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THE RIGHT TO A FAIR TRIAL IN CONSTITUTIONAL JURISDICTION: EUROPEAN APPROACHES AND THE UKRAINIAN CONTEXT

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INTRODUCTION

The right to a fair trial has a key place in the system of constitutional judicial guarantees of human rights since the basic principle of human rights protection is that any violated right can be restored through a certain procedure. If the state does not have such an effective procedure for the protection and restoration of the violated right, then any other rights enshrined in the legislation are simply declarative provisions, a legal fiction.

Various aspects of the right to a fair trial have been studied by such domestic and foreign scholars as O. Banchuk, R. O. Kuibida, D. Homien, D. Haris, L. Zwaak, V. V. Horodovenko, N. M. Gren, M. de Salvia, M. L. Entin, N. Mole, C. Harby, I. Koval, I. B. Koliushko, V. V. Komarov, N. Yu. Koruts, L. Lukaides, T. Neshataeva, M. Pogoretsky, I. Gritsenko, O. Prokopenko, O. I. Rabtsevych, K. Rozakis, N. Siza, R. Sopilnyk, O. Tkachuk, E. Tregubov, T. Tsuvina, S. Shevchuk, et al.

The right to a fair trial, as rightly emphasized by T.R.S. Allan in his work "Constitutional Justice," is a fundamental guarantee of the common law, based on the constitutional principles of equality and fair trial. Legal judicial procedures must be fair and must ensure a moral dialogue between the citizens and the state, showing the former due respect[1].

Standards of fair justice should be viewed as a crucial element of the rule of law. As is well known, according to the European and American legal traditions, law and justice are inextricably linked. Many authors define law through justice. Thus, according to O. Höfe, a system of rules that violates the fundamental criteria of justice is not a legal system[2].

In addition, the idea of justice and judicial proceedings is no less closely related. For example, well-known French sociologists L. Boltanski and L. Tevenot point out that the ability to resolve a dispute is an essential characteristic of (justice), truth, or truthfulness (justesse)[3].

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[1] Allan T. R. S. *Constitutional Justice. Liberal Theory of the Rule of Law.* Kyiv: Kyiv-Mohyla Academy Publishing House, 2008. – 385 p. – P. 317.

[2] Heffe O. *Politics, Law, Justice* "Gnosis," 1994, P.97-98.

[3] Boltanski L., Teveno L. *Critique and Justification of Justice: Essays on the Sociology of Grads.* New Literary Review, 2013. C. 70

The idea of justice permeates most European, including national, acts.

In particular, Article 2 of the Code of Administrative Procedure states that the task of administrative proceedings is to protect the rights, freedoms, and interests of individuals, rights, and interests of legal entities in the field of public relations from violations by public authorities, local governments, their officials and employees, and other entities in the performance of their administrative functions based on legislation, including delegated powers, through fair, impartial and timely consideration of administrative cases. According to Article 1(1) of the Civil Procedure Code of Ukraine, the objectives of civil proceedings are to consider and resolve civil cases in a fair, impartial, and timely manner to protect violated, unrecognized, or disputed rights, freedoms, or interests of individuals, rights, and interests of legal entities, and the interests of the state. The principle of a fair trial is also mentioned in Article 2 of the Criminal Procedure Code: the tasks of criminal proceedings are to protect individuals, society, and the state from criminal offenses, to protect the rights, freedoms, and legitimate interests of participants in criminal proceedings, as well as to ensure a prompt, complete and impartial investigation and trial so that everyone who has committed a criminal offense is held accountable to the extent of his or her guilt, no innocent person is accused or convicted, no In the opinion of the CCU, expressed in its decision of January 30, 2003, No. 3-rp/2003 in the case of the court's consideration of certain decisions of the investigator and prosecutor, "justice by its very nature is recognized as such only if it meets the requirements of justice and ensures effective restoration of rights"[4].

1. Institutional elements of the right to a fair trial in the legal positions of Constitutional Courts and the European court of human rights

A key step towards the establishment of this guarantee was the adoption of the Habeas Corpus Act of 1679 in England. According to this Act, judges were obliged, upon a complaint from a person who believes his or her arrest or the arrest of someone else to be unlawful, to require the arrested person to be brought before a court immediately to verify the legality of the arrest or for trial; the accused could be detained only upon presentation of an order stating the reason.

At the constitutional level, the right to a fair trial was first enshrined in the US Constitution, namely in the amendments to it, namely Amendments Fifth and Fourteenth, which provide that no person shall be deprived of life, liberty, or property without due process of law. The Sixth Amendment states that "in all criminal prosecutions, the accused shall be entitled to a speedy and public

[4] Decision of the CCU of January 30, 2003, No. 3-rp/2003 in the case of consideration by the court of certain decisions of the investigator and prosecutor.

trial by an impartial jury of the State and district wherein the offense was committed, such district to be fixed by law; the accused shall be informed of the nature and cause of the indictment, to confront the witnesses against him, to compel the attendance of witnesses in his favor, and to the assistance of counsel for his defense"[5]. The French Declaration of the Rights of Man and the Citizen of 1789 also contains provisions on the right to a fair trial. In particular, Article 7 states that no one may be accused, arrested, or detained except in cases determined by law, and Article 9 states that "since everyone is presumed innocent until proven guilty, any excessive cruelty to protect the person of the accused must be strictly punishable by law if an arrest is necessary"[6].

The enshrining of the right to a fair trial in international law coincides with the end of World War II and the establishment of the United Nations. The war showed that neglect of human rights inevitably leads to irreparable consequences, and this right, along with others, became subject to international legal regulation.

The right to a fair trial has been enshrined in several basic international documents: the Universal Declaration of Human Rights (1948), the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Covenant on Civil and Political Rights (1966), the American Convention on Human Rights (1969), the Charter of Fundamental Rights of the European Union (2000), etc. Today, based on the case law of the ECHR, the UN Human Rights Committee, other international judicial institutions, the activities of various UN agencies, OSCE missions, and the OSCE Office for Democratic Institutions and Human Rights, the Council of Europe has developed and explained the content of standards that reveal the essence of the right to a fair trial and its elements, transforming it into a system of requirements for the state to ensure such a human rights guarantee as effective judicial protection of human rights. Thus, Article 8 of the Universal Declaration of Human Rights provides that "everyone has the right to an effective remedy by the competent national tribunals for violations of the fundamental rights granted to him by the constitution or by law"[7].

At the international level, the right to a fair trial was first enshrined in the International Covenant on Civil and Political Rights. According to Article 14(1), all people are equal before the courts and tribunals. Everyone is entitled to a fair and public hearing in the determination of any criminal charge against

[5] The US Constitution of 1787 y. URL : https://uk.wikisource.org/

[6] The Declaration of the Rights of Man and of the Citizen of August 26, 1789. URL : https://uk.wikipedia.org/wiki

[7] The Universal Declaration of Human Rights of 10.12.1948. URL: http://zakon5.rada.gov.ua/laws/show/995_015

him or of his rights and obligations in any civil action by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, or when the interests of the private life of the parties so require, or to the extent deemed necessary by the court in special circumstances where publicity would prejudice the interests of justice; however, any judgment in a criminal or civil case shall be made public, except where the interests of minors require otherwise or where the case concerns matrimonial disputes or child custody. As we can see, not only the right was enshrined, but also the actions to be taken by the state were specified.

In addition, part 3 of this article establishes guarantees when criminal charges are brought: a) to be informed promptly and in detail, in a language he understands of the nature and grounds of the charges against him; b) to have sufficient time and opportunity to prepare his defense and to communicate with a defense counsel of his choice; c) to be tried without undue delay, etc.[8]

The right to a fair trial is also provided for in international documents on the protection of war victims. According to Art. 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, persons not taking an active part in the hostilities, including members of armed forces who have laid down their arms, and those who are hors de combat by reason of sickness, wounding, detention or any other cause... shall not be subject to judgment or punishment without having been previously convicted by a court duly constituted and having secured the judicial guarantees recognized by civilized peoples as indispensable[9].

