

THE JUDICIAL SYSTEM AND FORMATION OF THE JUDICIARY UNDER CONDITIONS OF WAR

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Summary

The aim of this article is to analyze the legislative initiatives of the Ukrainian Parliament concerning the establishment of military courts and to forecast the feasibility of their implementation. The forecasting encompasses the current state of the judicial system, the staffing levels of courts with judges, and the progress of judicial selection procedures under the current functioning of the Higher Qualification Commission of Judges of Ukraine (HQCJ). The article examines the historical background and reasons behind the dissolution of military courts in Ukraine, as well as the potential for their restoration during wartime. It also evaluates the prospects for forming a corps of judges, taking into account the ongoing competitive selection and appointment procedures. A crucial aspect considered in the study is that any decision made by public authorities must be assessed in terms of its enforceability, short- and long-term consequences, and the financial resources required for implementation. With limited exceptions, any governmental decision entails amendments to budgetary allocations. The methods applied in the study include: the historical method (for analyzing the dissolution of military courts in Ukraine); systems analysis (for examining the judiciary and assessing the feasibility of establishing a separate branch of courts within its structure); legal analysis (for assessing draft normative acts, their impact on the judiciary, and the prospects for implementation); and general scientific methods.

Key words: military criminal offenses, criminal proceedings, pre-trial investigation, serviceman, trial, criminal liability, draft law, military court.

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1. Introduction

In every decision made by public authorities, it is essential to consider not only the question “why?”, but also “how?”, “when?”, “for what purpose?”, “is it feasible?”, and others.

Currently, several draft laws have been submitted that propose the restoration of military courts in Ukraine. However, given the time that has passed since their dissolution, it is more accurate to speak of their establishment rather than restoration.

Without challenging the very idea of restoring (establishing) military courts, it is necessary to raise several reservations that the drafters of such legislation appear to overlook.

An illustrative reference may be made to a quote from a well-known television series – Criminal Minds: one of the most harmful public campaigns targeted at children was “don’t go with strangers,” which was promoted nationwide through public service announcements.

However, criminological and forensic research provides the following empirical insights.

When developing a criminologically relevant typology of kidnapping victims, it is crucial to account for the nature of their relationship with the offender. According to this criterion, four groups can be distinguished: Group one – individuals whose interaction with the perpetrator occurs at the moment of the crime (35%). Group two – individuals whose interaction with the perpetrator developed through a casual acquaintance (23%). **Group three – individuals whose relationship with the offender was based on a prior personal acquaintance (40%).** Group four – individuals who were in marital, familial, or other close relations with the offender (2%) (*Olyshevskiy, 2004*).

Approximately 50% of rape victims were previously acquainted with the perpetrator; 20% were intoxicated, and 11% were in a helpless state. Notably, 53% of victims were assaulted in their own apartments, often after having spent leisure time with the offender (*Holina V.V., Holovkin B.M., 2014*).

Data on the relationship between child sexual abuse victims and the offenders indicate: previously unknown – 25%, **acquainted – 45%, close relatives – 30%** (*Romantsova S., 2018*).

Clearly, “strangers” pose significant threats to children, but as the data demonstrates, abuse by acquaintances is also a serious and non-negligible danger.

Accordingly, prior to taking legislative steps, it is imperative to assess both the immediate and long-term consequences of any decision.

In the context of reestablishing military courts, this includes: the creation process itself, geographical placement, the timeline for operational readiness, security considerations, the speed and sources for forming a judicial corps, the nature of offenses currently committed by military personnel, among others.

The objective of this article is to draw conclusions regarding the necessity and feasibility of establishing military courts, based on an analysis of relevant draft laws, historical circumstances surrounding the dissolution of military courts, and statistical data on offenses committed by military personnel. The article does not aim to analyze the general necessity of forming military courts – a subject comprehensively addressed, for instance, in the monograph by Yu. Bobrov titled "Problems of Formation and Development of the Military Court System in Ukraine" (*Bobrov Yu., 2025*), whose abstract notably states: “The necessity of establishing military courts within the judiciary of modern Ukraine is substantiated in order to ensure the proper protection of the rights, freedoms, and legitimate interests of servicemen, and to provide legal support for national defense.”

