**Summary to the Decision of the Second Senate of the Constitutional Court of Ukraine No. 8-r(II)/2024 dated July 18, 2024 in the case upon the constitutional complaints of Ruslan Onishchenko and Dmytro Havryliuk regarding the compliance of Article 615.6 of the Criminal Procedure Code of Ukraine with the Constitution of Ukraine (constitutionality) (case on guarantees of judicial control over the observance of the rights of persons in custody)**

Ruslan Onishchenko and Dmytro Havryliuk appealed to the Constitutional Court of Ukraine to verify the compliance of Article 615.6 of the Criminal Procedure Code (hereinafter, the “Code”), in accordance with which “in case of expiry of the court ruling on detention and impossibility of deliberation by the court of the issue of extension of the detention period under the procedure set forth in this Code, the chosen precautionary measure in the form of detention shall be deemed to be extended until the relevant issue is resolved by the court, but not more than for two months” with the Constitution of Ukraine (constitutionality).

The Constitutional Court of Ukraine distinguishes between the general freedom of action, which, along with human dignity, is contained in the catalogue of constitutional human rights and is their essential content, and the right to liberty and inviolability of person (Article 29 of the Fundamental Law) as the freedom of a person from arbitrary detention.

At the same time, the Constitutional Court of Ukraine stipulates that the guarantees of the right to liberty and inviolability of person enshrined in Article 29 of the Constitution of Ukraine are valuably among the civilisational legacies recognised by all democratic states governed by the rule of law.

The Ukrainian constitutional doctrine of understanding the right to liberty and inviolability of person (Article 29 of the Constitution) is consistent with the obligations undertaken by Ukraine pursuant to the international human rights treaties (*pacta sunt servanda*).

The Constitutional Court of Ukraine outlines that in accordance with the provisions of Article 29 of the Fundamental Law, the guarantees of right to liberty and inviolability of person *expressis verbis* consist primarily in judicial control (and, as a result, in a reasoned court decision), which constitutionally makes it possible to keep a person in custody, and that custody may be applied only on the grounds and in the manner defined by law.

The legislator’s realisation of the provision of Article 29.2 of the Constitution of Ukraine as regards the “grounds” and “procedure” for detention implies that it should streamline the relevant procedures, however such legislative regulation is systematically linked by its content to the part of this constitutional provision that establishes the need for a reasoned court decision, namely “no one may be arrested or detained except by a reasoned court decision <...>”, and in no case may contradict it.

When legislating on the issue of extending the detention period of a person in case of expiry of a court decision on detention, the Parliament has a constitutional obligation to introduce a regulatory structure that, until the impossibility of court deliberation of this issue is eliminated, would contain guarantees to prevent damage to the objectives of criminal proceedings.

Legislative regulation of this issue requires specification of the concept of “impossibility of trial” directly in the context of circumstances arising from the full-scale armed aggression of the Russian Federation against Ukraine, as well as the introduction of a requirement to resolve the issue of extending the term of detention immediately after the elimination of the circumstances that made it impossible to hold a trial, but in any case within a period not exceeding seventy-two hours set out in Article 29.3 of the Constitution of Ukraine, after the expiry of the detention period determined by a reasoned court decision.

The constitutional role of the courts of the judicial system, guaranteed by the provisions of Article 29 of the Constitution of Ukraine, is due to the fact that no other body of state power is vested with the relevant powers to verify the validity of interference with the right to liberty and inviolability of person and does not have the relevant guarantees of impartiality and independence as defined by Articles 124, 125, 126 of the Fundamental Law.

The court’s clarification of the specific circumstances regarding the detention of a person as a precautionary measure in each case is of particular importance when extending the period of detention, given that over time, the justification for detention as a precautionary measure may require compelling and possibly new arguments.

In Article 615.6 of the Code, the legislator did not take into account the fact that the decision to extend the detention period should not only be delivered by the court, but also requires a higher level of justification, as it is the most serious interference with the right to liberty of person.

The right to be heard as a component of the right to judicial protection is subject to exercise until the state, its bodies or officials take any measures that may adversely affect a person, his or her rights and freedoms. This right derives from the fundamental principles of judicial proceedings, that, in particular, are set out *expressis verbis* in the provisions of Article 129.2 of the Constitution of Ukraine, and the exercise of this right does not depend on its establishment and/or detailed regulation in special legislation. Only if the right of a person to be heard in court is respected may the court fulfil its constitutional duty to independently and impartially deliberate all specific aspects of the case and issue a reasoned (substantiated) court decision thereof. Furthermore, the obstacles to access to court and the violation of the right to be heard in court in such an important matter as the extension of the detention period established by the impugned provisions of the Code means that a person cannot exercise the right to defence guaranteed by Article 63.2 of the Constitution of Ukraine.

