be notified on completion of pre-trial proceedings and all materials collected shall be disclosed to them. Such disclosure shall consist of all materials gathered in the course of pre-trial proceedings including such evidence which as such or in totality with other evidence may be used to prove the innocence or lesser degree of guilt of the accused or facilitate mitigation of punishment (Art. 290 Para. 2).

Prosecutor, investigator (inquirer) are required to grant access and possibility to copy or appropriately reproduce any exhibits or parts thereof, documents or copies thereof, as well as provide access to premises or places if they are in possession or under control of the State and if the public prosecutor intends to use information contained therein as evidence in court. And such access to materials implies the possibility to copy the materials or to reproduce the same (Art. 290 Paras. 3 and 4).

The defence party also has an obligation to grant access and possibility to copy or appropriately reproduce any exhibits or parts thereof, documents or copies thereof, as well as provide access to home or any other possession if they are in possession or under control of the defence, if the latter intends to use the information contained therein as evidence in court. However, it may not disclose materials which the public prosecutor may use to prove the guilt of the accused in

commission of a criminal offence. The other advantage the defence party has over prosecution is that a decision as to whether any specific materials should be deemed susceptible of being used by the public prosecutor to prove the guilt of the accused in commission of a criminal offence and, hence, a decision as to granting or not granting the public prosecutor access to such materials may be postponed until the defence has finished their examination of the materials of pre-trial proceedings (Art. 290 Para. 6).

In case either of the parties to criminal proceedings does not disclose materials, the court shall have no right to accept information contained therein as evidence (Art. 290 Para. 12)¹⁴.

5. The grounds and procedure of challenging decisions, actions, and omissions at pre-trial proceedings.

In the course of pre-trial proceedings participants under Chapter 26 of the CCP may challenge decisions, actions, and omissions of an investigator, an inquirer, or a prosecutor as well as decisions taken by an investigative judge either as a result of consideration of complaints or motions. There are two articles that consist of lists of procedural decisions, actions, and omissions that may be challenged at pre-trial proceedings, namely Art. 303 (regarding investigator (inquirer) and prosecutor) and Art. 309 (regarding investigative judge's rulings).

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THEME 2. COURT'S JURISDICTION.

THEME 3. PREPARATORY (PRELIMINARY) PROCEEDINGS

LEARNING OUTCOMES

The objective is to refresh student's knowledge on role of a court in criminal proceedings and court's composition and jurisdiction in criminal cases as well as provide students with the knowledge on the procedure of preliminary (preparatory) proceedings.

QUESTIONS COVERED

1. The notion and types of court jurisdictions. Composition of a court. Referral of criminal proceedings from one court to another.
2. The notion and objectives of the preparatory proceedings stage. The procedure of preparatory proceedings, participants of the stage.
3. Final decisions of the preparatory proceedings stage.
4. Addressing issues relating to preparation for a trial.

LEARNING MATERIAL

1. The notion and types of court jurisdictions. Composition of a court. Referral of criminal proceedings from one court to another.

Court jurisdiction commonly is defined as set of attributes of criminal proceedings (criminal case) that determine the specific court that shall hear the case¹⁵. Rules of court jurisdiction are crucial as they regulate the issue of court competence and are deemed as a part of the right to a fair trial ('tribunal established by law')¹⁶. Breach of jurisdiction rules is considered as a significant violation of the provisions of criminal procedure which leads to changing or setting the decision

¹⁵ Кримінальний процес: навчальний посібник / колектив авторів [електронне видання].

Одеса, 2020. С. 354. URL:

<https://drive.google.com/file/d/1PMtwP--U302TWNkGCN9FAjP7WZsbwrZL/view?usp=sharing>

¹⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, URL: <https://www.refworld.org/docid/3ae6b3b04.html>

aside by a court of appeal (Arts. 412 Para. 2 (6) and 409 Para. 1 (3) of the CCP).

The current CCP establishes the following types of court jurisdiction:

1) territorial jurisdiction; 2) instance jurisdiction; 3) substantive jurisdiction; 4) personal jurisdiction; 5) forum connexitatis.

Territorial jurisdiction is provided for in Art. 32 of the CCP and establishes a court of what administrative territorial unit shall hear the case. Under the abovementioned article criminal proceedings shall be conducted by the court within whose territorial jurisdiction the criminal offense has been committed. Where *several criminal offenses* have been committed, criminal proceedings shall be conducted by the court within whose territorial jurisdiction *the more severe offense* has been committed, and where the offenses were of equal severity, by the court within whose territorial jurisdiction the *most recent criminal offense* has been committed. Where the place of commission of a criminal offense is not possible to establish, the criminal proceedings shall be conducted by the court within whose territorial jurisdiction *pre-trial proceedings have been completed*.

However, these rules do not apply in case criminal proceedings are to be heard by the High Anti-Corruption Court of Ukraine (HACC) under Art. 33¹ of the CCP.

Instance jurisdiction is provided in Art. 33 of the CCP and establishes three levels of courts to hear criminal cases depending on the stage of criminal proceedings. Criminal proceedings in the first instance shall be conducted by local (rural district, city, urban district, and city-district courts) as well as the HACC. Criminal proceedings in appeal instance are conducted by respective appeals courts and also by the Appeal Chamber of the HACC. Criminal proceedings in cassation instance are conducted by the Supreme Court. Criminal proceedings on newly found circumstances are conducted by the court which rendered the decision to be reviewed. Criminal proceedings on exceptional circumstances are conducted on grounds specified in Art. 459 Para. 3 (1, 3) of the CCP by the court which rendered the decision to be reviewed and in case outlined in Art. 459 Para. 3 (2) of the CCP by the Grand Chamber of the Supreme Court.

Substantive jurisdiction is outlined in Art. 33¹ and Art. 32 Para. 3 of the CCP. Art. 33¹ provides special jurisdiction of the HACC over all corruption criminal proceedings provided for in the note to Art. 45 of the CC and Arts. 206², 209, 211, 366¹ of the CC provided at least one condition specified in Art. 216 Para. 5 (1-3) of the CCP is present.

Art. 32 Para. 3 establishes that in case criminal offence, pre-trial investigation of which was conducted by the territorial branches of the National Anti-Corruption Bureau of Ukraine (NABU), has been committed within territorial jurisdiction of local court, where appropriate territorial branch of the NABU is located, then criminal proceedings shall be conducted by the court, that is territorially the closest to the court where appropriate territorial branch of the NABU is located, of another administrative territorial unit (Autonomous Republic of Crimea, oblast, the city of Kyiv or Sevastopol).

Personal jurisdiction is provided for in Art. 32 Para. 2 of the CCP which states that criminal proceedings on criminal charges against a judge may not be conducted by the court where the accused is holding or held the office of a judge. Where the rules of territorial jurisdiction required that criminal proceedings against a judge should be conducted by the court where the accused is holding or held the office of a judge, such criminal proceedings shall be conducted by the court of another administrative territorial unit (Autonomous Republic of Crimea, oblast, the city of Kyiv or Sevastopol) which is territorially the closest to the court where the accused is holding or held the office of a judge.

There is also a rule outlined in Art. 34 Para. 1 (3) establishes that in case the accused or the victim is employed or was employed in the court under whose jurisdiction the conduct of the criminal proceedings falls, criminal proceedings are to be referred to another court.

Forum connexitatis means that there are several cases that are connected to each other and thus should be heard by one court. The possibility of joining criminal proceedings is provided for in Art. 217 Para. 1 and Art. 334 of the CCP. In particular, whenever a court of first instance for consideration materials of criminal

proceedings in respect of a person who is already the subject of proceedings in this court, such criminal proceedings shall be forwarded to the court composition conducting the proceedings, for disposal of the issue of joining them (Art. 334 Para. 2).

The issue of **composition of a court in criminal proceedings** is regulated by Art. 31 of the CCP and relevant provisions of the Law of Ukraine 'On Law on the Judiciary and the Status of Judges' of 2016 (for instance, see Art. 18 Para. 4 of the abovementioned law)¹⁷.

The CCP provides the procedure of **referral of criminal proceedings** from one court to another in Art. 34. There are four grounds to apply this procedure:

1) it was determined prior to the start of court trial that criminal proceedings were submitted to the court in violation of the rules on territorial jurisdiction;

2) after sustaining of motions of recusal (self-recusal) or in other cases, it is impossible to form a new composition of the court for trial;

3) the accused or the victim is employed or was employed in the court under whose jurisdiction the conduct of the criminal proceedings falls;

4) the court has been liquidated or operation of the court conduction the trial has been terminated under grounds specified in law.

It is also possible in case before the trial commences for criminal proceedings (except for criminal proceedings that are heard by the HACCC) to be referred to another court at the place of residence of the accused, majority of victims or witnesses with a view to ensuring prompt and effective proceedings as well as in case it is not possible for the corresponding court to administer justice.

The issue of referral of criminal proceedings from one court to another is decided either by a court of appeal instance or the panel of the Court of Cassation of the Supreme Court. The relevant court to consider the issue depends on whether the court that shall hear the case is located within the jurisdiction of one or several

¹⁷ On the Judiciary and the Status of Judges : Law of Ukraine on June 2, 2016 № 1402-VIII // Database «Legislation of Ukraine» / Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/go/1402-19> (date of share: February 12, 2022)

courts of appeals. In case it's one court then the issue shall be considered by a court of appeals, otherwise it's the latter. The issue of referral shall be addressed either upon the request of the court of first instance (appeal instance) or the motion of the parties or the victim no later than five days after the submission of such request or motion. There is a special rule regulating the referral of criminal proceedings from the HACC to another court where a request or a motion shall be considered by the Appeal Chamber of the HACC (Art. 34 Para. 2).

It should be noted that disputes between courts with regard to jurisdiction matters are not permitted and the court that was chosen to hear the criminal case shall start consideration of a case from the stage of preparatory proceedings (Art. 34 Para. 5, 6).

2. The notion and objectives of the preparatory proceedings stage. The procedure of preparatory proceedings, participants of the stage.

The preparatory proceedings stage is the first stage of court proceedings in a court of first instance. The objectives of this stage are 1) to check whether there are grounds to assign trial; 2) to check whether the final decisions made during pre-trial proceedings comply with the requirements of the CCP; 3) to resolve criminal proceedings.

The procedure of preparatory proceedings is regulated by Chapter 27 and certain provisions of Chapter 28¹⁸. The date of preparatory court hearing shall be assigned within five days after the day of receipt of one of the documents that are drafted to complete criminal proceedings (Arts. 283) as well as other necessary documents (Art. 291 Para. 4).

3. Final decisions of the preparatory proceedings stage.

A preparatory court hearing is conducted with participation of the public prosecutor, the accused, defense counsel, victim and his representative and legal representative, civil plaintiff, his representative and legal representative, civil

¹⁸ See also Про порядок здійснення підготовчого судового провадження відповідно до Кримінального процесуального кодексу України : Лист Вищого спеціалізованого суду України від 03.10.2012 № 223-1430/0/4-12 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/v1430740-12>

defendant and his representative, and the representative of the legal person in whose respect proceedings are taken. Upon fulfilling the requirements specified in Articles 342-345 of the CCP, the presiding judge asks the opinions of the participants in court proceedings regarding the possibility of assigning trial (Art. 314 Para. 2). After hearing the parties, the court may take one of the **following decisions**:

1) to pass a judgment of conviction based on an agreement concluded under Chapter 35 of the CCP or refuse to agree the agreement and either return the agreement along with an indictment to a prosecutor to continue pre-trial proceedings or assign trial based on the indictment;

2) to close criminal proceedings in case of establishing grounds outlined in Art. 284 Para. 1 (4-8) and Para. 2 of the CCP;

3) to return an indictment, motion to enforce compulsory medical or educational measures to the public prosecutor in case of noncompliance with the requirements of the CCP¹⁹;

4) to refer the indictment, motion to enforce compulsory medical or educational measures to an appropriate court for definition of jurisdiction, in case the criminal proceedings concerned is found to be not under the jurisdiction;

5) assign trial based on the indictment, motion to enforce compulsory medical or educational measures;

6) direct a probation officer to prepare a pre-trial report.

What decision to be made by a court in the preparatory court stage is subject to a document that has been sent to the court for a consideration and circumstances of the case. However, as regards a court's decisions to direct a probation officer to prepare a pre-trial report, it is regulated by Art. 314¹ of the CCP that establishes grounds and procedure for adopting the decision. The main goal of the report,

¹⁹ An overview of most common grounds for returning indictment and other 'final' documents could be found here:

<https://wiki.legalaid.gov.ua/index.php/nigcТаБу повернення обвинувального акта прокурорУ>

however, is to provide the court with the information regarding the person of a

perpetrator and possible penalty to enforce.

4. Addressing issues relating to preparation for a trial.

In case there are no obstacles to assign a trial, the court shall address the **issues regarding preparation for trial**. According to Art. 315 Para. 2 of the CCP these shall include:

- 1) assign the date and place for trial;
- 2) find out whether the trial must be conducted in private court session¹⁹;
- 3) dispose the issue of the composition of participants in trial;
- 4) consider motions of the participants in court proceedings on:
 - a) citing certain persons for examination in court;
 - b) demanding and obtaining certain objects or documents;
- 5) do whatever is necessary to prepare for trial.

The last subparagraph may include the issue of committing a defense counsel under Art. 49 the CCP, recognizing a person as a representative (legal representative) of a victim, filing a civil complaint etc, consideration of a motion to hear the case by the court of jury etc.

It should be noted that during the preparatory court hearing, the court may, upon motions of participants in court proceedings impose, alter or revoke measures to ensure criminal proceedings including any preventive measures imposed on the accused. When considering such motions, the court shall comply with provisions of Chapter H of the CCP. In absence of such motions from parties to criminal proceedings the court cannot review nor decide on the issue of application of measure to ensure criminal proceedings, including preventive measures²⁰.

¹⁹ The grounds to have a private court session during trial are provided for in [Art. 27 Para. 2](#) of the CCP.

²⁰ See the decision of the Constitutional Court of Ukraine *Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) положення третього речення частини третьої статті 315 Кримінального процесуального кодексу України* : від 23.11.2017 № 1-р/2017 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/v001p710-17>; and the relevant decision of the ECtHR: *Ignatov v. Ukraine*, Judgment of 15 December 2016, App. no. 40583/15 // HUDOC database. URL: <http://hudoc.echr.coe.int/eng?i=001-169524>

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THEME 4: TRIAL. PART 1

LEARNING OUTCOMES

The objective is to provide students with knowledge on the role, general provisions and scope of trial stage in criminal proceedings of Ukraine.

QUESTIONS COVERED

1. The notion and objectives of trial. General rules governing trial.
2. Participants in trial. Consequences (implications) of non-appearance of participants and actions to be taken in this case.
3. Scope of trial. Amendment of charges, bringing additional charges, and dismissal of charges.
4. The procedure of trial, its phases.

LEARNING MATERIALS

1. The notion and objectives of trial. General rules governing trial.

Trial is the main, central stage of criminal proceedings whose objective is to resolve criminal proceedings. This is the stage where the court must give the answer to the main question of criminal procedure: whether the accused person is guilty and what sentence should be imposed, however other auxiliary questions (for instance, resolution of civil action) shall be addressed as well²². Normally, only at the trial stage the person may be found guilty of committing the alleged criminal offence which can be inferred from the *presumption of innocence* principle and objectives of criminal proceedings (Arts. 17 and 2 of the CCP respectively).

The trial is conducted according to rules outlined in Chapters 28-30 of the CCP (and respective provisions of the Law of Ukraine 'On Law on the Judiciary and the Status of Judges' of 2016²³) which are structurally composed of provisions

²² The full list of questions to be addressed by a court when delivering a judgment is provided for in [Art. 368 Para. 1](#) of the CCP.

²³ European Commission For Democracy Through Law (Venice Commission). On the organization

regulating general rules (requirements) of conducting trial, participants and procedure thereof, decisions that can be passed, and special rules of trial conducted by a jury²⁴.

General rules governing trial are provided for in Section 1 of Chapter 28 and consist of provisions listed below. However, this list may be extended with relative ease.

Time limits and general procedure. Unlike pre-trial proceedings, the trial stage does not have strict time limits and should be completed within reasonable time (see Art. 28 of the CCP). General procedure of trial requires participation of parties to criminal proceedings, however this is subject to certain exclusions. A victim and other participants to criminal proceedings shall be summoned, though their presence, as a rule, is not mandatory. The trial is conducted within a courtroom, though some procedural actions may be conducted outside the courtroom.

