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Particular European Standards of Guaranteeing the Right to a Fair Trial in the Context of International Armed Conflict

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Abstract
The relevance of the research topic is due to at least several factors. Firstly, according to the analysis of the case law of the European Court of Human Rights, as well as annual reports on this issue, improper compliance with the standards of ensuring the right to a fair trial, established in Art. 6 of the European Convention on Human Rights, traditionally belongs to the most common violations by Ukraine as a defendant state and represents a systemic and structural problem. Secondly, the ongoing international armed conflict and the need to investigate and bring to trial an increasing number of criminal offences (including those against national security, war crimes, etc.) with all the challenges that this situation entails, puts an additional burden on the law enforcement and judicial systems and complicates their proper and effective functioning. Thirdly, the introduction of martial law is accompanied by additional restrictions on human rights and freedoms, and a derogation from a number of positive obligations assumed by the state, including in the area of ensuring the right to a fair trial. In view of the above, there is a necessity of scientific reflection on the essential content of the minimum standards for ensuring this right in the light of their implementation in the context of international armed conflict, as well as analysis of the novelties introduced into the national criminal procedure legislation in terms of compliance with the outlined standards in the course of implementation of the relevant regulatory provisions. The comprehensive application of a system of scientific research methods and techniques (in particular, dialectical, formal legal, comparative, systemic and structural, etc.) made it possible to consider the problems of ensuring access to court (including access to the procedures for reviewing criminal proceedings), which may be related to the issue of restoring criminal proceedings lost as a result of hostilities and occupation. The author also clarifies the system of guarantees and prerequisites that must be met in order to ensure the right to defence for suspects and accused persons who are not directly involved in criminal proceedings (i.e., in absentia proceedings). Finally, the author describes the key requirements for ensuring the right to cross-examination (Art. 6 (3)(d) ECHR) in the case of using testimony recorded during the pre-trial investigation by means of video recording.

Keywords: *human rights; right to a fair trial; European standards; criminal proceedings in absentia; derogation; right to cross-examination.*

Окремі європейські стандарти гарантування права на справедливий судовий розгляд в умовах міжнародного збройного конфлікту

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Анотація

Актуальність теми дослідження обумовлена принаймні декількома чинниками. По-перше, як свідчить аналіз правозастосовної практики Європейського суду з прав людини, а також щорічних звітів з цього питання, неналежне дотримання стандартів забезпечення права на справедливий суд, що закрпілено у ст. 6 Європейської конвенції з прав людини, традиційно належить до набільш поширених порушень з боку України як держави-відповідача та становить системно-структурну проблему. По-друге, міжнародний збройний конфлікт, що продовжується, й потреба розслідування судового розгляду перманентно зростаючої кількості кримінальних правопорушень (зокрема, проти національної безпеки, воєнних злочинів тощо) з усіма викликами, що такий стан спричиняє, створюють додаткове навантаження на систему органів правопорядку, судову систему та ускладнюють їх належне й ефективне функціонування. По-третє, запровадження воєнного стану супроводжується появою додаткових обмежень прав і свобод людини, відступом від низки позитивних зобов'язань, взятих на себе державою, зокрема і у сфері забезпечення права на справедливий суд. З огляду на зазначене, виникає потреба наукового осмислення сутнісного змісту мінімальних стандартів забезпечення цього права у світлі їх реалізації в умовах міжнародного збройного конфлікту, а також аналізу запроваджених у вітчизняне кримінальне процесуальне законодавство новел з погляду врахування під час реалізації відповідних нормативних приписів окреслених стандартів. Комплексне застосування системи методів і прийомів наукового дослідження (зокрема, діалектичного, формально-юридичного, компаративного, системно-структурного тощо) дозволило розглянути проблеми забезпечення доступу до суду (включно з доступом до процедур перегляду кримінального провадження), що може бути пов'язано з необхідністю відновлення матеріалів кримінального провадження, втрачених внаслідок бойових дій та окупації. Також з'ясовано систему гарантій і передумов, що мають бути дотримані з метою забезпечення права на захист підозрюваному, обвинуваченому, які не беруть безпосередню участь у кримінальному провадженні (тобто коли йдеться

про провадження in absentia). Розкрито ключові вимоги щодо забезпечення дотримання права на перехресний допит (пп. (d) п. 3 ст. 6 ЄКПЛ) у разі використання показань, зафіксованих під час досудового розслідування за допомогою відеозапису.

