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Comparative Analysis of Criminal Proceedings in Absentia in the Legislation of Federal Republic of Germany and Ukraine

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Abstract

Turbulent changes in legislation in recent years are an extensive basis for studies. Sometimes laws that regulate criminal procedural relations are adopted so quickly and spontaneously that later they only harm the interests of the state and complicate the work of the prosecutor – the procedural head during the investigation of criminal proceedings. Considering this, the issue of the role and place of the prosecutor in the mechanism for ensuring the rights and freedoms of citizens in the implementation of criminal proceedings, the implementation of its functions and powers is relevant. This is confirmed by the amendments to the Constitution of Ukraine adopted in July 2016, which still have not been implemented in other laws of Ukraine. The updated status of a prosecutor enshrined in the Basic Law creates a new basis for the procedural tactics of investigating criminal proceedings. Thus, it is worth analysing the new legislative regulation, empirical results, and practical components of the prosecutor's activity. The paper considers the functional algorithm of actions of the prosecutor – procedural head for the investigation of criminal offences. The purpose of the study is to characterise the features of the implementation of the procedural status of a prosecutor as a subject of criminal procedural activity in the investigation of crimes, the component of this activity as a supervisor or accuser in criminal proceedings, comparing such powers and determining the nature of these activities, considering their number in the law. Formal-logical, system-structural, comparative-legal, and statistical methods were used to achieve this goal. Based on the analysis of the provisions of recent changes in legislation and judicial and prosecutorial practice, the main area of the prosecutor's work as an accuser in criminal proceedings is established. The specific features of the prosecutor's procedural tactics at the stage of pre-trial investigation and in court, its focus on reasonably bringing to justice a person who has committed a criminal offence, to pass a guilty verdict of the court, are outlined. The importance and functional content of the prosecutor's criminal procedural activity in Ukrainian judicial system is established. Now they are primarily an accuser with a small number of supervisory powers, so the supervisory functions of the prosecutor are defined as secondary. Therewith, the prosecutor is the main participant in criminal proceedings, since they act at all stages from the beginning of criminal proceedings to their end

Keywords:

prosecutor; criminal procedure activity; accuser; public accusation; prosecutor's supervision; procedural guidance

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Introduction

In the criminal legislation of the Federal Republic of Germany (hereinafter – FRG), the procedure of criminal proceedings in the absence of a person is effectively operating for a long time.

Therewith, the Criminal Procedure Code of Ukraine, which gained legal force on November 19, 2012, did not provide for the possibility of completing a pre-trial investigation and passing a sentence in the absence of a suspect (accused) until January 2014. A separate institution of special pre-trial investigation as a component of criminal proceedings in the absence of a suspect or accused (in absentia) was introduced in October 2014.

Aspects of the criminal procedure legislation of Ukraine concerning criminal proceedings in the absence of a suspect, accused in criminal proceedings were investigated by various researchers, including: V.V. Afanasyev, O.V. Baulin, I.V. Glovyuk, V.V. Zuyev, O.S. Mazur, G.V. Matviyevska, O.O. Nahornyuk-Danylyuk, R.G. Piestsov, V.O. Popeliushko, O.Yu. Tatarov, V.M. Trofimenko, L.D. Udalova, O.G. Shilo, S.L. Sharenko, D.M. Shyshman, and others.

The specific features of the criminal procedure legislation of the FRG in different periods were investigated by such researchers as L.V. Golovko, K.F. Gutsenko, V.O. Popeliushko, Yu. Pikh, V.A. Savchenko, Ya.I. Soloviy, B.A. Filimonov, V.I. Felik, V.D. Yurchishyn, and others. Therewith, the issue of comparative analysis of criminal proceedings in the absence of a suspect or accused in absentia in the criminal procedure legislation of Ukraine and the FRG has not been investigated, so it requires a detailed analysis for the purpose of scientific understanding.

The purpose of the study is a comparison of the criminal procedure legislation of the FRG and Ukraine in relation to criminal proceedings in the absence of a suspect or accused both at the stage of pre-trial investigation and trial, and determination of the compliance of the legislation of these countries with international documents that establish criteria regulating consideration in the order of in absentia and the practice of the European Court of Human Rights.

Results and Discussion

The main source of German criminal procedure laws is the Criminal Procedure Code of the FRG (ger. Strafprozessordnung für die Bundesrepublik Deutschland), adopted on February 1, 1877. Other sources of German criminal procedure legislation are: the Judiciary Act of 1877, the Criminal Code of 1871, the Law on Judges of 1961, the Juvenile Courts Act of 1974, and the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by the Bundestag in 1952 [1], and the practice of the European Court of Human Rights, which are essential in German law [2].