Invariability (permanence) of the court composition. The trial shall be conducted in one court's composition and couldn't be changed while trial is in progress. However, in case a judge cannot participate it shall be replaced by another judge of the court or the case shall be referred to another court under Art. 34 of the CCP. If the judge hearing the case was replaced, the hearing shall start from the beginning, i.e., from the preliminary proceedings stage. Yet, it is possible to avoid the restart of court hearing provided the following conditions are met: 1) the parties to criminal proceedings, the victim, do not insist on a new conduct of procedural actions already performed by the court before replacement of a judge; 2) the judge who replaces the resigning judge has familiarised himself/herself with the course of

of courts and the status of judges (2016, amended 2020), Strasbourg, 10 September 2020, CDL-REF(2020)068, (Unofficial translation). URL:

https://www.legislationline.org/download/id/8753/file/Ukraine_law_organisation_courts_status_judges_2016_am2020_en.pdf

²⁴ Also see Про деякі питання порядку здійснення судового розгляду в судовому провадженні у першій інстанції відповідно до Кримінального процесуального кодексу України : Лист Вищого спеціалізованого суду від 05.10.2012 № 223-1446/0/4-12 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/v1446740-12>

court proceedings and materials of criminal proceedings available to the court, agrees with the procedural decisions taken by the court and deems inexpedient to conduct the procedural actions performed before replacement of a judge anew.

Powers of the presiding judge. The definition of a presiding judge is outlined in Art. 3 Para. 1 (2) of the CCP where it stated that it is a judge who presides over a trial by several judges (panel) or conducts it alone. Presiding judge has wide range of powers which include:

1) powers to ensure sequence and order of procedural actions (e.g., presiding judge opens court hearing as well as announces the beginning of trial according to Art. 342 Para. 1 and Art. 347 Para. 1 of the CCP respectively);

2) powers to ensure realisation by participants to criminal proceedings of their procedural rights and fulfilment of their duties (e.g., presiding judge explains to the accused the substance of charges and asks him whether he pleads guilty and whether he wishes to testify as well as finds out whether the witness received the instructions about the rights and duties of a witness, and whether he understands them, and if necessary, explains them to him under Art. 348 Para. 1 and Art. 352 Para. 1 of the CCP respectively);

3) powers to ensure ascertainment of all circumstances of criminal proceedings (e.g., establishing the scope of evidence to be examined and the way in which they shall be examined under Art. 349 of the CCP);

4) powers to remove from the trial everything which has no importance for criminal proceedings (e.g., presiding judge upon request of a party may dismiss the question which do not relate to the substance of the criminal proceedings²⁵ under Art. 352 Para. 8 of the CCP);

5) powers to ensure due order in the courtroom (measures to be taken in respect of violators of the order under Art. 330 of the CCP).

Participation of a reserve judge. In order to avoid the possible consequences of a judge's failure to continue the consideration of a case (Art. 319

²⁵ The information provided is not relevant. As to the rules regulating relevancy of evidence see [Art. 85](#) of the CCP.

Para. 1 of the CCP) the decision to appoint a reserve judge should be taken. The decision shall be made at the preliminary proceedings concurrently with the appointment of the preliminary court session if the judge believes the consideration of the case may require significant time to resolve. Thus, if in the course of trial, a judge is replaced by the reserve one, the trial continues and there is no need to restart court hearing.

Continuity of trial. The rule commands that trial shall continue without breaks, except for time to rest. However, the second paragraph of the same article containing the rule has a number of cases when the court hearing shall be adjourned, though the list is not exhaustive²⁶.

Consequences (implications) of participants' failing to appear in court. The consequences (implications) of participants' failing to appear in court are provided for in Arts. 323-327 of the CCP and differ depending on the participant. For example, the trial cannot be conducted without the participation of an accused person, prosecutor or a defence counsel where the participation of the later is mandatory²⁷. Meanwhile, the participation of a civil claimant is not mandatory where the court may either dismiss the civil action or resolve it without the claimant.

Rights and duties of those present in the courtroom. The CCP provides for the right to be present in the courtroom though under specific circumstances outlined in Art. 328 it may be limited by the presiding judge. The Art. 329 established the duties of those present in the courtroom and participants to criminal proceedings such as when parties can question witnesses or how to address the court, etc. It should be noted that participants rights and duties regarding the court hearing are outlined in the respective articles regulating their procedural status²⁸.

Measures to be taken in respect of violators of the order in the court. The

²⁶ For instance, a judge hearing the case may be required to consider a motion to impose a measure of restraint to a suspect under Art. 186 of CCP in another criminal proceedings where the judge is exercising the powers of an investigative judge.

²⁷ However, there are a number of exclusions, for instance, the procedure of special court proceedings allows having court hearings without the participation of an accused person (see [Art. 323 Para. 3](#) of CCP).

²⁸ See [Chapter 3](#) of the CCP.

Art. 330 of the CCP establishes the measures that could be taken by the court to the participants in the event of disobedience or breach of order in the courtroom. The measures differ depending on the participant but include a warning, temporary removal from the courtroom or removal for the whole duration of the trial²⁹, to hold liable for contempt of court (Art. 330 of the CCP).

Imposing, altering or revoking a preventive measure in trial. The issue of imposing, altering or revoking a preventive measure should be decided by the court in accordance with the procedure set out in Chapter 18 of the CCP. The issue of preventive measure shall be addressed by the court upon parties' motion or proprio motu.

Conducting expert examination upon court ruling. This general rule regulating trial could be deemed as a part of a broader issue of court activity during trial and its boundaries. The problem is especially acute given that a court is not a participant in criminal proceedings and thus shall not interfere in a dispute between parties, meanwhile a court shall deliver a just judgement where everyone who committed a criminal offence shall be prosecuted in proportion to his guilt and no one innocent was accused or convicted. And conducting expert examination upon court ruling is one of the limited powers of a court to ensure the above-mentioned goal. Expert examination may be ordered by a court either upon parties' motion (grounds are specified in Art. 242 of the CCP) or proprio motu. In the second case the court may assign the conduct of expert examination in the following cases:

1) if the court has been provided with a number of experts' opinions contradicting each other, and the interrogation of experts has not removed the discovered contradictions;

2) if during trial, grounds came to light specified in paragraph two of Article 509 of the CCP;

3) there are sufficient grounds to believe that the report issued by an expert (experts) is unsubstantiated or contradicts the other case materials or its

²⁹ *Karpyuk and Others v. Ukraine*, Judgement of 06 October 2015, App. nos. 30582/04 and 32152/04 // HUDOC database. URL: <http://hudoc.echr.coe.int/eng/?i=001-157510> (§ 132-140) or https://zakon.rada.gov.ua/go/974_b10 (Ukrainian version).

correctness is questionable.

The other action the court may take in order to gather evidence is to summon a person as a witness for questioning under Art. 134 of the CCP.

Application of measures to ensure criminal proceedings and conducting investigative (search) actions in trial. Measure to ensure criminal proceedings shall be applied during court proceedings in accordance with the provisions of [Section II](#) of the CCP. However, in case a motion to grant provisional access to objects and documents was filed the court shall consider the reasons for which such access was not performed during pre-trial proceedings.

Investigative (search) actions can be conducted in the course of trial only upon parties' motion where the court shall take into consideration the significance of the circumstances to be established, the feasibility of their ascertainment, as well as the reasons for which appropriate actions were not carried out during pre-trial proceedings. In case the decision is taken to conduct investigative (search) action(s) the court shall adjourn the trial for a time sufficient to conduct such action(s) and familiarise the participants with the results thereof. The conduct of the action(s) shall be ordered to the prosecutor and relevant investigative agency within the time-limits specified by the court.

Joining and disjoining materials of criminal proceedings . Article 334 of the CCP in the first paragraph provides for the possibility of joining and disjoining materials of criminal proceedings in the trial stage under the rules provided for in Art. 217 of the CCP, i.e., provisions establishing the procedure at pre-trial proceedings. The second paragraph of the article establishes the mechanism of hearing linked criminal proceedings in the same court, i.e., forum connexitatis jurisdiction.

Suspension of court proceedings. The suspension of court proceedings is envisaged in Art. 335 of the CCP, the decision of which could be made in the following two cases: 1) the accused person has evaded from court, and 2) the accused person has fallen ill with a mental or other grave prolonged disease that makes his participation in court proceedings impossible. In case there are several

accused persons the court shall continue court proceedings in respect of other accused persons. Unlike adjournment of trial in case of non-appearance of participants to criminal proceedings, suspension of court proceedings does not presuppose that the date of the next court hearing will be scheduled.

Conducting procedural actions during court proceedings through video conference. Court proceedings may be conducted through video conference with transmission from another premise, including such as is located beyond the bounds of the court premises, (distant court proceedings) where:

- 1) it is impossible for a participant of criminal proceedings to participate directly in the court proceedings for health or for other valid reasons;
- 2) it is necessary to ensure the persons' security;
- 3) a minor or underage person is to be interrogated as a witness or victim;
- 4) such measures are necessary to ensure speedy court proceedings;
- 5) there are other grounds recognised sufficient by the court.

The decision to conduct distant court proceedings may be taken by a court proprio motu or on a motion of a party or other participant to criminal proceedings, where parties' or victim's objection against such decision do not preclude the court from taking such a measure. However, it is not allowed to conduct distant court proceedings with the defendant being absent from the courtroom if the latter objects to it. Other provisions regulating this procedure are outlined in Art. 336 of the CCP.

2. Participants in trial. Consequences (implications) of non-appearance of participants and actions to be taken in this case.

Participants of court proceedings are listed in Art. 3 Para. 1 (26) of the CCP and include parties to criminal proceedings, victim, his representative and legal representative, civil plaintiff, his representative and legal representative, civil defendant and his representative, representative of the legal person in whose respect the proceedings are taken, probation officer, third person in respect of whose property the question of seizure of property is considered, as well as any other persons on whose request or complaint, where the CPP provides so, court proceedings are held.

Participants that take part in trial could be divided into **three groups** depending on whether their participation is mandatory and consequences (implications) of their non-appearance in court.

First group comprises participants whose participation is mandatory, namely prosecutor, defence counsel, accused person. Prosecutor's participation is mandatory save for the case when a prosecutor dismisses the charges under Arts. 340 and 341 of the CCP. As to prosecutor's participation in cases of private accusation (private criminal proceedings), the prosecutor's participation is also mandatory³⁰. The participation of defence counsel is mandatory in cases when such participation is required by law (Art. 52 of the CCP) or an accused person is represented by a defence counsel. In case of a prosecutor or defence counsel nonappearance the court shall adjourn the trial and schedule the new date of court hearing and take actions provided for in Art. 324 of the CCP. The participation of an accused person is mandatory in all cases except for special criminal proceedings under Art. 323 Paras. 3-4 and Chapter 24-1 of the CCP or conducting distant court proceedings under Art. 336 of the CCP. Absence of an accused person is the reason to adjourn the court hearing.

Second group comprises participants whose participation is mandatory, though is subject to certain circumstances, namely a victim, civil defendant, their representatives, legal representatives and representative of the legal person in whose respect proceedings are taken. As a rule, a victim's participation is mandatory which requires a court to notify such person of the date, time and place of the court hearing. Moreover, the victim's absence during trial is regarded as a significant violation of the provisions of criminal procedural law and thus, as is a reason for setting aside the court decision in appeal proceedings (Art. 412 Para. 2 (5) of the CCP). However, if the victim, having had due notice, does not appear, the court having heard the opinion of participants in court proceedings, decides to conduct the trial or to adjourn court hearing depending on to what extent it is possible to

³⁰ See Постанова Великої Палати Верховного Суду від 26 червня 2019 року (Справа № 404/6160/16-к, Провадження № 13-22кс19) // Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/82885726>

ascertain all circumstances during trial in the absence of the victim. The same rule applies to a civil defendant, their representative, legal representative, and representative of a legal person in whose respect criminal proceedings are taken (Art. 326 Paras. 2 and 3 of the CCP). The court may impose a pecuniary penalty on the above-mentioned participants in cases and in accordance with the procedure provided for by Chapter 12 of the CCP.

Third group consists of participants whose participation is not mandatory, namely civil plaintiff, its representative or legal representative. Participation of a civil plaintiff, their representative or legal representative is not mandatory though failing to appear in court, the court shall dismiss the civil action except for the case when civil plaintiff, their representative or legal representative asked court for court hearing in their absence or the defendant or civil defendant admitted the claim.

As to participation of a witness, specialist, interpreter, expert and probation officer as well as consequences (implications) of their non-appearance in court see Art. 327 of the CCP.

3. Scope of trial. Amendment of charges, bringing additional charges, and dismissal of charges.

Scope of trial establishes the limits of court hearing as to both the person to whom charges were brought and the scope of charge brought in the indictment. The scope of trial cannot be altered by a court except for changing legal qualification of the criminal offence concerned if such change alleviates the status of the person in respect of whom the criminal proceedings is conducted (Art. 337 Para. 3 of the CCP).

Since the charges are brought by a prosecutor, the scope of trial may be changed in the course of court hearing by the latter by amending charges, bringing additional charges, or dismissing charges (Art. 337 Para. 2 of the CCP). Thus, the court may hear the case if and only if there is a prosecutor or in certain cases a victim who presents the case against an accused person, otherwise the case shall be

closed by the court³¹.

Amendment of charges is provided for in Art. 338 of the CCP. Amendment of charges could be done by a prosecutor in order to change legal qualification and/or the scope of charges if in the course of trial new factual circumstances of the criminal offence of which a person is accused are ascertained. Having arrived at the conclusion to amend charges the prosecutor has to fulfil the requirements of Art. 341 of the CCP and draft a new indictment where the amended charge as well the grounds for taking the decision shall be stated. If the prosecutor amends charges by changing legal qualification to a criminal offence that provides for more lenient (reduced) liability or by reducing the scope of charges the presiding judge shall be required to advise the victim of his/her right to press charges in court in the previously brought scope³².

Bringing additional charges is provided for in Art. 339 of the CCP. The decision is taken by a prosecutor if information is obtained that the accused has possibly committed another criminal offence in the respect of which charges were not brought and which is closely connected with the original one, where these may not be considered individually, as well as where grounds for applying criminal measures to a legal person have been established. In this case the prosecutor after fulfilling the requirements of Art. 341 of the CCP has to lodge a motivated motion with the court to consider an additional charge in the same proceedings with the original charge and/or initiate proceedings in respect of the legal person.

Whenever the court sustains such a motion of the public prosecutor, the court is required to adjourn (postpone) the trial for the time needed for the preparation of defence against a new charge or preparation of a representative of the legal person in whose respect proceedings are taken and for the public prosecutor to comply with provisions of Arts. 276 through 278, 290 through 293 of the CCP, but not more than

³¹ See [Art. 284 Para. 1 \(7\) and Para. 2 \(2\)](#) of the CCP.

³² As to question how criminal proceedings shall be heard by the court in case if in the result of amendment of charges criminal proceedings are considered as private see Постанова Великої палати Верховного Суду від 03 липня 2019 року (Справа № 288/1158/16-к, Провадження № 13-28кс19) // Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/82998245>

for fourteen days. The time of adjournment may be extended by the court on a motion of the defence or the representative of a legal person in whose respect proceedings are taken if the scope or complex nature of the additional charge require more time for the preparation of defence. After expiry of the time limit specified by court, court proceedings shall begin with preliminary court hearing, however new examination of evidence already examined by court prior to bringing additional charge shall be conducted only if the court finds this necessary.

Dismissal of charges is regulated by Art. 340 of the CCP. The decision to dismiss the charges is taken if as a result of trial, the prosecutor comes to the belief that charges brought against the person are not substantiated. Taking such a decision requires approval of the head of the public prosecutor's office where one is employed (Art. 341 of the CCP). If the decision to dismiss the charges has been taken by the prosecutor the presiding judge is required to advise the victim of the right to press the charges and thus criminal proceedings would become private.

4. The procedure of trial, its phases.

The **trial** typically consists of four main **phases**:

- 1) preliminary phase;
- 2) trial (presentation and examination of evidence);
- 3) debate and the last word of a defendant;
- 4) deliberations and announcement of the decision.

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THEME 4. TRIAL. PART 2

LEARNING OUTCOMES

The objective is to provide students with knowledge on phases of the trial stage and explore each phase separately and in connection with other ones.

QUESTIONS COVERED

1. Preliminary phase.

2. Trial (presentation and examination of evidence).
3. Debate and the last word of a defendant.
4. Deliberations and announcement of the decision.

LEARNING MATERIALS

1. Preliminary phase.

Preliminary phase is governed by Arts. 342-346 of the CCP. Preliminary phase starts with opening a court session by the presiding judge at the time scheduled in the court decision (Art. 315 Para. 2 of the CCP). However, before this action takes place the court secretary has to check the presence of participants by establishing their identity and, if applicable, authority. After the opening of the court hearing the court secretary informs participants that the trial is recorded in the media.

Next, the presiding judge announces composition of the court, if present, name of the reserve judge, prosecutor(s), victim, civil plaintiff, accused person and its defence counsel(s)³³ as well other participants and informs them on their right to file a motion seeking a recusal and finds out whether they want to exercise it³⁴. After deciding on recusals, the bailiff hands over to participants the instruction on their rights and duties and the presiding judge finds out whether they understand their right and duties, and if necessary, provides explanations.

At the end of the preliminary phase the presiding judge orders witnesses to leave the courtroom and announces the beginning of the next phase, the *trial (presentation and examination of evidence)*.