Ключові слова: *права людини; право на справедливий суд; європейські стандарти; кримінальне провадження in absentia; дерогація; право на перехресний допит.*

Introduction

The issue of observance of fundamental human rights in criminal proceedings has always been relevant to the Ukrainian context. This is evidenced by the fact that Ukraine is permanently included in the so-called 'anti-top' of states against which the European Court of Human Rights (hereinafter – the ECHR or the Court) satisfies the largest number of complaints. Moreover, the most widespread violations traditionally include those aspects directly related to the criminal justice system, in particular, the reasonableness and duration of detention (Art. 5 of the European Convention on Human Rights (hereinafter – ECHR), the use of ill-treatment (Art. 3 of the ECHR) and various aspects of the right to a fair trial, such as the reasonableness of time limits, the right to defence, the enforcement of court decisions, etc. (Art. 6 of the ECHR). The vast majority of these violations are systemic and structural, requiring reform of domestic legislation and/or improvement of administrative practice and its application.

These aspects are further intensified in the context of the global threat, when, on the one hand, the state must respond to new challenges (rapid growth in the number of criminal offences, complications in the possibility of conducting certain procedural actions or pre-trial investigation, court proceedings in general, physical inaccessibility of a large number of potential suspects, etc.) These risks, among other things, necessitate the finding of new solutions, optimisation of mechanisms and procedures for bringing persons to criminal liability. On the other hand, it is obvious that such changes can potentially affect the level of protection of fundamental human rights and freedoms, as they are often associated with the introduction of additional restrictions or a certain derogation from the obligations assumed by the state.

In view of the above, the purpose and objectives of the study are to provide a scientific reflection on the essential content of the minimum standards for ensuring the right to a fair trial in the light of their implementation in the context of international armed conflict, and to analyse the novelties implemented in the national criminal procedure legislation

from the perspective of taking into account the standards outlined in the implementation of the relevant regulatory provisions.

It is clear that with the introduction of martial law and amendments to the criminal procedure legislation, scientific interest in the research of human rights issues, including the right to a fair trial, in the context of global threats has increased. Thus, for example, O. Kaplina, S. Kravtsov and O. Leyba have devoted their attention to the study of approaches to the possible renewal of the military justice system and, in particular, military courts. This aspect was investigated, inter alia, through the prism of the case law of the ECtHR under Art. 6 of the ECHR [1]. The legal challenges facing Ukraine under martial law, in particular, the protection of the right to a fair trial and the enforcement of judgements, were the subject of the scientific publication by Yu. Prytyka, I. Izarova, L. Maliarchuk, O. Terekh [2]. An empirical analysis of the impact of the armed conflict on the guarantees of fair trial in Ukraine was the subject of a scientific research in the work of K. Kowalczewska [3]. R. Kuibida, L. Moroz, & R. Smaliuk in their work focus on the negative impact and ongoing encroachment on the criminal, civil and administrative justice systems of Ukraine, police, prosecution and courts, access to justice for Ukrainian citizens living in the conflict zones in Donetsk and Luhansk regions; long-term consequences of recovery of the Ukrainian justice system in the conflict zones after the invading forces will be pushed out of these territories [4]. Within the framework of the aspect of the standards to be met by criminal proceedings in absentia, the work of O. Kalinnikov, which is dedicated to the comparative analysis of this aspect in the legislation of Ukraine and Germany, may also be useful [5].

Materials and Methods

The methodological basis of the study is a combination of general scientific and special methods of scientific knowledge. The formal legal (legal and technical) method was used to study the rules of law and analyse the peculiarities of legal technique; and the hermeneutic method allowed to identify the legal content of the rules, legislative proposals and defects in legal regulation. The statistical method helped to summarise the case law of the ECHR. The systemic and structural method was applied to build a system of standards for ensuring the right to a fair trial and its individual elements in criminal proceedings.