In general, German criminal procedure legislation is stable and dynamic, as it was constantly improved and supplemented with provisions required by the present [3].

The purpose of criminal proceedings in the German procedural literature is mainly recognised as truth [4], justice, and legal stability as necessary prerequisites for resolving a criminal dispute, and therefore for restoring and maintaining public order [5].

The Criminal Procedure Code of the FRG of 1877 in its original version allowed absentee proceedings only in not very important cases, in which the punishment was reduced to a monetary penalty [6].

In modern German legislation, the involvement of accused persons in criminal proceedings is linked to the constitutional obligation of the state to respect human dignity and, therefore, the right to a fair hearing and the principle of guilt. In addition, with the exception of some alternative proceedings, German legislation provides for the personal presence of the accused (defendant) throughout the entire trial [7].

The presence of the accused is important in German Criminal Procedure, [8] and this indicates that the illegal absence of the accused in a substantial part of the trial is “an absolute basis for appeal” [9].

According to the decisions of the Federal Constitutional Court, the personal involvement of the accused in criminal proceedings under the procedural legislation of Germany serves not only to ensure the rights to defence but also to establish the facts more reliably, reflecting the constitutional opinion that the position of the accused is an essential part of the court proceedings [8].

In the Criminal Procedure Code of the FRG, the concept of “abwesenheit” is used to refer to criminal proceedings in the absence of a person. In the generally recognised practice of the European Court of Human Rights, the term "in absentia" is used to refer to criminal proceedings in the absence of a suspect (accused, defendant), so this concept will be used when comparing the criminal process of Ukraine and Germany.

Therewith, the procedure for criminal proceedings on the territory of Ukraine, in accordance with Art. 1 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) [10], is recognised only by the criminal procedure legislation of Ukraine, which covers the relevant provisions of Constitution Of Ukraine, international agreements, the consent to be bound by which was granted by the Verkhovna Rada of Ukraine, the Criminal Procedure Code of Ukraine, and other laws of Ukraine.

At the initial stage of the CPC of Ukraine, which gained legal force on November 19, 2012, and is still in force today, it does not provide for the possibility of conducting pre-trial investigation and judicial

proceedings in the absence of a suspect, accused, due to the lack of a procedure for bringing to criminal responsibility persons who evade arrival at the pre-trial investigation bodies or the court.

The first attempt to overcome this gap was the Law of Ukraine No. 725-VII of January 16, 2014, which introduced criminal proceedings in absentia. However, these amendments to the Criminal Procedure Code of Ukraine entered into force on January 22, 2014, and on February 2, 2014, they became invalid on the grounds of the law of Ukraine of January 28, 2014, No. 732-VII.

Only the law of Ukraine "On amendments to the criminal and criminal procedure codes of Ukraine regarding the inevitability of punishment for certain crimes against the foundations of national security, public security and corruption crimes" of October 7, 2014, No. 1689-VII [11] introduced the institution of criminal proceedings in the absence of a suspect or accused, which in the CPC of Ukraine was called special pre-trial investigation and special court proceedings (in absentia).

Consequently, the criminal procedure legislation of both FRG and Ukraine provide for a certain procedure for conducting criminal proceedings in the absence of a suspect or accused (in absentia). However, Ukraine in absentia is a relatively new institution that is at the stage of development, while in Germany it is a traditional institution of criminal procedure, which has been operating for a long time and has a well-established practice of law enforcement.

At the stage of pre-trial investigation, before the presentation of a public charge, which is the moment when the prosecutor's office transfers the indictment to the court, in the absence of the accused for these reasons, the prosecutor's office is granted the right to temporarily close the proceedings, but only after the factual circumstances of the case have been investigated to the extent possible, and the evidence has been provided procedurally to the extent necessary [6].

Therewith, based on the analysis of chapter 24 of the CPC of Ukraine "Features of special pre-trial investigation of criminal offences" (Art. 297-297), it is provided that a special pre-trial investigation (in absentia): 1) is conducted only in relation to a person who has acquired the status of a suspect in the presence of sufficient evidence on ensuring the person's awareness of the existing criminal proceedings, in particular by serving them notice of suspicion and summons [12]; 2) in relation to clearly defined categories of criminal offences [13], which relate mainly to grievous and extremely grievous crimes; 3) in the case of hiding of suspect from pre-trial investigation bodies and the court to evade criminal liability and putting them on the interstate or international wanted list [14]; 4) with the mandatory involvement of a defence lawyer, in particular, by ensuring their involvement by the investigator, prosecutor [15]; 5) subject to compliance with additional, in comparison with the general procedure of criminal proceedings, guarantees of ensuring the rights of the suspect, accused, defendant [16]. Consequently, the German CPC does not actually provide for the possibility of conducting a pre-trial investigation in the absence of a person, which substantially contrasts it with the CPC of Ukraine, which defines the procedure for a special pre-trial investigation (in absentia).