The legislator’s regulation of the procedure for resolving the issue of extending the detention period as a precautionary measure in a manner that does not involve the participation of a court (judge) results in a violation of the constitutional right of everyone to judicial protection (Article 55.1 of the Constitution of Ukraine) in conjunction with the right to liberty and inviolability of person (Article 29.1 of the Constitution of Ukraine) and the right of the accused to a defence (Article 63.2 of the Constitution of Ukraine).

The detention of a person as a precautionary measure established by Article 615.6 of the Code is not a punishment for a criminal offence committed by a person; detention may be applied to a person who is only suspected of committing such an offence, and therefore its application shall be exceptional and meet the requirements of the principle of presumption of innocence.

The constitutional principle of the presumption of innocence is applicable in various aspects to all stages of criminal proceedings, including at the stage of choosing and/or extending a precautionary measure for a person. Thus, the implementation of the *in dubio pro reo* principle (in case of doubt – in favour of the accused) as a component of the presumption of innocence objectively establishes the need for a reasoned court decision upon the results of a trial with the participation of the accused person when extending the term of a precautionary measure in the form of detention.

The impugned provisions of the Code do not comply with the content of the principle of presumption of innocence in relation to its requirement that “all doubts as to the proof of a person’s guilt shall be interpreted in his/her favour” (second sentence of Article 62.3 of the Constitution of Ukraine).

The derogation from some of Ukraine’s international human rights obligations and the resulting ability of the state to restrict certain human rights and freedoms does not mean the introduction of legislative and other means that would not be consistent with the Constitution of Ukraine.

Even under martial law, the supremacy of the Constitution of Ukraine and its principles, including the rule of law, the separation of powers, and respect for human rights and freedoms, are the foundations of democratic constitutional order of Ukraine. In peacetime and under martial law, it is the Constitution of Ukraine that establishes the mechanism for introducing restrictions on human rights and freedoms.

Although the restriction of these human rights cannot be caused by the needs related to martial law, nonetheless the state interference in their protection is possible provided that the means chosen by the legislator are justified (proportionate), respect the essence of human rights and do not contradict the provisions of the Constitution of Ukraine, which expressly guarantee their scope.

By the impugned provisions of the Code, the legislator permitted the interference with the essence of human rights guaranteed by Articles 29 and 55 of the Constitution of Ukraine and violated the relevant provisions of the Fundamental Law, which guarantees the scope of their exercise (*expressis verbis*).

The human rights and freedoms guaranteed by the Constitution of Ukraine in the provisions of Article 29 (right to liberty and inviolability of person), Article 55 (right to judicial protection), Article 62 (presumption of innocence), Article 63 (right to defence) are not specified in the legal acts that introduced martial law in Ukraine, and therefore, interference with these rights and freedoms is not justified by the objectives of solving the issues that were the groundwork for the introduction of martial law in Ukraine.

The Constitutional Court of Ukraine declared Article 615.6 of the Criminal Procedure Code as such that do not comply with the Constitution of Ukraine (is unconstitutional), it shall cease to be effective three months after the date of this Decision delivery.

The Verkhovna Rada shall bring the normative regulation established by Article 615.6 of the Criminal Procedure Code, which was declared unconstitutional, into compliance with the Constitution of Ukraine and this Decision.

**Supplementary information:**

* International Covenant on Civil and Political Rights of 1966;
* Convention for the Protection of Human Rights and Fundamental Freedoms of 1950;
* Universal Declaration of Human Rights of 1948;
* General comment No. 35 on Article 9, Liberty and security of person. Adopted by the Committee at its 112th session (7–31 October 2014) CCPR/C/GC/35;
* General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32;
* Recommendation Rec (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse;
* Report – Respect for democracy, human rights and the rule of law during states of emergency: reflections - taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session [CDL-AD(2020)014].

**Cross-References:**

Constitutional Court of Ukraine:

* no. 1-r/2017, 23.11.2017;
* no. 7-r/2019, 25.06.2019;
* no. 3-r(ІІ)/2022, 08.06.2022;
* no. 5-r(ІІ)/2022, 22.06.2022;
* no. 7-r(ІІ)/2024, 19.06.2024.

European Court of Human Rights:

* *Witold Litwa v. Poland*, no. 26629/95, 04.04.2000;
* *S., V. and A. v. Denmark*, nos. 35553/12, 36678/12, 36711/12, 22.10.2018;
* *Brogan and Others v. the United Kingdom*, nos. 11209/84, 11234/84, 11266/84, 11386/85, 29.11.1988;
* *Mooren v. Germany*, no. 11364/03, 09.07.2009;
* *McKay v. the United Kingdom*, no. 543/03, 03.10.2006;
* *Buryaga v. Ukraine*, no. 27672/03, 15.07.2010;
* *Khudoyorov v. Russia*, no. 6847/02, 08.11.2005;
* *Belozorov v. Russia and Ukraine*, no. 43611/02, 15.10.2015.

Other Courts:

* Constitutional Court of the Republic of Croatia, no. U-III-4286/2007, 20.12.2007.