The empirical basis of the work was the ECtHR judgments on various aspects of the right to a fair trial guaranteed by Art. 6 of the ECHR, as well as analytical reports prepared by the ECtHR Secretariat.

Results and Discussion

A serious burden in terms of guaranteeing fundamental human rights, which falls on state authorities and their representatives in the context of

international armed conflict, is associated with the requirement to maintain the effective functioning of the judicial and law enforcement systems to ensure access to justice and the right to a fair trial. The standards of this right are regulated in Art. 6 of the ECHR and described in a large number of ECtHR case law. However, in the context of martial law, the relevant guarantees may be applied differently, which may be due to the challenges mentioned above.

With this in mind, we will try to highlight those problems of implementation of the European standards of guaranteeing the right to a fair trial that are particularly relevant in the context of international armed conflict:

Subsection 1. Ensuring access to the court (including access to the criminal review procedures)

In light of this, it is appropriate to refer to certain positions formulated by the ECtHR, in particular, in the judgment in the case of Khlebik v. Ukraine (application No. 2945/16) of 25 July 2017, which concerned an attempt to reopen the trial and recover the materials of criminal proceedings that remained in the temporarily occupied territory of the Luhansk region in 2014.

Firstly, as the Court noted in Paras 67-69, Art. 6 of the Convention does not impose an obligation on the state to establish courts of appeal or cassation, but if they have already been established at the national level, access to them must be ensured, and a person before them must benefit from the key guarantees arising from Art. 6 of the ECHR. However, the ECHR, given the non-absolute nature of the right of access to court, allows certain restrictions on this right, taking into account the existence of a certain discretion of the state, especially when changes are related to time, place, needs and resources of society, etc. [6].

Secondly, the case also raises the issue of the possible loss of materials of criminal proceedings due to the armed conflict and occupation of certain territories, which could potentially impede a person's access to court. Obviously, this problem is quite relevant in the current Ukrainian realities. Therefore, on the one hand, we will present the conclusions formulated by the ECHR in this regard, and on the other hand, we will point out the steps taken by the national legislator to partially overcome this problem.

More specifically, based on Paras 79-80, the Court stated that the respondent State "has taken all measures available in the circumstances to organise the work of its judicial system in a manner that would ensure the rights guaranteed by Art. 6". In particular, the ECtHR took into consideration that "the authorities have given due consideration to the possibility of restoring the applicant's case file, the national authorities have

done everything within their competence in the circumstances to resolve the applicant's situation" – namely, they tried to collect evidence in the territories under their control, requested assistance from the International Committee of the Red Cross to assist in the restoration of case files located in the territory beyond their control, and drafted a bill aimed at simplifying the consideration of the case [6].

When reviewing the legislative amendments that were enacted after the introduction of martial law in order to provide for a more flexible response of state agents to certain complications in ensuring the right of access to court, we note the following three main aspects: a) regulation of additional grounds for changing the investigative jurisdiction (Part 5 of Art. 36 of the CPC) and jurisdiction (Part 9 of Art. 615 of the CPC) in cases where the functioning of the relevant pre-trial investigation body or court is impossible for objective reasons; b) introduction of a rule on mandatory preservation of copies of criminal proceedings in electronic form (Part 14 of Art. 615 of the CPC); c) improvement of the procedural order for restoration of lost materials (Art. 615-1 of the CPC).

Undoubtedly, these legislative updates demonstrate the state's desire to create the necessary preconditions for ensuring the right of access to court even in the face of an existential threat. Nevertheless, it is equally important to take concrete actions in each individual case to implement the relevant guarantees and take adequate and appropriate measures that can reasonably be expected from the state in a given situation.

Subsection 2. Ensuring the right to defence for suspects and accused persons who are not directly involved in criminal proceedings (i.e., proceedings in absentia)

To begin with, we would like to emphasise that the ECtHR generally accepts that the so-called "proceedings in absentia" may meet the standards of ensuring the right to a fair trial (Sejdovic v. Italy (No. 56581/00) of March 1, 2006) [7]. Meanwhile, a number of preconditions and guarantees must be met.