When considering the issue of international legal regulation of the right to a fair trial, one cannot but refer to the 1998 Rome Statute of the International Criminal Court, which was recently ratified by our country. In particular, this document establishes certain guarantees for the accused. Thus, according to Article 66 “presumption of innocence”, everyone is presumed innocent until proven guilty in a court of law under the applicable law. The burden of proving the guilt of the accused lies with the prosecutor. In order to convict an accused, the Court must be satisfied that the accused is guilty and that this cannot be doubted on reasonable grounds. According to Article 67 “Rights of the accused”, when any charge is brought, the accused is entitled to a public hearing conducted in an impartial manner, i.e., the parties are given equal

[8] International Covenant on Civil and Political Rights of December 16, 1966. URL : http://zakon0.rada.gov.ua/laws/show/995_043

[9] Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949. URL : http://zakon5.rada.gov.ua/laws/show/995_154

opportunity to be heard, and at least the following guarantees based on full equality a) to be informed promptly and in detail, in a language which he fully understands and speaks, of the nature, grounds, and content of the charges against him; b) to have sufficient time and facilities to prepare his defense, and to communicate freely and meet with counsel of his choice in confidence; c) to be tried without undue delay, etc. Equally important in ensuring the fairness of the trial is Article 64(2) of the Statute, which states that an important function of the Trial Chamber is to ensure that the proceedings are fair and expeditious and are conducted with full respect for the rights of the accused and with due regard for the protection of victims and witnesses[10].

On the European continent, a decisive role in the establishment of the concept of the right to a fair trial was played by the provision in paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950: "the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall determine the rights and obligations of a civil nature or the validity of any criminal charge against him"[11]. This provision is supplemented by a list of specific rights of the accused of committing an offense (clause 3), the presumption of innocence (clause 2), and permissible exceptions to the principle of publicity of the trial (clause 1).

To summarize, the right to a fair trial is a complex human right consisting of separate elements, each of which is independent, and a violation of at least one of these elements will mean a violation of the right to a fair trial as a whole. Some scholars call these elements guarantee the right to a fair trial, or even individual human rights.

As for the elements of the right to a fair trial, I. Hrytsenko and M. Pogoretsky distinguish institutional (establishment of a court based on law, its independence and impartiality), organizational and functional (access to justice, equality of parties, right to legal aid, publicity (publicity and openness) of the trial, binding nature of court decisions), functional (adversarial process, reasonable time limits for consideration) and special (guarantees of criminal procedure enshrined in paragraphs 2, 3 of Article 6 of the ECHR) elements of this right[12].

O. S. Tkachuk writes that the structure of the right to a fair trial should include: 1) the preliminary element (access to court), which is a prerequisite for the implementation of other elements; 2) the institutional element

[10] Rome Statute of the International Criminal Court of July 17, 1998. URL : http://zakon3.rada.gov.ua/laws/show/995_588/page

[11] The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. URL : http://zakon3.rada.gov.ua/laws/show/995_004

[12] Гриценко І. Право на справедливий суд. *Вісник Київського національного університету ім. Тараса Шевченка.* 2012. № 91. С. 4-5.

(independent, impartial court determined by law), due to the existence of which the characteristics of a proper court in a democratic society are established; 3) the procedural element (publicity, reasonable time for consideration of the case and fairness of consideration in a narrow sense or a fair hearing), i.e. fixation of the basic procedural requirements for consideration of the case; 4) the legitimation element (legal certainty and enforcement of court decisions)[13].

V. Komarov and N. Sakara distinguish between access to a judicial institution that is not burdened by legal and economic obstacles; due process of law; public trial; reasonable time for trial; and trial by an independent and impartial court determined by law[14].

In her turn, T. A. Tsuvina is convinced that when studying the right to a court in conceptual terms, one should proceed from the fact that by their legal nature, its elements can be divided into two groups, based on which one can distinguish static and dynamic aspects of the right to a court in civil proceedings. The static aspect includes elements that do not affect the progress of the case but are requirements for the judiciary in a democratic society, as well as for the specific composition of the court, i.e., ensure stability, static existence of the court as a certain institution and access to it. Such requirements include access to the court, as well as independence and impartiality of the court, and its determination by law. The dynamic aspect of the right to court is directly related to the procedural requirements for consideration of a case, to the development, and movement of civil proceedings, and their dynamics. In this context, the dynamic elements collectively constitute the right to a fair trial, which includes procedural equality of the parties, adversarial proceedings, publicity (glasnost) of the process, motivation, finality, and enforceability of court decisions, and reasonable time for trial[15].

If we turn to the positions of constitutional control bodies regarding the understanding of the essence and structure of the right to a fair trial, then, for example, the Constitutional Court of Ukraine has repeatedly emphasized that the right to judicial protection is a guarantee for the realization of other constitutional rights and freedoms, their establishment, and their defense through justice[16]. Therefore, the state must fully ensure the realization of the

[13] Ткачук О. С. Проблеми реалізації судової влади у цивільному судочинстві : монографія. Х. : Право, 2016. С. 138. .

[14] Комаров, В. В. Право на справедливий судовий розгляд у цивільному судочинстві : навч. посібник. Харків.: Нац. юрид. акад. України, 2007. С. 13.

[15] Цувіна Т. А. Право на суд у цивільному судочинстві: монографія. Х. : Слово, 2015. 281 с. С. 75-76.

[16] Рішення Конституційного Суду України від 23 листопада 2018 року № 10-р/2018. *Вісник Конституційного Суду України.* 2019 р. № 1, с. 66

right to judicial protection guaranteed by Article 55 of the Constitution of Ukraine[17].

Regarding the content of the right to judicial protection, the constitutional jurisdiction body emphasized that it is established by Part 1 of Article 55 of the Constitution of Ukraine. It should be determined both in connection with the basic principles of judicial proceedings defined by Part 2 of Article 129 of the Constitution of Ukraine and taking into account the content of the right to a fair trial, as defined in Article 6 of the European Convention on Human Rights and interpreted by the European Court of Human Rights[18].

Furthermore, in the opinion of the Constitutional Court of Ukraine, the legal mechanism for realizing the right to judicial protection must ensure the effectiveness of a person's right to judicial protection. This is evident in the establishment by law of procedural possibilities for the real protection and restoration of violated rights and freedoms, especially in situations where these violations are caused by the decisions, actions, or inactions of public authorities, their officials, and employees[19].

The Constitutional Court of Latvia recognized that the concept of a «fair trial» mentioned in the first sentence of Article 92 includes two aspects: 1) a fair trial as an independent judicial institution that hears cases; 2) a fair trial as a proper process, in accordance with the rule of law, ensuring fair and objective decisions.

Article 92 of the Constitution establishes both the obligation of the state to create an appropriate judicial system and its duty to adopt procedural norms ensuring that courts adjudicate cases in a manner guaranteeing fairness and objectivity. (See, for example, point 2 of the conclusions in the decision of the Constitutional Court of Latvia of March 5, 2002, in case No. 2001-10-01, and

[17] Рішення Конституційного Суду України (Другий сенат) у справі за конституційною скаргою Хліпальської Віри Василівни щодо відповідності Конституції України (конституційності) положень частини другої статті 26 Закону України „Про виконавче провадження“ (щодо забезпечення державою виконання судового рішення) від 15 травня 2019 року № 2-р(II)/2019. *Вісник Конституційного Суду України.* 2019 р., № 3, стор. 27

[18] Рішення Конституційного Суду України (Другий сенат) від 21 липня 2021 року № 5-р(II)/2021 у справі за конституційними скаргами Кременчуцького Анатолія Михайловича та Павлика Владислава Володимировича щодо відповідності Конституції України (конституційності) припису частини десятої статті 294 Кодексу України про адміністративні правопорушення. Вісник Конституційного Суду України. 2021 р., № 4, стор. 145

[19] Рішення від 1 березня 2023 року № 2-р(II)/2023 у справі за конституційною скаргою Плескача В'ячеслава Юрійовича щодо відповідності Конституції України (конституційності) приписів частини першої статті 294, частини шостої статті 383 Кодексу адміністративного судочинства України (щодо рівноправності сторін під час судового контролю за виконанням судового рішення). *Вісник Конституційного Суду України.* 2023 р., / № 1-2 /, стор. 94

point 9 of the decision of the Constitutional Court of April 11, 2007, in case No. 2006-28-01)[20].

