

RIGHT TO A FAIR TRIAL IN EXTRAORDINARY CONDITIONS

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Abstract: The relevance of the study is determined by the necessity to generalize the problems of implementation of the right to a fair trial faced by various states in connection with quarantine restrictions, as well as the experience of the administration of justice under martial law. This made it possible to establish a common understanding of the right to a fair trial within the borders of the Council of Europe member states, as well as the means of solving the issue of justice by the Ukrainian authorities in the conditions of the occupation and the military actions of the Russian army.

Keywords: Judicial system, trial, equality and non-discrimination, access to court, justification of decision, independence and impartiality of court.

INTRODUCTION

Justice is administered by courts in all states except for unlimited monarchies. Court plays an important role in maintaining law and order in society. An effectively organized system of justice administration is the basis of economic, social and cultural development of a state, and implementation of the right to free personal development. S. Fredman (2009), explaining the role of courts in the political process, indicates that courts cannot dictate choices to politicians, but must demand public justification of political choices regarding the human rights' implementation.

The presence of an effective judicial system is the basis of a democratic society formation. The effectiveness of the courts' functioning is a factor in the state's fulfillment of its obligations in the field of human rights. The court is usually seen as an essential element of a democratic society. Society perceives the court as a body ensuring human rights, and is the guarantor of their provision; the court considers disputes between different people, including disputes between a person and a state. Access to justice is considered as a component of the rule of law, which is "a central notion in legal thought and in the practice of democratic states" (Buyse et al., 2021). "In a civilized society the

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main regulator of human behavior is law and, accordingly, the rule of law is recognized there” (Kuchuk et al., 2019).

That is why the courts’ activity is constantly in the center of scientists’ attention. Although there are still some insufficiently studied aspects of the judiciary functioning. Thus, we fully agree with the conclusion of T.A. Guimaraes (Guimaraes, et al., 2018), A.O. Gomes and E.R. Guarido Filho (2018) on the lack of the theory of justice administration. C. Guarnieri and P. Pederzoli (2020) indicate that legal aspects are mainly studied: “In the European context, academic lawyers have traditionally cultivated the study of courts, judicial procedures and jurisprudence, mostly favoring a legal dimension”. Although, in our opinion, this is quite obvious, considering that under the rule of law, law itself is the main regulator of social relations.

The publication “Public and Private Justice: Dispute Resolution in Modern Societies” should be cited separately because it discusses how the European Court of Human Rights defines “reasonable time” and access to the courts; however, the main purpose of this study is to compare and assess the national legal systems of various European nations (Uzelac & van Rhee, 2007). The practice of the European Court of Human Rights contains other elements of the right to a fair trial.

The right to a fair trial is the most studied issue. Mindaugas Simonis (2019) considers the right to a fair trial as “the Mother of Justice”, although scientists’ attention is also paid to certain aspects of this right. For example, E. Ng (2022) explored the rights of the accused to a fair trial, noting that this right is an internationally recognized fundamental right. The subject of the study by M. Dymitruk (2019) was the provision of the right to a fair trial in conditions of the development of information technologies, and the use of artificial intelligence in the field of justice. S. Bakhshay and C. Haney (2018) examined the impact of biased media coverage on the right to a fair trial (in a jury trial). However, it should be noted that there is no established understanding of the right to a fair trial essence today. One of the reasons for this, in our opinion, is the different interpretation of the “justice” concept in different societies.

The spread of Covid-19 in 2019 and the introduction of restrictive measures by states had a significant impact on human rights implementation. A great number of rights were limited. Restrictions imposed by states also affected the right to a fair trial. “It is clear that the functioning of national judicial systems has been severely disrupted. This limited functioning of courts impacted the individuals’ right to a fair trial guaranteed, in particular, under Article 6 of the European Convention on Human Rights” (Kamber & Kovačić Markić, 2021). The issues of implementing the right to a fair trial in the context of the fight against Covid-19 became the subject of research by K. Kamber and L. Kovačić Markić (2021), R.D. Nanima (2020), B. Perezhniak, D. Balobanova, L. Timofieieva, O. Tavlui, Yu. Poliuk (2021).

Ensuring the right to a fair trial in the conditions of war is less researched, and this fact determined the relevance of the theme chosen. Ukraine’s experience can be positive in this aspect, considering that as a result of Russia’s armed aggression against Ukraine

in 2014 and especially in 2022, the Ukrainian authorities had to take measures for the functioning of courts and the administration of justice (Knyazev, 2022). The issue of ensuring the right to a fair trial for Ukraine has moved from a theoretical level to a practical one, which makes it possible to analyze the specifics of this right implementation, and to identify positive and negative aspects of the state authorities' activities.

Thus, the purpose of this study is to clear the features of ensuring the right to a fair trial in extraordinary conditions, in particular, in conditions of martial law. The materials of the article can be used for further research on the right to a fair trial and its individual components. Article's fundamental provisions might become guidelines for states to improve national legislation to ensure the right to a fair trial in extraordinary conditions.