2. Trial (presentation and examination of evidence).

Trial (presentation and examination of evidence) is governed by Arts. 347-363 of the CCP. Trial begins with the prosecutor reading a summary of the indictment, and if the civil action has been lodged, the civil plaintiff, representative

³³ No more than five defence counsel may represent the interest of one accused person (see [Art. 46 Para. 3](#) of the CCP).

³⁴ On procedure of recusal and disqualification see [Chapter 3 § 6](#) of the CCP.

or legal representative shall read out the civil action; however, the court, taking into account the requirements of reasonable time, may limit the duration of the reading.

After that, the presiding judge identifies the accused person, explains to him/her the substance of charges and asks whether he/she pleads guilty and whether wishes to testify. Where a civil action is entered in criminal proceedings, the presiding judge shall ask the defendant, civil defendant whether they admit such.

Having completed the above-mentioned actions, the presiding judge gives the floor to the parties to present their opening statements where the prosecution goes first, followed by the defence and other participants. In opening statements parties shall state what is going to be proved, what evidence shall be examined and in what order. The evidence presented by the prosecution is examined first followed by the evidence presented by the defence (Art. 349 Para. 1 of the CCP).

The amount or scope of evidence to be examined as well as the order are established by the court's ruling, though it can be changed during the trial. It is possible to not examine certain circumstances in case they are indisputable, though the court shall ascertain whether the participants understand correctly the contents of such circumstances, whether there are no doubts regarding voluntary nature of their position and explains them that in such a case they will be deprived of the right to challenge these circumstances by way of appeal. That's the reason why in case an accused person pleads guilty and does not dispute the circumstances of the case, the court shall question the accused person; otherwise, the procedure provided for in Art. 349 Para. 3 of the CCP cannot be applied.

After the amount and order of evidence examination has been established by the court's ruling the parties shall present their evidence for examination. Under Art. 23 of the CCP the court shall examine all evidence directly which requires that all testimonies shall be given by the participants orally and before the court, though it is subject to certain exclusions (namely, distant court proceedings, and questioning of a witness and/or victim in the course of pre-trial proceedings in courtroom by an

investigative judge³⁵). It also prohibits a court from admitting evidence that has not been directly examined (Art. 23 Para. 2 of the CCP).

The examination of evidence includes:

- 1) questioning of participants (an accused person, a witness, a victim, an expert, a specialist) (Arts. 351-354, 356, and 360 of the CCP)³⁶;
- 2) presentation for identification (Art. 355 of the CCP);
- 3) examination of expert's findings (Arts. 356 and 332 of the CCP);
- 4) examination of physical evidence (Art. 357 of the CCP);
- 5) examination of documents including audio and video recording (Arts. 358, 359 of the CCP);
- 6) field inspection (Art. 361 of the CCP).

Another key aspect of the presentation and examination phase is the issue of possible examination of additional evidence. The Code in Art. 333 outlines the option for parties to bring additional evidence by lodging motions to court seeking conducting specific investigative (search) actions. Such motions may be filed by both parties however in case of prosecution, the court shall consider the reasons for which appropriate actions were not performed at the stage of pre-trial proceedings (Para 4.). The other option lies in conducting expert examination or granting access to objects and documents upon a participants' motion (Art. 332 and 333) as well as asking the court to enforce other measures to ensure criminal proceedings (for example, summon of witness).

As to the court's activity aimed at establishing all circumstances of a criminal case, the court may only 1) order to conduct expert examination under specific reasons provided for in Art. 332 Para. 2 of the CCP, 2) summon a witness to

³⁵ See [Art. 225](#) of the CCP. Also, it is possible to use hearsay evidence in order to compensate for the inability of a witness's, a victim's questioning. See the decision of the Supreme Court (Ukraine) in case No. 766/19891/17.

³⁶ Questioning of participants has their distinct features, including whether one must give testimony and whether it must be truthful, whether additional persons shall be invited etc. which may be found within the aforementioned articles. Also have a look at the distinction between direct and cross examination of witnesses during examination of evidence phase (Art. 352 of the CCP).

conduct questioning (Art. 134 of the CCP).

After having ascertained circumstances and examined relevant evidence in the course of trial, presiding judge asks participants whether they wish to submit supplementary arguments and in absence of such motions or after having disposed the motions filed, the court shall pass the ruling to end ascertaining circumstances and their verification with evidence and announces the debate phase open.

3. Debate and the last word of a defendant.

Debate and the last word of a defendant phase is regulated by Art. 364 and 365 of the CCP. The debate includes two parts: 1) speeches and 2) rejoinders which follow one another. In the first part participants may have a word, where the prosecution party comes first followed by the defence party. Participants may invoke only such evidence as has been examined in court session and the duration of their speeches is not limited in time, though the court may stop the participant, if the latter upon having been reprimanded, again goes beyond the scope of the criminal proceedings at hand, or again allows himself/herself to utter insulting or indecent words, and may pass the floor to another participant in pleadings reprimand. The second part of debate comes in the form of rejoinder where the defence party has the privilege of the last rejoinder.

After debate has been announced closed, the court gives the floor to the accused to give the last word. The court is not allowed to limit the duration of the last plea nor it is possible to ask the accused person. However, if during either debate or announcement of the last plea participants inform of new circumstances of significant importance for criminal proceedings the court *proprio motu* or upon a motion from participants of the court proceedings, shall resume the ascertainment of circumstances established during criminal proceedings upon completion of which the court shall open debate in respect of additionally examined circumstances, and shall give the floor to the accused for his last plea (Art. 365 Para. 4 and Art. 364 Para. 5 of the CCP).

4. Deliberations and announcement of the decision.

Deliberations and announcement of the decision is the last phase of trial

which takes place after an accused person makes his/her last plea where the court immediately retires in the deliberation room to pass a judgement which the presiding judge announces to those present in the courtroom.

During deliberations no one may stay in the deliberation room, except court composition that conducts the trial where judges are not allowed to communicate with individuals who participated in criminal proceedings. The court may discontinue deliberations only for rest with the fall of night. During deliberations judges shall resolve (answer) the list of the following questions which are outlined in Art. 368 of the CCP:

- 1) whether the action in which an individual is accused has really occurred;
- 2) whether this action contains elements of criminal offence and under exactly which Article of the Law of Ukraine on criminal liability;
- 3) whether the defendant is guilty for committing this criminal offence;
- 4) whether the defendant should be punished for the criminal offence he has committed;
- 5) whether circumstances which aggravate or mitigate the punishment of the defendant do exist and which exactly;
- 6) what kind of punishment has to be imposed on the defendant and whether he shall serve it;
- 7) whether the civil action entered shall be granted and, if so, in whose favour, in what amount and according to which procedure;
- 7¹) whether there are grounds to apply criminal measures to the legal person;
- 8) whether the defendant committed the criminal offence in a state of limited criminal capacity;
- 9) whether grounds exist for imposing on the defendant who committed the criminal offence in a state of limited criminal capacity, compulsory medical measures specified in Article 94 Para. 2 of the CC;
- 10) whether compulsory medical treatment shall be imposed on the defendant in cases prescribed by Article 96 of the CC;
- 11) whether it is necessary to assign a public tutor to the underage defendant;

- 12) what shall be done with attached property, objects and documents;
- 13) who shall be charged procedural expenses and in what amount;
- 14) what shall be done with measures to ensure criminal proceedings.

These set of questions shall be addressed by the court separately in respect of every individual and in respect of every criminal offence in question.

The decision is passed by a majority of judges comprising the court on the basis of results of judges' deliberations by poll in which none of the judges may abstain, where the presiding judge shall be the last to vote. Each judge may draft their separate opinion³⁷ which is appended to the decision and is present in the case materials, yet is not pronounced in the courtroom. After adoption of the decision, it shall be signed by all judges, despite the presence of a separate opinion.

A court decision is pronounced publicly immediately after the court has left the deliberation room. Judge presiding in the court session explains the contents of the decision, procedure and time limit for its challenge.

It shall be noted that in case of passing a judgement in the form of a ruling, the court may draft and pronounce only operative part³⁸, provided drafting the whole decision requires significant time. In that case, the full text of the ruling should be issued no later than within five days upon pronouncement of the partial ruling.

After the sentence has been pronounced, presiding judge shall advise the defendant, defence counsel, his legal representative, victim, his representative and the representative of the legal person in whose respect proceedings are taken of their right to file a plea for pardon, the right to review journal of court session and submit written comments thereto.

If the defendant or the representative of the legal person in whose respect proceedings are taken has no knowledge of the State language, then, after the judgement has been pronounced, a translator shall explain to him the content of the

³⁷ The term '*separate*' within the scope of the CCP refers to dissenting opinions only, where concurring opinions are not allowed. For more information see *Question 44* in The ECHR in 50 questions // European Court of Human Rights. URL: https://www.echr.coe.int/Documents/50Questions_ENG.pdf

³⁸ On the types and parts of decisions see the next part of the Theme.

operative part of the judgement. A copy of the judgement in the defendant's language or in another language he/she knows, in translation certified by the translator, shall be handed over to the defendant.

Participants in court proceedings shall have the right to obtain a copy of the court's decision in the court. A copy of judgement shall be handed over to the defendant, the representative of the legal person in whose respect proceedings are taken and the prosecutor immediately after pronouncement thereof.

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THEME 4. TRIAL. PART 3

LEARNING OUTCOMES

The objective is to provide students with the knowledge on decision of the court of the first instance rendered in criminal proceedings as well as special proceedings used in it (namely, trial by jury and simplified procedure for criminal misdemeanours).

QUESTIONS COVERED

1. Types of court decisions. Legality, validity and reasonableness of court decision.
2. Types of judgments. The content of a court ruling and a judgement.
3. Correcting slips and obvious arithmetic mistakes in a judgement.
Explaining a court decision.
4. Simplified procedure for criminal misdemeanours.
5. Proceedings in trial by jury.

LEARNING MATERIALS

1. Types of court decisions. Legality, validity and reasonableness of court decision.

The CCP provides three **types of court decisions**, namely: 1) **judgement** (*вирок*), 2) **ruling** (*ухвала*), and 3) **order** (*постанова*). However, the last one could be rendered only by the Supreme Court; thus, the trial may end up with a judgement or ruling, or both.

Judgement is the form of court decision in which the court decides on the substance of litigation (Art. 369 Para. 1 of the CCP).

Ruling is the form of court decision in which the court decides other matters³⁹(Art. 369 Para. 2 of the CCP).

³⁹ In fact, the substance of litigation may be resolved in the courtroom by passing the ruling, for

Every court decision must be **legal, valid** and **reasoned**.

Under Art. 370 of the CCP, a decision is regarded as **legal** when it is made by a competent court in accordance with rules of substantive law and in observance of the requirements for criminal proceedings specified in the CCP.

A decision is **valid** when it is made by court based on objectively ascertained circumstances which are supported with evidence examined during trial and assessed by the court as prescribed in Article 94 of the CCP.

A decision is **reasoned** when it sets forth appropriate and sufficient motives and grounds for passing thereof⁴⁰.

2. Types of judgments. The content of a court ruling and a judgement.

The Art. 373 of the CCP outlines two **types of judgments**: 1) **acquittal**, and 2) **conviction**.

The decision of acquittal shall be made unless it is proved that:

- 1) criminal offence was committed in which a person is accused;
- 2) criminal offence was committed by the defendant;
- 3) the act committed by the defendant contains elements of crime.

The **acquittal** shall be rendered also in case the court establishes grounds for closing criminal proceedings as specified in Art. 284 Para. 1 (1 and 2) of the CCP.

The **conviction** shall be passed in case the defendant is found guilty of the commission of the alleged criminal offence (offences) and to impose a punishment, or exempt from punishment, or serving of the sentence where stipulated by the Law of Ukraine on criminal liability, or to apply other measures prescribed in the Law of Ukraine on criminal liability (Art. 373 Para. 2 of the CCP).

example in case of enforcement of compulsory educational / medical measures (see Art. 500 Para. 2 and Art. 512 Para. 2 of the CCP).

⁴⁰ As the ECHR holds in its numerous decisions, that courts are not obliged to give a detailed answer to every argument raised (*Van de Hurk v. the Netherlands*, § 61). However, it must be clear from the decision that the essential issues of the case have been addressed (*Boldea v. Romania*, § 30; *Lobzhanidze and Peradze v. Georgia*, § 66) and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the case (*Moreira Ferreira v. Portugal (no. 2)* [GC], § 84; *S.C. IMHSuceava S.R.L. v. Romania*, § 40).

For more information, see Chapter V, Para. A (3) of the Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb) // Council of Europe/European Court of Human Rights, 2020. URL: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

The **content of** both a **ruling** and a **judgement** is outlined by Arts. 372 and 374 of the CCP respectively.

Both the ruling and the judgement shall consist of 3 parts: 1) **introduction**, 2) **reasoning**, and 3) **operative part**. However, the exact content differs and may be found in the above-mentioned articles.

3. Correcting slips and obvious arithmetic mistakes in a judgement. Explaining a court decision.

The CCP in Art. 379 provides the possibility of **correcting slips and obvious arithmetic mistakes** in a court decision. The procedure may be initiated by the court *proprio motu* or upon motion of a participant in criminal proceedings of another individual concerned and shall be performed in the court session where all participants are informed on the date, time, and place of the court session. Failure of individuals who have been duly informed to appear in court session does not preclude consideration of the issue of introducing corrections, however, the court's ruling on making corrections to the decision in question may be challenged (Para. 3).

The court may explain the decision made in case it is hardly understandable, upon a participant of court proceedings or the body enforcing court decision, where the explanations shall be outlined in the separate court's ruling (Art. 380 Para. 1 of the CCP).

The court shall consider a motion to explain the court decision within ten days and notify the person who has applied for an explanation of the court decision and the participants in court proceedings. Failure of individuals who have been duly informed to appear in court session does not preclude consideration of the motion to explain a court decision.

A copy of the ruling to explain the court decision, not later than on the day following the day when the ruling was passed, shall be sent to the person who has applied for an explanation of the court decision and the participants in court proceedings. A copy of the ruling passed on the motion to explain the court decision, not later than the next day after the ruling has been passed, is sent to participants in criminal proceedings, as well as to the requestor who was not present in the court

session.

Court's ruling on explanation of the court decision or refusal to explain it may be appealed by the person who has applied for an explanation of the court decision and by any participant of court proceedings.

4. Simplified procedure for criminal misdemeanours.

Chapter 30 § 1 outlines the **simplified procedure** of trial **for criminal misdemeanours** which includes two Articles (381 and 382).

Art. 381 Para. 1 provides that trial shall be scheduled by a court in either a five-day term having received an indictment on commission of a criminal misdemeanour or according to Art. 298² Para. 4 of the CCP, provided the person in question was apprehended.

The trial phase may be omitted, that is the indictment on commission of criminal misdemeanour would be considered without conducting trial and participants (including an accused person) only if the accused person does not challenge the circumstances established in the course of the pre-trial inquiry and gives his consent to consideration of the indictment. However, if the court deems it necessary to have a hearing in the courtroom with participants it can do so (Art. 382 Para. 3 of the CCP).

Under Art. 382 Para. 2 of the CCP the court shall consider the indictment on criminal misdemeanour and pass a judgement either within five days from the date of receipt of the indictment or urgently in case the person was apprehended under Art. 298² Para. 4 of the CCP.

The court's judgement based on the results of the simplified procedure shall be passed in accordance with the procedure stipulated in the CCP and must meet the general requirements for the court's sentence. The court's judgement based on the results of the simplified procedure shall include the circumstances which were established by the pre-trial investigation body and which are not challenged by the participants in court proceedings, instead of evidence to confirm the circumstances established by the court.

A copy of the sentence based on the results of the court's hearing of the

indictment on criminal misdemeanour shall be sent to the participants in court proceedings no later than the day following the day of passing the sentence.

As regards other requirements of conducting trial, simplified procedure concerning criminal misdemeanours shall be provided in accordance with the general rules of judicial proceedings stipulated by the CCP (Art. 381 Para. 3).

5. Proceedings in trial by jury.

Another type of special proceedings in the court of first instance is the **proceedings in trial by jury**, which are regulated by Chapter 30 § 2 of the CCP⁴¹.

This section includes 1) general provisions of trial by jury; 2) provision guaranteeing a trial by jury to a defendant; 3) procedural provisions regulating the participation of jurors in trial (summoning, selection, removal, administering oath, and a juror's rights and duties during trial); 4) procedure of deliberation and voting in the deliberation room.

The first section established that the jury shall be created (empanelled) at the district (local) court of the first instance. It also states that all issues related to trial shall be considered jointly by the panel of court (consisting of judges and jurors) except for the issues provided for in Art. 331 Para. 3 of the CCP (enforcement of preventive measures).

