HISTORICAL DEVELOPMENT OF THE INSTITUTE OF SPECIAL COURT PROCEEDINGS IN UKRAINE (IN ABSENTIA)

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Annotation. *Judicial consideration of criminal proceedings without the participation of the accused (in absentia) is a fairly common thing in various legal systems and has deep historical roots, which are connected with local political events, culture and traditions. Thus, criminal proceedings in the absence of a suspect or accused are used in the legislation of the Netherlands, Spain, Italy, France, Switzerland, Denmark, Estonia, Moldova, and other countries.*

However, regardless of different approaches to the application of such a mechanism of judicial proceedings, appeals to the European Court of Human Rights regarding the procedure for sentencing a person in absentia are not so rare.

In connection with this, questions often arise regarding the justness of the judicial process during absentee proceedings, since in such cases the accused is not present at the court session, which practically makes it difficult to observe his rights and freedoms.

The article analyzes the historical development of the institution of special criminal proceedings on the territory of Ukraine, since the formation of any modern legal system depends on historical and political changes in the country. The analysis of various historical legal documents will help to understand the reasons and conditions for the formation of the law enforcement technique in the criminal process during the consideration of the case without the participation of the accused in court (in absentia), the attitude to such type of procedure, as well as the protection of the rights of the parties during the use of special criminal proceedings.

The article examines the peculiarities of the emergence of such a mechanism as special court proceedings in Ukraine, the introduction of the "in absentia" institution, its peculiarities and the purpose of its functioning.

Keywords: *accused, special court proceedings, special criminal proceedings, correspondence criminal proceedings, "in absentia", history of criminal procedure, criminal offense.*

1. Introduction.

The conducted research is relevant, because for Ukraine, court proceedings "in absentia" are a relatively new practice, and therefore, in order to understand the principles of absentee trials, it is necessary to investigate their historical roots in order to establish the purpose of functioning of such an institution.

2. The state of development of this problem.

To date, the history of the emergence of special court proceedings in the legal system of Ukraine, the aspects of its functioning and conditions of development are being studied by many domestic scientists. During the study of the historical development of Ukrainian legislation, many scholars paid attention to this topic in their works, including O.O. Nahorniuk-Danyliuk, S.M. Zelenetskyi, I.Y. Boiko, O.I. Nelin, etc.

3. The purpose of the article (the aim of the work) is to study the historical development of the emergence of such an institution as a special court proceeding in Ukraine to establish an understanding of its functioning principles and purpose.

4. Review and discussion.

The development of the judiciary in Ukraine has its own peculiarities, since some territories of our country in different periods of history were part of different other states, where different legal systems operated accordingly.

The beginning of the criminal procedural law of Ukraine should be associated with the emergence, as a result of the completion of the process of political consolidation of the Eastern Slavs, Kyivan Rus, and the introduction of such a document as the Ruska Pravda (or the Russian Justice).

During the specified period, personal participation of a defendant (accused) in court proceedings was mandatory, and the possibility of carrying out criminal proceedings in the absence of the defendant was not envisaged [1, p. 41].

The criminal process was carried out in accordance with the main starting principles, namely: presumption of innocence; consideration and resolution of a criminal case on the basis of competitiveness and relative equality of the parties; mandatory execution of court decisions and sentences; commensurability of the social danger of the criminal act to the prescribed punishment, which testified to the high level of development of judicial thought in Kyivan Rus.

Ruska Pravda established the rules of trial and resolution of criminal cases. The competition of the parties manifested itself in the form of a court battle. The side that was victorious was recognized as having won the case. A significant role in this type of criminal process was played by the accuser, who was the victim of the crime himself and who could initiate the emergence, development, and sometimes termination of the legal relations in terms of criminal procedure [2, p. 5].

During the period of the disintegration of Kyivan Rus as a result of feudal fragmentation, the adversarial type of criminal process was preserved; it occupied a dominant position in the court process system, and the personal participation of the parties in the trial was given special attention, which made it impossible to carry out criminal proceedings in the absence of the accused [3, p. 181].

In the west of the former Kyivan Rus in the year 1199, the Volyn prince Roman Mstyslavych united the Galician and Volyn principalities into a single Galicia-Volyn state, which became the heir of Kyivan Rus and continued the state-building traditions on Ukrainian lands [4, p. 273].