Let us dwell on each element separately, based on the legal positions of the European Court and Constitutional Courts. The first right that has been singled out in the ECHR case law under part 1 of Article 6 of the Convention is the right to court. Thus, in its practice of applying Article 6 of the Convention, the ECHR notes that the right to a trial has two aspects: the right to a civil dispute in court and the right to a trial on criminal charges ("Golder v. the United Kingdom" of 21.02.1975). The components of the right to trial are the right to access to court, i.e. the ability to initiate court proceedings in a civil case (Prince Hans-Adam II of Liechtenstein v. Germany of 12.07.2001), the right to a fair trial, and the right to enforce a final court decision[21].

As we can see, the right to a fair trial includes the right to access justice. This statement was first made in the Court's judgment in Golder v. the United Kingdom in 1975. The key issue, in this case, was whether Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms is limited to guarantees for the plaintiff in the trial or whether this paragraph also guarantees the right of access to court, i.e. the right to initiate court proceedings and, accordingly, the obligation of the court to initiate and conduct them. If Article 6(1) ECHR were understood as referring exclusively to proceedings that have already been initiated in court, a Contracting State could, without violating this provision, get rid of the judicial system or limit the jurisdiction of the courts in certain types of proceedings and entrust such cases to other bodies that are dependent on the government. Such assumptions, incidentally arising from the danger of arbitrary power, would have serious consequences that are directly contrary to the principles mentioned, and of course, the Court cannot ignore them (Lawless v. Ireland (1961), § 52, and Delcourt v. Belgium (1970), §§ 14–15).

It would be illogical, in the Court's view, if Article 6 § 1 spelled out in detail the procedural guarantees of the parties to court proceedings without first of all ensuring that without which the use of such guarantees would be impossible, namely, access to the court. The characteristics of fairness, publicity, and efficiency of court proceedings would be useless in the absence of court proceedings. The ECtHR understands the right to access court as follows: the person concerned must be able to have his or her case heard in court and must not be hindered by excessive legal or organizational obstacles. In this case, states also have a positive obligation to allow real and concrete

[20] Див. https://www.satv.tiesa.gov.lv/wp-content

[21] Дудуаш Т. І. *Практика Європейського суду з прав людини:* навч. посіб. Київ. : Алерта, 2016. С. 220.

access to court, which may be associated with such measures as the provision of free judicial and legal assistance when a person lacking sufficient means, is unable to adequately defend his or her case or seek simplification of legal proceedings[22].

Concerning the definition of the term "court" in the context of Article 6 of the Convention, the following positions have been expressed in the practice of the ECtHR. A court or tribunal established and acting following the rules of law, according to its functions, i.e. the range of issues within its competence or authorized to resolve them, may be called or recognized as a court in the manner prescribed by law (Sramek v. Austria, § 36; Cyprus v. Turkey, § 233). In addition, another feature is the binding nature of the court's decision, namely, the power to make a binding decision that cannot be changed by a non-judicial body to the detriment of one of the parties. This is also included in the meaning of the concept of "court" (Van de Hurk v. the Netherlands of 19.04.1994). According to the ECtHR, this body must also meet other requirements: 1) to be independent, especially about the executive branch; 2) to be impartial; 3) to provide for the duration of the mandate of its members; 4) to provide sufficient procedural guarantees; 5) to be competent to decide both questions of fact and law; 6) to have the right to change the decisions of state bodies (Gradinger v. Austria of 23.10.1995)[23].

Based on this logic, the Court in its judgments concerning Ukraine also included international commercial arbitration, the High Council of Justice, and labor dispute commissions in the concept of "court." In particular, in its judgment in the case of Regent Company v. Ukraine of 03.04.2008, the Court recognized that the International Commercial Arbitration at the Ukrainian Chamber of Commerce and Industry is a court within the meaning of the Convention[24]. And in its decisions in the cases of Romashov V. Ukraine" of 27.07.2004[25], «Bukhovets v. Ukraine» of 08.11.2005. The court stated that the decision of the Labor Dispute Commission can be equated to a court decision

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[22] De Salvia M. *Precedents of the European Court of Human Rights. Guidelines for the jurisprudence relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Judicial practice from 1960 to 2002*. Legal Center Press, 2004.1072 .

[23] See Practical Guide to Article 6 – Criminal Limb: [Electronic resource]. – Access mode: http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf; Practical Guide to Article 6 – Civil Limb: [Electronic resource]. – Mode of access: http://www.echr.coe.int/Documents/ Guide_Art_6_ENG.pdf; De Salvia M. Precedents of the European Court of Human Rights. Guidelines for the jurisprudence relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Judicial practice from 1960 to 2002. – St. Petersburg: Yuridichesky Center Press, 2004.-1072 y.

[24] Case Regent Company v. Ukraine, no. 773/03, 03 April 2008 [Electronic resource]. – Access mode: http://legalweekly.com.ua/index.php?id=16061&show=news&newsid=121429

[25] Case Romashov v. Ukraine, no. 67534/01, 27 July 2004 [Electronic resource]. – Access mode: http://zakon3.rada.gov.ua/laws/show/980_227

and that the state is responsible for its non-enforcement. In addition, the state enforcement service, which opened enforcement proceedings based on the commission's certificate, is responsible for its execution. Also, a "court" is a regional real estate transaction authority (judgment of the Court in the case of Sramek v. Austria of 22.10.1984); a council for compensation for damage caused by crimes (judgment of the Court in the case of Rolf Gustafson v. Sweden of 01.07.1997); a committee for the settlement of disputes in the field of forestry (judgment of the Court in the case of Argyrou and Others v. Greece of 15.01.2009).

At the same time, the Court did not recognize the French Council of State as a judicial authority, although it is the one that makes cassation decisions concerning the disciplinary department of the State Council of the Order of Physicians, noting that it cannot be considered a "judicial body with full jurisdiction", especially because it does not have the right to assess the appropriateness of guilt and sanctions"[26].

As for the understanding of the category "court" in the context of the right to a fair trial, according to the Constitutional Court of Ukraine, "the right to judicial protection is ensured by constitutional guarantees of justice administered by courts established on the basis of the Constitution of Ukraine and in accordance with the procedure prescribed by law"[27].

In the legal positions of constitutional courts in the context of the right to a fair trial, the need to ensure the independence of the judiciary is specifically emphasized. In the Decision on the Independence of Judges (BVerfGE 39, 334 – Richterspruchprivileg) of May 29, 1975 the Constitutional Court of Germany confirmed that interference by the executive branch in the process of appointing judges or in their activities contradicts the principle of separation of powers enshrined in Articles 20 and 97 of the Basic Law. The Court emphasized that judicial independence is not only an organizational principle but also a guarantee of fair justice.