The second section guarantees the right to a trial by jury to a defendant by requiring a prosecutor to provide the defendant with written explanations regarding the possibility, specifics and legal implications of hearing the case in criminal proceedings in the trial by jury which shall be attached to the indictment and the register of pre-trial investigation records, which are referred to the court. Art. 384 of the CCP also commands the prosecutor and the court to explain to the defendant that the person accused of committing a crime punishable with life imprisonment, in the course of the preparatory court session shall have the right to make a motion for hearing his case in criminal proceedings in the trial by jury, as well as specifics of

⁴¹ See also Про деякі питання здійснення кримінального провадження в суді першої інстанції судом присяжних : Лист Вищого спеціалізованого суду України від 20.01.2017 № 223-1-6/0/4-17 // Закон і Бізнес. URL: <https://zib.com.ua/ua/127351-prisyazhni-yaki-rozpochali-sudoviy-rozglyad-u-kriminalnomu-p.html>

hearing his case in criminal proceedings in the trial by jury.

The third section includes provisions regulating the procedure of summoning, selection, and removal of juries, administration of oath by juries, and their rights and duties in the course of trial.

1. *Summoning the jury* shall be carried out in accordance with Art. 385 of the CCP. The persons eligible under Law of Ukraine 'On the Judiciary and the Status of Judges' shall be summoned by the court by serving them written summons no later than five days before the date of the court session. The presiding judge shall give instructions to the clerk of the court session to summon seven juries who shall be selected by the court's automated system from the person listed in the array of judges⁴².

2. Having been summoned by the court, jurors shall appear before the court to undergo the *selection procedure* which shall take place upon opening the court session (trial). The jurors shall be informed on the details of criminal procedure they were invited as well as their rights and duties, and ask them whether there are any circumstances which prevent their participation as a juror. The prosecutor, the victim and the accused, with the permission of the presiding judge, may also raise questions to jurors in order to reveal those issues. Moreover, any juror may be challenged by the participants in court proceedings on the grounds described in Arts. 75 and 76 of the CCP.

Upon completion of selection procedure three (five) juries shall be left. In case the number of juries left exceeds the required number, juries shall be selected by the automated court system; in case the number of juries is below the required number, additional jurors shall be summoned to undergo selection procedure and be appointed to hear the criminal case. The number of required juries depends on whether there is a need for reserve juries (see Arts. 387 Paras. 8-10 and 320 for reserve judge) which account for two persons.

Having been selected, juries shall make the oath and occupy the appropriate

⁴² Detailed procedure for selection of jurors see [Chapter 3](#) of the Law of Ukraine 'On the Judiciary and the Status of Judges : Law of Ukraine on June 2, 2016 № 1402-VIII // Database «Legislation of Ukraine» / Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/go/1402-19>

seats in the courtroom (Art. 388 of the CCP).

3. A juror may be *removed* and *relieved* from further participation in trial in the following cases: 1) in case a jury fails to perform his/her duties, and 2) if there are solid grounds to believe that a juror, as a result of illegal influence, lost impartiality required for resolving the issues of criminal proceedings in compliance with law⁴³.

A juror is removed and relieved from further participation in trial on the initiative of the presiding judge or on the motions of participants by a decision of the majority of the court, which shall be passed in the deliberation room and affirmed by a reasoned ruling.

In case the removal of a juror prevents further hearing of the case (for example, no reserved jurors left and the number of juries is below 3) a new jury shall be selected in accordance with the procedure stipulated in this subsection, after which judicial proceedings shall start from the beginning (Art. 390 Para. 3 of the CCP).

4. *Rights and duties* of jurors are outlined in Art. 386 of the CCP and Art. 63 Para. 2 of the Law of Ukraine 'On the judiciary and the status of judges'. The jury has the following *rights*:

- 1) participate in examination of all information and evidence in the course of a court session;
- 2) take notes during court session;
- 3) put, with the permission of the presiding judge, questions to the accused, the victim, witnesses, experts and other persons being examined;
- 4) ask the presiding judge to explain the provisions of law that are subject to application when deciding certain issues, legal terms and notions, content of the documents read out in the.

And the following *duties*:

⁴³ There are additional reasons for relieving a juror which are laid out in [Art. 66](#) Para. 2 of the Law of Ukraine On the Judiciary and the Status of Judges : Law of Ukraine on June 2, 2016 № 1402-VIII // Database «Legislation of Ukraine» / Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/go/1402-19>

- 1) honestly answer the questions asked by the presiding judge and participants in court proceedings regarding possible impediments stipulated by this Code or law that can prevent his participation in the trial, his relationships with the persons participating in the criminal proceedings subject to court's hearing, extent of his knowledge about the circumstances of the given criminal proceedings; also, on request of the presiding judge, give the required information about himself;
- 2) maintain order in court session and obey orders of the presiding judge;
- 3) not to leave the court session room during trial;
- 4) not to talk, without permission of the presiding judge, about the substance of the criminal proceedings and the procedural actions conducted during them with the persons who are not part of the court;
- 5) not to collect information related to the criminal proceedings outside court session;
- 6) not to disclose the information directly related to the substance of the criminal proceedings and the procedural actions conducted during them, which became known to the juror while performing his duties.

The fourth section lays out the procedure of deliberation and voting. Since the juries compose the court in the trial the juries take part in deliberation on an equal basis⁴⁴ with professional judges and a simple majority of votes is required to pass a judgement. However, a juror may abstain from voting in a case when the majority of the court voted to pass a conviction and a juror voted for acquittal of the accused. In this case the vote of the juror who abstained shall be added to the votes for the decision that is most favourable for the accused. If there are differences of opinion which decision is most favourable for the accused, the issue shall be resolved by voting (Art. 391 Para. 3 of the CCP).

⁴⁴ The juror even has a right to express a dissenting opinion that shall be attached to a judgement, in case of disagreement with the majority opinion ([Art. 381 Para. 4](#) of the CCP).

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THEME 5. REVIEW OF COURT DECISIONS IN THE COURT OF APPELLATE INSTANCE

LEARNING OUTCOMES

The objective is to provide students with the knowledge on the procedure of review of court decision in the court of appellate instance, namely, general provisions, the flow of the appeal complaint, the procedure of court hearing of appeal review and decisions to be taken by the court.

QUESTIONS COVERED

1. Appeals review stage: general overview, decisions that can be challenged, actors who have the right to appeal.
2. Procedure for lodging and preliminary review of an appellate complaint: time limits, requirements for appellate complaint, preliminary actions.
3. Appeals review procedure.
4. Court of appellate instance powers to resolve an appellate complaint (final decisions of the appeals review stage).

LEARNING MATERIALS

1. Appeals review stage: general overview, decisions that can be challenged, actors who have the right to appeal.

Appeals review is the stage of criminal proceedings at which the decisions of a court of first instance and an investigative judge can be reviewed by the court of appeal. The appropriate court of appeal and its composition is chosen taking into account the territorial jurisdiction rules (Art. 32 of CCP) and provisions of Art. 31 Para. 4 of CCP. The latter provides that criminal cases shall be heard by a panel of at least three professional judges except for cases which are subject to the jurisdiction of the HACC (Art. 31 Para. 12 (2) of CCP)⁴⁵.

⁴⁵ The article requires that one among the panel of judges of the HACC that review the case shall

The appeals review proceedings are outlined in the [Chapter 31](#) of the CCP, though certain aspects of it may also be found in Letter of the Specialised Court of Ukraine for Civil and Criminal Cases of 22 November 2012⁴⁶.

Art. 392 Para. 1 of the CCP provides three categories of **decisions** taken by the court of first instance **that may be challenged in the court of appellate instance**, which include:

- 1) judgments, except as provided otherwise by Article 394 of this Code;
- 2) rulings to enforce or refusal to enforce compulsory medical or educational measures;
- 3) other rulings, in cases specified by the present Code.

The summarised, though a bit outdated, list of all decisions that could be challenged in the appeal review proceedings may be found in the appendices to the above-mentioned Letter of the Specialised Court of Ukraine for Civil and Criminal Cases.

However, since the Constitutional Court has found certain provisions of Art. 392 Para. 2 of the CCP unconstitutional, specifically in part that prohibits separate challenging of the decision of the court of first instance to continue (enforce) preventive measure in the form of a custody⁴⁷, it is possible to file an appeal complaint against such a type of court decision before the end of a trial.

The Art. 393 of the CCP complements the **right to appeal** enshrined in the Art. 55 of the Constitution of Ukraine by establishing the list of people who may

have 5 years of professional experience as a judge.

⁴⁶ Про деякі питання порядку здійснення судового провадження з перегляду судових рішень у суді апеляційної інстанції відповідно до Кримінального процесуального кодексу України : Лист Вищого спеціалізованого суду від 21.11.2012 № 10-1717/0/4-12 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/v1717740-12>

However, keep in mind that there are also plenty of decisions of the Supreme Court that regulate the appeal review proceedings as well. For example, see [decision](#), [decision](#).

⁴⁷ See Рішення Конституційного Суду України у справі за конституційною скаргою Глуценка Віктора Миколайовича щодо відповідності Конституції України (конституційності) положень частини другої статті 392 Кримінального процесуального кодексу України : Рішення Конституційного суду України від 13.06.2019 № 4-п/2019 // База даних «Законодавство України» / Верховна Рада України. ЦИБ: <https://zakon.rada.gov.ua/laws/show/v004p710-19>.

lodge an appeal complaint in criminal proceedings. It should be pointed out that the Art. 393 also points to the specific circumstances under which a person within the list may file a complaint. Thus, the list includes:

1) a defendant found guilty, his legal representative or defence counsel, as regards the defendant's interests;

2) a defendant in whose respect a judgement of acquittal has been passed, his legal representative or defence counsel, as regards the motives and grounds for acquittal;

3) the suspect, accused, his legal representative or defence counsel;

4) legal representative, defence counsel of an underage person or underage person himself/herself in whose respect the issue has been disposed of application of a compulsory educational measure, as regards the underage person's interests;

5) legal representative and defence counsel of a person in whose respect the issue has been disposed of application of compulsory medical measures;

6) public prosecutor;

7) victim or his legal representative or representative, as regards the victim's interests but within the limits of demands submitted by them in the court of first instance;

8) civil plaintiff, his representative or legal representative - to the extent related to the decision on the civil action;

9) civil defendant or his representative - to the extent related to the decision on the civil action;

91) the representative of the legal person in whose respect proceedings are taken, to the extent relevant for the interests of the legal person;

92) physical or legal person in the part concerning their interests in resolving the issues regarding physical evidence, documents given to the court; third persons in the part concerning their interests in resolving the issues of special forfeiture;

93) whistleblower in the part concerning their interests in resolving the issues of whistleblower remuneration;

10) other persons in cases specified by the present Code⁴⁸.

In addition to the non-exhaustive list of actors, who may lodge a complaint, there are also provisions that prohibit review of decisions of the court of first instance. Such rules may be found in the Arts. 394, 421, Art. 403 Para. 4, Art. 404 Para. 2, and Art. 409 Para. 3 of the CCP.

For instance, Art. 394 establishes that decisions of the court of first instance passed on the basis of results of 1) simplified proceedings and 2) proceedings on the agreements cannot be challenged in the appeal review proceedings and may be made under certain conditions set out in the Paras. 3 and 4 of the Article.

Article 421 of the CCP in turn, provides the general **rule that prohibits worsening the defendant's situation** that includes a set of provisions aimed to protect a defendant.

2. Procedure for lodging and preliminary review of an appellate complaint: time limits, requirements for appellate complaint, preliminary actions.

The **procedure for lodging an appeal complaint** by a person is prescribed in Arts. 395 and 396 of the CCP. The first sets out the time-limits within which specific decisions could be challenged as well as the correct court where the complaint should be sent and the second establishes the requirements for the appellate complaint.

Under Art. 395 appellate complaints shall be lodged either to the court of first instance that rendered the challenged decision or directly to the court of appellate instance. It depends on the decision that is being challenged, in case of decisions of the court of first instance - via the court of first instance and in case of rulings of an investigative - to the court of appellate instance.

Time-limits depend on the decision challenged and are the following:

- 1) **30 days** - against judgement or ruling to apply or refusal to enforce compulsory medical or educational measures;
- 2) **7 days** - against other ruling of a court of first instance, except for the

⁴⁸ As regards other persons, the approximate list of persons entitled to file an appeal complaint may be found in the [Letter](#).

decision to impose, alter, revoke or continue the preventive measure in the form of custody;

3) **5 days** - against rulings of an investigative judge.

However, if ruling of court or investigating judge was passed without summoning the person who challenges it, as well as if a judgement was passed without summoning the person who challenges it, in a procedure laid down in Article 382 of the present Code, then the time limit for filing appellate complaint shall be computed from the date on which this individual has received the copy of the court decision concerned.

Article 396 of the CCP provides the list of **requirements for an appellate complaint** and what necessary parts it shall consist of (Para. 2) and what other elements shall be included if necessary (for instance, materials attached to the complaint, or documents certifying defence counsel powers, etc.).

After the receipt of an appellate complaint the court of first instance within *three days* after the expiry of the time-limit for appellate complaint shall send the complaint received together with materials of criminal proceedings to the court of appellate instance (Art. 397 Para. 1). However, if appeal complaints were received by the court of first instance after the referral of the materials to a court of appeal instance, the court of first instance shall send them to the appellate court on the *next day* following the day of receipt of materials (Art. 397 Para. 2).

After the receipt of appeal complaints by a court of appellate instance, the case shall be referred to a **reporting judge** not later than on the following day. Having received an appellate complaint, the reporting judge shall review it on their compliance with requirements set out in the CCP within three days.

As a result of such review the reporting judge **may adopt** one of the **following decisions**:

- 1) ruling to open an appeal proceedings;
- 2) ruling to leave an appeal complaint without motion;
- 3) ruling to dismiss (return) an appeal complaint;
- 4) ruling to refuse to open proceedings.

The exact grounds for each of the decisions could be found in the Art. 399 of the CCP, where the last two decisions of the reporting judge could be challenged by lodging a cassation appeal (Art. 399 Para. 6).

In case of adoption of the decision to open appeal proceedings, the reporting judge *within 10 days* following the day of adoption shall address the **issues regarding the preparation for hearing** that are laid down in Art. 401 of the CCP, namely:

1) sends copies of the ruling on the opening of appeals proceedings to participants in court proceedings together with copies of appellate complaints and information on their rights and duties;

2) sets a time-limit for the lodging objections to the appellate complaint (see Arts. 393 and 402);

3) suggests that participants present new evidence which they invoke or demand or request evidence upon a motion of a participant;

4) decides on other motions including imposing, altering or revoking a preventive measure;

5) decides on other issues as necessary for further hearing.

The decisions taken by the reporting judge shall be taken in the form of a ruling, which shall be sent to participants. On completion of preparation for hearing the reporting judge shall pass a **ruling on termination of preparation and assigns hearing**.

3. Appeals review procedure.

The court hearing in the form of **appeal review is governed by the same rules that regulate the trial** in the court of first instance subject to certain requirements of appeal review which are laid down in Art. 405 of the CCP. However, the most striking difference lies within the possibility of conducting written appellate proceedings in case participants applied for conducting hearing in their absence (Art. 406 of the CCP).

After conducting the hearing in the form of appeal review a **court of appellate instance may pass one of the following decisions** (which are subject to

the decision that was challenged - either a court of first instance decisions or a ruling of an investigative judge):

If a court decision was challenged:

- 1) uphold the judgement or ruling challenged;
- 2) alter the judgement or ruling;
- 3) quash the judgement fully or partially and pass a new judgement ;
- 4) quash the ruling fully or partially and pass a new ruling;
- 5) quash the judgement or ruling and close criminal proceedings;
- 6) quash the judgement or ruling and order a new trial (retrial) in the court of first instance.

7) quash the judgement made based on an agreement⁴⁹ and refer the case to the court of first instance for conducting trial provided the agreement was reached in the course of court proceedings;

8) quash the judgement made based on an agreement and refer the case to the court of first instance for conducting trial provided the agreement was reached in the course of pre-trial investigation;

If an investigative judge's ruling was challenged:

- 1) uphold the ruling;
- 2) quash the ruling and pass a new ruling.

4. Court of appellate instance powers to resolve an appellate complaint (final decisions of the appeals review stage).

The **decision to alter a judgement** of a court of first instance is rendered the following cases:

- 1) mitigation of the imposed punishment if it finds that the punishment by its severity is inconsistent with the gravity of criminal offence and the personality of the accused;
- 2) where legal qualification of the criminal offence is changed, and an article (paragraph of article) of the Law of Ukraine on criminal liability for less grave criminal offence is applied;

⁴⁹ See [Chapter 35](#) of the CCP.

3) reducing the amounts subject to exaction, or increasing such amounts if such increase shall not affect the scope of accusation and legal qualification of the criminal offence ;

4) in other cases, where the change of judgement will not aggravate the defendant's status.

The **decision to alter a ruling to enforce compulsory measures of educational or educational measures** is rendered in the following cases:

1) where legal qualification of the action in the Law of Ukraine on criminal liability is changed, and an article (paragraph of article) of the Law of Ukraine on criminal liability for less grave criminal offence is applied;

2) mitigation of the type of the compulsory medical or educational measures.