BASIC CONCEPTS AND METHODS FOR REVEALING THE TOPIC OF THE RIGHT TO A FAIR TRIAL

In this study, the content of the right to a fair trial is formed based on the analysis of the practice of the European Court of Human Rights. These elements are not “invented” by us; they are part of the established practice of this Court. The characteristics of each of the elements of the right to a fair trial named in the study are systematised from separate decisions of the Court (which reflect the established practice of this Court, are repeated in many decisions, and therefore are still relevant today). We do not attempt to fully explain the fairness of the right to a fair trial. We concentrate on the procedural aspects of court justice, much like the European Court of Human Rights, rather than the substantive aspects.

The right to a fair trial includes the following elements:

1) the fair nature of the trial involves compliance with the principles of equality and non-discrimination, the adversarial nature of the parties in the trial, and also requires the court to justify the decision made; this element of the right to a fair trial establishes requirements for the procedural aspects of the administration of justice, which must balance possible exceptions to the principle of adversariality of the parties;

2) the independence and impartiality of the court includes such elements, as: the way of judges' appointment, the procedure for their dismissal and prosecution; term of office of a judge; prohibition of interference in the administration of justice; the procedure for the administration of justice that should be determined by law and provide for the secrecy of the decision, liability for contempt of court; guaranteed financing of courts, proper financial provision of courts, social protection and security of judges and their family members; and efficient judicial self-government;

3) access to the court involves provision by the state of the opportunity for persons to apply to the court; the state establishes a number of restrictions on access to the court, namely: requirements for appeal, terms of appeal, and court costs. The right of access to the court is also granted to persons recognized as having limited legal capacity;

4) the right to a public hearing of the case determines the following requirements for the administration of justice as follows: open court hearings, oral hearing of the case in the court of first instance, publicity of the court's decision pronouncing. Limiting the publicity of the trial is allowed in exceptional cases, if publicity would harm the interests of justice;

5) the right to consider the case within a reasonable period requires the administration of justice in a period that is sufficient and necessary for the implementation of procedural actions provided for by law and the resolution of the case without unjustified delays; there must be an optimal balance between the term of the case consideration and the proper administration of justice;

6) the right to enforce a court decision requires unconditional enforcement of a court decision.

The prevention of the disease of Covid-19 caused the introduction of strict quarantine restrictions, which affected almost all components of the right to a fair trial. The right to access to court and the right to a public trial were the most restricted. The implementation of the right to access to the court was mainly ensured through video conferences, while the right to a public hearing of the case remained unrealized (International Union of Judicial Officers, 2020). The right to a fair trial is even more affected under martial law. When the entire territory of the state is shelled, a large part of the population is forced to leave the state it is too difficult to ensure the right to a fair trial. Herewith, all components of the right to a fair trial are under threat.

The primary measures that should be taken to improve the situation with ensuring the right to a fair trial should be as follows:

- 1) making legislation on conducting court hearings in the form of video conferences;
- 2) introduction of the electronic system “electronic court” (for the exchange of electronic documents between participants in the legal process);
- 3) development of principles for determining urgent cases;
- 4) courts’ technical support;
- 5) court employees’ training (regarding the formation of skills in the use of appropriate technical means, software, etc.);
- 6) proposals for monitoring court proceedings development, and involvement of the public in the control of judicial proceedings.

The research of the right to a fair trial is based on the content analysis method. Legislation, legal acts, including the European Court of Human Rights’ decisions, and Ukrainian legislation in the field of ensuring the right to a fair trial in wartime, were worked up by means of this method. This made it possible to establish a common understanding of the right to a fair trial within the Council of Europe (1950) member states (by means of the European Court of Human Rights practice’s analysis), as well as the means of solving (by the Ukrainian authorities) the issue of justice in the conditions of the occupation of part of its territory and the constant military actions of the Russian army.

Achieving the goal of the study determined the structure of the paper, which includes the three aspects coverage. First, it is the clarification of the right to a fair trial sense, which is especially important in the conditions of the lack of unity of views on this phenomenon, and terminological ambiguity (the presence of different terms denoting the right to a fair trial). Herewith, its interpretation by the European Court of Human Rights is taken as the basis of such a general understanding. This choice is stipulated by the fact that

the European Court of Human Rights practice possesses a precedent nature allowing reveal a common understanding of the right to a fair trial in 46 member states of the Council of Europe. We should also mention Russia's expulsion from the Council of Europe in 2022 due to systematic and gross violations of human rights and an act of aggression against Ukraine (Law of Ukraine No 389-VIII, 2015). This additionally confirms the possibility of clarifying the general understanding of the right to a fair trial (the presence of consensus concerning this right's components). Such a general understanding is a model of the right to a fair trial allowing to further determining the specifics of this right implementation in extraordinary conditions.

Secondly, it is a description of the features of ensuring the right to a fair trial in the context of the fight against Covid-19 (Betetto, 2020; Doya Nanima, 2020). Covid-19 has significantly affected the society life, significantly limiting social interaction, contacts of people both at the national and international levels. In the context of the right to a fair trial, Covid-19 has become a factor in significantly limiting a person's access to court. It is primarily about physical access; however, it affects the possibility of a person to be present during the consideration of his case. Above mentioned, to a certain extent, is also characteristic of the right to a fair trial exercise under martial law.