2. Dissolution of Military Courts: Stages and Rationale

It is important to recall how the dissolution of military courts took place and what the underlying reasons were, in order to determine whether those reasons remain relevant today.

The process of dissolving military courts began in 2004 with the issuance of Presidential Decree No. 1262/2004 dated 19 October 2004, titled “On the Dissolution of Certain Military Local Courts and Amendments to the Network and Number of Judges of Military Appellate and Military Local Courts.” This decree eliminated several military courts and reduced the number of military judges from 157 to 132.

On 14 September 2010, the President of Ukraine issued a Decree “On the Dissolution of Military Appellate and Military Local Courts,” pursuant to paragraph 23 of part one of Article 106 of the Constitution of Ukraine, Article 19 and paragraph 4 of Section XIII “Transitional Provisions” of the Law of Ukraine “On the Judiciary and the Status of Judges.” Through this decree, all military courts were formally dissolved.

The official rationale for the dissolution of military courts was based on several factors:

1. Economic inefficiency: The downsizing of the Armed Forces of Ukraine led to a significant decrease in the number of cases to be adjudicated by military courts, rendering their continued operation financially unjustified.

2. Aspiration toward European standards: The existence of military courts was viewed as a potential violation of the principle of judicial independence, as judges might be subject to influence from military command structures.

3. Judicial reform: The dissolution of military courts was part of a broader judicial reform initiative aimed at establishing higher courts, including the High Specialized Court of Ukraine for Civil and Criminal Cases and reforms of the Supreme Court.

Any future efforts to reestablish military courts should be evaluated with these factors in mind.

3. Draft Laws on the Restoration of Military Courts

One of the actively debated issues in the legal domain today is the restoration of military courts. The answer to the question “why?” is often simplified: because there is a war. However, the legislator seems to have left the other questions – “how?”, “when?”, “for what purpose?”, and “is it feasible?” – largely unanswered, both for society and possibly even for themselves.

Currently, there are two alternative draft laws proposing the restoration (establishment) of military courts:

Draft Law No. 13048 of 27 February 2025, “On Amendments to the Law of Ukraine ‘On the Judiciary and the Status of Judges’ Regarding the Functioning of Military Courts,” authored by S. Vlasenko (5, Draft Law No. 13048);

Draft Law No. 13048-1 of 11 March 2025, “On Amendments to the Law of Ukraine ‘On the Judiciary and the Status of Judges’ Regarding the Establishment and Organization of Military Courts,” authored by M. Dyrdin (6, Draft Law No. 13048-1).

Efforts to restore military courts had also been made earlier, particularly in 2015 in connection with the start of the Anti-Terrorist Operation (ATO).

It is important to analyze specific provisions of the draft laws, particularly in light of the factors that previously led to the dissolution of military courts.

Have the draft laws taken into account the reasons for which military courts were abolished, particularly the concern about potential influence on judicial independence?

Draft Law No. 13048:

“Article 56-2. Procedure for Conferring Military Ranks upon Judges of Garrison Military Courts, Military Appellate Courts, and the Supreme Court

...2. Judges of garrison military courts, military appellate courts, as well as judges of the chamber for military cases within the Criminal Cassation Court, shall be conferred officer military ranks, starting from Junior Lieutenant of Justice. The procedure for conferring and promoting military ranks shall be defined by a regulation approved by the Ministry of Defense of Ukraine in coordination with the High Council of Justice.

The procedure for conferring higher military ranks shall be determined by the President of Ukraine.” (5, Draft Law No. 13048).

Draft Law No. 13048-1:

“13) To supplement Article 52 with a third part reading as follows:

3. Judges of local military courts, the Military Appellate Court, and the Military Judicial Chamber of the Supreme Court shall perform military service in accordance with the law and the Regulation on Military Service in Military Courts, which shall be approved by the President of Ukraine upon the submission of the High Council of Justice.” (6, Draft Law No. 13048-1).