The **decision to quash or alter a decision of a court of first instance** shall be taken by the court of appellate review under the following circumstances:

1) incomplete character of the trial

2) inconsistency of court's findings as stated in the decision with factual circumstances of criminal proceedings;

3) significant violations of the requirements of criminal procedure;

4) misapplication of the Law of Ukraine on criminal liability;

5) inconsistency of imposed punishment with the gravity of criminal offence and the personality of the accused.

Under Art. 410 of the CCP the **trial is regarded as incomplete** if circumstances which may have served as the basis for rendering a lawful, reasoned and fair judgement were not investigated during such trial, in particular where:

1) the court dismissed motions of participants in court proceedings for examination of certain persons⁵⁰, examination of evidence or conduct of other procedural actions in order to ascertain or reject certain circumstances which may have served as the basis for rendering a lawful, reasoned and fair judgement;

⁵⁰ Whether the decision to dismiss the request for examination of witnesses has been lawful, see the three-pronged test developed and addressed by the ECtHR in the case of [Murlazaliyeva v. Russia](#).

2) the necessity to examine a given reason arises from new facts found during consideration of the case by the appellate court.

Inconsistency of a court of first instance's findings with factual circumstances of criminal proceedings according to Art. 411 of the CCP implies that:

1) the court's findings are not substantiated with evidence examined during trial;

2) the court did not consider evidence which could significantly affect the court's findings;

3) the court's decision did not state why the court considered certain evidence and dismissed other evidence when there is contradictory evidence that is significant for the court's findings;

4) the court's findings as set forth in the court decision, contain significant contradictions.

Under Art. 412 Para. 1 of the CCP **significant violations of the provisions of criminal-procedural law** are such violations of the provisions of the CCP as prevented or could prevent the passing by court of a legitimate and justified court decision. And in the next paragraph of the article the **non-exhaustive list** of such violations is provided which are the following:

1) in the presence of grounds for closure of court proceedings on a criminal case, it was not closed;

2) the court decision was passed by the court in powerless composition;

3) the court proceedings were conducted in the absence of the accused, except in cases specified in Article 381 of the present Code, or in the absence of public prosecutor, except in cases when his participation was not mandatory;

4) the court proceedings were conducted in the absence of the defence counsel when his participation was mandatory;

5) the court proceedings were conducted in the absence of the victim who was not duly informed on the date, time and place of court session;

6) rules of jurisdiction were breached;

7) materials of proceedings lack the journal of the court session, or the technical information medium on which court proceedings in the court of first instance were recorded.

According to the Art. 413 of the CCP **misapplication of the Law of Ukraine on criminal liability** that incurs quashing or altering a court decision is:

- 1) non-application by court of a statute that shall be applied;
- 2) application of a statute that is not applicable;
- 3) misinterpretation of a statute that is at odds with the statute's exact content;
- 4) imposition of a more severe punishment than specified in the appropriate article (paragraph of the article) of the Law of Ukraine on criminal liability.

And the last reason for quashing or altering a court's decision is **inconsistency of imposed punishment with the gravity of criminal offence and the personality of the accused**. Under Art. 414 of the CCP, it means that a defendant is sentenced with a punishment that is within the scope established by the relevant article (paragraph of the article) of the Law of Ukraine on criminal liability, though in its type and size is clearly unfair because of its leniency or its severity.

The **decision to quash a court decision and order a new trial** is passed by an appellate court in the following cases:

- 1) significant violations of the requirements of criminal procedure specified Art. 412 Para. 2 (2 through 7)⁵¹;
- 2) a judge whose qualification was challenged on grounds of circumstances which clearly cast doubts on his impartiality, participated in the adoption of court's decision, and the court of appellate instance held that the motion on his disqualification was justified
- 3) a court decision has been passed or signed by court composition other than the one which tried the case.

⁵¹ That covers almost all the list of significant violations, except for the case when a court did not pass a ruling to close criminal proceedings (for a detailed list of grounds for closure, see [Art. 284](#) of the CCP).

The Art. 415 provides that the **findings and motives** of quashing court decisions, **shall be binding** on the court of first instance in the new trial. However, the court of appellate instance shall not have the right to decide in advance on the issue of whether charges were proved or not, whether evidence was reliable or not, whether one evidence prevails over another, whether the court of first instance was right to apply one or another of the statutes of Ukraine on criminal liability and punishment.

In case a decision of a court of first instance was quashed and a ruling to have a **new trial** was passed, the retrial shall be conducted under the respective chapter that governs trial proceedings, however there are certain **additional requirements** laid down in Art. 416 of the CCP. In particular, 1) the case shall be heard by a different composition of court⁵², 2) the application of law that qualifies the person in question actions as a more grave criminal offence and/or provides more severe punishment for the offence committed is permitted only in case the relevant appeal complaint seeking such application is filed by either a prosecutor, or a victim (their representative), 3) the enforcement of a stricter compulsory measures of educational/medical measures as well as qualification of the actions committed as a more grave under the Law of Ukraine on criminal responsibility is permitted only if an appeal complaint seeking such review is lodged by either a prosecutor, or a victim (their representative).

Having established the circumstances set forth in the Art. 284 of the CCP, a court of appellate instance shall quash the judgement of conviction (sentence) and pass a **ruling to close criminal proceedings**⁵³.

Arts. 418 and 419 of the CCP establish in what form a decision of an appellate court is rendered that could be either a judgement⁵⁴ or a ruling, as well as the content of such ruling.

Art. 419 provides the reasons under which a court of appellate instance **quash**

⁵² In case it is impossible to form a new composition of court, the rules laid down in [Art. 34](#) to be applied.

⁵³ Compare this rule with the provisions laid down in [Art. 373](#) Para. 1 of the CCP.

⁵⁴ In case provided for by the Art. 407 Para. 1 (3) of the CCP.

a decision of a court of first instance and passes a judgement, which are the following:

- 1) necessity to apply a law on a graver criminal offence or to increase the scope of charges;
- 2) necessity to apply a more severe punishment;
- 3) reversal of groundless judgement of acquittal of the court of first instance;
- 4) incorrect discharge of the defendant from service of punishment.

The same article established the reasons for **quashing the decision to enforce compulsory measures of educational/medical measures and pass its own ruling** on that issues which are the following:

- 1) necessity to legally qualify an action provided for in the Law of Ukraine on criminal liability, as graver;
- 2) application of more severe type of compulsory medical or educational measures;
- 3) reversal of groundless court ruling refusing to apply compulsory medical or educational measures and closure of criminal proceedings in respect of a minor or an underage person based on motives that they had not committed an action provided for in the Law of Ukraine on criminal liability.

From the end of 2020 it is possible to review the ruling to enforce (impose) preventive measures, but only in the form of keeping in custody as prescribed by Art. 392 Para. 2 and Art. 422¹ of the CCP. The latter outlines the procedure of reviewing the appeals against such a ruling.

In case an **appeal complaint** is lodged **against a ruling of an investigative judge**⁵⁵ the procedure of appeal review is outlined in Art. 422 of the CCP. According to provisions of the article, after an appeal complaint has been received by the reporting judge the latter shall demand and obtain from the court of first

⁵⁵ The non-exhaustive list of rulings of an investigative judge that could be challenged in the course of pre-trial investigation are provided for by Art. 309 Paras. 2 and 3 of the CCP. The list is non- exhaustive since there are [several decisions](#) of the Supreme Court which allows review of certain rulings which are not set out in the above-mentioned article.

instance the relevant materials, and not later than *within a day* shall notify the appellant, public prosecutor and other interested persons, of the time, date and place of appeals trial⁵⁶. And the article commands that the consideration of the appeal complaint shall be conducted not later than within three days after its receipt by the court of appellate instance.

Following the review of a ruling of an investigative judge, the court of appellate instance shall either 1) uphold the ruling or 2) quash the ruling and pass a new one (Art. 407 Para. 3 of the CCP).

On completion of appeal review of 1) rulings of an investigative judge as well a ruling of a court of first instance to impose, alter, and extend preventive measure in the form of keeping in custody and 2) other decisions of a court of first instance, **materials of criminal proceedings** shall be sent back to the court of first instance no later than *within three* and *seven* days, respectively.

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⁵⁶ Notice that the reporting judge cannot leave an appeal complaint without motion since the provisions of Art. 398 and Art. 399 Paras. 1, 2 and 3 (1, 2) of the CCP are applicable only to appeals against decisions of a court of first instance (see the [decision](#) of the Supreme Court).

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THEME 6. REVIEW OF COURT DECISIONS IN THE COURT OF CASSATION INSTANCE

LEARNING OUTCOMES

The objective is to provide students with the knowledge on the procedure of review of court decision in the court of cassation instance, namely, general provisions, the flow of the cassation complaint, the procedure of court hearing of cassation review and decisions to be taken by the court.

QUESTIONS COVERED

1. Cassation review stage: general overview, decisions that can be challenged, actors who have the right to file a complaint to the court of cassation instance.
2. Procedure for lodging and preliminary review of a cassation appeal:

time limits, requirements for a cassation appeal, preliminary actions.

3. Cassation review procedure.
4. The court of cassation powers to resolve cassation appeal (final decisions of the appeals review stage).
5. Referral of a case for hearing to a chamber, joint chamber of the Cassation Criminal Court, and to the Grand Chamber of the Supreme Court.

LEARNING MATERIAL

1. Cassation review stage: general overview, decisions that can be challenged, actors who have the right to file a complaint to the court of cassation instance.

Cassation review is the stage of criminal proceedings at which the decisions of a court of first and appellate instance can be reviewed by the court of cassation instance concerning their compliance with the requirements of criminal procedural legislation. Proceedings at this stage are regulated by the [Chapter 32](#) and corresponding provisions of the Law of Ukraine '[On Law on the Judiciary and the Status of Judges](#)' of 2016 (for instance, see Arts. 14, 37, 44, 45)⁵⁷. Cassation review proceedings are commonly regarded as the final stage at which a court decision could be reviewed, and the court of cassation instance is commonly referred to as the *court of last resort*⁵⁸, however it's not the case⁵⁹.

Despite the fact that the cassation review of criminal proceedings shall be held in the Cassation Court of the Supreme Court of Ukraine (Art. 31 Para. 5 of the CCP), in actuality there are four possible courts (court compositions) that can hear

⁵⁷ European Commission For Democracy Through Law (Venice Commission). On the organisation of courts and the status of judges (2016, amended 2020), Strasbourg, 10 September 2020, CDL- REF(2020)068, (Unofficial translation). URL: https://www.legislationline.org/download/id/8753/file/Ukraine_law_organisation_courts_status_judges_2016_am2020_en.pdf

⁵⁸ For example, see the United States Code, Title 34, Subtitle 34, Chapter 101, Subchapter VIII, § 10251(a)(16) / 34 USC § 10251(a)(16). URL: https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&defid=34-USC-1410044295-1194442144&term_occur=999&term_src=title:34:subtitle:I:chapter:101:subchapter:VIII:section:10251

⁵⁹ See [Chapter 34](#), and [Art. 460](#) of the CCP, in particular.

the case. Nonetheless, the general rule (Art. 31 Para. 5) establishes that cassation review proceedings shall be conducted by the **panel of three or any other odd number of judges**⁶⁰.

Under Art. 424 of the CCP the **following decisions could be challenged in the cassation review**:

1) a court of first instance's judgments after the review thereof in appeals procedure;

2) a court of first instance's rulings on application or refusal to apply compulsory medical or educational measures after the review thereof in appeals procedure;

3) decisions of a court of appellate instance passed in respect of the mentioned decisions of a court of first instance;

4) a court of first instance's rulings, after review thereof in appeals procedure, as well as a court of appellate instance's rulings if they hinder further criminal proceedings, except in cases specified by the CCP;

5) a court of first instance's judgement based on an agreement, after review thereof in appeals procedure, as well as a court decision of a court of appellate instance based on results of review of appellate complaint against such judgement.

Rulings that hinder further criminal proceedings include, for example, ruling to suspend criminal proceedings (Art. 335 of the CCP) or ruling of a court of appellate instance to dismiss an appellate complaint or not to open proceedings (Art. 399 Para. 6 of the CCP).

Below is the list of **persons** who may lodge a cassation appeal (**have a right to appeal in cassation**):

1) convicted person, his legal representative or defence counsel, as regards the convict's interests;

2) acquitted defendant, his legal representative or defence counsel, as regards the motives and grounds for acquittal;

3) suspect, accused person, their legal representative or defence counsel;

⁶⁰ Special cases are considered at the end of the theme.

4) legal representative, defence counsel of a minor person, or the minor himself/herself, in respect to whom the issue was disposed on application of compulsory educational measures, as regards the minor's interests;

5) legal representative or defence counsel of a person in respect to whom the issue was disposed on application of compulsory medical measures;

6) public prosecutor;

7) victim or his/her legal representative or representative, as regards the victim's interests, but within the scope of claims submitted by them in the court of first instance;

8) civil plaintiff, his/her representative or legal representative, to the extent related to the disposition of the civil action;

9) civil defendant or his/her representative, to the extent related to the disposition of the civil action;

10) representative of the legal person in whose respect proceedings are taken, to the extent relevant for the interests of the legal person.

2. Procedure for lodging and preliminary review of a cassation appeal: time limits, requirements for a cassation appeal, preliminary actions.

A cassation appeal shall be **filed directly to the court of cassation instance** within the **three months** from the date on which the decision of the court of appellate instance was pronounced, or if a convicted person were kept in custody, within the same time limits from the date of service of a copy of the court decision. However, it is possible to file a cassation appeal even if an applicant missed the time-limit, in case the applicant has accompanied the cassation appeal with a motion seeking the renewal of the time-limit⁶¹.

The **requirements that apply to a cassation appeal** are almost the same as they are for an appeal complaint and set forth in Art. 427 of the CCP. However, it should be highlighted that it is not allowed to attach a motion seeking examination of evidence to the cassation appeal since the court of cassation instance cannot resolve issues (questions) of fact.

⁶¹ See [Art. 117](#) Para. 2 of the CCP.

As in the case of review of an appeal complaint, the cassation appeal shall also undergo the same procedure. The court of cassation instance⁶² following the **review of the cassation complaint** on its compliance with the requirements of Art. 427 of the CCP as well as other provisions of Chapter 32 may take one of the **following decisions**:

- 1) ruling to open cassation proceedings;
- 2) ruling to leave a cassation appeal without motion;
- 3) ruling to dismiss cassation proceedings;
- 4) ruling to refuse to open cassation proceedings.

It should be stressed that unlike the decisions of a reporting judge in the appeal review stage, neither of these decisions could be challenged and are **deemed final**. The specific grounds for rendering each of these decisions could be found in Arts. 428 and 429 of the CCP.

Having opened cassation appeal proceedings the reporting judge within 10 days following the day the decision was made shall take the following actions:

- 1) sends copies of the ruling on the opening of cassation proceedings to participants to court proceedings along with copies of cassation appeals, information on their rights and duties, and sets time-limit for the **submission of objections**⁶³ to the cassation complaint;
- 2) demands and obtains materials of criminal proceedings;
- 3) decides on filed applications;
- 4) decides on the suspension of execution of the challenged court decisions;
- 5) decides other matters as necessary for cassation hearing.

3. Cassation review procedure.

The **cassation hearing (trial)** shall be conducted in accordance with the rules for appeal review hearing but taking into account the peculiarities of cassation appeal review. The cassation review is normally conducted without the participants,

⁶² The exact composition of the court is chosen by the Automated document management system of the court subject to requirements of the Art. 31 as well as Arts. 75 and 76 of the CCP.

⁶³ The procedure for lodging objections to cassation appeals is provided for in [Art. 431](#) of the CCP.

as failure to appear before a court of cassation instance does not hinder cassation hearing (Art. 434 Para. 4 of the CCP). Nonetheless the presence of the convicted person may be found mandatory by the court (Art. 430 Para. 4 of the CCP) as well as the cases when the presence of certain actors is required by the law⁶⁴.

The **procedure of cassation hearing** is governed by the requirements of the preliminary trial phase as outlined in Arts. 342-345 of the CCP, on completion of which the reporting judge announces the content of challenged decisions, cassation appeals and objections to them. After that, the parties and other participants in court proceedings produce their arguments, following which the judges retire to the deliberation room to pass a decision and announce it to the participants⁶⁵ according to rules specified in Arts. 368-380 of the CCP (Art. 441 Para. 4 of the CCP).

4. The court of cassation powers to resolve cassation appeal (final decisions of the appeals review stage).

The cassation appeal may be **resolved by** the court of cassation instance by **passing the following decisions**⁶⁶:

- 1) uphold the court decision;
- 2) quash the court decision and order a new trial (retrial) in the court of first or appellate instance;
- 3) quash the court decision and close criminal proceedings;
- 4) alter the court decision.

Art. 437 guarantees the **inadmissibility of impairment of a legal position of the acquitted and the accused** which prohibits the court from passing a harsher decision than either the court of first or appellate instance except for certain cases.