In the Decision of May 10, 2006 (Pl. ÚS 18/06) the Constitutional Court of the Czech Republic emphasized that the judicial system must be protected from any form of political pressure. Judicial independence is a fundamental principle of the rule of law, as provided by the Constitution and the Charter of Fundamental Rights and Freedoms. The Court also ruled that excessive interference by the executive branch in the process of appointing judges

[26] Case Diennet v France: ECHR 26 Sep 1995 http://europeancourt.ru/uploads/ECHR_Diennet_v_France_26_09_1995.pdf

[27] Рішення Конституційного Суду України у справі за конституційним поданням 46 народних депутатів України щодо офіційного тлумачення термінів „найвищий судовий орган", „вищий судовий орган", „касаційне оскарження", які містяться у статтях 125, 129 Конституції України від 11 березня 2010 року № 8-рп/2010. Вісник Конституційного Суду України. 2010 р., № 3, стор. 7

undermines the principle of separation of powers enshrined in Article 1 of the Constitution of the Czech Republic. Additionally, guarantees of the independence and impartiality of judges are not limited to the appointment process. They include protection from possible pressure or influence during the performance of their duties.

In the Decision of the Constitutional Court of Lithuania of March 6, 2006 the Court examined legislative provisions that granted the executive branch significant influence over the process of appointing and approving judges. The Court emphasized that judicial independence is the foundation of the rule of law. Any interference by the executive or legislative branches in the appointment process of judges threatens the principles of separation of powers. The Court stated that attempts at political pressure on judges or manipulations during their appointment contradict the Constitution and undermine trust in the judicial system.

In the Decision of October 14, 2015 (K 12/14) the Constitutional Tribunal of Poland also declared unconstitutional a law that granted the executive branch excessive influence over the appointment of judges, as such measures threaten judicial independence.

The Constitutional Court of Ukraine also emphasizes the importance of judicial independence: the constitutional principle of judicial independence ensures the important role of the judiciary in the mechanism for protecting the rights and freedoms of citizens. It is a guarantee for the realization of the right to judicial protection provided by Article 55 of the Constitution of Ukraine. Any reduction in the guarantees of judicial independence contradicts the constitutional requirement to ensure independent justice and the right of citizens to protection of rights and freedoms by an independent court. This leads to a limitation of the opportunities to realize this constitutional right, and thus contradicts Article 55 of the Constitution of Ukraine[28].

The institutional elements of the right to a fair trial include the independence and impartiality of the court established by law.

Let's look at the first component – the independence of the court. As we have repeatedly pointed out in our work, the independence of judiciary is one of the most important characteristics of the rule of law, a real and effective way to protect human rights.

[28] Рішення Конституційного Суду України у справі за конституційним поданням Верховного Суду України щодо відповідності Кон-ституції України (конституційності) окремих положень статті 2, абзацу другого пункту 2 розділу II „Прикінцеві та перехідні по-ложення“ Закону України „Про заходи щодо законодавчого забезпечення реформування пенсійної системи“, статті 138 Закону України „Про судоустрій і статус суддів“ (справа щодо змін умов виплати пенсій і щомісячного довічного грошового утримання суддів у відставці) від 3 червня 2013 року № 3-рп/2013. *Вісник Конституційного Суду України.* 2020 р., / № 1-2 /, стор. 159

In accordance with the Basic Principles on the Independence of the Judiciary, adopted by the United Nations General Assembly in resolutions 40/32 and 40/146 on 29.11.1985 and 13.12.1985, the independence of the judiciary is guaranteed by the state and enshrined in the constitution or laws of the country. All states and other institutions are obliged to respect the independence of the judiciary and to observe it[29].

In determining whether a judicial body is independent, the ECtHR considers the following factors: 1) the procedure for appointing its members; 2) the duration of their tenure; 3) the existence of mechanisms to protect against external influence and whether the court also has external signs of independence. For example, in the Judgment in the case of Campbell and Fell v. the United Kingdom of 28.12.1984. the Court stated that a particular judicial body must be "independent" both from the executive branch and from the parties to the case (see Le Compte, Van Leuven and De Meyere v. Belgium (1981), § 55), the Court drew attention to the procedure for appointing members of the Board of Visitors, the duration of their service as such (see ibid. ibid., § 57), the existence of safeguards against pressure on them (see Piersack v. Belgium (1982), § 27), and whether the organization has the external attributes of independence (see Delcourt v. Belgium (1970), § 31)[30].

As already noted, the term "independent" should also mean independence of the judiciary from other branches of power – the executive and parliament (judgment of the Court in the case of "umartin v. France" of 24.11.1994), as well as the parties to the dispute (judgment of the Court in the case of "Sramek v. Austria" of 22.10.1984). Independence from the executive branch may be violated both in case of direct interference of the executive in the process (judgment of the Court in the case of Sovtransavto Holding Ukraine of 25.07.2002) and in case of appointment or dismissal of a judge, for example, by the executive (judgment of the Court on admissibility in the case of Larke V. the United Kingdom of 25.08.2005). However, the appointment of a judge by the executive branch does not violate the requirement of independence if the independence of judges in the exercise of judicial power is ensured (judgment in the case of Flux V. Moldova (No. 2)" of 03.07.2007). Independence from the parliament means that judges are not subject to pressure, even if they are appointed by the parliament (judgment of the Court

[29] Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 Aug. to 6 Sept. 1985 and endorsed by General Assembly resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985.

In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. – ST/HR/1/Rev.6(Vol.I/Part1). – 2002. – p. 409-412.

[30] Case Campbell and Fell v. the United Kingdom 28 June 1984, Series A no. 80 [Electronic resource]. URL: http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/kempbell-i-fell-protiv-soedinennogo-korolevstva-postanovlenie-evropejskogo-suda/

in the case of Sacilor-Lormines v. the Hound of 09.11.2006). Independence from the parties to the proceedings as a sign of court independence implies that if the panel includes judges subordinate to one of the parties, the other party to the proceedings may have reasonable doubts about the independence of such people. This undermines the credibility of the court in a democratic society (the Court's judgment in the case of Sramek v. Austria of 22.10.1984)[31].

The ECHR case law proceeds from the fact that the concept of "impartial court" includes two main elements: 1) subjective, i.e. whether the members of the judicial institution were personally impartial (had no personal interest or bias); 2) objective, i.e. whether the court was perceived from an objective point of view to be sufficiently impartial and whether the guarantees of impartiality were sufficient in this particular case to exclude any reasonable doubt about it. As the Court noted in Fey v. Austria of 24.02.1993, the existence of impartiality in the context of part 1 of Article 6 should be determined in accordance with the subjective, i.e. based on the personal conviction of the individual judge in a particular case, as well as the objective, which consists in assessing whether the said judge has provided sufficient guarantees to exclude any reasonable doubt in this regard, aspects[32].

In the case of Morris vs. the United Kingdom of 26.02.2002. The court explained the "impartiality" of the court: there are two aspects of these requirements. First, the court must be subjectively free from personal bias or partiality. Secondly, it must also be free from objective bias, for which it must provide substantial guarantees to eliminate any reasonable doubt in this regard."

The European Court of Human Rights has issued several judgments against Ukraine concerning the impartiality of judges. For example, in the case of Bilukha v. Ukraine of 09.11.2006, the case concerned the bias of the chairperson of the Artemivsk District Court, who had solely considered the applicant's case in the first instance but had requested and received property from the defendant company for free. In such circumstances, the applicant's fears about the impartiality of the court chairperson were found to be objectively justified, even though he had satisfied one of the applicant's complaints during the trial, and his decisions were upheld by higher courts[33].

In Reznichenko v. Ukraine, the ECtHR also found bias in the first instance court that sentenced the applicant, and thus a violation of Article 6(1) of the

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[31] Practical Guide To Article 6 Civil Limb : URL: http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

[32] Case Fey v. Austria від 24.02.1993 URL : http://echr.ketse.com/doc/14396.88-en-19930224/view/

[33] Case of Bilukha v. Ukraine of November 9, 2006. URL : http://khpg.org/index.php?id=1182330721

Convention, noting that the presiding judge, who had solely considered the applicant's case, herself had doubts about her impartiality in the case.

