

# КРИМІНАЛЬНИЙ ПРОЦЕС ТА КРИМІНАЛІСТИКА

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## VIOLATION OF A PERSON'S RIGHT TO A PUBLIC TRIAL OF CRIMINAL PROCEEDINGS

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The article is devoted to the issue of researching the procedural consequences of the violation of a person's right to a public trial of criminal proceedings. Such violations are divided into two categories – significant and non-significant. The authors give examples of Resolutions of the Criminal Cassation Court of the Supreme Court. This article is a form of systematization of the already accumulated knowledge of a number of the issues, and an endeavour of the modern vision. The topic is certainly relevant, since the rights of a person in criminal proceedings formulate and determine the fundamental ideas of all criminal procedural activity. At the same time, the procedural consequences of violating the elements of a person's right to a public trial of criminal proceedings are insufficiently studied in the doctrine of domestic criminal procedural law.

*Keywords:* violation of law; public excellent consideration; criminal proceedings: significant violations; non-significant violations.

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The public nature of the trial is the basis of criminal proceedings, which guarantees the fairness of the decision. Publicity of court proceedings provides public control over the course of court proceedings which legitimizes court decisions, making it possible to study the way in which courts approach the corresponding type of cases, which in turn leads to an increased trust in the courts.

The requirement of publicity is ensured through openness, oral proceedings, public announcement, and publication of court decisions. There may be exceptions to the general requirement of publicity defined by the law and determined by specific circumstances [4, p. 110]. It is worth noting that paragraph 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 clearly defines the exceptions under which the restriction of this right is allowed. It is always necessary to proceed from this presumption in favour of a public hearing. It is impossible to disagree with the opinion of the scholar Y. Matat. that exceptions shall be clearly determined by the circumstances of the case on the basis of strict verification of their necessity.

The right of a person to a public trial of criminal proceedings is an integral part of the right to a fair trial. The right to a fair trial, an integral component of the rule of law, appears today as a fundamental legal value of any democratic society. Among the elements that characterize this right are the right to oral criminal proceedings and personal presence during the trial, public announcement of court decisions and public access to its decisions [7, p. 220, 225].

The principles of criminal procedure, as a branch of law, are the fundamental ideas and provisions which are enshrined in law. One of the properties of these principles, subject to discussions, is the statement that any violation of the principles of criminal proceedings entails the annulment of the decision in court proceedings. At the same time, the legal consequences of violating the principles of the procedure may not be limited to this alone. They depend on what exactly these violations were: significant or not significant. However, recognition of a procedural violation as not significant does not mean that it should remain without consequences. But the forms of response to non-essential violations should be different from essential ones. If the judgment is acquittal, even significant violations of the principles of the process do not always lead to its cancellation [1, p. 128].

Pursuant to Part 1 of Art. 412 of the Criminal Procedure Code of Ukraine, significant violations of the requirements of the Criminal Procedure Law are such violations of the requirements of this Code that prevented or could have prevented the court from making a legal and well-founded judgment. N. Bobechko proposes to supplement the above-mentioned article and defines significant violations as non-compliance or action contrary to the provisions of the criminal procedural legislation of Ukraine, which establish guarantees of the rights, freedoms and legitimate interests of participants in criminal proceedings, establish the grounds, conditions, sequence and terms of procedural actions, their fixation, as well as non-compliance of the provisions of the criminal procedural legislation of Ukraine, which determine the grounds, the mode of acceptance, registration, announcement and appeal to the execution of procedural decisions, if such actions prevented the adoption of a legal, justified and fair decision [3, p. 113]. This norm is not a basis for the appellate court to annul the verdict or decision of the local court. However, in accordance with clause 1 part 1 of article 415 of the Criminal Procedure Code of Ukraine, the appellate court cancels the verdict or court order and appoints a new trial in the court of first instance, if the violations provided for in clauses 5, 3, 4, 5, 6, 7 are established parts of the second article 412 of this Code [3, part 1 of article 412 of the Criminal Procedure Code; Clause 1 part 1 of Art. 415].