⁶⁴ In that case the cassation hearing shall be adjourned. For instance, in case of defence counsel's failure to appear, since under the [Art. 52](#) of the CCP their participation is mandatory. Also see Постанова Верховного Суду України від 23 листопада 2017 р. (Справа № 359/6489/13-к) // Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/70663910>

⁶⁵ In case participants of the cassation appeal review have applied for resolving the case in their absence a copy of the court decision is sent to participants within three days from the date of its signing (see [Art. 435](#) of the CCP).

⁶⁶ Notice that unlike the court of appellate instance the court of cassation instance cannot quash a decision and pass a judgement or a ruling on enforcement of compulsory measure of medical/educational character as the.

These cases are almost identical to those provided for appeal proceedings.

Art. 438 establishes the following list of **grounds** under which the court shall **quash or alter** the challenged **decision**: 8870

- 1) significant violations of the requirements of criminal procedure;
- 2) misapplication of the Law of Ukraine on criminal liability;
- 3) inconsistency of imposed punishment with the gravity of criminal offence and the personality of the accused.

Whether the grounds specified above are present, the court of cassation instance shall be guided by Arts. 412-414 of the CCP.

The court of cassation instance passes decisions in one of the following **forms**: 1) **ruling** - to resolve all procedural matters (concerning the adjournment and suspension of court proceedings); and 2) **order** (постанова) - to resolve the case (on the merits)⁶⁷.

5. Referral of a case for hearing to a chamber, joint chamber of the Cassation Criminal Court, and to the Grand Chamber of the Supreme Court.

As was mentioned in the beginning of the topic, there are **four options of the court that shall hear the case under the cassation appeal review procedure**. These include three possible compositions of judges of the Cassation Criminal Court, namely 1) panel of judges, 2) chamber, and 3) joint chamber; as well as the Grand Chamber of the Supreme Court.

The reason is that **the case may be referred**⁶⁸ from one 'court' to another under Art. 434¹ of the CCP as the judges of a court of cassation instance may come to a conclusion that 1) it is necessary to deviate from the conclusion on the application of rule of law in similar relations, which was set out in an earlier decision of the higher-level structural division of the Supreme Court (Paras. 1-4); 2)

⁶⁷ The contents of an order are provided for in [Art. 442](#) of the CCP. It shall contain, inter alia, reasons for dismissal of a cassation appeal, as well as what articles were breached and what these violations are (in case the challenged decision was quashed/alterred).

⁶⁸ For more on the topic, see N. Bobechko, A. Voinarovych, V. Fihurskyi 'Referring a case to the highest division of the Supreme Court in the criminal procedure legislation of Ukraine and European countries' 2021 1(9) Access to Justice in Eastern Europe 143- 165. DOI: 10.33327/AJEE-18-4.1-a000050. URL: http://ajee-journal.com/upload/attaches/att_1614524446.pdf

the case contains an exclusive legal problem and such a referral is necessary for the assurance of development of law and formation of uniform law enforcement practice (Para. 5).

The procedure of referring the case from one 'court' to another is outlined in Art. 434² of the CCP. The decision on referral of the case shall be taken by the court proprio motu or on a motion of participants in the form of a ruling by a majority of judges that hear the case. However, if the Grand Chamber of the Supreme Court finds no reasons to hear the case referred it may take a decision (in the form of a ruling) to return it to a chamber of the joint chamber of the Cassation Criminal Court.

On completion of cassation proceedings, materials of criminal proceedings are forwarded to the court of first instance within *seven days*, unless otherwise provided in the decision taken by the court of cassation instance (Art. 443 of the CCP).

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THEME 7. CRIMINAL PROCEEDINGS ON NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES

LEARNING OUTCOMES

The objective is to provide students with the knowledge on the procedure of reviewing final court decisions based on newly discovered and exceptional circumstances. It includes questions on the legal nature of such circumstances as well the procedure of such review.

QUESTIONS COVERED

1. The concept and general overview of proceedings on newly discovered and exceptional circumstances: courts that review decisions under newly discovered and exceptional circumstances.
2. Grounds for review of court decisions under newly discovered and exceptional circumstances.
3. Actors, time-limits and procedure for lodging applications seeking review of court decisions under newly discovered and exceptional circumstances.
4. The procedure of review of court decisions by a court under newly discovered and exceptional circumstances. Final decisions.

LEARNING MATERIALS

1. The concept and general overview of proceedings on newly discovered and exceptional circumstances: courts that review decisions under newly discovered and exceptional circumstances.

Criminal proceedings on newly discovered and exceptional circumstances is the stage of criminal proceedings at which court decisions that became final (entered into force) can be reviewed by a court. The proceedings on review of court decisions on newly discovered and exceptional circumstances are

regulated by Chapter 34 of the CCP. Moreover, the possibility of review of court decisions that became final upon newly discovered circumstances is guaranteed by a number of international treaties and charters, namely The Universal Declaration of Human Rights (Arts. 7, 8, 10); The International Covenant on Civil and Political Rights (Art. 16); ECHR (Art. 6) and Protocol No. 7 (Art. 4) thereto⁶⁹.

The concept of criminal proceedings on newly discovered (and exceptional) circumstances could be found in the decision of the Criminal Cassation Court of SC, when it was stated that from a systematic analysis of the content of Chapter 34 of the CCP and the general principles of criminal proceedings, it follows that criminal proceedings based on newly discovered circumstances are a form of review of court decisions that have become final (entered into legal force). In its content, this stage of the criminal procedure acts as a mechanism that complements the common measures to ensure the adoption of just court decisions in criminal proceedings. This type of proceeding has a subsidiary nature (reserve character) and is used only in cases where all other procedural remedies have been exhausted⁷⁰.

2. Grounds for review of court decisions under newly discovered and exceptional circumstances.

The Art. 459 of the CCP provides **two groups of circumstances** under which a court decision could be reviewed under the rules of this stage, namely:

1) newly discovered circumstances:

- a) artificial manufacture or falsification of evidence, incorrect translation, finding and explanations of expert, deliberately untrue testimonies

⁶⁹ It should be mentioned that any mechanism of reviewing court decisions should be in compliance with not only general rules of criminal proceedings but also observe the *res judicata* principle, which in turn constitutes a *legal certainty* requirement. As stated in Para. 46 of the [Report](#) adopted by the Venice Commission, *legal certainty requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. Legal certainty requires respect for the principle of res judicata. Final judgements by domestic courts should not be called into question. It also requires that final court judgments be enforced. Systems which allow for the quashing of final judgments without cogent reasons of public interest and for an indefinite period of time are incompatible with the principle of legal certainty.*

⁷⁰ Постанова Касаційного кримінального суду Верховного Суду від 09 жовтня 2018 року (Справа № 11-о/79615/2017) // Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/review/77088323>

of a witness, victim, the suspect, accused on which the judgement was based;

b) reversal of a court decision based on which the judgement or ruling to be reviewed were made;

c) other circumstances which were not known to the court at the time of trial when the court decision was passed and which, per se or together with previously discovered circumstances, prove incorrectness of the judgement or ruling subject to review.

2) **exceptional circumstances:**

a) if the Constitutional Court of Ukraine ruled the law, other legal act or certain provision thereof which was applied by court unconstitutional;

b) an international judicial body, which jurisdiction is recognised by Ukraine, has found a violation of Ukraine's commitments that was made by a court in resolving the case in question;

c) a judge was found guilty in commission of a criminal offence or it was found that a prosecutor, an investigator, an investigative judge, or a court committed abuses due to which the decision in question was rendered. The article also consists of paras. 4 and 5 that establish that exceptional circumstances (under 2 (c)) shall be established by a court judgement which has taken legal effect, and where it is not possible to pass a judgement, such circumstances shall be established by a pre-trial body or investigative judge decision to close criminal proceedings, ruling to impose compulsory medical measures.

3. Actors, time-limits and procedure for lodging applications seeking review of court decisions under newly discovered and exceptional circumstances.

An application to review a court decision on newly discovered and exceptional circumstances could be lodged by **participants of court proceedings**⁷¹ within a given **time-limits** which depend on what circumstances the

⁷¹To remind, the concept of **participants of court proceedings** is defined in [Art. 3](#) Para. 1 (26) of the CPP where these are the parties to criminal proceedings, a victim, a civil plaintiff, a civil defendant, their representative and legal representative, a representative of the legal person in whose respect the proceedings are taken, a representative of probation service, third person as to whose property the issue of property seizure is considered, as well as other on whose request or

request is based.

So, for **newly discovered circumstances** the base time-limit is **three months** which 1) may be extended up to the term during which the person may be held criminally liable in case the aim of review is to quash the judgement of acquittal or impose harsher punishment or 2) not be limited in time in case of presence of circumstances which prove a person is either not guilty or committed a less grave offence.

For **exceptional circumstances** the **time-limit is 30 days** regardless of the type of the circumstances.

Art. 462 of the CCP provides the list of **requirements to the application** to review court decision on newly discovered and exceptional circumstances which are standard for applications to review a court decision except for certain parts (for instance, it should include circumstances which allegedly could affect the challenged court decision or facts that prove the existence of newly discovered or exceptional circumstances).

Depending on the circumstances the **application may be lodged** to one of the following courts:

1) to the court which was the **first to commit mistake** as a result of not being aware of the existence of these circumstances;

2) to **the court** of the instance **where the judge was working** and who committed an offence due to which the decision in question was rendered;

3) to **the Grand Chamber of the Supreme Court** in case an international judicial body, which jurisdiction is recognized by Ukraine, has found a violation of Ukraine's commitments that was made by a court in resolving the case in question.

4. The procedure of review of court decisions by a court under newly discovered and exceptional circumstances. Final decisions.

Not later than the following day, a judge, upon the receipt of the application,

complaint, where the CCP so provides, court proceedings are held. The same article also outlines a broader concept of **participants of criminal proceedings** that does include the former but they are not equal.

shall verify whether or not the requirements of Art. 462 of the CCP are met and takes a decision to open proceedings. In case of failure, the rules of Art. 429 Para. 3 of the CCP shall be applied. A copy of ruling shall be immediately sent to the applicant, together with the application to review court decision and all materials attached thereto.

The proceedings should be ended within the **two-month time-limit** from the day of receipt and considered in accordance with rules which apply to a court that shall conduct the review. Participants in court proceedings shall be informed of the date, time and place where the request will be reviewed. Failure of individuals who have been duly informed, to appear in court session does not preclude consideration of the request to review court decision. The court may refrain from examining evidence regarding circumstances which were established in a court decision being reviewed upon discovery of new circumstances, if such are not challenged.

Having examined the application and all evidence necessary, the court may take **one of the following decisions**:

- 1) quash a judgement or a ruling and render a new judgement or ruling;
- 2) leave the application without consideration;
- 3) in case of the Grand Chamber of the Supreme Court it may also quash the decision in question fully or in part and order a new trial (retrial) in the court of first or appellate instance.

The decisions taken as a result of the review may be challenged under the rules of regulating the criminal procedure of the court of the respective instance.

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THEME 8. SPECIAL PROCEDURES

LEARNING OUTCOMES

The objective is to provide students with the overview of core special procedures used provided for in CCP and demonstrate not only the procedure but how these procedures achieve objectives of criminal proceedings under specific circumstances of a case.

QUESTIONS COVERED

1. Criminal proceedings based on agreements.
2. Private criminal proceedings.
3. Criminal proceedings against (in respect of) minors (underage persons).
4. Criminal proceedings on enforcement of compulsory measures of medical character.

LEARNING MATERIALS

1. Criminal proceedings based on agreements.

Criminal proceedings based on agreements is a special form of criminal proceedings the procedure of which laid down in Chapter 35 of the CCP⁷².

According to Art. 468 of the CCP there are **two types of agreements** that could reached in the course of criminal proceedings, namely

- 1) reconciliation agreement (between a victim and a suspect (defendant));
- 2) plea agreement (between the prosecutor and a suspect (defendant));

A suspect (defendant) may enter into a **reconciliation agreement** with a victim only in case he/she is prosecuted for commission of a criminal offence in the form of a criminal misdemeanour, non-grave crime and in private criminal proceedings. The initiative may come from both sides of an agreement though in

⁷² Also see Постанова ВССУ “Про практику здійснення судами кримінального провадження на підставі угод” від 11.12.2015 № 13 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/v0013740-15>

case a suspect (defendant) is suspected in (charged with) **domestic violence**, the agreement may be initiated only by a victim, its (legal) representative.

It is prohibited to reach an agreement with a representative of a legal entity (Art. 469 Para. 3 of the CCP).

In case there are **several victims** the agreement shall be reached with all victims (in case of commission of one criminal offence) and could be reached with certain victims (in case there are several criminal offences committed). In case there are **several suspects (defendants)** an agreement may be reached with few of them where the materials of criminal proceedings in respect of these individuals shall be disjoined from the criminal case (Art. 469 Para. 8 of the CCP)⁷³.

The plea agreement can be reached between a suspect (defendant) and a prosecutor in case the former is suspected in (charged with) a criminal offence in the form of criminal misdemeanour, non-grave and grave crime. However, it is possible to enter into agreement in case of commission **especially grave crime subject to the following requirements**:

1) in cases that conducted under the jurisdiction of NABU⁷⁴ provided the person in question has revealed its accomplices and that information has been confirmed by evidence;

2) in case of commission of a crime by a group of persons with conspiracy, an organized group or a criminal organization or a terrorist group if the person in question is not the organizer of such a group or organization and has revealed the criminal actions of other members of the group, provided the information given has been confirmed by evidence.

The additional requirement for reaching a plea agreement is that the harm, as a result of commission of the criminal offence in question, shall be caused only to state or public interest, i.e., there are no victims. Nevertheless, it may be secured, provided a prosecutor has received written consent of all victims (Art. 469 Para. 4

⁷³ See Постанова ВССУ “Про практику здійснення судами кримінального провадження на підставі угод” від 11.12.2015 № 13 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/v0013740-15>

⁷⁴ See [Art. 214](#) Para. 5 of the CCP.

of the CCP).

The Art. 470 of the CCP provides the following **circumstances that shall be weighed by a prosecutor** in case of entering a plea agreement, namely:

- 1) degree and nature of cooperation on the part of the suspect or the accused in conducting criminal proceedings regarding him or other persons;
- 2) nature and severity of the charges brought (suspicion);
- 3) availability of public interest in ensuring a faster pre-trial proceedings and trial, and detection of more criminal offences;
- 4) availability of public interest in prevention, detection and termination of more criminal offences or other more serious criminal offences.

Both agreements could be initiated by participants concerned at any time in the course of both **pre-trial and court proceedings**. However, in case of court proceedings, the agreement may be initiated before the retirement of judges to the deliberation room (Art. 469 Para. 5 of the CCP).

The content of the both agreements is set forth in Arts. 471 and 472.

The general procedure for criminal proceedings on agreements laid down in Art. 474 provides certain modifications to both pre-trial and court proceedings.

If an **agreement was reached in the course of pre-trial proceedings** the indictment together with the agreement signed by the parties to it shall be referred to court without delay. The public prosecutor shall have the right to postpone referral of the indictment together with the agreement signed by the parties to it to court until the receipt of the expert's findings or completion of other investigation actions required to collect and fix evidence which can be lost in the course of time or which will be impossible to conduct/perform later without significant detriment to their results in case the court refuses to approve the agreement.

On receipt of the agreement (along with the indictment and any additional documents thereto that are set forth in Art. 291 Para. 4 of the CCP) it shall be examined by the court during preliminary (preparatory) court proceedings with compulsory participation of the parties thereto and notification of other participants in court proceedings, where the absence of other participants in court proceedings

shall not preclude such examination.

If an **agreement was reached in the course of court proceedings** the court shall immediately suspend the conduct of procedural actions and start examination of the agreement.

Prior to taking the decision on approval of the **plea agreement**, the court, during court session, must find out whether the defendant understands clearly enough the following:

1) that he has the right to a fair trial during which the public prosecutor shall be required to prove beyond any reasonable doubt each circumstance in respect of the criminal offence of which he is accused, and that he has the following rights:

- a) keep silence, and the fact of keeping silence will not have any probative value for court;
- b) be represented by the defence counsel, including getting legal assistance free of charge in accordance with the procedure and in the cases stipulated by law, or conduct his/her own defence;
- c) examine, during trial, witnesses for the prosecution, file motions to summon witnesses, and produce evidence in his favour;

2) implications of the conclusion and approval of agreements;

3) nature of each charge in relation to which the accused pleads guilty;

4) type of punishment and other measures/actions which will be enforced against him if the court approves the agreement.

Prior to taking the decision on approval of the **reconciliation agreement**, the court, during court session, must find out whether the defendant understands clearly enough the following:

1) that he has the right to a fair trial during which the prosecution shall be required to prove beyond any reasonable doubt each circumstance in respect of the criminal offence of which he is accused, and that he has the following rights:

- a) keep silence, and the fact of keeping silence will not have any probative value for court;
- b) be represented by the defence counsel, including getting legal

assistance free of charge in accordance with the procedure and in the cases stipulated by law, or conduct his own defence;

c) examine, during trial, witnesses for the prosecution, file motions to summon witnesses, and produce evidence in his favour;

2) implications of the conclusion and approval of agreements;

3) nature of each charge;

4) type of punishment and other measures/actions which will be enforced against him if the court approves the agreement.