The CPC of the FRG notes V.O. Popeliushko, suggests several varieties of the main trial in absentia [17]:

– in cases where the defendant leaves the trial or does not appear for the continuation of the postponed main trial. In such cases, the trial may end in the absence of the defendant, if the defendant has already been questioned on the merits of the charge and the court does not consider their continued presence necessary (CPC of the FRG). Such a procedural mechanism is aimed at preventing obstruction or undue prolongation of judicial proceedings. The main hearing may end in the absence of a person, if the defendant is absent or does not appear, or when the interrupted main hearing continues. It is necessary for the court of the first instance to already consider the person on the charge, that is, the defendant was given the opportunity to respond to the indictment after it was read at the beginning of the main hearing to do this [18];

– when a defendant intentionally put themselves in a state of procedural incapacity and thus intentionally prevents the proper conduct or continuation of the trial in their presence, provided that they have not yet been questioned on the merits of the charge, although after the opening of the main trial they had such an opportunity (CPC of Germany). The absence of defendants is considered guilty if, after being considered on the indictment, they have placed themselves in a condition that prevents them from being eligible for trial [9];

– in case of removal of the defendant from the courtroom to pre-trial detention on account of their inappropriate behaviour, if the person seriously violates the procedure for the hearing (§ 177 of the law on the judicial system, § 231b of the CPC of the FRG) [19]. In such a case, the trial may continue in their absence, if the court does not consider their further presence necessary, and for as long as the court has concerns that the presence of the defendant may seriously damage the process of the main trial [8]; if necessary, protect the interests of justice by considering the interests of other defendants, witnesses, and the interests of the defendant during the questioning of these persons (§ 247 of the CPC of the FRG). The law also allows a defendant to be

removed from the courtroom during part of a hearing to reveal the truth or protect witnesses or defendants. The defendant may be ordered to leave the courtroom during the examination, if, based on specific facts, there are grounds that the witness or co-defendant would not tell the truth or refuse to give evidence in the presence of the defendant [20];

– if the court releases the defendant, at their request, from appearing at the main trial (§ 233 of the CPC of the FRG). According to § 233 of the CPC of the FRG, a defendant may, at their own request, lodge an application with a court for exemption from the obligation to appear at the main hearing if, as a result of the proceedings alone or in aggregate, only a penalty of imprisonment up to six months, a monetary fine of up to one hundred and eighty day rates, a warning with a penalty clause, a prohibition on driving a vehicle, confiscation of what was acquired by criminal means, seizure, destruction or reduction in disrepair of the objects and means of committing the act is expected.

Such a statement can be extremely useful if the defendant prefers to refrain from appearing in person due to the considerable distance between their place of residence and the court for reasons of poor health, professional, or private reasons;

– if the main trial is conducted against several defendants, but separate court sessions do not concern a specific defendant (§ 231c of the CPC of the FRG). Conditional type of proceedings in absentia;

– if the defendant uses the right to take part in the main court proceedings (§ 232 of the CPC of the FRG). This type of proceeding, in absentia, is based on the right to take part in the trial of their case if they were properly summoned and that, as a result of the trial, alone or in aggregate, only a penalty is expected, mainly in the form of a monetary penalty.

In turn, the CPC of Ukraine distinguishes two types of criminal proceedings in the absence of a suspect or accused (in absentia): special pre-trial investigation (Art. 2971-2975) and special court proceedings (Art. 323) depending on the stages of criminal proceedings.

According to Art. 323 of the CPC of Ukraine, judicial proceedings in criminal proceedings concerning crimes specified in part 2 of Art. 297-1 of this Code can be conducted in the absence of the accused (in absentia), except for a minor who is hiding from the investigating authorities and the court to evade criminal liability (special court proceedings) and is put on the interstate or international wanted list.

Thus, the criminal procedure legislation of the FRG, in contrast to the CPC of Ukraine, provides for several types of judicial proceedings in absentia.

According to the provisions of the CPC of the FRG, in cases where the accused evades investigation or trial by staying abroad, regardless of whether or not the issue of their extradition by a foreign state is resolved, and in cases in which their place of stay is unknown, the law does not provide for the proceedings in absentia. Such cases are considered in German law as temporary surmountable procedural obstacles, for overcoming which the CPC of the FRG provides for separate proceedings (book 2, section VIII, §§ 276-295 of the CPC of the FRG) [6].