Thirdly, it is a description of the features of ensuring the right to a fair trial under martial law. Ukraine was chosen for the implementation of this part of the study and this is conditioned by the following circumstances, namely: Ukraine is a member of the Council of Europe, the jurisdiction of the European Court of Human Rights extends to it, which is especially important in the context of the first part of the paper (allows to compare the features of ensuring this right in both ordinary and extraordinary conditions). For seven months, active hostilities, armed aggression by Russia and the occupation of a large part of the territory of Ukraine by Russian troops and constant shelling of the entire territory of Ukraine have been taking place on the territory of Ukraine. The courts continue to function in such conditions.

It should be highlighted that the implementation of the right to a fair trial in Ukraine was substantially impacted by the pandemic and martial regime. Of course, the extent of their influence varies. However, there are considerable parallels between the aspects of the right to a fair trial that are subject to limitations and the steps that the authorities use to get over the limitations brought on by these circumstances. Additionally, the decision to include both extreme situations in a single research is based on the reality that the pandemic and martial law were the main causes of widespread limitations on the right to a fair trial, rather than a few isolated limitations (violation). To determine if the consequences for possible violations of the right to a fair trial are similar or different, we combine these two factors in our study.

GENERAL UNDERSTANDING OF THE RIGHT TO A FAIR TRIAL AND THE FAIR NATURE OF THE COURT

The right to a fair trial is an integral part of a democratic society, although even today there is no unified understanding of its sense in different states. We would like to add that various terms are used to denote this right in the of international law acts.

Thus, Art. 8 of the Universal Declaration of Human Rights (United Nations, 1948) includes the “effective remedy by the competent national tribunals” term. Art.6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) contains the “Right to a fair trial” term. Art. 14 of the International Covenant on Civil and Political Rights (United Nations, 1966) contains the following: “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Art. 13 of the Convention on the Rights of Persons with Disabilities (European Court of Human Rights, 2006c; United Nations, 2006) includes the “Access to justice” term. And Art. 47 of the Charter of Fundamental Rights of The European Union (The European Parliament, the Council and the Commission, 2012) contains the “Right to an effective remedy and to a fair trial” term. It is worth agreeing with some scholars who indicate that part of these international acts has formed the international system of human rights protection (Kuchuk et al., 2022; Krešimir, 2022).

“In the Court’s opinion, the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 para 1 (art. 6-1) of the Convention restrictively” – indicates the European Court of Human Rights in Case of *Moreira De Azevedo v. Portugal* (European Court of Human Rights, 1990). In our opinion, the concept of the right to a fair trial is still not clearly defined. The list of elements of this right is not exhaustive, however, the European Court practice analysis allows us to name the following components of the right to a fair trial.

Despite the fact that justice is the foundation of the legal system, and its essence, there has not been a unified approach to understanding this concept essence even within the Council of Europe member states. We fully agree with O. Spengler’s statement (1922) that “any culture as a whole being of a higher order has its own moral face. There are as many morals as there are cultures”. This idea is also reflected in the European Court of Human Rights decisions. Thus, even in the case of *Handyside v. the United Kingdom* (European Court of Human Rights, 1976), this court concluded that it is impossible to find a universal European theory of morality in the national legislation of the contracting states. Attitudes to the rules of morality reflected in legislation, change from time to time and from place to place, especially in our era, which is characterized by a rapid and far-reaching evolution of views on this issue. In *Otto-Preminger-Institut v. Austria* (European Court of Human Rights 1994b) case the European Court of Human Rights compared the perception of morality and religion, indicating that, as in the case of “morality”, it is impossible to single out the only concept for all European states about the religion importance in society; such concepts might differ even within one and the same state.

At the same time, the European Court of Human Rights in *Open Door and Dublin Well Woman v. Ireland* (European Court of Human Rights, 1992) case indicated that “cannot accept that the opinion of the state in the area of moral protection is free from control and is not a subject to review”. Let us emphasize that the trial fairness is manifested in a number of characteristics that will be disclosed below as the right to a fair trial individual elements. At the same time, characterizing justice, we will point out the following requirements for judicial proceedings.

First, a fair court must ensure the equality of the participants in the process and equal access to the court implementation. The principles of equality and non-discrimination are fundamental principles of law. “While there is no universal standard for defining the principles of equality and nondiscrimination, for the purposes of this study, the principle of equality is the principle that individuals under the same jurisdiction are equal in their rights, and the principle of nondiscrimination is the principle that individuals should not be treated unfairly based on an immutable characteristic or core trait” (Osborne, 2021).

In our opinion, the essence of these principles regarding the right under the study is as follows: it is forbidden to put one of the parties to the trial in a less favorable position (compared to the other party). Each of the parties must have an equal opportunity to present their evidence in support of their position or refutation of the other party’s position. It should be noted that a similar opinion was expressed by the European Court of Human Rights in the case of *Foucher v. France* (European Court of Human Rights, 1997a): “The Court reiterates in this connection that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent. The same provision is reproduced in cases *Bobek v. Poland* (European Court of Human Rights, 2007a) and *Klimentyev v. Russia* (European Court of Human Rights, 2007b).

In case of *Kuopila v. Finland* (European Court of Human Rights, 2000a) the European Court of Human Rights recognized a violation of the right to a fair trial due to the defense’s denial of evidence, which violated the parties to the trial equality principle. The right to contest, necessitating the familiarization of the parties to the case with the materials of the case and the presentation of evidence, follows from the principle of equality of participants in the legal process. In addition, it is worth pointing out a change in the approach of the European Court of Human Rights regarding giving importance to the external aspects of the administration of justice (which should embody fairness) and public opinion regarding a fair trial. This is stated in paragraph 24 of *Borgers v. Belgium* (European Court of Human Rights, 1991) case.