Besides, prior to taking the decision on approval of the reconciliation agreement, the court, during the court session, must find out whether the **victim** understands clearly enough the implications of approval of the agreement.

Be it preliminary (preparatory) court session or trial the court shall examine the agreement reached by participants concerned on whether it complies with the requirements of the CCP and other laws. Following the examination, the court shall either approve or refuse to approve it.

The court shall refuse to approve the agreement if any of the following **conditions are present**:

1) the terms and conditions of the agreement contradict the requirements of the CCP and/or other laws, including wrong legal determination of the nature of criminal offence which is more severe than the one in respect of which the possibility of conclusion of the agreement is provided for;

2) the terms and conditions of the agreement do not substantially correspond to the public interests;

3) the terms and conditions of the agreement violate the rights, freedoms or interests of the parties to the agreement or other persons;

4) there are solid grounds to believe that the agreement was not concluded voluntarily or the parties have not reconciled⁷⁵;

⁷⁵ In order to ascertain voluntariness of the agreement the court may, where necessary, request documents, including any complaints of the suspect or the accused, filed by them during criminal proceedings and decisions taken as a result of their consideration, as well as summon and interview persons in court ([Art. 474](#) Para. 6 of the CCP).

5) it is obvious that the accused cannot fulfil the obligations assumed under the agreement;

6) there is no factual evidence to establish guilt⁷⁶.

If court finds that the agreement in question violates requirements of the CCP and any other law, it shall refuse to approve it and takes the **following decisions**:

1) in case the agreement was examined at the preliminary (preparatory) court session:

a) to refer back the materials of criminal proceedings to the prosecutor to conduct the pre-trial proceedings on general grounds, provided the agreement was reached at the pre-trial proceedings stage;

b) to set a date of trial in case, provided the agreement was reached during preliminary (preparatory) court session and a prosecutor lodged a motion in which it is stated that there is no need to continue pre-trial proceedings as a result of its factual completion.

2) in case the agreement was examined at trial:

a) to continue the hearing of the case under the general procedure.

In case there is no grounds to refuse the approval, the court shall **approve the agreement and pass a judgement of conviction**⁷⁷. The decision shall comply with the general requirements for judgements and with specific ones, which include, inter alia, information about the concluded agreement, its details, content and the imposed punishment; decision on imposition of the punitive measures agreed between the parties for each of the charges and the final punishment. When imposing a sentence, the court may utilise the provisions of the General Part of the CC (and parties may negotiate such terms in an agreement)⁷⁸.

⁷⁶ Due to this requirement the court during the preliminary court session may request materials of pre-trial proceedings for examination. See, for example, "Узагальнення судової." практики здійснення кримінального провадження на підставі угод. URL: https://zib.com.ua/ua/print/92557-uzagalnennya_vssu_sudovoi_praktiki_zdiysnennya_kriminalnogo.html.

⁷⁷ It is not possible to reach an agreement on enforcement of compulsory educational/medical measures. In this case the court shall refuse to approve the agreement.

⁷⁸ Parties may seek imposition of a punishment milder than prescribed by a sanction of an article

In case a party to the approved agreement **fails to comply** with its terms, a victim or a prosecutor has a right to file a motion seeking to revoke the decision made to the court that approved the agreement. The motion may be lodged within the statutory period of limitations established for making the person criminally liable for perpetration of the corresponding criminal offence. Such motion shall be considered by the court in the court session in the presence of the participants, though their absence does not hinder the hearing.

In case the motion was granted and the **decision in question was revoked**, it shall either set a date of a court hearing under the general rules governing trial in case the agreement was reached during court proceedings, or refer the materials to the prosecutor to conduct pre-trial proceedings, provided the agreement was reached at the stage of pre-trial proceedings.

The decision made as a result of consideration of a motion seeking revoke of a judgement **may be challenged under appeal review procedure**.

2. Private criminal proceedings.

Private criminal proceedings is the form of criminal proceedings which may be initiated by an investigator, public prosecutor only based on the victim's application in respect of criminal offences established in cases provided for in Art. 477 Para. 1 of the CCP. This form of criminal proceedings is regulated mainly by Chapter 36 of the CCP.

The private criminal proceedings has the following features:

- 1) may be initiated only on the application of a victim (Art. 477 Para. 1 of the CCP);
- 2) such application may be lodged within the periods of limitation for prosecution for the commission of the criminal offence concerned (Art. 478 of the CCP);

of within the Special Part of the CC, for instance in the presence of several circumstances mitigating the punishment as well as other circumstances a court may impose a primary punishment lower than the lowest threshold prescribed by the sanction or change to another, milder type of primary punishment, which is not prescribed by the sanction (See [Art. 69](#) of the CC). For more details, see [Chapter XI](#) of the CC.

3) dropping charges by a victim, their representative in cases specified in the CCP is the unconditional ground for closing criminal proceedings (Art. 26 Para. 4, Art. 284 Para. 1(7) of the CCP).

As to the procedure of private criminal proceedings, after the submission of application on commission of a criminal offence pre-trial proceedings are conducted under the general rules. The same applies to court proceedings as the fact that criminal proceedings are conducted under the provisions of Chapter 36 does not rule out participation of a prosecutor⁷⁹.

However, there is one additional 'form' of private criminal proceedings that could occur in case a prosecutor drops charges in the course of a court hearing as set out in [Art. 340](#) of the CCP. According to the article, given the situation described above, the presiding judge shall ask a victim whether he/she wants to press the charges against a defendant and in case of a positive answer the criminal proceedings shall be conducted under the rules of private criminal proceedings, where the victim enjoys all the rights of the prosecution party in trial (Art. 340 Paras. 4 and 5).

3. Criminal proceedings against (in respect of) minors (underage persons).

Criminal proceedings in respect of minors (juveniles) is the special form of criminal proceedings the rules of which are mostly laid out in Chapter 38 of the CCP with various features spread among different chapters of the CCP (which will be shown later) and in other laws⁸⁰; there is also an informative letter of the High Specialised Court of Ukraine⁸¹.

⁷⁹ For more details see Постанова Великої Палати Верховного Суду від 26 червня 2019 року (Справа № 404/6160/16-к). URL: <https://reyestr.court.gov.ua/Review/82885531>

⁸⁰ See, for instance, the Law of Ukraine 'On National Police' (Art. 23) URL: <https://zakon.rada.gov.ua/laws/show/580-19>;

the Law of Ukraine On the Judiciary and the Status of Judges : Law of Ukraine on June 2, 2016 № 1402-VIII // Database «Legislation of Ukraine» / Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/go/1402-19>

⁸¹ Лист ВССУ 'Про практику здійснення судами кримінального провадження щодо неповнолітніх' 16.01.2017 № 223-66/0/4-17 // Закон і Бізнес. URL: <https://zib.com.ua/ua/print/127476-list-vssu-vid-16012017-223-6604-17-pro-praktiku-zdiysnennya.html>

The Chapter 38 of the CCP established the following two forms of criminal proceedings in respect of minors (juveniles):

- 1) criminal proceedings in respect of individuals who committed criminal offence at the age under the 18;
- 2) criminal proceedings in respect of individuals who committed a *socially dangerous act*⁸² at the age between 11 and the age of criminal responsibility.

Each form has its common and distinct features. However, we will go through the specific requirements of criminal proceedings in respect of minors (juveniles) and underline the differences of the above-mentioned forms where necessary.

General requirements that set additional procedural guarantees for a minor who is prosecuted within the criminal proceedings.

The circumstances to be established in criminal proceedings in respect of minors (juveniles) are set forth in Arts. 91 and 485 where the latter is the list of circumstances that are specific to this form of criminal proceedings and complement the former. It includes,

- 1) full and comprehensive information on the personality of the underage person concerned: his age (date, month and year of birth), state of health and level of development, other social and psychological personal traits which should be taken into account when individualising his liability or imposing a measure of restraint of educational nature. Where information is available on the underage person's mental deficiency not related to a mental disease, it should also be ascertained whether he was capable to be fully aware of the meaning of his actions, and to what he was capable to be in control of his actions;
- 2) the underage person's attitude towards his actions;
- 3) environment in which the underage lives and is brought up;
- 4) existence of adult instigators and other accomplices in a criminal offence.

⁸² As the person is normally subject to criminal responsibility from the age of 16, it technically cannot commit criminal offences (according to the [Art. 18](#) Para. 1 of the CC). However, the minor still shall be held liable for commission of 'socially dangerous act' by enforcing a preventive measure of educational character to him/her (see Arts. [97](#) and [105](#) of the CC).

The next one requires the **participation** of additional actors or imposes additional requirements to them. For instance, a minor suspect shall be **represented by a defence counsel** upon establishing that the person concerned is an underage or when in any doubt as to his/her majority (Art. 52 Para. 2(1) of the CCP)⁸³. Moreover, the participation of parents or other **legal representatives** is obligatory as outlined in Art. 488 of the CCP.

The other one prohibits the application of **preventive measures** in the form of custody (*send to a children's placement centre*⁸⁴) as well as apprehension (arrest) of a minor (juvenile) except for the minor is prosecuted for commission of grave or especially grave crime (Art. 492 of the CCP). Furthermore, in addition to preventive measures laid out in Art. 176 of the CCP it is also possible to enforce a preventive measure in the form of committing a minor (juvenile) suspect or defendant to supervision. The supervision may be carried out by parents, custodians, caretakers, and in respect of minors (juveniles) brought up in a children care institution, by that institution's administration (Art. 493 of the CCP).

In case of **questioning** of a minor (juvenile) that has not attained the age of 16, the participation of **a pedagogue, psychologist or a medical practitioner** is required (Art. 491 of CCP).

The last one is the rule that establishes that in a case when the participation of a minor (juvenile) is required for either a questioning or other procedural action, a summon shall be served to a minor's (juvenile's) parents or other legal representative (Arts. 489 and Art. 135 Para. 4 of the CCP).

Stage-specific⁸⁵ **requirements** are divided into two groups, namely those applied at 1) pre-trial proceedings, or 2) court proceedings.

Pre-trial proceedings, first of all, shall be conducted by an **investigator** who is specifically **authorised** by the head of a pre-trial investigation agency to conduct pre-trial investigations against underage persons (Art. 484 of the CCP).

⁸³ Which in fact applies both to pre-trial and court proceedings.

⁸⁴ For minors that meet the requirement outlined in [Art. 498](#) and [Art. 499](#) Para. 4 of the CCP. Duration of the preventive measure is limited to 30 days, though it may be extended.

⁸⁵ Rather part-specific requirements that implies two parts of criminal proceedings, namely pre-trial and court proceedings (see [Art. 3](#) Para. 1(10) of the CCP).

Secondly, if a minor (juvenile) is suspected of having committed a criminal offence together with an adult, the possibility of **disjoining** proceedings in respect of the minor (juvenile) shall be deliberated during pre-trial investigation (Art. 494 of the CCP). However, materials of pre-trial proceedings may not be disjoint if it can have adverse effects on the completeness of pre-trial proceedings and trial (Art. 217 Para. 4 of the CCP).

The next one, is the requirement concerning the duration of questioning, which shall last no more than an hour with a necessary break following it. The overall duration of the questioning shall be limited to 2 hours (Art. 226 of the CCP).

Lastly, in case of a criminal offence committed by a minor who hasn't reached the age of criminal responsibility, the prosecutor after completion of pre-trial proceedings shall issue a **motion seeking enforcement of a compulsory measure of educational character** (Art. 292 Para. 1 and Art. 499 Para. 5 of the CCP). In case the minor (juvenile) in question has reached the age of criminal responsibility but satisfies the conditions specified in Art. 105 Para. 1 or Art. 97 Para. 1 of the CC the prosecutor shall also issue a motion seeking enforcement of a compulsory measure of educational character, provided the minor (juvenile) and/or his/her legal representative does not object thereto (Art. 497 Paras. 1 and 2 of the CCP).

Court proceedings requirements include, first of all, the special court composition that shall hear the case in respect of minor (juvenile), particularly by a **judge that is authorised** to hear such cases by a decision of the assembly of judges of the court (Art. 31 Para. 14 of the CCP and [Art. 18](#) of the Law of Ukraine 'On Law on the Judiciary and the Status of Judges' of 2016). In case the minor (juvenile) is charged with a criminal offence that shall be heard by the panel of judges or a court of jury⁸⁶ only the **presiding judge** shall satisfy the aforementioned conditions.

Secondly, in case of criminal proceedings in respect of minors (juveniles), a

⁸⁶ Although the life-imprisonment cannot be imposed on a minor (juvenile) defendant (see [Art. 64](#) Para. 2 of the CC), the wording of the Art. 31 Para. 3 of the CCP of Ukraine suggests that such individuals are also entitled to be tried by a court of jury. For more details see [Лист ВССУ 'Про практику здійснення судами кримінального провадження щодо неповнолітніх' 16.01.2017 № 223-66/0/4-17.](#)

court shall notify the appropriate representatives of juvenile police departments who can participate in court proceedings by asking questions and expressing their opinions about the most appropriate measures to be applied to a minor (juvenile) defendant (Arts. 496 and 500 Para. 1 of the CCP)⁸⁷.

The next one is that under provisions of Art. 27 Para. 2 of the CCP, the criminal proceedings where the defendant is a minor (juvenile), a court or an investigative judge may take a decision **to hear the case in camera** for either the entire court proceedings or in any part of it.

Yet another feature is that a minor (juvenile) defendant may be **temporarily removed** from the courtroom upon the decision of a court, having weighed opinions of a prosecutor, defence counsel, and the legal representative of the defendant, provided ascertainment of certain circumstances may adversely affect the defendant concerned (Art. 495 of the CCP).

Having received the case against a minor (juvenile) that reached the age of 14⁸⁸, a court during a preliminary (preparatory) court session shall order a probation officer to prepare a **pre-trial report** that shall be taken into account by the court when addressing the questions outlined in the Art. 368 of the CCP (Art. 314 Para. 3 and Art. 314¹ of the CCP).

The other distinction of the court proceedings in respect of minors (juveniles) is that in case a motion seeking **enforcement of a compulsory measure of educational measure** was lodged by a prosecutor, a court during trial may either

- 1) grant it and pass a ruling to enforce a compulsory measure of educational character, or
- 2) reject it and pass a ruling to reject enforcing a compulsory measure of

⁸⁷ For more details see Про затвердження Інструкції з організації роботи підрозділів ювенальної превенції Національної поліції України : Наказ МВС України від 19.12.2017 № 1044 // База даних «Законодавство України» / Верховна Рада України. URL: <https://zakon.rada.gov.ua/go/z0686-18>.

⁸⁸ However, there is a list of exemptions (Art. 314¹ Para. 4 of the CCP) which stems from the fact that a pre-trial report is designed to 'assist' a judge in question on imposition of punishment which cannot be applied to minors that hasn't attained the age of criminal responsibility or in case a motion to enforce a compulsory measure of educational measure was referred to a court by a prosecutor.

educational character and close criminal proceedings (Art. 497 Para. 3 and Art. 501 of the CCP).

In deciding whether the motion shall be granted and a measure to be enforced the court shall **address the following issues** (in addition to those outlined in Arts. 91 and 485 of the CCP):

- 1) whether a socially dangerous action has really occurred;
- 2) whether such action was committed by the underage concerned in the age from eleven till the age of criminal responsibility for this act;
- 3) whether it is necessary to impose a compulsory educational measure and, if so, which measure exactly⁸⁹.

4. Criminal proceedings on enforcement of compulsory measures of medical character.

Criminal proceedings on enforcement of compulsory measures of medical character are regulated by Chapter 39 of the CCP and [Chapter XIV](#) of the CC. Latter outline the general provisions on application of compulsory medical measures.

According to [Art. 92](#) of the CC **compulsory medical measures** shall mean an outpatient psychiatric assistance, placement of a person, who committed a socially dangerous act that involves elements of any act described in the Special Part of the Code, in a special treatment institution for the purpose of his/her compulsory treatment, and also prevention of this person from committing any socially dangerous acts⁹⁰.

Thus, the **compulsory medical measures (CMM)** are not a form or type of punishment which stems from the fact the Arts. 11 and 18 of the CC which hold that a criminal offence, inter alia, is an act committed by an actor of a crime (offender), i.e., a **sane person**.

So, under Art. 503 of the CCP CMM are applied only to **two categories of**

⁸⁹ The list of compulsory measures of educational character is provided for in [Art. 105](#) Para. 2 of the CC.

⁹⁰ The Code also provides the list of compulsory medical measures which is set out in [Article 94](#).

people⁹¹:

1) a person committed a socially dangerous act provided for the by the law

of Ukraine on criminal liability in the state of insanity;

2) a person committed a criminal offence in the state of sanity but fell mentally ill before the passing of judgement.