As can be seen, the issue of potential influence on judicial independence remains unresolved.

Do the legislators account for the financial implications – or rather, the lack thereof – for creating a system of military courts?

Draft Law No. 13048:

“5. Financial and Economic Justification

The adoption of this particular law does not require additional expenditures from the State Budget of Ukraine. Financial and economic calculations will be provided within the draft laws on the establishment of garrison military courts and military appellate courts.”(5, Draft Law No. 13048).

Draft Law No. 13048-1:

“5. Financial and Economic Justification

The implementation of this draft law will not require additional expenditures but rather a reallocation of existing ones, since the proposed legislative amendments are intended to be carried out using current judges, court staff, and the already existing material and technical base of the judicial system.”(6, Draft Law No. 13048-1)

It appears that the authors of these draft laws operate in a parallel reality – one where government decisions do not entail the need for financial resources for their implementation.

4. Feasibility and Necessity of Restoring Military Courts at Present

Is it possible to carry out the selection of judges at this time? According to data from the HQCJ (<https://vkksu.gov.ua/oblik>), 4,457 judges are currently serving. The total number of judicial positions that must be filled is 6,582. Accordingly, 2,125 positions remain vacant. (The published list of judges includes 4,919 individuals – greater than the number of active judges – likely due to some judges lacking authority at present.)

Naturally, the situation varies depending on the court instance, region, individual court and judge workload, and so forth. Statistical data indicate that 32% of judicial positions are vacant overall. The situation is most critical in appellate courts, where more than 56% of judicial positions remain unfilled.

Competitions for positions in local and appellate courts are ongoing, and a competition has been announced for the High Anti-Corruption Court. This raises the question: can the HQCJ (whose current composition remains in office until 2027) realistically conduct an additional competition? This appears unlikely.

Nevertheless, the draft laws propose extremely tight deadlines for such procedures. For example:

Draft Law No. 13048 states: “II. Final and Transitional Provisions. Part 2, item 6: The Higher Qualification Commission of Judges of Ukraine shall conduct a qualification examination by means of anonymous testing in the specialization of military law and practical assignments *within two months* following the deadline for submitting application documents.”

Draft Law No. 13048-1 provides: “3. The selection of candidates for the position of judge in a military court shall be conducted with the particularities defined by this Law and the Regulation on Military Service in Military Courts, within a period not exceeding *two months* from the date of the competition announcement.”

As of now, the competition for appellate court judges, announced in November 2023, is still ongoing.

Can judges of general jurisdiction courts adjudicate criminal proceedings involving servicemen, taking into account the nature of the offenses they commit?

Table 1

Registered in 2023 (Five Sections with the Highest Number of Offenses Committed by Servicemen) (Karchevskiy, 2025):

№	Section	Total (registered according to OGPI*)	Servicemen (registered according to OGPII*)	Note
1.	XIX Criminal offenses against the established procedure of military service (military criminal offenses)	28,666	3,210	Art. 407 AWOL** (1792), Art. 408 (99)
2.	XIII Criminal offenses in the sphere of trafficking in narcotic drugs, psychotropic substances, their analogues or precursors, and other offenses against public health	39,124	1,740	Art. 309 (without intent to distribute) (1691)
3.	XV Criminal offenses against the authority of public authorities, local self-government bodies, public associations, and criminal offenses against journalists	25,697	752	Art. 358 (665) (Forgery of documents, use of forged documents)
4.	II Criminal offenses against life and health of an individual	63,766	715	Art. 115 (130), Art. 121 (99)
5.	VI Criminal offenses against property	178,902	584	Art. 185 (416)

Statistical data on registered criminal offenses committed by servicemen indicate that judges of local courts are capable of handling such proceedings, the majority of which do not require specialized military knowledge.

Moreover, Draft Law No. 13048 includes the following provision: “...3. In the adjudication of cases related to military service, judges of military courts have the right to involve military experts for consultations, clarifications, or to provide opinions on military matters. The list of accredited experts shall be approved by the General Staff of the Armed Forces of Ukraine.”(5, Draft Law No. 13048) This provision suggests that even the establishment of military courts staffed with specialized judges will not eliminate the necessity of involving subject-matter experts in specific areas of military practice – an option equally available to judges of general jurisdiction courts.

