**Summary to the Decision of the Second Senate of the Constitutional Court of Ukraine No. 7-r(II)/2024 dated June 19, 2024, in the case upon the constitutional complaints of Serhii Bychkov and Anatolii Bai regarding the compliance of Article 176.6 of the Criminal Procedure Code of Ukraine with the Constitution of Ukraine (constitutionality)**

Serhii Bychkov and Anatolii Bai appealed to the Constitutional Court of Ukraine to verify the compliance of Article 176.6 of the Criminal Procedure Code of Ukraine (hereinafter, the “Code”), in accordance with which “during martial law, the precautionary measure specified in paragraph 1.5 of this Article shall be applied to persons suspected or accused of committing crimes provided for in Articles 109-1142, 258‒2586, 260, 261, 437‒442 of the Criminal Code of Ukraine, in the presence of the risks specified in Article 177 of this Code,” with the Constitution of Ukraine (constitutionality).

The constitutional right to freedom and personal inviolability is one of the fundamental rights, inalienable to everyone, especially valuable for each person and society as a whole, which requires enhanced protection guarantees to prevent arbitrary deprivation of liberty of a person. Therefore, the state is obliged to introduce legal regulation that will protect person from arbitrary deprivation of liberty and comply with constitutional norms and principles.

The Constitutional Court of Ukraine proceeds from the fact that deprivation of liberty of a person, in particular in the case of the application of the precautionary measure to him/her in the form of detention, is the most tangible form of restriction of his/her constitutional right to freedom and personal inviolability, in consequence, Article 29 of the Constitution of Ukraine stipulates enhanced guarantees of protection of this right against arbitrary restriction.

The provisions of Article 29 of the Constitution of Ukraine permit a precautionary measure application in the form of detention as a restriction of the constitutional right to freedom and personal inviolability. However, such a restriction shall be proportionate and not violate the enhanced guarantees of protection of the respective constitutional right of a person against arbitrary interference in the case of a precautionary measure application in the form of detention, as set out in Article 29.2 of the Constitution of Ukraine, which provides that no one may be detained “except by a reasoned court decision” and “only on the basis and in accordance with the procedure established by law”.

Detention only upon a reasoned court decision (Article 29.2 of the Constitution of Ukraine) is also conditioned by the need to observe the principle of presumption of innocence guaranteed by the provisions of Article 62 of the Constitution of Ukraine, which, in conjunction with the requirement of proportionality, obliges a court in each case to justify the need to apply a precautionary measure in the form of detention, given that such a person is presumed innocent of committing a crime until his/her guilt is proved in accordance with the law and established by a court verdict. Unreasonable precautionary measure application in the form of detention to a person based solely on the gravity of the crime of which the person is suspected or accused, as well as his/her prolonged detention, convert the said precautionary measure into a criminal punishment, that is a violation of the principle of presumption of innocence.

In order to achieve the purpose of criminal proceedings and protect the relevant public interests, the legislator may not determine the precautionary measure in the form of detention as a non-alternative measure and must ensure that at least one precautionary measure, which is more mitigating and may be chosen as less burdensome for the constitutional right to freedom and personal inviolability, is available in criminal proceedings.

The Constitutional Court of Ukraine holds that the fundamental judicial protection of a person against arbitrariness during the deprivation of his/her liberty may not be restricted under any circumstances, even under martial law.

The Constitutional Court of Ukraine underscores that even under martial law, the role of the court is crucial in the system of institutional protection of the rule of law, and judicial protection of human rights and freedoms from arbitrariness is of utmost importance; in such circumstances, arbitrary detention of a person without a reasoned court decision is prohibited.

The state has a positive obligation to create appropriate national legal mechanisms for bringing a person to criminal liability, particularly, to ensure the effective functioning of the criminal justice, in order to guarantee enhanced protection of the sovereignty, territorial integrity, inviolability, defence capacity, state, economic and information security of Ukraine under martial law and to bring to criminal liability the persons who have committed crimes that infringe on these crucial constitutional public interests.

The Constitutional Court of Ukraine finds legitimate the purpose for which the legislator supplemented Article 176 with part 6 of the Code intending to enhance the protection of the sovereignty, territorial integrity, inviolability, defence capacity, state, economic, and information security of Ukraine by establishing by the respective norm of the Code temporarily (for the period of martial law) a special procedure for a precautionary measure application in the form of detention to persons suspected or accused of committing crimes that are acutely dangerous by their gravity and nature under martial law.