This separate proceeding is considered as an alternative for in absentia, in particular, "special pre-trial investigation" and "special judicial proceedings" (chapter 24-1 and Art. 323 of the CPC of Ukraine) – "proceedings against absent persons" (Book 2, Section VIII, §§ 276-295 of the CPC of the FRG). It is conducted separately from the main court proceedings, it aims to provide evidence in case of the upcoming appearance of the absent accused (§ 285 of the CPC of the FRG). However, the law also defines another task, namely to induce the accused to appear in court by, on the one hand, temporary confiscation of their property (§§ 290-293 of the CPC of the FRG), and on the other – by applying an incentive measure in the form of a guarantee of inviolability (§ 295 of the CPC of the FRG) [6].

The analysis of §§ 276, 285 of the CPC of the FRG demonstrates that separate proceedings are used to preserve evidence when the location of the accused is unknown, or the accused is not accessible to the German authorities in other circumstances.

In all cases, with the exception of those where a criminal act committed by an absent person is punishable by imprisonment for up to six months or a monetary fine of up to one hundred and eighty daily rates, if there are suspicions against the absent accused that would justify the issuance of a pre-trial detention order, a court order may impose a temporary confiscation of their property within the scope of the CPC of the FRG (§ 290 of the CPC) [17]. The purpose of the temporary confiscation of the property of "Vermögensbeschlagnahme" is to force the absent accused to appear in court by seizing their property and financial resources and thus securing the main trial. This measure can be applied regardless of the possibility of extradition of the accused by a foreign state or the refusal of the accused to return to Germany, even in the event of loss of property. However, it cannot be applied if the presence of the accused cannot be ensured by applying this measure. An example is an absence due to reasons beyond the control of the accused (illness, detention against their will, etc.). The purpose of this measure cannot be achieved either if the value of the property is so insubstantial that its confiscation cannot encourage the accused to appear [21].

Based on the analysis of the CPC of the FRG, the resolution on temporary confiscation of property will be published in the Federal Gazette and, at the discretion of the court, published in another

appropriate way. From the moment of its first publication in the Federal Gazette, the accused loses the right to dispose of confiscated property by entering into transactions [17].

In addition, the procedural law provides for the involvement of persons in the main hearing who are not charged, but may be adversely affected by the confiscation order of the criminal court, since they are the owners of this property or have another right to it. In this case, the court obliges such a person to take part in the proceedings [19].

In such proceedings, the accused may be represented by a defence lawyer and even relatives. If charges have already been brought against an absent accused, the totality of the accused's property located within Germany may be seized by the court to force them to appear, if the grounds of suspicion justify the issuance of an arrest warrant [22], [9].

The decision on the application of the temporary confiscation of property is brought to the attention of the agency to which the institution of supervision of the seized property of the persons present is subordinate (§ 292 paragraph 2 of the CPC of the FRG) [17]. According to § 293 of the CPC of the FRG, temporary confiscation is cancelled when there are no grounds for it anymore. Cancellation will be announced the same way as the application. An order to remove the resolution from the Federal Bulletin, which is executed within a month is conducted to do this [21].

In addition to the special confiscation of property in the framework of proceedings against absent persons, according to § 295 of the CPC of the FRG, the court has the right to issue a written guarantee of inviolability to the absent accused, which may be associated with the fulfilment of certain conditions. Such a guarantee provides an exemption from pre-trial detention as a preventive measure, but only in relation to the criminal act in connection with which it was granted. The guarantee loses its validity in the event of a guilty verdict with a custodial sentence, or if the accused makes preparations to escape, or if they do not fulfil the conditions on which the guarantee of inviolability depended [1].

Thus, the task of the separate proceedings under the CPC of the FRG, which is considered as an alternative for in absentia, is to induce the accused to appear in court by both temporary confiscations of their property and applying an incentive measure in the form of a guarantee of inviolability.

Alternative legal mechanisms in criminal proceedings in the absence of a suspect (accused), except for a special pre-trial investigation or special court proceedings, are not provided for in the CPC of Ukraine, and any mechanisms for inducing a suspect (accused) to appear to an investigator, prosecutor, or court during a special pre-trial investigation and special court proceedings.

According to the criminal procedure legislation of Germany, absentee court proceedings are allowed under certain circumstances.

After a public accusation is made, which is the moment when the prosecutor's office transfers the indictment to the court, the court is ex officio obliged to check the existence of procedural prerequisites for the process. If a temporary procedural obstacle is established, which is the absence of the accused for the above reasons, the court has the right, based on § 205 of the CPC of the FRG, to decide on the temporary closure (suspension) of the trial [6].