Another requirement of the right to a fair trial is that the court must be established by law, which means ensuring that "the judiciary in a democratic society is independent of the executive but is governed by a law adopted by the parliament" (see the judgment in the case of Zand v. Austria of 12.10.1978). It is important that in this case the court also stated that: the phrase "established by law" applies not only to the legal basis for the very existence of the "court," but also to the compliance of such court with certain rules governing its activities. The term "court established by law" in part 1 of Article 6 of the Convention is used to refer to the entire organizational structure of the courts, including [...] matters within the jurisdiction of certain categories of courts [...]". In view of this, a body that, without jurisdiction, judges' persons based on its own practice, which is not provided for by the Law, was not considered a "court established by law"[34].

In the cases of Sokurenko and Stryhun v. Ukraine and Veritas v. Ukraine,[35] The Court expressed similar positions. In particular, the ECtHR emphasized that under Art. 111[18] Under the Commercial Procedure Code, the Supreme Court, having overturned the decision of the Higher Commercial Court, could either return the case for a new trial to the lower court or terminate the proceedings. Instead, it upheld the ruling of the Court of Appeal, and such actions were not provided for by the Commercial Procedure Code, as confirmed by the government in its comments. The Court also noted that there was no other legal provision that authorized the Supreme Court to make such a decision. Finally, the Court considered that the general provisions of the Constitution of Ukraine, to which the government referred, could not serve as a sufficient legal basis for such specific competence, which was not granted by the relevant legislation. According to the ECtHR, having exceeded its powers, which were clearly set out in the Commercial Procedure Code, the Supreme Court cannot be considered a "court established by law" within the meaning of Article 6(1) of the Convention.

Therefore, based on the ECHR case law, a court will be considered to be established by law only if it is established directly by law, acts within its competence, and has a legitimate court composition.

[34] For example, it is based on this understanding of the provisions of Part 1 of Article 6 of the European Court of Justice Convention that the Supreme Court of Ukraine in its Resolution of 23.06.2015 in case No. 21-688a15 decided on the court jurisdiction in disputes with the Antimonopoly Committee of Ukraine (Resolution of the Supreme Court of Ukraine of 23.06.2015 in case № 21-688a15 URL : http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/E042FE9D384A36D7C2257E7E0024F229)

[35] Case of Veritas v. Ukraine URL: http://zakon5.rada.gov.ua/laws/show/974_418

An important element of understanding the term «court» is the possibility of appealing a court decision in the appellate and cassation instances, the importance of which is emphasized by the Constitutional Court of Ukraine. In the opinion of the constitutional jurisdiction body, an important component of the right to fair judicial protection is the review of court decisions through appellate and cassation proceedings. This ensures the restoration of violated rights and legally protected interests of individuals and citizens and is one of the constitutional guarantees for realizing other rights and freedoms, protecting them from violations and unlawful encroachments, including erroneous and unjust judicial decisions. It serves as a mechanism to restore violated rights and freedoms and to minimize the negative consequences of potential judicial errors[36].

2. Procedural elements of the right to a fair trial in constitutional proceedings and the case law of the European court of human rights

The procedural elements of the right to a fair trial include publicity (openness) of the trial, adversarial process, equality of parties, and reasonable time limits for the trial.

Publicity of a trial means an open trial, in which any person may be present at the trial, and an open announcement of the court decision based on the results of the trial. The Court's position regarding the content of the publicity requirements is set out in a generalized manner. For example, they emphasize the significance of this element and its importance for protection against secret justice. In addition, the Court points to transparency as a condition of publicity. In particular, in the judgment in the case of Pretto and Others v. Italy" judgment of 08.12.1983, the ECtHR noted "that the public nature of the proceedings referred to in paragraph 1 of Article 6 of the Convention protects the parties from the secret administration of justice beyond public control; it serves as one of the ways to ensure confidence in the courts. By guaranteeing the transparency of justice, the public character contributes to the achievement of the objectives of Article 6(1) of the Convention, namely the fairness of the trial, the guarantee of which is one of the basic principles of all democratic societies within the meaning of the Convention"[37]. In another judgment in Diennet v. France, September 26, 1995, the Court noted that a public hearing

[36] Рішення Великої палати Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) положень частини першої статті 294, статті 326 Кодексу України про адміністративні правопорушення від 23 листопада 2018 року № 10-р/2018. *Вісник Конституційного Суду України.* 2019 р., № 1, стор. 66

[37] Case Pretto and Others v. Italy, 8 December 1983, Series A no. 71 URL : http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/pretto-i-drugie-protiv-italii-postanovlenie-evropejskogo-suda/

protects the parties from secret arbitrariness that is out of the public eye. The guarantee of publicity of law enforcement is important for the main objective of Article 6 § 1, namely, ensuring a fair trial[38]. The Court associates the principle of publicity with the oral hearing of the case[39]. At the same time, the rule on publicity of the proceedings is not absolute but may be limited. According to the Convention, such restrictions may be imposed to: 1) protecting morals, public order, or national security; 2) protecting the interests of minors (for example, in proceedings concerning the residence of minors after the divorce of parents or in disputes between members of the same family (B. and P. v. the United Kingdom; however, in cases involving the transfer of a child to a public institution, the grounds for refusing a public hearing must be carefully examined (Moser v. Austria)); 3) protection of the private life of the parties (this applies to disciplinary proceedings against a doctor, as well as cases where the need to protect personal data and privacy of patients may justify a closed hearing, but must necessarily take place in a limited range of circumstances, i.e., when compelled (Diennet v. France); ensuring the interests of justice (exists since Austria [40](Osinger v. Austria), § 45).

In addition, in the Court's opinion, proceedings in appeal and cassation instances, where the factual circumstances are not investigated, but only the application of the law is checked, may take place without the participation of the parties, which also does not violate the requirement of openness of the trial. Thus, in the judgment in the case of Ekbatani v. Sweden, dated May 26, 1988, the Court noted that publicity is inherent in the first instance, and therefore in higher courts, a deviation from this principle may be justified by procedural peculiarities. If the appeal concerns only issues of law, leaving aside the factual circumstances of the case, the requirements of Article 6 of the Convention can be met even if the applicant was not given the opportunity to be heard in person in the court of appeal or cassation. In the latter case, we are talking about such an instance, which is not tasked with establishing the facts of the case, but only with interpreting the violated provisions of law"[41]. The absence of a hearing in the second and third instances may be justified by specific features of the proceedings if an oral hearing was provided in the first instance court (the Court's judgment in Helmers v. Sweden of 29.10.1991).

[38] Case Diennet v. France, 26 September 1995 URL : http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/denne-protiv-francii-postanovlenie-evropejskogo-suda/

[39] See the Court's judgment in the case of Fredin v Sweden (no. 2) of 23.02.1994). The rule on publicity of the proceedings is not absolute but may be subject to restrictions.

[40] See Practical Guide to Article 6 – Criminal Limb: URL: http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf; Practical Guide to Article 6 – Civil Limb: URL: http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

[41] Case Ekbatani v. Sweden. 26.05.1988 URL : http://zakon2.rada.gov.ua/laws/show/980_162

Thus, proceedings that give the right of appeal and proceedings that deal only with questions of law as opposed to questions of fact may be consistent with the requirements of Article 6, even if the applicant is not given the opportunity to be heard in person by the appellate or cassation court (the Court's judgment in Miller v. Sweden of 08.02.2005).

Another requirement of the principle of openness of court proceedings is the public announcement of the court decision, which, in accordance with the provisions of the Convention, may not be subject to any restrictions. However, in practice, there are certain reservations, namely, this applies to cases where only the operative part of the judgment may be announced following a closed session. In addition, the following cases do not constitute a violation of publicity requirements: 1) the higher court, which did not announce the judgment publicly, dismissed the complaint on the grounds of law – the need to assess the proceedings as a whole given the national legal order and the role of the court in it (judgment of the Court in Pretto and Others v. Italy of 08.12.1983); 2) the appellate court announced a summary of the judgment publicly and upheld the decision of the court of first instance, which held an oral hearing but did not announce the judgment publicly (judgment of the Court in Lamanna v. Austria" of 10.07.2001); 3) in cases of children's residence, the absence of public announcement of the decision may be justified by the need to protect privacy, provided that written copies of the decision are provided to those persons who prove the legitimate interest in the case (the Court's judgment in the case of V. and R. v. the United Kingdom of 24.04.2001).