Ruska Pravda remained the source of law in the Galicia-Volyn State, but church statutes of princes Volodymyr and Yaroslav, as well as princely charters were also applied [5, p. 79].

So, we can conclude that in the period of Kyivan Rus and during feudal fragmentation, it was impossible to hold a trial without participation of the accused in court. The process was based on the relative equality of the parties, although the accuser (the victim) directly had a more favorable position, since both the start of the trial and the opportunity to influence the further course of the process depended on him.

In the period between the 14th and the 18th centuries the lands of modern Ukraine were seized by neighboring countries, due to which the specified period is characterized by application of different legal systems, different court process and procedures, depending on the parts of the territory that were under the power of one or another country.

What remained common was that the adversarial type of criminal process continued to prevail on Ukrainian lands, and no provisions indicating the possibility of a trial in the absence of the accused were established during this period [3, p. 181].

For several centuries, the Lithuanian Statutes were the main collections of law in Ukraine, even in the part that was annexed to Poland. During the specified period, there were no differences in the procedure for consideration of civil and criminal cases.

The court process was characterized by: initiation of a case by an interested party (oral or written); mandatory designation of the defendant in the case; the participation of the parties was mandatory; possibility of party representation (prosecutor, guardian, government defender, attorney); the evidence was documents, things, objects that were related to the case, as well as witness statements (issues of admission and questioning of witnesses in court were regulated in detail); the process of consideration of the case in court took place orally and openly; the process ended with the announcement of a decision [6, p. 84].

It is necessary to pay attention to Clause I of Section I of the Statute of the Grand Duchy of Lithuania of 1529, according to which the Grand Duke undertook not to punish anyone on the basis of an accusation in absentia, even if the case concerned an insult to the dignity of his majesty. It was required that both parties should appear before the court in person, and by a direct trial according to Christian law, their guilt should be conclusively proved, and only after the trial and such proof of guilt, according to the custom of Christian law, should they be convicted and punished according to the gravity of their crimes [7].

Lithuanian Statutes of 1566 and 1588 kept the rule of summoning the defendant to the court with summonses and the prohibition of punishment on the basis of an accusation in absentia, even if the case concerned encroachment on power or treason [8, 9].

Thus, the Lithuanian Statutes contained a direct ban on holding a trial in absentia and assigning punishment without the accused in court.

At the same time, Zaporozhian Sich had its own legal system, the basis of which was Cossack law, which existed mainly in an unwritten form [10, p. 142-143]. The Cossack court had a democratic character, and the judicial system was based on the principles of democracy, immediacy, competitiveness, and collegiality, which were a guarantee of observing the personal rights of Cossacks in court [11, p. 142-143].

Later, as a result of the liberation war of 1648-1654, the Ukrainian Hetman State (or Viisko Zaporizke) was created within three voivodeships. The main feature of the criminal law of the Hetmanate period was its private legal nature, that is, the prosecution of a crime was mainly a private matter.

Taking into account the fact that the legal system of Hetman's Ukraine did not contain uniform norms that would regulate relations during court proceedings, there was a need to systematize legal norms.

In connection with the above, it is necessary to pay attention to such a legal document as "The Rights by which the people of Little Russia are judged" of 1743 (hereinafter referred to as the "Rights..."), which, although not approved in the form of a law, nevertheless constituted a kind of codification of the existing law, which was actually applied in the courts.

"Rights..." clearly drew a line between the process in the so-called extrajudicial and criminal cases, and also regulated the issue of subpoenas and the consequences of non-appearance according to such subpoenas. Regarding the procedure of subpoenas in civil lawsuits after filing in court, a special person was sent to the victims of complaints to the defendant, and in remote places, the subpoena was made in writing. In the case of failure to appear in court without valid reasons, the prosecution was carried out on the basis of the plaintiff's arguments, and it was also allowed to impose a fine on the defendant [12, p. 91].

Sections 7, 8, 9 were dedicated to the judicial system, the norms of exclusively criminal procedural law were contained in section 25, which, in particular, refers to the interrogation of criminals and suspects of crimes "under torture", and maintenance of special books in courts for "recording of penal cases", on the order of execution of sentences, etc [13].