What measures can be taken to ensure the adequate protection of the rights and freedoms of servicemen in judicial proceedings?

Certain steps have already been taken in this direction. In 2024, the National School of Judges of Ukraine, funded by the State Budget and international organizations, conducted 205 educational

Table 2

Registered in 2024 (Five Sections with the Highest Number of Offenses Committed by Servicemen) (Karchevskiy, 2025):

№	Section	Total (registered according to OGPI*)	Servicemen (registered according to OGPII*)	Note
1.	XIX Criminal offenses against the established procedure of military service (military criminal offenses)	93,900	6,841	Art. 407 AWOL** (5405), Art. 408 (323)
2.	XIII Criminal offenses in the sphere of trafficking in narcotic drugs, psychotropic substances, their analogues or precursors, and other offenses against public health	48,233	2,368	Art. 309 (without intent to distribute) (2313)
3.	II Criminal offenses against life and health of an individual	80,054	1,418	Art. 121 (151), Art. 126-1 (150), Art. 115 (140)
4.	VI Criminal offenses against property	132,910	1,302	Art. 185 (980)
5.	IX Criminal offenses against public safety	8,789	897	Art. 263 (Unlawful handling of weapons) (879)

*OGP – The Office of the Prosecutor General

** AWOL – Unauthorized absence from a military unit

events for the training and ongoing professional development of judges. These activities reached a total of 9,904 judges through various formats of instruction (Information and Analytical Report: <https://nsj.gov.ua/files/1737634627%D0%92%D0%98%D0%A2%D0%AF%D0%93%20%D0%B7%20%D0%86%D0%90%D0%97%20%D0%9D%D0%A8%D0%A1%D0%A3%20%D0%B7%D0%B0%202024%20%D1%80%D1%96%D0%BA-new.pdf>).

According to the report, in cooperation with and supported by international technical assistance projects, international and non-governmental organizations, and civil society organizations, a range of relevant training events were conducted for judges (highlighting those related to servicemen):

- Trainings such as “Training on International Humanitarian Law and Attacks on Infrastructure Objects,” “Mediation as a Means of Settling Family Conflicts (Disputes),” “Training on the Use of Open-Source Intelligence (OSINT) in the Investigation of War Crimes,” “Basic Course on International Crimes,” “Adjudication of International Crime Cases in Ukraine and Drafting Judicial Decisions,” “Conflict-Related Sexual Violence,” and “Compensation for Damages Caused by the Armed Aggression of the Russian Federation to Citizens and Legal Entities in Ukraine”;

- Webinars such as “War Crimes and Related Issues in the Context of Armed Conflict in Ukraine,” “Military Administrative Offenses: Qualification Challenges,” and “Webinar on the Investigation of Child Abduction Crimes in Wartime Conditions”;

- Roundtables on “Problematic Aspects of Investigating and Adjudicating War Crime Cases” and “Challenges in the Investigation and Judicial Review of Cases During Martial Law: Interrogation and Jurisdiction”;

– Conference on “Promoting Judicial Well-Being During Conflict and Gender Sensitivity in Ukraine’s Judicial System.”

5. Conclusions

The findings of this study allow for the following conclusions:

The draft laws proposing the restoration of military courts fail to address key aspects of such a process: they do not eliminate the risk of influence by other branches of government on the judiciary; they disregard the financial implications of establishing a separate branch of the judiciary; and they do not realistically account for the time required to complete judicial selection procedures.

Statistical data on registered offenses committed by servicemen (for the years 2023–2024) reveal other urgent issues requiring immediate attention – such as substance abuse, the need for psychological support, and adequate financial provision for servicemen – which must also be addressed at the legislative level.

A feasible interim solution for ensuring the proper protection of the rights and freedoms of servicemen in judicial proceedings is the continued work of the National School of Judges to enhance the qualifications of sitting judges.

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