As for constitutional jurisdiction, we can recall the Decision of the Constitutional Tribunal of Poland of 15 May 2014 in case K 35/12, which concerned the constitutionality of provisions restricting public access to judicial proceedings. The Tribunal found that such restrictions without due justification were contrary to the Constitution of Poland, especially Article 45, which guarantees the right to a fair and public hearing.

Having examined the effect of this principle at the international level, we note that in Ukrainian procedural legislation, the principle of publicity of the trial is consistent with the principles of publicity and openness of the trial. The principle of publicity of the trial is enshrined in Article 129 of the Constitution of Ukraine, and the principle of publicity and transparency of the judicial proceedings is proclaimed in Article 6 of the Civil Procedure Code of Ukraine, Article 12 of the Administrative Court of Ukraine, Article 20 of the Criminal Procedure Code of Ukraine. Article 11 of the Law of Ukraine "On the Judiciary and the Status of Judges" sets forth the rules of publicity and openness of the judicial process, namely, court decisions, court hearings, and information on cases considered by the court are open, except in cases established by law. No one may be restricted in the right to receive oral or

written information about the results of consideration of his/her court case in court; any person has the right to free access to a court decision under the procedure established by law.

Another principal element of the right to a fair trial is the adversarial nature of the process. In particular, in its judgment in Khuzhin and others v. Russia, the Court noted that the principle of adversarial proceedings is one of the aspects of the concept of a fair trial on the facts of the case. In both criminal and civil cases, this principle provides that each party must be guaranteed a reasonable opportunity to know and comment on the objections or evidence presented by the other party, as well as to present its case on terms that do not put one party at a greater disadvantage than the opponent[42].

Thus, the adversarial principle means the right to be informed of all evidence presented by the other party and to comment on it.

According to the ECtHR, the principle of "equality of arms" in a trial is a component of the definition of a fair trial in a broad sense. Thus, in the case of Nideröst-Huber v. Switzerland, it stated that if the comments submitted to the court are not communicated to any of the parties, this is considered a violation not only of the principle of equality of arms but also a violation of the broader concept of fairness of the proceedings.

In determining the "equality of the parties to the proceedings," the Court applies the category of "fair balance." The condition of "equality of arms" in the sense of a "fair balance" between the parties is applied in both civil and criminal proceedings (Feldbrugge v. the Netherlands, § 44).

The ECtHR understands "fair balance" between the parties as equality of arms, which means that each party should be given the opportunity to present the case and evidence in conditions that are not significantly worse than those of the opponent (Dombo Beheer B.V. v. The Netherlands, judgment of 26.05.2009 in the case of Batsanina v. Russia). Submission of materials to the court by one party is inadmissible if the same materials are not submitted to the other party, as the latter cannot comment on them in the future. Only the parties should decide whether the submitted materials require a response (APEH Üldözötteinek Szövetsége and Others v. Hungary). That is why states should enshrine in their legislation equal procedural opportunities for the parties in the administration of justice.

It is from the above-mentioned standpoint that the ECtHR has considered several cases concerning Ukraine. For example, in the case of Fyodorov and Fyodorova v. Ukraine of 07.07.2011, the Court found a violation of the requirement of equality of arms, namely the fact of improper notification of the applicant about the time and place of consideration of his case by the court of appeal. In particular, the ECtHR noted that, given the requirement of Ukrainian law to notify the parties properly, the general entry in the court

[42] Case «Khuzhin and others v. Russia» dated October 23, 2008. URL : http://cedem.org.ua/library/sprava-huzhyn-ta-inshi-proty-rosiyi/

record that the applicant was duly notified of the time and place of his case hearing is not sufficient to refute the applicant's allegations of improper notification. In addition, the Court emphasizes that the hearing before the Court of Appeal lasted for one and a half hours, during which the other party, represented by three people, was given the opportunity to provide its oral explanations, considering the statement of facts. Upon consideration of the appeal, the decision of the court of first instance was overturned. Thus, the ECHR found a violation of Part 1 of Article 6 of the ECHR due to the fact that the principle of equality of arms was not observed, since the trial of the applicant's case took place in his absence, but with the participation of another party who had the opportunity to orally present his position[43].

In the case of Mala v. Ukraine, the ECtHR found a violation of the principle of equality of arms (fairness) in that the court of appeal did not provide any assessment of the applicant's argument, which was of key importance for the outcome of the proceedings[44].

Constitutional jurisdiction bodies also confirm the importance of the principle of equality as a key element of the right to a fair trial.

Regarding the principle of equality as a component of the right to fair judicial protection, the Constitutional Court of Ukraine emphasized that the Constitution guarantees every individual judicial protection of their rights within the framework of constitutional, civil, economic, administrative, and criminal proceedings in Ukraine. Provisions that regulate dispute resolution, including those aimed at restoring violated rights, must not contradict the principle of equality before the law and the court and must not limit the right to judicial protection[45].

The Constitutional Court of Ukraine stated, "The equality of all individuals in their rights and freedoms, as guaranteed by the Constitution of Ukraine, implies the necessity of ensuring them equal legal opportunities of both material and procedural nature for realizing identical rights and freedoms. In a rule-of-law state, recourse to the court serves as a universal mechanism for protecting the rights, freedoms, and legitimate interests of individuals and legal entities"[46].

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[43] Case "Fyodorov and Fyodorova v. Ukraine" of July 7, 2011. URL : http://soc-in.com/zakonodavstvo/sudova-praktika/evropejskij-sud/2239-sprava-fedorov-i-fedorova-proti-ukrayini.html

[44] Case Mala v. Ukraine» dated July 3, 2014. URL : http://zakon3.rada.gov.ua/laws/show/974_a23

[45] Рішення Конституційного Суду України у справі за конституційним поданням Президента України щодо офіційного тлумачення положень частин другої, третьої статті 124 Конституції України (справа щодо підвідомчості актів про призначення або звільнення посадових осіб) від 7 травня 2002 року № 8-рп/2002. *Вісник Конституційного Суду України.* 2002 р., № 2, стор. 29

[46] Рішення Конституційного Суду України у справі за конституційним зверненням громадянина Трояна Антона Павловича щодо офіційного тлумачення положень статті 24 Конституції України (справа про рівність сторін судового процесу) від 12 квітня 2012 року № 9-рп/2012. *Вісник Конституційного Суду України.* 2012 р., № 3, стор. 41

Let's move on to another element, which is a reasonable time for consideration of the case. In accordance with the requirements of Article 6 of the Convention, cases on civil rights and obligations, as well as cases on criminal charges, must be considered within a reasonable time. This is because a significant duration of the trial may lead to the fact that the restoration of the violated right of a citizen will lose any meaning due to the delay in the process or legal uncertainty of the position of the person charged in the criminal case, which is also a violation of his or her constitutional rights. The above undermines the authority of the judiciary and may cause a citizen to lose faith in the relevance of going to court to protect their rights.

The analysis of the Court's practice shows that when considering certain categories of causes related to the verification of the rules of compliance with a reasonable time limit, it tries to answer two main questions: what period should be taken into account and whether such a period was reasonable in the context of paragraph 1 of Article 6 of the Convention.