Firstly, as follows from the analysis of the Court's case-law, the following key guarantees must be ensured: a) the person's awareness of the criminal proceedings against him/her as a prerequisite for consideration of the case in absentia; b) ensuring the right to effective legal assistance from the chosen or appointed defence counsel; c) guaranteeing the right to re-examination of the case in the person's direct presence.

With regard to awareness, we can draw attention to a number of legal positions of the ECtHR, which will allow us to understand the essence and peculiarities of the implementation of this guarantee. Thus, in Nicol v.

Netherlands (No. 12865/87), the Court noted that the state and its bodies cannot be held liable when the accused fails to take the necessary measures [8]. Similarly, as noted by the ECtHR in the judgment in Demebukov v. Bulgaria (No. 68020/01), the same conclusions also apply to cases where the accused has created a situation that made it impossible for him or her to be informed and participate in criminal proceedings [9]. In addition, in the case of Sanader v. Croatia (No. 66408/12), the Court also emphasised that the gravity and resonance of the case (e.g. war crime) and the person's residence in the territory not controlled by the authorities may justify the conclusion that the trial in absentia would not in itself contravene Art. 6 if the authorities failed to ensure the person's notification and presence [10].

It is also significant that the person himself or herself clearly demonstrates his or her refusal to participate (as stated in the judgement in the case of Petrina v. Croatia' (No. 31379/10) [11]). Particularly, the ECtHR emphasises that cases where a person, although aware of the proceedings, could not actually attend the hearing for objective reasons cannot be considered as a refusal (Hokkeling v. The Netherlands, No. 30749/12) [12].

With regard to the guarantee of a potential new trial, the Court focuses on the fact that the state should not create objective obstacles to such reopening of proceedings, for instance, by requiring mandatory detention of a person, as this would mean that the person is forced to give up the right to liberty guaranteed to him or her (Sanader v. Croatia, No. 66408/12) [10]. A potential new trial must also meet certain requirements, such as: 1) it does not matter in what form it takes (appellate review, new trial at first instance, etc.); 2) an adversarial procedure for examining evidence with the participation of the accused is essential; 3) the right to cross-examination (examination by the defence of persons testifying against the accused) must be guaranteed; 4) all these requirements will not be met if the only available procedure does not allow for a trial. Similar conclusions can be drawn on the basis of the legal approaches set out in M.T.B. v. Turkey, no. 47081/06 [13], Abazi v. Albania, No. 48383/12 [14] and others.

Thus, based on the analysis of the ECtHR case-law, the prerequisites for conducting proceedings in absentia should be the following: 1) the authorities must make reasonable efforts to ensure the participation of the person; 2) the accused must have a real opportunity to participate in the trial (even in the format of a video conference); 3) the refusal to participate in the trial must be clearly demonstrated. We would like to underline that the very existence of the in absentia procedure and its application is important for ensuring a reasonable balance between the right to a fair trial for the accused, on the one hand, and the right to an effective investigation for victims and their relatives (especially when it comes to

crimes that represent all the atrocities of war (in the sense of Arts. 2 and 3 of the ECHR).

Subsection 3. Ensuring that the right to cross-examination (Art. 6 (3) (d) ECHR) in the case of using testimony recorded during the pre-trial investigation by means of video recording

Primarily, it should be mentioned that Part 11 of Art. 615 of the CPC of Ukraine contains only an indication of the existence of martial law – without specifying the objective impossibility of direct interrogation of the person concerned in court. Formally, this indicates that the relevant testimony recorded at the pre-trial investigation stage using video recording may be taken into account by the court when deciding the case on the merits, even without assessing the possibility of questioning the witness or victim during the trial. Given that neither the court nor the prosecution under such regulatory framework is obliged to provide arguments and explanations in favour of the expediency of taking such testimony into account as evidence in making a court decision and confirming the objective impossibility of direct interrogation of the person during the court hearing. This points to the existence of excessive discretionary powers of these authorities in the context of guaranteeing the defence the right to cross-examine prosecution witnesses, as enshrined in Art. 6 (3)(d) ECHR. This circumstance increases the risk of abuse of the relevant procedural powers, which may ultimately have a negative impact on ensuring a fair trial.