This stipulates increased requirements for the procedural aspects of the administration of justice that should ensure the fairness of the process. Thus, we indicated above the necessity for equal access of the parties to the evidence, however, in exceptional cases related to the protection of the rights of other persons, the access of the defense party to the evidence might be limited, however, the European Court of Human Rights in the case of *Doorson v. the Netherlands* (European Court of Human Rights, 1996) indicated that ensuring the anonymity of witnesses made certain difficulties for the defense that should not normally exist in a criminal trial, however, such restrictions would be interpreted as a violation of Art. 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, if they are not sufficiently balanced by judicial procedures.

The reasonableness of the court’s decision should be noted separately. Justice involves justification of the decision made by the judge. In our opinion, the validity of a court decision has the following significance: first, it acts as a means of legitimizing the decision. The strength

of the court's decision is provided by the strength of the decision logic, the completeness of the evidence analysis and the persuasiveness of the arguments presented. Let us emphasize that we believe that proper legal reasoning of the court's decision is the requirement of the rule of law. Herewith, it is crucial to understand that legal phenomena (as social and cultural phenomena) have an axiological component, and therefore legal logic should take into account not only the deduction and induction methods, but also value judgments, especially in the aspect of interpretation of legal norms *mutatis mutandis*. "Indeed, the exercise of the legal role and the scholarly understanding of legal texts were classically defined as *ars iuris* - an art of law - which drew on the panoply of humanist disciplines, from philology to fine art" (Ben-Dor, 2013). "Scholasticism and dialectic method is used as a support hermeneutic interpretation of legal facts to me *recht* construction of a new legal norm normative ideas should not be separated from *Idee recht* itself (Budihanto, 2017)".

Obviously, the court is not obliged to carry out a detailed analysis of all the arguments provided by the participants in the case, however, all the essential circumstances of the case should be carefully analyzed. The court should demonstrate to the parties that they have been heard (European Court of Human Rights, 1994c). Court decisions' reasoning allows use of the right to appeal the decision effectively. It is appropriate to indicate the reasons for accepting or rejecting the arguments presented by the parties.

INDEPENDENCE AND IMPARTIALITY OF THE COURT

It is quite obvious that a dependent court as well as a biased court cannot properly administer justice. Moreover, such an "institution" can hardly be called a court. The presence of an independent and impartial court is a characteristic feature of the rule of law. The existence of such a court is a mandatory condition for the rule of law implementation. "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason" – is indicated in the Basic Principles on the Independence of the Judiciary (United Nations, 1985), the international instrument, adopted at the UN level as long ago as 1995.

According to the principle of separation of powers, implemented in democratic states, the state power is exercised by legislative, executive and judicial bodies. A system of checks and balances is a constituent of this principle. However, if the judiciary can largely "restrain" the legislature and the executive power (for example, by way of negative law-making, when the bodies of constitutional justice perform the role of a "negative legislator"), then neither the legislature nor the executive power can interfere with the administration of justice (European Commission for the Efficiency of Justice, 2020).

The European Court of Human Rights in case of *Sovtransavto Holding v. Ukraine* (European Court on Human Rights, 2002) recognized the violation of the right to a fair trial because of the systematic interference of public authorities (including the head of state) in the judicial process. The same is true in the aspect of impartiality and independence of the court. In case of *Beaumartin v. France* (European Court on Human Rights, 1994a) the European Court of Human Rights recognized a violation of the right to a fair trial due to the procedure

of the administrative court operating in France at the time in case of the necessity to interpret an international treaty. Thus, faced with the difficulties of interpreting an international treaty, the administrative court was obliged to apply to the Minister for Foreign Affairs. The minister's explanation was binding on the court. Therefore, high demands (including ethical ones) are laid down on judges in every democratic state. They (demands) also contribute to the formation of an unbiased court and serve as the basis for legitimizing court decisions.

The European Court of Human Rights practice analysis under Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms allows us to conclude that the factors of independence and impartiality of courts are as follows:

- the way of judges appointing, the procedure for their dismissal and prosecution (herewith, for example, the appointment of judges by the parliament does not mean their dependence, if the parliament does not give instructions and does not exert pressure on judges (European Court of Human Rights, 2006a);
- judge's term of office;
- prohibition of interference in the administration of justice (including by higher courts. For example, in the case of *Agrokompleks v. Ukraine* (European Court on Human Rights, 2013a), the European Court of Human Rights recognized a violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since the instructions by the Supreme Arbitration Court of Ukraine were given to review the applicant's case; this court exerted an overt influence on the judicial process);
- the procedure for the administration of justice, which must be defined in the law (and not in a by-law) and provide for the secrecy of the decision-making (violation of the secrecy of the deliberation room must be interpreted as the reason for annulment of the decision), and liability for contempt for court;
- guaranteed courts' financing, proper courts' material provision, social protection and security of judges and their family members;
- effective judicial self-government (it should not be formal; it should exist not only *de jure*, but also *de facto*).