The CPC of the FRG, namely § 276, defines a temporarily absent person. Thus, the accused is considered absent if the place of their stay is unknown or if they are abroad and it is impossible to bring them to the court to which their case is being considered.

Unlike the CPC of the FRG, the criminal procedure legislation of Ukraine does not cover the concept of "hiding of a suspect from pre-trial investigation bodies and the court to evade criminal liability", which creates problems in the law enforcement of the institution in absentia.

Therewith, according to § 287 of the CPC of the FRG, if the place of stay of the accused is known, the judge of the court who has jurisdiction over the case opens "proceedings against the absent person", sends the absent person a corresponding notification about the progress of the proceedings, against which the accused cannot make claims. In the event that a public charge is brought against the absent person, and the place of their stay is unknown, the judge, having opened the relevant proceedings, conducts the so-called requirement to appear by notifying one or more public mass media (in newspapers, on radio, television, or even by attempting to establish contact with the absent person by other suitable means with a request to appear in court or inform the place of their stay (§ 288 of the CPC of the FRG) [21].

When the absence of the defendant is discovered only after the opening of the main court proceedings, the court decides to suspend it (§ 205 of the CPC of the FRG), but for the purpose of providing procedural evidence through an authorised judge of the court conducting the trial, or at their request through an authorised judge of another court (simultaneously with the initiation of “proceedings against the absent person”) conducts their investigation (§ 289 of the CPC of the FRG, § 157 of the Law on the judicial system) [17].

The main trial may be conducted without the defendant, if they were properly summoned and the summons (but not based on a summons via public notice) stated that the trial may be conducted in the defendant's absence, and the results of the trial alone or in aggregate will only impose a penalty of a

monetary fine of up to one hundred and eighty day rates, a warning with a penalty clause, a prohibition to drive a vehicle, confiscation of what was acquired by criminal means, seizure, destruction, or reduction in disrepair of objects and means of committing the act. The imposition of a more severe penalty or correction measure in such proceedings is impossible, and the deprivation of a driver's license is allowed if the possibility of this was indicated in the subpoena (paragraphs 1, 2 § 232 of the CPC of the FRG) [6].

The court must be sure that the person deliberately ignores the obligation to be present without valid reasons [23]. The court may not apply a higher fine or penalty than those indicated above, in particular, a penalty of imprisonment [19]. The presence of all these conditions does not allow a person not to appear, but only authorises the court to hold the main hearing in the absence of the defendant [28]. Even if the above conditions for a hearing in absentia are met, the court may order to bring the defendant to it, first of all, if it considers that the presence of the defendant is necessary to reveal the truth [19].

In the criminal procedure legislation of Ukraine, the procedure for judicial proceedings in the absence of the accused is called special judicial proceedings (in absentia).

According to the provisions of the CPC of Ukraine, judicial proceedings in criminal proceedings can be conducted in the absence of the accused (in absentia), except for a minor, only in respect of clearly defined crimes, which mainly belong to grievous and extremely grievous crimes, who is hiding from the investigating authorities and the court to evade criminal liability and is put on the interstate and international wanted list (part 3 of Art. 323 of the CPC of Ukraine).

The prosecutor submits a petition to the court, to which they add materials stating that the accused knew or should have known about the criminal proceedings initiated to apply the procedure of special judicial proceedings. Based on the results of this request, the court issues a decision on the implementation of special court proceedings against such an accused (part 3 of Art. 323 of the CPC of Ukraine) in case of its satisfaction, or a decision on refusal to satisfy the request for special court proceedings, declaring the accused wanted and suspending criminal proceedings (Art. 335 of the CPC of Ukraine).

Summons for the accused in the event of special judicial proceedings are sent to the last known place of their residence or stay, and the procedural documents to be served to the accused are sent to the defence lawyer. Information about such documents and summons for the accused must be published in the mass media of the national field of distribution. From the moment of publication of the summons in the mass media of the general state field of distribution, the accused is considered to be properly informed with its content.

Thus, according to the criminal procedure legislation of Germany, holding a full main hearing in the absence of the accused is permissible in the interests of protecting the functioning of the criminal justice system, if they were properly summoned, for this purpose the location of the defendants must be known to the court, thereby they must be warned that the hearing can take place in their absence [8] in cases, according to the results of the trial of which, punishment can be imposed in the form of a predominantly monetary penalty.

In turn, the CPC of Ukraine provides for conducting a trial in the absence of the accused, who is hiding from the investigating authorities and the court to evade criminal liability and is put on the interstate and/or international wanted list in the absence of the accused in proceedings only related to grievous and extremely grievous crimes. Attention is also drawn to the issue of the involvement of a defence lawyer in criminal proceedings in the absence of the accused (defendant) in the CPC of the FRG. Thus, according to § 286 of the CPC of the FRG, a defence lawyer can act for an absent accused (defendant), and their relatives are allowed as representatives even without a power of attorney.