Article 503 in Para. 2 commands that in case there are grounds⁹² for conducting criminal proceedings in respect of the imposition of CMM in the course of pre-trial investigation, the investigator, inquirer, public prosecutor, shall issue a resolution to change the procedure of pre-trial investigation and shall continue it under the rules provided for by the Chapter 39 of the CCP. Therefore, the *same mechanism* that is present in criminal proceedings against minors (juveniles) applies to criminal proceedings on application of CMM, namely that any criminal proceedings shall be instituted under general rules and later, if necessary (circumstances present), the criminal proceedings shall be proceeded under different rules.

So again, as in the previous part, we will go through the specific requirements of criminal proceedings on enforcement of CMM by, first, mentioning the **general rules** of such proceedings and move on to **stage- or part-specific ones**.

General requirements that set additional procedural guarantees for a person against which the question on application of CMM is raised.

Psychiatric examination⁹³. As was said earlier in case a person suffers from

⁹¹ It shall be noted that the CC also establishes the third category of people to which CMM could be applied, particularly a person who committed a criminal offence in the condition of **partial insanity**. However, the condition of partial insanity does not prevent per se the imposition of a punishment but only provides a court only with a possibility to apply one of the CMM if it finds necessary (See [Art. 504](#) of the CCP).

⁹² Such grounds include, inter alia: 1) mental disorder or mental disease of the person as certified by a medical document; 2) inadequacy of the person's behaviour at the time or after committing of the socially dangerous act (disturbance of consciousness, dysfunction of perception, thinking, will, emotions, intellect or memory, etc.). See [Art. 509](#) Para. 1 of the CCP.

⁹³ The general rules regarding conduction of expertise are outlined in [Arst. 242-244](#) of the CCP and specialized laws and instructions, for instance see ЗУ “[Про судову експертизу](#)” № 4038 від 25.02.1994; [Інструкція про призначення та проведення судових експертиз та експертних](#)

mental diseases/ disorder or there are grounds to believe that it is the Art. 509 Para.1 of the CCP commands the requirement to involve an expert (experts) to carry out a psychiatric examination of the person. The examination may be either outpatient or in-hospital depending on the place of examination where first is preferred one. The latter is conducted in case the prolonged observation (examination) of a person is necessary.

The issue of placing the person in a medical institution for carrying out psychiatric expert examination shall be disposed at the time of pre-trial investigation by the investigating judge's ruling upon motion of a party to criminal proceedings, in a procedure laid down for submission and consideration of motions to enforce a measure of restraint, and during court proceedings, by a ruling of the court (Art. 509 Para. 2 of the CCP). In case a person refuses to undergo the psychiatric examination, it may be forced to by a ruling of an investigative judge or a court under Art. 242 Para. 3 of the CCP⁹⁴.

It should be pointed out that the **results** of the psychiatric examination **are not binding** for a court or pre-trial proceedings body though any disagreement with an expert's findings must be reasoned in the relevant decision, ruling or judgement⁹⁵.

Circumstances that shall be established are outlined in Article 505 of the CPP which provides the following list:

- 1) time, place, means, and other circumstances of the commission of a socially dangerous act or criminal offence;
- 2) commission of this socially dangerous act or criminal offence by the person concerned;
- 3) existence of this person's mental disorder in the past, degree and nature of mental disorder or mental disease at the time of commission of the socially

досліджень.

⁹⁴ The more detailed information on the procedure of conducting psychiatric examination could be found in '[Порядок проведення судово-психіатричної експертизи](#)' (Про затвердження Порядку проведення судово-психіатричної експертизи : Наказ МОЗ України від 08.05.2018 № 865).

⁹⁵ See [Art. 94](#) and [Art. 101](#) Para. 10 as well as [Art. 332](#) of the CCP.

dangerous act or criminal offence, or at the time of pre-trial investigation;

4) behaviour of the person both before and after the commission of the socially dangerous act or criminal offence;

5) the danger which the person presents is in consequence of his mental state, for himself/herself and for other persons, as well as the likelihood of such person causing other serious damage;

6) nature and amount of damage caused by the socially dangerous act or criminal offence;

7) the circumstances proving that the money, valuables and other property subject to special confiscation have been gained as a result of a social dangerous act or criminal violation and/or are the proceeds of such property or have been intended (used) for a person to commit a socially dangerous act or criminal violation, financing and/or supporting materially a socially dangerous act or criminal violation, related inter alia to their illicit trafficking, or have been sought, made, modified or used as a means or instrument of commission of a socially dangerous act or criminal violation⁹⁶.

According to Art. 506 of the CCP the **person in whose respect the criminal proceedings on application of CMM are conducted**⁹⁷ enjoys the rights of the suspect and the accused in the scope which is determined by the nature of mental disorder or mental disease as established in accordance with findings of forensic psychiatric examination, and shall realise such rights through a legal representative, defence counsel. As to defence counsel, the participation of the latter is mandatory under the Art. 507 as well as Art. 52 Para. 2 (5) of the CCP. The person shall be represented by a defence counsel upon establishing the fact of mental disorder or other circumstances that questions the person's sanity.

Due to the specific state of a person the CCP prohibits the application of 'general' preventive measures (i.e., provided for by Art. 176 Para. 1 of the CCP) and

⁹⁶ The abovementioned list recalls another list of circumstances to be established that is enshrined in [Art. 91](#) of the CCP.

⁹⁷ That is the 'full name' of this actor that should not be confused with a suspect or accused person as the latter are persons that are prosecuted with the commission of a criminal offence. Basically it is the same situation as with the minor (juvenile).

outlines the list of **special preventive measures** that could be used. These include:

- 1) commitment for care to custodians, close relatives or family members, under mandatory medical supervision;
- 2) placement in a psychiatric institution under the regime which excludes their dangerous behaviour.

However, the imposition of the measures is subject to general requirements on application of preventive measures set out in [Chapter 18](#) of the CCP.

Stage-specific requirements are divided into two groups, namely those applied at 1) pre-trial proceedings, and 2) court proceedings.

Pre-trial proceedings on application of CMM are governed by general rules that regulate this stage of criminal proceedings with certain exceptions that have already been covered in the general-requirements section (defence counsel, preventive measures, psychiatric examination etc.). However, the final phase of pre-trial proceedings is different in this case. Under Arts. 511 and 283 of the CCP pre-trial proceedings shall be completed with either a decision to close criminal proceedings or a motion to apply CMM.

In case of a motion, in parallel with the referring it to a court, the prosecutor shall send, against acknowledgement of receipt, their copy and a copy of the register of pre-trial proceedings records to the defence counsel of a person subject to compulsory medical or educational measures (Art. 293 Para. 1 of the CCP).

Court proceedings requirements provided for in this Chapter of the CPP mainly refer to the **trial** stage which, firstly, include the **special court composition**. Under Art. 512 Para. 1 of the CCP trial shall be conducted by a sole judge with the mandatory participation of the person in whose respect the CMM could be applied. Unlike the criminal proceedings against minors (juveniles) the trial by jury is impossible.

The following requirement is that the **trial** shall **end** with the adoption of one of the following **decisions**:

- 1) a ruling to impose CMM;
- 2) a ruling to refuse to impose CMM;

3) a ruling to close criminal proceedings.

The ruling to impose CMM is delivered by a court in case it is found that the person concerned has committed the socially dangerous action in a state of insanity or after commission of criminal offence, fell ill with a mental disease which precludes imposition of punishment. And the following facts and circumstances must be established during the trial:

1) whether a socially dangerous action, criminal offence was committed;

2) whether such socially dangerous action, criminal offence was committed by the person concerned;

3) whether the person committed the socially dangerous action, criminal offence in a state of insanity;

4) whether after commission of criminal offence, the person fell ill with a mental disease which precludes imposition of punishment;

5) whether it is necessary to apply compulsory medical measures to the person, and if so, which ones exactly.

The ruling to refuse to impose CMM is taken in case a court found that the socially dangerous action, criminal offence was not committed or was committed by another person, as well as that it was not proved that the person concerned has committed the socially dangerous action, criminal offence. Under these circumstances the court shall also close the criminal proceedings (Art. 513 Para. 3 of the CCP).

And finally, **the ruling to close criminal proceedings** is passed in case it is established that the socially dangerous action has been committed by the person in a state of insanity who at the moment of trial, has recovered or, as a result of changes in his state of health, applying compulsory medical measures is no longer needed (Art. 513 Para. 4).

The court may also close criminal proceedings regarding application of compulsory medical measures, if insanity of the person at the moment of commission of the socially dangerous action has not been established, as well as in case the person fell ill with mental disease after the commission of criminal offence.

In this case, after the court closes criminal proceedings regarding application of compulsory medical measures, a public prosecutor shall be required to commence criminal proceedings in general procedure (Art. 513 Para. 5).

The Code also provides the mechanism for extension, change or termination of a CMM in Art. 514 which falls into **execution of court decision stage** ([Section VIH](#) of the CCP).

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SEMINAR PROGRAMME

THEME 1. PRE-TRIAL PROCEEDINGS. PART 1

1. The notion and structure (system) of pre-trial proceedings. General rules of pre-trial proceedings (institution of criminal proceedings, time limits of pre-trial proceedings, jurisdiction of pre-trial investigation bodies, joining and disjoining materials, consideration of motions, review of materials of pre-trial proceedings before its completion, confidentiality of pre-trial investigation).

2. The notion and system of investigative (search) actions. General rules of conducting investigative (search) actions.

3. The system of 'open' investigative (search) actions. Grounds and procedure of conducting.

4. The system of covert investigative (search) actions. Grounds and procedure of conducting covert (search) actions that interfere in private communication.

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THEME 1. PRE-TRIAL PROCEEDINGS. PART 2

1. The grounds and procedure of notification of suspicion. The procedure of challenging the notification of suspicion.
2. The grounds and procedure of suspension of pre-trial proceedings and its renewal.
3. Special pre-trial investigation.
4. Forms in which pre-trial proceedings shall be completed.
5. Disclosure of the materials of pre-trial proceedings.
6. The grounds and procedure of challenging decisions, actions, and omissions at pre-trial proceedings.

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THEME 2. COURT'S JURISDICTION.

THEME 3. PREPARATORY (PRELIMINARY) PROCEEDINGS

1. The notion and types of court jurisdictions. Composition of a court. Referral of criminal proceedings from one court to another.

2. The notion and objectives of the preparatory proceedings stage. The procedure of preparatory proceedings, participants of the stage.

3. Final decisions of the preparatory proceedings stage.

4. Addressing issues relating to preparation for a trial.

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THEME 4. TRIAL. PART 1

1. The notion and objectives of trial. General rules governing trial.
2. Participants in trial. Consequences (implications) of non-appearance of participants and actions to be taken in this case.
3. Scope of trial. Amendment of charges, bringing additional charges, and dismissal of charges.
4. The procedure of trial, its phases.

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THEME 4. TRIAL. PART 2

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2. Trial (presentation and examination of evidence).
3. Debate and the last word of a defendant.
4. Deliberations and announcement of the decision.

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THEME 4. TRIAL. PART 3

1. Types of court decisions. Legality, validity and reasonableness of court decision.
 2. Types of judgments. The content of a court ruling and a judgement.
 3. Correcting slips and obvious arithmetic mistakes in a judgement.
- Explaining a court decision.
4. Simplified procedure for criminal misdemeanours.
 5. Proceedings in trial by jury.

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THEME 5. REVIEW OF COURT DECISIONS IN THE COURT OF APPELLATE INSTANCE

1. Appeals review stage: general overview, decisions that can be challenged, actors who have the right to appeal.
2. Procedure for lodging and preliminary review of an appellate complaint: time limits, requirements for appellate complaint, preliminary actions.
3. Appeals review procedure.
4. Court of appellate instance powers to resolve an appellate complaint (final decisions of the appeals review stage).

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THEME 6. REVIEW OF COURT DECISIONS IN THE COURT OF CASSATION INSTANCE

1. Cassation review stage: general overview, decisions that can be challenged, actors who have the right to file a complaint to the court of cassation instance.

2. Procedure for lodging and preliminary review of a cassation appeal: time limits, requirements for a cassation appeal, preliminary actions.

3. Cassation review procedure.

4. The court of cassation powers to resolve cassation appeal (final decisions of the appeals review stage).

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THEME 7. CRIMINAL PROCEEDINGS ON NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES

1. The concept and general overview of proceedings on newly discovered and exceptional circumstances: courts that review decisions under newly discovered and exceptional circumstances.

2. Grounds for review of court decisions under newly discovered and exceptional circumstances.

3. Actors, time-limits and procedure for lodging applications seeking review of court decisions under newly discovered and exceptional circumstances.

4. The procedure of review of court decisions by a court under newly discovered and exceptional circumstances. Final decisions.

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THEME 8. SPECIAL PROCEDURES

1. Criminal proceedings based on agreements.
2. Private criminal proceedings.
3. Criminal proceedings against (in respect of) minors (underage persons).
4. Criminal proceedings on enforcement of compulsory measures of medical character.

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QUESTIONS FOR EXAM PREPARATION

1. The notion and structure (system) of pre-trial proceedings.
2. General rules of pre-trial proceedings (institution of criminal proceedings, time limits of pre-trial proceedings, jurisdiction of pre-trial investigation bodies, joining and disjoining materials, consideration of motions, review of materials of pre-trial proceedings before its completion, confidentiality of pre-trial investigation).
3. The notion and system of investigative (search) actions. General rules of conducting investigative (search) actions.
4. The system of 'open' investigative (search) actions. Grounds and procedure of conducting.
5. The system of covert investigative (search) actions. Grounds and procedure of conducting covert (search) actions that interfere in private communication.
6. The grounds and procedure of notification of suspicion. The procedure of challenging the notification of suspicion.
7. The grounds and procedure of suspension of pre-trial proceedings and its renewal.
8. Special pre-trial investigation.
9. Pre-trial proceedings on misdemeanours.
10. Forms in which pre-trial proceedings shall be completed.
11. Disclosure of the materials of pre-trial proceedings.
12. The grounds and procedure of challenging decisions, actions, and omissions at pre-trial proceedings.
13. The notion and types of court jurisdictions.
14. Composition of a court in criminal proceedings.
15. Referral of criminal proceedings from one court to another.
16. The notion and objectives of the preparatory proceedings stage.
17. The procedure of preparatory proceedings, participants of the stage.
18. Final decisions of the preparatory proceedings stage.
19. Addressing issues relating to preparation for a trial.
20. The notion and objectives of trial. General rules governing trial.
21. Participants in trial. Consequences (implications) of non-appearance of participants and actions to be taken in this case.
22. Scope of trial. Amendment of charges, bringing additional charges, and dismissal of charges.
23. The procedure of trial, its phases.

24. Preliminary phase.
 25. Trial (presentation and examination of evidence).
 26. Debate and the last word of a defendant.
 27. Deliberations and announcement of the decision.
 28. Types of court decisions. Legality, validity and reasonableness of court decision.
 29. Types of judgments. The content of a court ruling and a judgement.
 30. Correcting slips and obvious arithmetic mistakes in a judgement.
- Explaining a court decision.
31. Simplified procedure for criminal misdemeanours.
 32. Proceedings in trial by jury.
 33. Appeals review stage: general overview, decisions that can be challenged, actors who have the right to appeal.
 34. Procedure for lodging and preliminary review of an appellate complaint: time limits, requirements for appellate complaint, preliminary actions.
 35. Appeals review procedure.
 36. Court of appellate instance powers to resolve an appellate complaint (final decisions of the appeals review stage).
 37. Cassation review stage: general overview, decisions that can be challenged, actors who have the right to file a complaint to the court of cassation instance.
 38. Procedure for lodging and preliminary review of a cassation appeal: time limits, requirements for a cassation appeal, preliminary actions.
 39. Cassation review procedure.
 40. The court of cassation powers to resolve cassation appeal (final decisions of the appeals review stage).
 41. Referral of a case for hearing to a chamber, joint chamber of the Cassation Criminal Court, and to the Grand Chamber of the Supreme Court.
 42. The concept and general overview of proceedings on newly discovered and exceptional circumstances: courts that review decisions under newly discovered and exceptional circumstances.
 43. Grounds for review of court decisions under newly discovered and exceptional circumstances.
 44. Actors, time-limits and procedure for lodging applications seeking review of court decisions under newly discovered and exceptional circumstances.
 45. The procedure of review of court decisions by a court under newly discovered and exceptional circumstances. Final decisions.
 46. Criminal proceedings based on agreements.
 47. Private criminal proceedings.

48. Criminal proceedings against (in respect of) minors (underage persons).
49. Criminal proceedings on enforcement of compulsory measures of medical character.

LEARNING RESOURCES

Recommended reading

- Universal Declaration of Human Rights (1948 with amendments). URL: <http://www.un.org/en/universal-declaration-human-rights/index.html>
- European Convention of Human Rights (1950 with amendments). URL: http://www.echr.coe.int/Documents/Convention_ENG.pdf
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