Therefore, among the above-mentioned points there are grounds that are elements of a person's right to a public trial of criminal proceedings: p. 3) the trial was conducted in the absence of the accused...; p. 4) court proceedings were conducted in the absence of a defense attorney, if his participation was mandatory; p. 5) the court proceedings were conducted in the absence of the victim, who was not properly notified of the date, time and place of the court session; p. 7) the case files do not contain a technical medium of information on which the court proceedings in the court of first instance were recorded (Part 6 of Article 11 of the Law of Ukraine «On the Judiciary and the Status of Judges» specifies that when considering cases, the course of the judicial process is fixed by technical means in the manner established by law) [8, Part 6 of Article 11].

In the Decision of the Supreme Court dated May 28, 2020 in case No. 621/2063/17, the Court emphasizes that in accordance with Clause 3, Section 2 of Art. 412 of the Criminal Procedure Code of Ukraine, a court decision is subject to cancellation in any case, if the court proceedings were conducted in the absence of the accused, except for

the cases provided for in Part 3 of Art. 323 or Art. 381 of this Code, or the prosecutor, except for cases when his participation is not mandatory. The consideration of the proceedings without the participation of the accused, for example, when there is a justified request of the defense party to postpone it in connection with the latter's stay in a health care institution or treatment, in view of the provisions of paragraph 3, part 2 of Art. 412 of the Criminal Code of Ukraine, is a significant violation of the requirements of the criminal procedural law as well as a ground for annulment of the decision of the appellate court of the Code [6].

In the Resolution of the Criminal Cassation Court of the Supreme Court dated January 30, 2020 in case No. 204/2153/15 – k, the Court notes that, in accordance with Clause 7 of the second part of Article 412 of the Criminal Procedure Code of Ukraine, the absence in the materials of the proceedings of the log of the court session or the technical medium of information on which the judicial proceedings in the court of first instance, is one of the grounds, in the presence of which the court decision is subject to cancellation in any case due to a significant violation of the requirements of the criminal procedural law.

The content of this norm with the conjunction «or» indicates that from a number of listed concepts – «journal of a court session», «technical carrier of information» – just one of them is sufficient to recognize the significance of a violation of the requirements of the law [11].

In the Resolution of the Criminal Cassation Court of the Supreme Court dated March 31, 2020, in case No. 753/20985/17, the Court considers that in the context of the judgment presented for the conclusion, it is necessary to clarify the question of how the complete recording of the court proceedings with the help of a technical means affected the legality of the decision court decision based on the «level of materiality» of deviations from the requirements of the norm of criminal procedural law [9].

In the Resolution of the Criminal Cassation Court of the Supreme Court dated December 16, 2020 in case No. 241/5587/17, the Court found that the review of criminal proceedings in the court of appeal, which was carried out in the absence of the convicted person duly notified of the date, time and place of the court session, in view of on the provisions of Art. 412 of the Criminal Procedure Code of Ukraine, is considered a significant violation of the requirements of the criminal procedural law, and therefore, according to Part 1 of Art. 438 of the Criminal Procedure Code of Ukraine, the decision of the appellate court is subject to cancellation with the appointment of a new trial in the appellate court [10].

Proceedings in the court of cassation cannot be ignored. According to clause 1 part 1 of Article 438 of the Criminal Procedure Code of Ukraine, a significant violation of the requirements of the criminal procedural law is the basis for annulment or change of court decisions when considering the case in the court of cassation instance [5, clause 1 of Art. 438].

The topic for research remains the determination of the materiality or insignificance of the violation of the right to a public hearing of criminal proceedings as a component of a person's right to a public trial of criminal proceedings. Non-application or incorrect application of the requirements of the Code of Criminal Procedure, which prevented or could have prevented the court from fully and comprehensively clarifying the circumstances of the criminal proceedings, establishing the truth, ensuring the rights and legitimate interests of the participants in the criminal proceedings, and passing a legal and justified court decision, are considered significant violations of the criminal procedural law. In Article 412 of the Criminal Procedure Code of Ukraine, the legislator determined that an inherent property of the concept of «substantial violation of the

requirements of the criminal procedural law» is its ability to prevent the court from making a legal and well-founded decision [8].