In all cases of absentee proceedings to the extent that the main trial can be conducted in the absence of the defendant, they have the right to entrust their representation in court to the defence lawyer, issuing them a written order for this, and if they do not have a defence lawyer, give their consent to this. If the defence is conducted as intended, the defendant's consent to this is not necessary (§§ 234, 234A of the CPC of the FRG) [17].

If such representation is possible, that is, when the main hearing can be held in the absence of the accused, and the defence lawyer has received a power of attorney from such a person, the former has the right to exercise all the procedural rights of the defendant, in particular, to make a statement of accusation on behalf of such a person [8]. Therewith, the presence of a defence lawyer at the hearing is not a substitute for the presence of the defendant. Undoubtedly, the absent defendant loses the opportunity to contribute to the clarification of the facts at the main hearing [18]. However, according to §§ 240, 257, the defence lawyer can exercise most of these rights of involvement, regardless of whether the defendant is present, in particular, the right to ask questions to witnesses and experts and comment on the evidence. According to part 2 of Art. 297-3, part 3 of Art. 323 of the CPC of Ukraine, the involvement of a defence lawyer during a special pre-trial investigation from the moment the investigating judge considers the request and special court proceedings is mandatory.

Fixing in the CPC of Ukraine the requirement for mandatory involvement of a defence lawyer in criminal proceedings against persons in respect of whom a special pre-trial investigation and special judicial proceedings (in absentia) are conducted, aimed at ensuring the right to defence of a suspect or accused. However, the impossibility of communication of a defender appointed by the relevant body (institution) authorised by law to provide free legal assistance with a suspect or accused who haven't met before, excludes the possibility of coordination between these persons of a legal position and substantially complicates the exercise by the defender of their powers, in particular, to establish information about circumstances, factual data that could have been communicated to them exclusively by the client [16]. This may lead to a violation of the right to defence, namely the "right to effective defence", the concept of which defined by the practice of the European Court of Human Rights.

Consequently, the criminal procedure legislation of both Germany and Ukraine provides for the right to defence for a suspect accused in criminal proceedings in absentia, but during law enforcement, there are problems in ensuring this right under the CPC of Ukraine in the case of defence by a lawyer appointed by the relevant body (institution) authorised by law to provide free legal assistance.

Under § 235 of the CCP of the FRG, if the main hearing was held in the absence of the defendant, they may, within one week after the sentence was served, request that the proceedings be annulled and returned to the previous stage under the same conditions as those established in the event of non-compliance with the time-limits; if the summoning of the defendant to the main trial was not communicated to them, they may claim that the proceedings were returned to the previous stage.

According to the CPC of the FRG, if it is allowed to hold the main hearing in the (permanent or temporary) absence of the defendant, further judicial means are the same as those applied to court decisions after the usual main hearing: review (i.e., appeal only on matters of law), and in some cases – appeal (i.e., appeal on matters of fact and law) [19].

According to paragraph 1 of part 1 of Art. 392 of the CPC of Ukraine, court decisions that were adopted by the courts of the first instance and did not enter into legal force, namely sentences adopted as a result of special court proceedings, may be appealed.

According to part 3 of Art. 400 of the CPC of Ukraine, if an appeal is filed by an accused against whom the court has issued a verdict based on the results of special court proceedings, the court resumes the term, provided that the accused are provided with confirmation of the existence of valid reasons and sends the appeal together with the materials of the criminal proceedings to the Court of Appeal, observing the relevant rules.

The content of this legal provision certifies that the time limit for the appeal must be restored by the court that issued such a verdict that contradicts the principles of proceedings in the Court of Appeal, defined in chapter 31 of the CPC of Ukraine.

Therewith, the CPC of Ukraine, apart from the appeal against a verdict adopted as a result of special judicial proceedings with certain restrictions, does not provide for a separate procedural mechanism for re-examination in the event that the accused has not been properly notified about the trial.

An international document defining certain requirements for criminal proceedings in the absence of a suspect (in absentia) is Resolution (75) 11 of the Committee of Ministers of the Council of Europe "On the criteria governing proceedings conducted in the absence of the accused", adopted on January 19, 1973. According to this document, non-compliance with the requirement for the mandatory presence of an accused during the consideration of their case in court is permissible only in exceptional cases; ways and means must be found to ensure the rights of the accused to be heard and to be present during the consideration of their case; the case of the accused is not considered in their absence if it is possible to move the proceedings to the territory of another state or make a request for extradition; everyone whose case was considered in their absence should be able to challenge this judicial decision by any means available to them if they were present; a person whose case was considered in their absence and who was not served with a summons in a due way must have a legal remedy that allows it to annul the court decision [24].