ACCESS TO COURT

The right to a fair trial provides for an individual or legal entity to be able to go to court without hindrance if they believe that their rights have been violated. Public authorities cannot forbid a person to apply to the court, and the court cannot deny justice to a person. Such a prohibition or refusal encroaches on the essential idea of the right to a fair trial. Let us point out that the European Court of Human Rights emphasized the importance of access to court precisely in the context of the right to a fair trial in the case of *Golder v. the United Kingdom* (European Court on Human Rights, 1975), the right enshrined in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms would be ineffective without access to court.

In our opinion, the right of access to the court can be ensured in different ways in different states. However, in any case, the level of access to court must be sufficient to

ensure human rights. Every person who believes that his rights have been violated should have the opportunity to go to court. The degree of a person's access to justice provided under national law must be sufficient to ensure the person's right to a trial in accordance with the rule of law in a democratic society (European Court of Human Rights, 1985).

Therefore, the state must establish limitations of the right to access to court in the law. As for such restrictions, the states are endowed with a wide discretion in their establishing, however, these restrictions cannot contradict the rule of law. Usually, these restrictions are related to the term of appeal to the court (thus, the statute of limitations is established in civil law; the statute of limitations for criminal liability is established in criminal law), and requirements for appeal (requirements for a statement of claim), etc. Therefore, the state determines the procedure for applying to the court in the national legislation, while the legislation can change, accordingly affecting the change in the procedure for access to the court. "Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (European Court of Human Rights, 1985). The right to access to the court can be limited only if three criteria are taken into account: 1) legality of the restriction; 2) existence of a legitimate purpose; 3) compliance with the principle of proportionality.

In our opinion, in the context of the right of access to the court, we should also talk about the right to legal aid, which acts as a guarantee of effective access to the court. It is quite obvious that, for example, in the absence of legal aid in criminal cases, the trial would mostly end in a verdict for the defendant. One cannot but mention the access to the court of persons who are recognized as having limited legal capacity. Thus, the case of Nataliya Mikhaylenko v. Ukraine (European Court on Human Rights, 2013b) is a demonstrative one. The civil legislation of Ukraine did not provide for the possibility of a person with limited legal capacity to independently apply to the court for restoration of legal capacity. In this case, the European Court of Human Rights noted that such an approach of national legislation, according to which a legally incapable person does not have the right to direct access to the court, does not correspond to the general trend existing in European states.

We will point out the issue of the court fee apart. In *Kreuz v. Poland* case (European Court on Human Rights, 2001) it is noted that "The Court has ruled that in some cases, in particular where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on the individual's access to a "court" or "tribunal"“. Thus, ensuring the right to a fair trial can be justified by establishing financial restrictions on access to the court.

However, the court fee should not lead to a situation where the applicant abandons his claim; the amount of the fee should be proportionate and should not violate the essence of the right of access to the court. Let us emphasize that the lack of access to the court makes it impossible to exercise the right to a fair trial enshrined in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("The fair, public and

expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated”) is pointed out by the European Court of Human Rights (2010), therefore without ensuring access to court the right to a fair trial will be illusory and ineffective.

It should be emphasised that a number of changes to the national legislation, notably those relating to access to courts, were implemented in Ukraine as a result of the start of Russia’s armed aggression. These include organisational elements of changing the territorial jurisdiction, court operations under the conditions of the High Council of Justice ceasing to operate, and new methods of informing the public about court activity. The Council of Judges decided what should take priority in the same matter (access to the court) when it came to protecting one of the competing rights: “recommend to the assemblies of judges, heads of courts, judges of the courts of Ukraine in the event of a threat to the life, health, and safety of court visitors, staff courts, judges to promptly make a decision on the temporary suspension of judicial proceedings... until the circumstances are eliminated” (Council of Judges of Ukraine, 2022a).

The analysis of the national legislation changes reveals that the primary purpose of these changes was to ensure the participants in court proceedings’ lives and health as well as their safety. “It is almost impossible to predict everything and feel completely safe from enemy shelling, but strict compliance with the requirements and rules of civil defense in most cases saves the population from death and maiming” (Council of Judges of Ukraine, 2022b). Therefore, the main means of ensuring access to the court became the use of information technologies (for example, conducting video conferences, which provides the opportunity to participate in the court session while being in a safe place) and partially changing the territorial jurisdiction. We would like to add that even at the beginning of the pandemic, the use of the EasyCon system was foreseen at the legislative level to ensure the conduct of court hearings online.

At the same time, it should be highlighted that a person's right to judicial protection cannot be limited in accordance with Ukrainian law, not even when martial law is in power. The peculiarities of the work of a particular court are determined by the actual situation in the respective region.

THE RIGHT TO A PUBLIC HEARING

This right is directly related to the right of access to court. This right is a guarantee of the activity of courts within the limits of the rule of law; it protects the parties to the judicial process from secret justice and provides for the possibility of public control over the administration of justice. Thus, this right is an additional means of legitimizing decisions made by courts. Without observing the publicity of the trial, it is not possible to ensure the justice of the court. At the same time, it is worth pointing out the possibility of conducting closed court sessions, for example, in cases related to state secrets, commercial secrets, in cases of private prosecution, if necessary to ensure the safety of witnesses, however, such hearings are an exception to the rule, but not the rule and the decision to hold such a meeting is made in a specific case, taking into account the

circumstances of the case. The European Court of Human Rights has emphasized that “Publicity contributes to fulfilling the aim of Article 6 paragraph 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention”.