Violations of the criminal procedural law, which did not and could not affect the legality and validity of the verdict or decision, are not recognized as significant and do not entail changes or annulment of the court decision. For example, violation of part 2 of Art. 328 of the Criminal Procedure Code of Ukraine, which provides: close relatives and family members of the accused and the victim, as well as representatives of the mass media have the priority right to be present during the court session [5, Part 2 of Art. 328].

As a conclusion, it is worth noting that the procedural consequences of violating a person's right to a public hearing of criminal proceedings are not accounted for in the national legislation. We agree with the statement of V. Bezpala: The further development of the system in significant violations of the requirements in criminal procedural law as a basis for canceling or changing a court decision should be recognized as a promising direction for the development of the science of criminal procedural law, improvement of criminal procedural legislation and the practice of its application [2, p. 237]. However, if the violation of such a right (violation of a person's right to a public hearing of criminal proceedings, taking into account the violation of at least one of the above-mentioned elements) is determined by the court to be significant, or stipulated in the Criminal Procedure Code of Ukraine as significant, the consequence is the annulment of the sentence or decision by the court of appeal or cassation instance. The issue of defining violations as insignificant and establishing their procedural consequences remains the subject of discussion.

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## ПОРУШЕННЯ ПРАВА ОСОБИ НА ПУБЛІЧНИЙ СУДОВИЙ РОЗГЛЯД КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ

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Досліджено процесуальні наслідки порушення права особи на публічний судовий розгляд кримінального провадження. Такі порушення поділяються на істотні та неістотні. Наведено приклади постанов Касаційного кримінального суду у складі Верховного Суду.

Ця стаття є формою систематизації вже накопичених знань з низки питань і пошуком сучасного бачення. Тема безумовно є актуальною, оскільки права особи у кримінальному провадженні формулюють та визначають основоположні ідеї всієї кримінальної процесуальної діяльності. Водночас процесуальні наслідки порушення елементів права особи на публічний судовий розгляд кримінального провадження є недостатньо вивченими у науці вітчизняного кримінального процесуального права.

Публічний характер судового розгляду є засадою кримінального провадження, яка гарантує справедливість прийнятого рішення. Публічність судових проваджень забезпечує контроль громадськості за перебігом судових процесів та легітимізує судові рішення, дає змогу вивчити спосіб, в який суди підходять до такого типу справ, що своєю чергою зумовлює підвищення довіри до судів. Вимога публічності забезпечується шляхом відкритості та усності судового розгляду, публічного проголошення та оприлюднення судових рішень. Із загальної вимоги публічності можуть бути винятки, визначені в законі та зумовлені конкретними обставинами.

Право особи на публічний судовий розгляд кримінального провадження є складовою частиною права на справедливий суд. Право на справедливий суд, будучи невід'ємною складовою верховенства права, постає сьогодні як фундаментальна правова цінність будь-якого демократичного суспільства.

Варто зазначити, що процесуальні наслідки порушення права особи на публічний розгляд кримінального провадження у національному законодавстві не передбачено. Перспективним напрямом розвитку науки кримінального процесуального права, удосконалення кримінального процесуального законодавства та практики його застосування варто визнати подальшу розробку системи істотних порушень вимог кримінального процесуального закону як підстави для скасування або зміни судового рішення. Проте, якщо порушення такого права (порушення права особи на публічний розгляд кримінального провадження, враховуючи порушення хоча б одного вищезгаданого елементу) буде визначено судом як істотне, або передбачене у КПК України як істотне, наслідком є скасування вироку чи ухвали судом апеляційної чи касаційної інстанції. Предметом дискусії залишається питання визначення порушень неістотними та встановлення їх процесуальних наслідків.

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