After the formation of the Polish-Lithuanian Commonwealth (Rzecz Pospolita), an attempt was also made to codify the current legislation, and in 1782 a single Code of Laws was issued. The legal system of that time did not distinguish between civil and criminal proceedings. The summons to the court was carried out by special court officials three weeks before the start of the trial. After hearing both sides and initiating all the evidence, the court made a decision [11, p. 168, p. 183-184].

At the end of the 18th century as a result of the three divisions of Poland (1772, 1793, 1795) a significant part of Right Bank Ukraine went to Russia.

The judicial reform of 1864 changed the criminal justice system of the Russian Empire and, in particular, the law. The Statute of criminal proceedings (hereinafter referred to as the Statute), approved on November 20, 1864, introduced the institution of a sentence in absentia, i.e. a verdict passed in the absence of the defendant according to the model that existed in the French Criminal Procedure Code [12, p. 91].

Article 133 of the mentioned Statute established that if the person accused of an offense for which the punishment was not more severe than arrest did not appear and did not send a lawyer by the set deadline, then the justice of the peace should have issued a verdict in absentia.

If a person was accused of committing a crime punishable by imprisonment or more severe measure, the justice of the peace had to adjourn the case until such person was brought to court, but could make a verdict in absentia for the recovery of damages and losses under the rules of civil procedure.

Articles 133–139 of the Statute provide that a copy of the absentee verdict was sent to the accused and within two weeks from the delivery of a copy of the absentee verdict, the accused had the right to submit a response regarding a new trial [14].

So, we come to the conclusion that the judicial reform of 1864 for the first time recorded the possibility of conducting a trial without the participation of the accused in court and the possibility of a court ruling in absentia.

At the same time, the main legal document regulating criminal proceedings on the territory of Galicia was the Austrian Code of Criminal Procedure, adopted on May 23, 1873 and valid until 1918.

According to the mentioned legal document, the presence of the accused during the consideration of the case was mandatory. But the presiding judge had the right to remove the defendant from the courtroom during the interrogation of accomplices, when there were reasons to believe that his presence could negatively affect the testimony of other defendants.

In addition, the presiding judge had the right to temporarily remove the defendant from the courtroom if the defendant violated the order in the courtroom or showed contempt for the court. After the defendant's return, the presiding judge had to inform him about everything that happened at the court session in his absence.

Thus, the Austrian Code of Criminal Procedure also provided for the possibility of conducting a trial without the accused in court, although only for a clearly regulated period of time and with the possibility for the latter to be informed about what happened in his absence. We believe that the purpose of introducing such exceptions was to ensure the normal functioning of the judicial system, clarify all the circumstances of the case, and make a fair decision on the merits.

Later, on the territory of modern Ukraine, there was a "step back" regarding the possibility of conducting court proceedings in absentia.

So, in the period from 1917 to 1922 the issue of absentee proceedings was not regulated by law. Normative legal acts of the Central Rada, the Skoropadskyi Hetmanate, and the Directory in the field of justice established a number of provisions that differed from the Russian imperial legislation, which became fundamentally new at that time (the principles of legality, presumption of innocence, inviolability of the person and the home, equality of all participants before the law and the court, etc were declared) [14]14.

In connection with the lack of a single normative act that would regulate the judiciary, in 1920 a decision was made to create the Code of Criminal Procedure of the Ukrainian People's Republic, but this decision remained unimplemented, since in November 1920 the troops of the Ukrainian People's Republic left the territory of Ukraine occupied by the Bolsheviks.

The institute of absentee trial of criminal cases was introduced again on the territory of modern Ukraine by the Code of Criminal Procedure of the Russian Socialist Federative Soviet Republic in 1922 and the Code of Criminal Procedure of the Russian Socialist Federative Soviet Republic in 1923.

According to Article 351 of the Criminal Procedure Code of the Russian Socialist Federative Soviet Republic of 1923, a verdict rendered in the absence of the defendant was considered a verdict in absentia, with the exception of the following cases: when the defendant was removed from the courtroom due to violation of the order of the court session; when considering a case of a crime punishable by imprisonment for a term of more than six months, or a case considered by a people's court with the participation of six people's assessors, where the appearance of the defendant was mandatory, if the latter expressly agreed to the consideration of the case in his absence, and also when it was proven that the defendant evaded the delivery of a summons or was hiding from the court; when the defendant appeared in court after the opening of the court session, but before the verdict was passed and was allowed to give explanations; when the defendant, who was present at the hearing of the case, himself left the courtroom before the verdict was announced [12, p. 94-95].