We would like to add that the publicity of the case may be limited even in courts conducting appellate or cassation proceedings. However, such a restriction is possible if a public hearing of the case was ensured in the court of first instance. It should be noted that the public nature of the court process allows for the realization of the right to a fair trial by virtue of the protection of the parties from unjustified decisions and public control over the administration of justice. Publicity ensures public awareness of the court process.

In our opinion, the right to a public trial includes the following aspects: first, it is open court hearings (the hearing, to which only the parties and their representatives are admitted, cannot be interpreted as an open court hearing); secondly, the oral hearing of the case in the court of first instance, thirdly, the publicity of the announcement of the court’s decision. This conclusion can be drawn from the European Court of Human Rights practice analysis, in particular, from the following cases: *Hermi v. Italy* (European Court on Human Rights, 2006a), *Jussila v. Finland* (European Court on Human Rights, 2006b), *Raza v. Bulgaria* (European Court on Human Rights, 2010), *Riepan v. Austria* (European Court on Human Rights, 2000b), *Sutter v. Switzerland* (European Court on Human Rights, 1984).

Thus, it should be pointed out the double meaning of the public nature of the judicial process: individual (protection of the parties from secret and arbitrary proceedings) and public (public control over the administration of justice, legitimacy of decisions made by the courts). Limiting the publicity of court proceedings is carried out in case when such proceedings may harm the interests of justice.

Let us point out that in the conditions of martial law, the Ukrainian authorities took measures affecting this aspect of the right to a fair trial. Thus, admission to court sessions of persons who are not participants in court sessions was limited; consideration of cases is postponed if possible.

THE RIGHT TO HEAR THE CASE WITHIN A REASONABLE PERIOD AND THE RIGHT TO ENFORCE A COURT DECISION

The court cannot be called fair if the trial is dragged on for too long. The Plenum of the Supreme Specialized Court of Ukraine for consideration of civil and criminal cases (Supreme Specialized Court of Ukraine for consideration of civil and criminal cases, 2014) gave the following interpretation of a reasonable period: “Reasonable, in particular, is the term that is objectively necessary for the execution of procedural actions, the adoption of procedural decisions and the consideration and resolution of the case in order to ensure legal protection timely (without unjustified delays)”.

In the case of *Beaumartin v. France* (European Court of Human Rights, 1994a) the European Court on Human Rights pointed out that “It follows that the Court cannot regard as “reasonable” in this instance a lapse of time of more than eight years”. In this case, the applicants themselves delayed the process, appealed to a court that had no jurisdiction, did not submit their comments for a long time, and a complicated issue of interpretation was raised in the case itself; at the same time, the duration of the court proceedings was not argued in court. At the same time, let’s emphasize that the duration of the case consideration is influenced by a number of factors, including the complexity of the case, as well as the behavior of the parties to the court process. Herewith, the right to a reasonable period must be observed in each case, taking into account the circumstances of the case (European Court of Human Rights, 1978).

It should be noted that the term “reasonable period” has an autonomous meaning and is interpreted by the European Court of Human Rights regardless of the definition of this term in the national legislation of the Convention for the Protection of Human Rights and Fundamental Freedoms member states. It is obvious that the period of court proceedings might differ from state to state; however, it should not be excessive. At the same time, overloading of judges or insufficient number of judges cannot be the reason for increasing the periods of court proceedings. The state is entrusted with the duty to ensure the functioning of the courts in such a way that the courts can consider the case within a reasonable period. Herewith, it should also be taken into account that certain cases require speedy consideration, namely child custody cases (European Court of Human Rights, 1999). In our opinion, the judge’s professionalism is the means of finding a balance between a reasonable period and the quality of the trial. Judges should be subject to increased requirements, which is stipulated by the importance of judicial power and the social role of courts, and the importance of fair administration of justice.

The right to a fair trial would be ineffective if the court’s decision remain unsatisfied. Therefore, the right to enforce a court decision is an inherent component of the right to a fair trial. “However, that right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention” (European Court of Human Rights, 1997b). The given provision fully characterizes the idea of the court decision execution.

THE RIGHT TO A FAIR TRIAL IN THE CONTEXT OF THE FIGHT AGAINST COVID-19

Covid-19 has radically changed the usual way of life of people all over the world. Countermeasures were taken at the international level. Borders between states were closed. The movement of people within the borders of the states was significantly restricted.

The ban on large gatherings of people was mainly in effect. The reception of citizens by public authorities was also limited. This also affected the access of individuals and legal entities to the court. The requirement for self-isolation of a person should be mentioned separately, as well as the significant restriction of the rights of those people who did not agree to vaccination.

Thus, in some states, courts had to suspend the personal reception of citizens, it is recommended to submit documents only in electronic form, to consider only cases of an urgent nature, if there is a technical possibility, to initiate consideration of cases by way of the use of video communication systems; to limit access to courts of persons who are not participants in court proceedings (Supreme Court of RF, 2020). These and other restrictions' systematic generalization, adopted by various states, was carried out by the European Commission for the Efficiency of Justice (2020), and the results of this generalization are given on the website of the Council of Europe.