The period of time in cases of civil rights and obligations starts from the moment the proceedings are opened or from the moment the judicial authority accepts the statement of claim (judgment of the Court in the case of Poiss v. Austria of 23.04.1987). However, in some cases, an earlier period may be considered. For example, an appeal to an administrative body cannot be a prerequisite for initiating court proceedings. In such a case, this period may be included in the mandatory preliminary administrative procedure (judgment of the Court of Justice of the Grand Chamber in the case of Kress v. France of 07.06.2001). The end of the duration of the trial is considered to be the date of the decision on the dispute (judgment of the Court in the case of Poiss v. Austria of 23.04.1987). As we can see, the requirement of the reasonableness of the term of consideration of the case applies to all stages of the process at which the dispute is settled, not excluding the stages that follow the decision on the merits (judgment of the Court in the case of Robins v. the United Kingdom of 23.09.1987). The execution of the judgment is a part of the proceedings and is considered when calculating the duration of the proceedings (judgment of the Court in Di Pede v. Italy of 26.09.1996). In cases concerning our country, such as Voitenko v. Ukraine, Shmalko v. Ukraine, and Romashov v. Ukraine, brought by the applicants in connection with the failure to enforce court decisions rendered for a long time, the ECtHR noted that the enforcement of a decision rendered by any court should be considered as a mandatory component of court proceedings. In other judgments in Prypyalo v. Ukraine and Stadnyuk v. Ukraine, it was also noted that the trial and enforcement proceedings are respectively the first and second stages of one proceeding. Thus, a reasonable period of court proceedings should end with the execution of a court decision, and enforcement proceedings cannot

be separated from court proceedings. We will elaborate on the problems of enforcement of court decisions in a separate subsection of the study.

The beginning of criminal proceedings is the moment when a person becomes an accused within the meaning of the Convention (judgment of the Court in the case of Neumeister v. Austria of 27.06.1968). This may be the date preceding the acceptance of the case for consideration by the court (judgment of the Court in the case of Deweer v. Belgium of 27.02.1980): if the deprivation of liberty occurred after the arrest order (judgment of the Court in the case of Wemhoff v. Germany" of 27.06.1968), in case of indictment (the above-mentioned judgment of the Court in the case of 'Neumeister v. Austria') or as a result of the opening of a preliminary investigation against the person concerned (the judgment of the Court in the case of 'Ringeisen v. Austria' of 16.07.1971). With regard to the expiration of the criminal proceedings, the Court's case law clarifies that it is the date of the decision on the merits (both factual and legal) of the prosecution (the Court's judgment in Neumeister v. Austria»), i.e. it can be either the verdict of the court of first instance if it is not appealed and has entered into force or the decision of the court of appeal, which has entered into force (the Court's judgment in the case of Delcourt v. Belgium of 17.01.1970)[47].

The ECHR has developed criteria that can be used to assess the reasonableness of the trial period. These include: the complexity of the case; the behavior of the parties; the behavior of public authorities; and the importance of the issue before the court for the applicant.

Let us consider each of them separately. The complexity of the case, i.e., the peculiarities of its circumstances and facts. As the Court notes in its judgment, the complexity of the case may relate to both factual and legal aspects (Katte Katte Klitsche de la Grange v. Italy § 55; Papachelas v. Greece [GC] § 39). In this regard, N. Sakara notes that the complexity of the case, and, accordingly, the terms of its consideration, depends on the complexity of the subject matter of proof in the case, the volume of facts of the subject matter of proof, and the number of evidence[48]. In our opinion, the content of the criterion of "complexity of the case", based on the practice of the ECHR, was most successfully revealed by T. A. Tsuvina, who writes that complications of the trial on issues of fact arise due to the peculiarities of proof in a particular case, for example, the need for an expert examination; the complexity of the examination of evidence due to the need to collect and study a large amount, search and interrogation of witnesses, provision of a court order to a foreign

[47] Дудуаш Т. І. *Практика Європейського суду з прав людини*: навч. посіб. Київ. : Алерта, 2016. С. 220.

[48] Сакара Н. Ю. *Проблема доступності правосуддя у цивільних справах* Харків: Право, 2010. С. 173.

court, etc. Legal complications most often arise in connection with the application of substantive or procedural law. In the first case, difficulties may arise due to the need to use new and unclear laws, statutes, or a complex regulatory framework (e.g., on urban planning, land consolidation, mandatory procurement, etc.), interpretation of international agreements; in the second case (in the case of procedural law), when determining the jurisdiction of a large number of plaintiffs and defendants; numerous interlocutory motions of the parties; the need to engage an interpreter, etc.[49]

The next criterion for the reasonableness of the trial period is the behavior of the parties. It should be noted that Article 6 of the Convention does not require the active cooperation of the applicant with the judicial authorities, which, in turn, cannot be blamed for the incomplete use of the measures available to them under national law (Erkner and Hofauer v. Austria, § 68). The person concerned need only demonstrate that all procedural measures concerning him have been duly taken to prevent delays and that he has resorted to measures to shorten the duration of the trial as provided for by national law (Unión Alimentaria Sanders S.A. v. Spain).

Delays in litigation related to the behavior of the parties (the applicant) may be caused by objective and subjective factors. In particular, the lack of promptness of the parties in submitting submissions may adversely affect the timing of proceedings; frequent/repeated changes of the representative (König v. Germany); requests or acts of omission also affect the course of proceedings (Acquaviva v. France); attempts to secure a settlement agreement (Pizzetti v. Italy); proceedings were mistakenly filed with a court that does not have jurisdiction (Beaumartin v. France), etc.

At the same time, the ECtHR notes that although public authorities cannot be held responsible for the behavior of the defendant, the actions of one of the parties aimed at postponing the trial do not relieve the former of their obligation to ensure that the proceedings are considered within a reasonable time (Mincheva v. Bulgaria, § 68).

The third criterion is the activity of state bodies. When analyzing this criterion, it should be noted that the state is responsible for the delay of the proceedings not only by the judiciary but also by other public authorities (Martins Moreira v. Portugal). If we are talking about the behavior of the judiciary, we can talk about numerous delays caused by the actions or inaction of the court. For example, in the case "Guincho v. Portugal" of 04.03.2013 the ECtHR recognized as a violation of paragraph 1 of Article 6 of the Convention the consideration of the case by the District Court of Vila Franca de Hira for three years, ten months, and eighteen days, since the case remained without

[49] Цувіна Т. А. *Право на суд у цивільному судочинстві:* монографія Х. : Слово, 2015. С. 238.

movement twice: for more than six months, when they were waiting for the execution of the order to serve the statement of claim on the defendant sent to Lisbon, and for more than a year and a half, which was required to provide the plaintiffs with the defendants' objections.

The fourth criterion is the significance of the issue before the court for the applicant. The purpose of introducing this criterion is to develop a range of cases that are of particular importance to the applicant and therefore should be considered within a shorter time frame. We are talking about the so-called cases requiring special promptness, to which the Court refers to cases: concerning social status and legal capacity, which require special attention because they relate to social status and legal capacity (Bock v. Germany; Laino v. Italy); child custody (Hokkanen v. Finland; especially if a long period of time may cause irreversible circumstances in the parent-child relationship (Tsikakis v. Germany); parental responsibility (Paulsen-Medalen and Svensson v. Sweden); and employment disputes (Vocaturo v. Italy, § 17). Particular attention from the authorities is required in cases where the applicant suffers from an "incurable disease" and has a "short life expectancy." For example, (in the case of X. v. France, the applicant was a hemophiliac and died a month before the ECtHR passed a judgment in a case in which he complained about the excessive (two-year) duration of the proceedings in the national courts in his claim against the state for compensation for damage caused by HIV infection).

The problem of time limits for court proceedings is relevant for our country, as evidenced by the numerous judgments delivered by the ECtHR against Ukraine concerning issues of non-compliance with time limits for court proceedings by national courts.

Thus, in the case of Kiselyov v. Ukraine, the ECtHR noted that although certain delays in the proceedings occurred due to the need to correct deficiencies in the applicant's appeal, more significant delays were caused by repeated postponements of the case by the court of first instance due to the absence of the defendant's representatives, although the court did not take any measures to ensure their presence. In addition, the Supreme Court of Ukraine considered the case for 2 years and 3 months and repeatedly returned the case file because the court of first instance failed to properly prepare the cassation appeal and case file.