In the light of the above, it is worth noting that the ECtHR in its practice has formulated a number of important factors to be taken into account in cases where the court in its judgment on the merits of the case refers to testimony from witnesses (in the autonomous sense of this category of subjects) that the court did not personally listen to during the court hearing.

They were first set out at the level of generalised principles by the Grand Chamber of the ECtHR in its judgment in the case of Al-Khawaja and Tahery v. the United Kingdom (applications No. 26766/05 and 22228/06) in 2011, however, they have also been subsequently confirmed in more recent judgments (Dimović v. Serbia (application No. 24463/11), June 28, 2016, Seton v. the United Kingdom (application No. 55287/10), March 31, 2016, T.K. v. Lithuania (application No. 114000/12), June 12, 2018). In particular, the European Court emphasised the significance of taking into account the following factors: 1) the existence of valid grounds for admitting the testimony of an absent witness, bearing in mind the general rule that witnesses testify during the trial and that the prosecution has made reasonable efforts to ensure the presence of this witness in court; 2)

the interrogation of this witness at the preliminary stage of the proceedings; 3) the accused has an effective opportunity to challenge the relevant testimony against him/her, to verify and dispute the reliability of the testimony given by the witness Nevertheless, this is the basis for the most careful scrutiny of the relevant proceedings in general. The presence of balancing factors, in particular measures that will allow for a fair and proper assessment of the reliability of testimony, will be crucial [15]. For example, such factors may include the availability of a video recording of the interrogation of an absent witness at the investigation stage – this was pointed out by the Grand Chamber of the ECHR in the 2015 case Schatschaschwili v. Germany [GC] (application No. 9154/10) [16].

Furthermore, it is also appropriate to mention the ECHR's approaches to the distribution of the burden of proof in such circumstances. In this regard, the European Court in its judgment in the case of Süleyman v. Turkey (application No. 59453/10) of November 17, 2020 highlighted that the applicant (i.e. the defence) is not obliged to prove the importance of the personal appearance and interrogation of the prosecution witness [17], continuing these considerations in the judgment of Keskin v. the Netherlands (application No. 2205/16) of January 19, 2021, where the ECtHR noted that if the prosecution decides that a certain person is an important source of information and relies on his or her testimony during the trial, and if the testimony of this witness is used by the court to substantiate the conviction, then his or her personal appearance and interrogation is necessary [18].

Based on the abovementioned, we can conclude the following: firstly, the use of the provisions of Part 11 of Art. 615 of the CPC of Ukraine to justify the possibility of the court's reference in the sentence to the video-recorded testimony of a witness who was not present at the trial should be an exception, not a general rule; secondly, the prosecution must argue the impossibility of questioning this witness in court, in particular, indicate the reasons for the witness's non-attendance and the reasonable measures taken to ensure his/her presence at the trial, and the court must motivate this in its decision; thirdly, if the interrogation of the person concerned at the pre-trial investigation stage took place after the notification of suspicion, the defence should be provided with the opportunity to participate in such interrogation, which should be recorded using video; fourthly, the relevant testimony should also be supported by other evidence, and its use as decisive evidence should be a measure of last resort.

Conclusions

The comprehensive application of a system of scientific research methods and techniques (in particular, dialectical, formal legal, comparative,

systemic and structural, etc.) made it possible to consider the problems of ensuring access to court (including access to the procedures for reviewing criminal proceedings), which may be related to the issue of restoring criminal proceedings lost as a result of hostilities and occupation. The author also clarifies the system of guarantees and prerequisites that must be met in order to ensure the right to defence for suspects and accused persons who are not directly involved in criminal proceedings (i.e., in absentia proceedings). Finally, the author describes the key requirements for ensuring the right to cross-examination (Art. 6 (3)(d) ECHR) in the case of using testimony recorded during the pre-trial investigation by means of video recording.

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