In the context of the right to a fair trial general model defined by us, we will indicate as follows. The countermeasures implemented by the states to overcome Covid-19 in general could not affect the following constituent elements of the right to a fair trial:

2.1. Court's independence and impartiality.

Such a component of the right to a fair trial as access to court and the right to a public hearing (especially in the context of the requirement for self-isolation and vaccination) has been most affected.

The following components were less affected:

- 2.2. The fair nature of the court, in terms of the competitiveness of the parties (in particular, due to the lack of opportunity to be present in court);
- 2.3. The right to consider the case within a reasonable period (in particular, because of the person's non-appearance at the court session);
- 2.4. The right to enforce a court decision ("Faced with the COVID-19 pandemic, the UIHJ is aware of recent developments in many countries, regarding essential measures taken, which also have an impact on the legal system and on the enforcement of court decisions" (UIHJ, 2020)).

One of the means that was used by a number of states to overcome those circumstances that did not allow ensure the right to a fair trial was the digitalization of the judicial process. In particular, it is about the use of a video communication system. However, in our opinion, video communication tools only partially solve the outlined problem. Thus, there is no doubt that by virtue of them a person can follow the court process, personally provide evidence, refute the arguments of the opposing side, including using the help of a defense attorney, and of an interpreter. However, first, a fair trial requires a preliminary fair investigation (in criminal proceedings), which in a number of cases requires the physical presence of the suspect. Or let's point out the impossibility of a physical meeting between a lawyer and a suspect in respect of

whom custody has been applied, provided the introduction of quarantine at the place of detention.

Second, such a communication mostly does not guarantee the implementation of the public hearing of the case and the possible control of the public over the judicial process. Even if the court on its official website will indicate the data by which a person can join the court session, another problem may arise: people, whose goal will be to disrupt the court session, will be able to join it. If this were a courtroom, then such persons could be prosecuted for contempt of court, however, open video conferences allow entering under fictitious data, which makes it impossible to identify a person (if it is possible to identify, then the efforts and means are incompatible with the purpose of such identification). Admission to the video conference with identification of the person mainly conditions the participation of only the parties and their representatives (which makes it impossible for the public to monitor the court proceedings).

In addition, it is worth mentioning the low level of information and technical support of courts, especially, if it is a district court in the states of the post-Soviet space. At the same time, it should be noted that quarantine measures should not be used by the authorities to violate human rights, in particular, the right to a fair trial. Thus, N. Betetto (2020) emphasized the following: “The CCJE has already emphasized that the rule of law is guaranteed by the fair, impartial and effective administration of justice. These principles developed by the CCJE, as well as by the Council of Europe as a whole, notably including rights to access to a court and to an effective remedy, should be strictly safeguarded during emergency situations in general and a pandemic in particular”.

Moreover, it is necessary to point out the necessity for legal regulation of the judiciary digitization processes. State authorities, taking into account the requirements of the rule of law, must act within the limits of the powers defined by law. The use of digital technologies makes possible the leakage of personal information, and the intervention of public authorities in the sphere of personal privacy. In our opinion, the use of video conferencing should be approved by the parties to the litigation and should be an exception; the court must hold court hearings with the participation of the parties (as a rule), the decision to hold a video conference must take place only if this form does not affect the exercise of the right to a fair trial. Let us add that it is necessary to adopt general rules for determining those cases that can be considered as a priority. It is obvious that the decision to recognize a case as a priority is made in each specific case, but without general rules (principles) such activity will be arbitrary, and makes corruption risks (and as a result leads to a violation of the equality principle).

Thus, it is worth pointing out such a positive effect of quarantine restrictions on the administration of justice as information and digital technologies introduction into the judicial process. However, the digitalization of judicial proceedings cannot be considered as a means to ensure the right to a fair trial. The introduction of quarantine restrictions became a challenge for the judiciary in all states of the world and revealed problems, the solution of which should become the main task for national states and international organizations. All relevant circumstances must be taken into account,

which will allow finding a balance between the necessity for health protection and the right to a fair trial.

THE RIGHT TO A FAIR TRIAL IN CONDITIONS OF WAR (ON THE EXAMPLE OF UKRAINE)

The Autonomous Republic of Crimea, and part of the Donetsk and Luhansk regions (part of the territory of Ukraine) were occupied as a result of Russia's armed aggression. This could not but affect the administration of justice in these territories. The judges were moved to the territory under the control of Ukraine however, the same cannot be said about the materials of the court hearings that were in the courts, accordingly, a large part of the documents was lost. Although, it should be noted that the changes in the procedure for conducting judicial proceedings affected only those courts that functioned in the occupied territory and the front-line zone.

The situation changed radically in February 2022, when Russia carried out a full-scale invasion of the territory of Ukraine, occupying part of the territory, bombing the entire territory of Ukraine, destroying residential areas, administrative buildings, etc. Mobilization was announced in Ukraine and about 700,000 people were called for service into the Armed Forces of Ukraine. It is obvious that it is difficult to ensure the right to a fair trial (as well as other human rights) in such conditions. Let us remind that according to the possibility of limitation, human rights are divided into relative and absolute. The right to a fair trial is a relative right, it can be limited (provided a number of conditions are met). Since the right to a fair trial imposes a number of positive obligations on the state, its implementation depends on the active actions of public authorities. According to the legislation of Ukraine, during the period of martial law, the powers of courts, prosecutor's offices, agencies carrying out investigative activities, and pre-trial investigation cannot be suspended (The Verkhovna Rada of Ukraine, 2015). However, some courts have suspended their activity because of the active hostilities and temporary occupation.