Unlawful delays related to the postponement of the case are also highlighted in the case of Kravets v. Ukraine, where the total duration of the proceedings on the applicant's claim was about 7 years and 11 months in the courts of three instances. At the same time, the case was returned to the court of first instance for a new trial, and out of 42 scheduled court hearings, 32 were postponed for several reasons.

Situations where national courts could not decide on jurisdictional issues for a long time were also recognized as not meeting the requirements of reasonable trial time. Thus, in the case of Slyadnyeva v. Ukraine, the ECtHR focuses on the fact that the decision of the court of appeal on the issue of jurisdiction lasted about a year in the first and about 10 months in the second proceedings. The delays were also caused by the suspension of the proceedings and the commissioning of an expert examination by a body that was not authorized to do so.

Delays in the proceedings were also associated with repeated returns of the case to the lower courts, as well as the transfer of the case from one court to another. Thus, in the case of Bestiyanets v. Ukraine, in which the proceedings lasted 8 years and almost 10 months, the ECtHR found a violation of the reasonableness of the trial time, explaining that there were delays due to the transfer of the case from one court of first instance to another; the return of the case by the court of appeal to the court of first instance for a new trial; suspension of the proceedings until the consideration of a case related to the applicant's case.

In this context, we would like to add that an important task for Ukraine is to introduce a reliable mechanism for protecting the right to reasonable time limits. It is no coincidence that the European Court draws attention to this aspect, since the absence of these legal guarantees poses a great danger to the rule of law, especially when excessive delays in the administration of justice occur within national legal systems, and the parties to the proceedings do not have any reliable means of protecting the violated right.

At the same time, it is these guarantees that make it possible to develop specific indicators that make it possible to assess the compliance of an individual trial or the functioning of the judicial system as a whole with the existing standards of a fair trial. Given the above, we would add that it is necessary to amend certain legislative acts on the judiciary and judicial proceedings with the ultimate goal of effectively ensuring the right of citizens to a fair trial. This will expand the rights of citizens and provide additional guarantees of equality before the law and the court, publicity, and openness of the trial, binding nature of court decisions, and regulation of the impartial distribution of court cases.

The enforcement of court decisions is a crucial element of the right to a fair trial[50]. Without effective enforcement, judicial protection becomes uncertain, ineffective, and ultimately illusory. Conversely, as national practice

[50] Захист права на справедливий суд відповідно до європейської конвенції з прав людини Посібник для юристів 2-ге видання підготовлене Довидасом Віткаускасом. 188 с. С. 46. URL : https://www.echr.com.ua/wp-content/uploads/2018/06/spravedlyviy-sud-ECHR_UKR.pdf

shows, the non-enforcement of court decisions or delays in their execution significantly violate human rights, undermining the social value of justice and eroding public trust in the judicial system. Moreover, enforcement is essential for legal certainty, as individuals who win a lawsuit rightfully expect the timely execution of court decisions and the restoration of their violated rights[51].

The execution of a court decision is also considered by the Constitutional Court of Ukraine as an integral component of the right to fair judicial protection. This includes, in particular, a set of actions defined by law, aimed at protecting and restoring the violated rights, freedoms, legitimate interests of individuals, society, and the state.

The Constitutional Court of Ukraine emphasized that ensuring the execution of court decisions by the state, as an integral component of the right to judicial protection, has been enshrined at the constitutional level in connection with the amendments to the Constitution of Ukraine introduced by the Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice)" of June 2, 2016, No. 1401–VIII, which supplemented the Constitution, in particular, with Article 1291. Part 2 of this article provides that the state ensures the execution of court decisions in accordance with the procedure prescribed by law.

The Constitutional Court of Ukraine views the mandatory execution of court decisions as a positive obligation of the state. This is because, by establishing appropriate national organizational and legal mechanisms for the realization of the right to execute court decisions, the state must not only implement effective systems for executing court decisions but also ensure the functioning of these systems in a way that allows access to them for every individual in whose favor a mandatory court decision has been made. This includes situations where the decision is not executed, including by a state body.

The Constitutional Court of Ukraine emphasized that the legal procedure for ensuring the execution of court decisions by the state must comply with the principles of the rule of law and fairness and must guarantee the constitutional right to judicial protection. The failure of the state to fulfill its positive obligation to ensure the functioning of the system for executing court decisions leads to the restriction of the constitutional right to judicial protection and undermines its essence[52].

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[51] Лемак О. В. *Право на судовий захист: конституційно-правовий аспект.* дис... канд. юрид. наук. Ужгород, 2014.

[52] Рішення Конституційного Суду України (Другий сенат) у справі за конституційною скаргою Хліпальської Віри Василівни щодо відповідності Конституції України (конституційності) положень частини другої статті 26 Закону України „Про виконавче провадження" (щодо забезпечення державою виконання судового рішення) від 15 травня 2019 року № 2-р(II)/2019. *Вісник Конституційного Суду України.* 2019 р., № 3, стор. 27.

CONCLUSIONS

The right to a fair trial takes a key place in the system of constitutional guarantees of human rights, since the fundamental principle of human rights protection lies in the fact that any violated right can be restored through a certain procedure, especially this concerns the restoration of human rights in case of their violation by state authorities. If there is no such effective judicial procedure of protection and restoration of a violated right in the state, then any constitutional rights are a legal fiction.

Analysis of the practice of interpretation of the right to a fair trial by Ukrainian and European constitutional jurisdiction bodies shows that the essence and structure of this right they consider relying on the precedents of the European Court of Human Rights, especially in the part of the interpretation of the right to a fair trial. In particular, the Constitutional Court of Ukraine considers this right in connection with the fundamental principles of judicial proceedings, defined by the provisions of Part 2 of Article 129 of the Constitution of Ukraine, as well as taking into account the content of the right to a fair trial, defined in Article 6 of the Convention and interpreted by the European Court of Human Rights.

In particular, the decisions of constitutional courts concern the interpretation of such elements of the right to a fair trial as: organic (the right to access to court and the right to execution of a court decision); institutional (independence and impartiality of a court established by law); procedural (adversarial proceedings, equality of arms, reasonable timeframes for judicial proceedings) and special elements (presumption of innocence, the right to legal assistance).

Additionally, it should be emphasized that a significant part of the analyzed decisions of constitutional control bodies concerns the problem of ensuring the independence of the judicial branch of power, which is a key indicator of fair justice, since the independence of judges is the foundation of the rule of law. Any interference from the executive or legislative authorities in appointing judges and making decisions by them threatens the principles of separation of powers. And attempts of political pressure on judges or manipulations in their appointment contradict the principles of a constitutional state and the rule of law and undermine trust in the judicial system.

SUMMARY

The right to a fair trial takes a key place in the system of constitutional judicial guarantees of human rights, since the fundamental principle of human rights protection lies in the fact that any violated right can be restored through a certain procedure. If a state lacks such an effective judicial procedure for the

protection and restoration of a violated right, then any other rights enshrined in legislation are merely declarative provisions, a legal fiction.

Based on the practice of the Constitutional Court of Ukraine and other European constitutional jurisdiction bodies and the practice of the European Court of Human Rights, the following main elements of the right to fair judicial protection are analyzed in detail: organic (the right to access a court and the right to enforce a court decision); institutional (independence and impartiality of the court established by law); procedural (adversarial proceedings, equality of arms, reasonable timeframes for judicial proceedings).

It is stated that, based on the legal positions of the Constitutional Court of Ukraine, justice is recognized as such only if it meets the requirements of fairness and ensures effective restoration of rights, and the right to a fair trial should be considered in connection with the fundamental principles of judicial proceedings, defined by the provisions of Part 2 of Article 129 of the Constitution of Ukraine, as well as taking into account the content of the right to a fair trial, defined in Article 6 of the Convention and interpreted by the European Court of Human Rights.

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