Certain criminal procedure criteria for criminal proceedings in absentia are also contained in Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe to member states "On the simplification of criminal justice" of September 17, 1987 [25].

In particular, this document emphasises that member states should consider and allow first-instance courts to hear and decide on cases in the absence of the accused, at least regarding minor offences, and consider the penalty that may be imposed, provided that the accused has been properly informed of the date of the hearing and the right to legal or other representation [25].

The analysis of the CPC of the FRG shows the general compliance of the criminal procedure legislation of this country with the criteria defined by international documents.

In turn, the procedure for special pre-trial Investigation, special court proceedings defined by the CPC of Ukraine, do not meet the following criteria,

in particular with regard to: the severity of crimes, proceedings o which can be conducted in absentia; the impossibility of conducting if the location of the suspect or accused is known outside Ukraine; the severity of the punishment that can be imposed as a result of special court proceedings; the lack of a defence method that allows reviewing the verdict.

The European Court of Human Rights, in its practice, has developed certain criteria for compliance of the in absentia procedure with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular in the cases of Sejdovic v. Italy, Medenica v. Switzerland, Haralampiev v. Bulgaria [7].

Thus, the accused may voluntarily waive the right to appear in person at the trial, directly or tacitly, provided that the refusal is established unequivocally and that the accused can reasonably foresee the consequences of their non-appearance. The European Court of Human Rights has repeatedly analysed German criminal procedure law, which deals with certain aspects of criminal proceedings in the absence of the accused. Given the strict requirements for criminal proceedings in absentia, German legislation seems to mostly meet the standards of the European Court of Human Rights [26], but there are some problematic aspects. Thus, the European Court of Human Rights in the case of Schatschaschwili v. Germany identified that Germany had violated § 1 Art. 6 and § 3(d) Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms on account of the failure to examine during the trial the absent key prosecution witnesses, whose statements had a substantial impact on the applicant's guilty verdict, who had been questioned by the investigating judge at the pre-trial investigation stage in the absence of the accused and their defence lawyer, since neither the accused nor the defence lawyer had had the opportunity to put questions to the witnesses, rendering the trial unfair [7].

This reinforces the criticism expressed by the European Court of Human Rights earlier in the Hümmer v. Germany decision, in which a violation of Art. 6 of the Convention was identified, since no defence lawyer was appointed to take part in the pre-trial questioning of the key accusation witness by a judge, and this witness then did not give evidence at the main hearing [7].

Regarding the appeal proceedings in the absence of a person, the European Court of Human Rights in Neziraj v. Germany case, found a violation of § 1 Art. 6, § 3(c) Art. 6 of the Convention regarding the rejection of the defendant's appeal in connection with their inability to appear at the court session of the appellate instance, since, according to the CPC of the FRG, the Court of Appeal was obliged to reject the appeal filed by the defendant without making a decision on its merits, if the latter did not appear at the appeal hearing [7].

Following the decision of the European Court of Human Rights in 2012, the German legislator changed the procedural rules in appeal proceedings, allowing an appeal to be heard in absentia, primarily if the defendant is represented by a defence lawyer, and the presence of the defendant is not considered necessary to reveal the truth. So far, the European Court of Human Rights has not made a single decision against Ukraine in which it has assessed any aspects of the special pre-trial Investigation, special judicial proceedings (in absentia).

However, the Office of the United Nations High Commissioner for Human Rights in its reports on the human rights situation in Ukraine has repeatedly emphasised that the provisions of the criminal procedure legislation on special pre-trial Investigation, special judicial proceedings do not provide sufficient guarantees to protect the right to a fair trial and due process, and therefore the current procedure for proceedings in absentia does not comply with the legal practice of the European Court of Human Rights [27].

Thus, the position of V.O. Popeliushko is reasonable, who believes that absentee proceedings in German criminal proceedings are regulated considering both the interests of justice and the interests of the accused. Proceedings against absent persons, which do not concern the issue of guilt or innocence of the accused, and thus exclude the possibility of violating the rights that they are endowed with in the main trial, are an effective legal mechanism for ensuring their appearance in court and thereby resolving the criminal case on its merits in compliance with all procedural guarantees [17].

Since the criminal procedural legislation of Ukraine is at the stage of development and does not fully comply with the international standards that are brought to criminal proceedings in the absence of a suspect, accused (in absentia), to ensure the achievement of the tasks of criminal proceedings defined in Art. 2 of the CPC of Ukraine, and the development of criminal procedural legislation of Ukraine in absentia, certain legal provisions of the CPC of the FRG can be borrowed.