By the Resolution of the All-Russian Central Executive Committee of the Council of People's Commissars of the Russian Socialist Federative Soviet Republic dated May 04, 1933 "On changes to Articles 346 and 370 of the Criminal Procedure Code of the RSFSR and on the exclusion of Section I, Chapter 26 of the same code", the norms regulating the procedure for conducting criminal proceedings in absentia were excluded [15].

Articles 2381, 240, 247–249 of the Criminal Procedure Code of the Ukrainian SSR, approved by the resolution of the Central Executive Committee of the Ukrainian SSR dated July 20, 1927, regulated the issues of consideration of the case in the absence of the defendant. In case of violation of the order of the court session, as well as for disobeying the presiding judge's orders, the defendant could have been removed from the court room, after which the hearing in the case continued. The verdict was announced to the defendant immediately after its rendering.

In cases of crimes for which the court could impose a prison sentence of more than six months, the appearance of the defendant was mandatory, and the hearing of the case without him was allowed only in the event of the express consent of the defendant, and also if the court found that the defendant avoided the court (a reasoned decision of the court was issued regarding this)12.

Also, cases regarding terrorist organizations and acts of terrorism aimed against the officers of the Soviet government were considered without the participation of the parties.

The Law of the USSR dated December 25, 1958, which approved the Fundamentals of Criminal Justice of the Union of the SSR and the Union Republics, in Article 39 established that the consideration of the case in the session of the court of first instance should take place with the participation of the defendant, whose appearance in court was mandatory. Consideration of the case in the absence of the defendant was allowed only in exceptional cases, which were specifically provided for by law [16, p. 397-398].

From December 28, 1960, a new Code of Criminal Procedure of Ukraine became valid on the territory of Ukraine, in which Part 1 of Article 262 it is stated that the consideration of the case in the session of the court of first instance should take place with the participation of the defendant, whose appearance in court was mandatory. In the absence of the defendant, consideration of the case was allowed only in exceptional cases, when the defendant was outside of Ukraine and avoided appearing in court, as well as when the defendant requested to consider the case of a crime, for which the punishment in the form of deprivation of liberty could not be imposed, in his absence. However, even in such cases, the court had the right to recognize the appearance of the defendant as mandatory [17].

Therefore, the procedure for conducting a trial without the participation of the accused was provided for in the normative legal acts of the USSR and was accordingly implemented in the legislation of the Union republics.

In our opinion, although the possibility of holding a trial in absentia was enshrined in the Code of Criminal Procedure of the specified period, such a process does not reflect modern democratic values according to the established practice of the European Court of Human Rights and is not clearly regulated in comparison with the current Code of Criminal Procedure of Ukraine.

On August 24, 1991, the Verkhovna Rada of the then Ukrainian SSR adopted the Act of Declaration of Independence of Ukraine.

The current Code of Criminal Procedure of Ukraine was adopted on April 13, 2012, but the institution, which defines the procedure for conducting a special pre-trial investigation of criminal offenses and special court proceedings in the absence of a suspect or accused (in absentia) was introduced on October 7, 2014 by the Law of Ukraine "On Amendments to the Criminal Code and the Code of Criminal Procedure of Ukraine regarding the inevitability of punishment for certain crimes against the foundations of national security, public security and corruption crimes" as a separate chapter 24-1 of the Criminal Procedure Code of Ukraine [18].

It is the introduction of a new institution of criminal proceedings in absentia that, in our opinion, makes it possible to bring a person to criminal liability without his actual participation in the pre-trial investigation or trial, increases the effectiveness of investigation of individual crimes, ensures the principle of inevitability of punishment, as well as the confiscation of property for their commission.

5. Conclusions.

Thus, the analysis of historical sources testifies to the ancient practice of using the possibility of sentencing a person in absentia on the territory of modern Ukraine. The conditions of admissibility of the application of such an institution were dictated by specific historical circumstances, various legal systems and the needs of further development of society.

However, taking into account the current level of development of the legal system in general and the criminal process in particular, the institution of special criminal proceedings (in absentia), provided for by the current Code of Criminal Procedure of Ukraine, is more detailed and procedurally determined in comparison with the procedures used in ancient times.

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