When restricting the right to freedom and personal inviolability, not any less burdensome measures for the rights and freedoms of individuals are required, but only those that may achieve the legitimate purpose at a qualitative level.

The Constitutional Court of Ukraine outlines that the application under Article 176.6 of the Code under martial law of a precautionary measure in the form of detention to a person suspected or accused of committing crimes against the foundations of national security of Ukraine, public safety, peace, security, humanity and international legal order, in the presence of risks provided in Article 177 of the Code, is a necessary means to ensure the effectiveness of investigation of these crimes and fulfilment of the tasks of criminal proceedings under martial law, is due to the need for enhanced protection of sovereignty, territorial integrity, inviolability, defence capacity, state, economic and information security of Ukraine.

By defining the criteria for a precautionary measure application in the form of detention by an investigating judge or court to a person, the legislator complied with international standards for a detention application, balanced the need to ensure the effective conduct of criminal proceedings and the right of a person to freedom and personal inviolability in respect of whom the proceedings have been initiated, and established that such a person may be detained only on the basis of a reasoned court decision.

In accordance with the provisions of the Code, when applying a precautionary measure in the form of detention under Article 176.6 of the Code, it is possible, under certain grounds and circumstances specified in Articles 177 and 178 of the Code, to apply bail as a more mitigating precautionary measure, i.e. detention is not defined as non-alternative exceptional precautionary measure.

The special procedure for a precautionary measure application in the form of detention under Article 176.6 of the Code provides the investigating judge or court with the possibility to apply such a precautionary measure only in pursuance of a reasoned court decision, as required by Articles 8 and 29.2 of the Constitution of Ukraine.

The Constitutional Court of Ukraine declared Article 176.6 of the Criminal Procedure Code of Ukraine as conforming to the Constitution (is constitutional).

**Supplementary information:**

* Universal Declaration of Human Rights of 1948;
* Convention for the Protection of Human Rights and Fundamental Freedoms of 1950;
* International Covenant on Civil and Political Rights of 1966;
* General comment No. 35 Article 9 (Liberty and security of person) dated December 16, 2014;
* Recommendation Rec (2006) 13 dated September 27, 2006, of the Committee of Ministers of the Council of Europe 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. 3-rp/2003, 30.01.2003;
* no. 15-rp/2004, 02.11.2004;
* no. 17-rp/2010, 29.06.2010;
* no. 10-rp/2011, 11.10.2011;
* no. 2-rp/2016, 01.06.2016;
* no. 6-rp/2016, 08.09.2016;
* no. 1-r/2017, 23.11.2017;
* no. 4-r/2019, 13.06.2019;
* no. 7-r/2019, 25.06.2019;
* no. 4-r(II)/2020, 17.06.2020;
* no. 1-r(II)/2022, 06.04.2022;
* no. 5-r(II)/2022, 22.06.2022;
* no. 3-r(II)/2023, 22.03.2023;
* no. 4-r(II)/2023, 19.04.2023;
* no. 5-r(II)/2023, 05.07.2023.

European Court of Human Rights:

* De Wilde, Ooms and Versyp v. Belgium, nos. 2832/66, 2835/66, 2899/66, 18.06.1971;
* Storck v. Germany, no. 61603/00, 16.06.2005;
* De Tommaso v. Italy, no. 43395/09, 23.02.2017;
* Khimchak and Bilyk v. Ukraine, nos. 4565/14, 42209/15, 10.06.2021;
* Grubnyk v. Ukraine, no. 58444/15, 17.09.2020;
* Nuray Şen v. Turkey, no. 41478/98, 17.06.2003;
* Hassan v. the United Kingdom, no. 29750/09, 16.09.2014;

Other Courts:

* Federal Constitutional Court of Germany, no. 2 BvR 1073/060 (15, 16), 02.07.2008;
* Federal Constitutional Court of Germany, no. 2 BvR 1853/20, (24, 25, 26, 28, 29), 01.12.2020;
* Constitutional Court of the Republic of Croatia, no. U-III-3698/2003, 28.09.2004;
* Constitutional Court of the Republic of Croatia, nos. U-III-4182/2008, U-III-678/2009, 17.03.2009;