The scientific originality consists in a comprehensive analysis of criminal proceedings in the absence of a suspect or accused in the criminal procedure legislation of Germany and Ukraine, the examination of the criminal process of Germany to clarify all its features and determine further ways of developing the criminal procedure legislation of Ukraine.

Conclusions

1. The criminal procedure legislation of both Germany and Ukraine provides for a certain procedure

for conducting criminal proceedings in the absence of a suspect or accused (in absentia).

2. The CPC of the FRG does not provide for the possibility of conducting a pre-trial investigation in the absence of a person, which substantially distinguishes it from the CPC of Ukraine, which defines the procedure for special pre-trial investigation (in absentia).

3. The criminal procedure legislation of the FRG, in contrast to the CPC of Ukraine, provides for so-called separate proceedings aimed at encouraging the accused to appear in court.

4. According to the criminal procedure legislation of the FRG, in contrast to Ukraine, holding a full main hearing in the absence of the accused (defendant) is possible in certain cases, provided that proper notification is given in cases, as a result of judicial consideration of which, a punishment in the form of mainly monetary penalties can be imposed.

5. The CPC of the FRG mostly complies with the standards of the European Court of Human Rights.

6. The criminal procedural legislation of Ukraine is at the stage of development and does not fully comply with international standards that are brought to criminal proceedings in the absence of a suspect, accused (in absentia), and therefore for the development of criminal procedural legislation of Ukraine in absentia, certain legal provisions of the CPC of the FRG can be borrowed.

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Порівняльний аналіз кримінального провадження in absentia в законодавстві ФРН та України

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Анотація
Метою статті є порівняння кримінального процесуального законодавства Федеративної Республіки Німеччини та України щодо кримінального провадження за відсутності підозрюваного чи обвинуваченого на стадії як досудового розслідування, так і судового розгляду, а також дослідження відповідності законодавств цих країн міжнародним документам, у яких визначено критерії, що регламентують розгляд у порядку in absentia та практиці Європейського суду з прав людини. З огляду на поставлену мету, особливості об'єкта й предмета дослідження, обрано методологічний інструментарій. Під час дослідження використано систему методів наукового пізнання: формальної логіки (абстрагування, аналогію, дедукцію, індукцію, синтез) – для з'ясування змісту розглядуваного питання; теоретичний – у процесі дослідження наукової та навчально-методичної літератури. Наукова новизна полягає в комплексному дослідженні кримінального провадження за відсутності підозрюваного чи обвинуваченого в кримінальному процесуальному законодавстві Федеративної Республіки Німеччини та України, причому увагу акцентовано на кримінальному процесі Федеративної Республіки Німеччини для з'ясування всіх його особливостей з метою визначення подальших шляхів розвитку кримінального процесуального законодавства України. За результатами здійсненого дослідження сформульовано висновки: 1) кримінальне процесуальне законодавство як Федеративної Республіки Німеччини, так й України передбачає певний порядок здійснення кримінального провадження за відсутності підозрюваного, обвинуваченого (in absentia); 2) Кримінальний процесуальний кодекс Федеративної Республіки Німеччини фактично не передбачає можливості проведення досудового розслідування за відсутності особи, що суттєво відрізняє його від Кримінального процесуального кодексу України, який визначає порядок спеціального досудового розслідування (in absentia); 3) кримінальне процесуальне законодавство Федеративної Республіки Німеччини, на відміну від Кримінального процесуального кодексу України, передбачає так зване окреме провадження, спрямоване на спонукання обвинуваченого до явки в суд; 4) за кримінальним процесуальним законодавством Федеративної Республіки Німеччини, на відміну від України, проведення повного основного слухання за відсутності обвинуваченого (підсудного) можливе в певних випадках, за умови належного повідомлення у справах, за результатами судового розгляду яких може бути призначено покарання у вигляді переважно грошового стягнення; 5) Кримінальний процесуальний кодекс Федеративної Республіки Німеччини здебільшого відповідає стандартам Європейського суду з прав людини; 6) кримінальне процесуальне законодавство України знаходиться на стадії становлення і не цілком відповідає міжнародним стандартам, які пред'являють до кримінального провадження за відсутності підозрюваного, обвинуваченого (in absentia), а тому для розвитку кримінального процесуального законодавства України in absentia певні правові норми Кримінального процесуального кодексу Федеративної Республіки Німеччини може бути запозичено

Ключові слова:
спеціальне досудове розслідування; спеціальне судове провадження, in absentia; підозрюваний; обвинувачений; конфіскація; КПК ФРН