Among the main changes that took place in the field of administration of justice the following should be noted:

1) Change of territorial jurisdiction. The activity of individual courts in Donetsk, Zhytomyr, Zaporizhzhia, Kyiv, Luhansk, Mykolaiv, Sumy, Chernihiv, Kharkiv and Kherson regions was suspended. Due to the impossibility of administering justice in certain districts of these regions, the territorial jurisdiction over the cases considered in these courts was changed by transferring it to the court that is closest territorially to the court that cannot administer justice, or to another court. Such a change was made by order of the Chairman of the Supreme Court (in order to implement such authority of the Chairman of the Supreme Court, amendments were made to the legislation on the judicial system and the status of judges.

After the de-occupation and restoration of the activity of the relevant courts, the territorial jurisdiction of court cases is restored (also by means of the adoption of a decision by the Chairman of the Supreme Court). Herewith, the time of consideration of cases that were transferred to other courts is determined (which is correct, based on the fact that

re-transfer of the case may lead to a delay in the consideration of the case). At the same time, there are problems with the material and technical support of these courts, given the significant damage to both the premises and buildings in general.

2) *The procedure for acquainting the participants of the court process with the case materials.* Characterizing this aspect, we mean the courts operating in the territory controlled by Ukraine. In addition to systematic air alarms that force people to hide in shelters, let us point out that a significant number of citizens were mobilized, and an even larger number of people left the borders of Ukraine (in the latter case, no change of place of residence was reported, which is quite obvious). It is impossible to inform the participant of the case who moved to another country or changed his place of residence in Ukraine without informing the official authorities of his new place of residence.

We would like to add that in order to prevent hacker attacks, access to the register of court decisions, the “Cases’ Status” and “List of cases scheduled for consideration” services were restricted in Ukraine. At the same time, individual courts post information for participants in court cases on their websites. In addition, telephone communication remained, the e-mail of the court functioned, and messages were received by individual courts on Messenger Facebook. However, there is a question about the appropriateness of the message by such means. The possibility of exchanging procedural documents through a mailbox on the official website of the judiciary at the address: mail.gov.ua was created. It is impossible but mention the use of the “Electronic Court” information system as part of the Unified Judicial Information and Telecommunication System, the implementation of which began in 2017, the main purpose of which is the exchange of procedural documents between the participants in the court process, the submission of electronic documents to the court with tracking of the status of their consideration.

3) *Participation of subjects of legal proceedings in the court session.* At the beginning of 2020, changes, allowing the participants in the case to participate in the court session remotely, were made to the legislation. If until now, videoconferencing was allowed, but with the mandatory presence of the participant in the court (albeit another), now the parties to the process are given the opportunity to participate in the court session using their own technical means (identification of the person is carried out by virtue of the use of an electronic signature). The EasyCon system was implemented, and the use of other means available to litigants was allowed.

Although the implementation of video conferences to a certain extent contributed to solving the problems of justice administration in the conditions of Covid-19, in the conditions of martial law, this tool does not have such effectiveness, which is connected with the lack of a safe place (in the conditions of constant shelling by Russia of the entire territory of Ukraine).

4) *Compliance with procedural terms.* As the head of the Supreme Court V. Kniazev (2022) noted, “martial law is a valid reason for missing deadlines, but each judge will evaluate this reason individually, within the limits of the case to be considered”. Even under martial law, justice must be done, so litigants should take care to file appropriate

documents when it is possible. Therefore, as we see in the conditions of martial law, when the judges themselves are in danger, it is difficult to ensure all the components of the right to a fair trial.

CONCLUSION

Thus, the right to a fair trial includes the following provisions: equality and non-discrimination, competition between the parties, justification of the decision made; independence and impartiality of the court; access to court; public hearing of the case, hearing of the case within a reasonable period; effectuation of a court decision.

Distinguishing the constituent elements of the right to a fair trial allows us to identify those of them that are difficult to implement under quarantine restrictions or under martial law. This approach provides an opportunity to develop recommendations for improving the state's activities in ensuring the right to a fair trial. Under the specified extraordinary conditions, the right of access to the court and public hearing of the case is subject to restrictions. Under martial law, the right to consider the case within a reasonable period is also limited.

However, any limitation of the right to a fair trial must meet the requirements of the law, have a legitimate purpose, and the limitation measures must be proportionate. The authorities should pay special attention to further digitalization of the judiciary, taking into account the necessity to ensure the right to a public trial.

The above mentioned makes it possible to determine the following areas of improvement of public authorities in ensuring the right to a fair trial in martial law conditions (which can also be applied during the pandemic). In particular, the urgent issue is the normative consolidation of the extension of procedural terms (in non-urgent cases) and the principles of determining those matters that are urgent. Other recommendations relate to the improvement of the established mechanisms for the application of information technologies. Activities under martial law require the adoption of non-standard decisions, however, these decisions must be made in compliance with the requirements of the rule of law. A separate direction should be the development by judicial self-government bodies of the procedure for restoring lost court proceedings.

CONFLICTS OF INTEREST

The authors declare they have no financial and competing interests.

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