

## Participation of the Prosecutor in Non-Criminal Proceedings: ECtHR Case Law and National Context

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### Abstract

*The article analyses the grounds for the prosecutor's participation in civil, commercial and administrative proceedings in Ukraine through the prism of European standards of fair trial. In the article the author uses the methods of analysis and synthesis, systemic-structural and logical-legal methods, as well as the methods of teleological and evolutionary interpretation of ECHR jurisprudence. Structurally, the article is divided into three parts. In the first part, the author analyses the pan-European approaches to the participation of prosecutors in non-criminal proceedings as reflected in the documents of the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers of the Council of Europe (CoE), the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE). In the second part, the author analyses the participation of prosecutors outside the criminal justice system in the context of certain guarantees of the right to a fair trial as provided for in Art. 6(1) of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) on the interpretation and application of this Article. The third part of the article analyses the recent judgment of the ECHR in the case of Shmakova v. Ukraine, which is assessed from the perspective of the right to peaceful enjoyment of possessions (Art. 1 of Protocol № 1 to the ECHR). The article concludes that the current trend in Ukrainian judicial practice towards an expanded interpretation of the grounds for prosecutor's participation in civil, commercial and administrative proceedings is not fully consistent with the European standards of the right to a fair trial (Art. 6(1) ECHR) and the right to peaceful enjoyment of possessions (Art. 1 of Protocol № 1 to the ECHR).*

**Keywords:** *prosecutor; participation of a prosecutor in civil proceedings; grounds for participation of a prosecutor in civil proceedings; right to a fair trial, equality of arms; right to peaceful enjoyment of possessions.*

# **Участь прокурора в некримінальних провадженнях: практика Європейського суду з прав людини та національний контекст**

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## **Анотація**

*У статті проведений аналіз підстав участі прокурора у цивільному, господарському та адміністративному судочинстві України крізь призму європейських стандартів справедливого судочинства. У статті використані методи аналізу та синтезу, системно-структурний та логіко-юридичний методи, а також методи телеологічного та еволюційного тлумачення практики Європейського суду з прав людини (ЄСПЛ). Структурно стаття складається із трьох частин. У першій частині авторкою проаналізовані загальноєвропейські підходи до участі прокурора у некримінальних провадженнях, які відбиті у документах Парламентської асамблеї Ради Європи (ПАРЕ), Комітету міністрів Ради Європи (КМРЕ), Венеціанської комісії, Консультативної ради європейських прокурорів (КРЕП) і Консультативної ради європейських суддів (КРЕС). У другій частині авторкою аналізується участь прокурора поза сферою кримінальної юстиції у контексті окремих гарантій права на справедливий судовий розгляд, що впливають із п. 1 ст. 6 Європейської конвенції з прав людини (ЄКПЛ) та практики ЄСПЛ з питань тлумачення та застосування цієї статті. У третій частині статті аналізується нещодавнє рішення ЄСПЛ у справі «Shmakova v. Ukraine», яке оцінюється з точки зору права на мирне володіння майном (ст. 1 Протоколу № 1 до ЄКПЛ). У статті робиться висновок, що помітна нині у судовій практиці тенденція до розширеного тлумачення підстав для участі прокурора у цивільному, господарському та адміністративному судочинстві не повною мірою узгоджується із європейськими стандартами права на справедливий судовий розгляд (п. 1 ст. 6 ЄКПЛ) та права на мирне володіння майном (ст. 1 Протоколу № 1 до ЄКПЛ).*

**Ключові слова:** *прокурор; участь прокурора у цивільному судочинстві; підстави участі прокурора у цивільному судочинстві; право на справедливий судовий розгляд; рівноправність сторін; право на мирне володіння майном.*

## **Introduction**

The legal regulation of the prosecutor's participation in civil, commercial and administrative proceedings has undergone significant changes as a result of

the constitutional reform of the judiciary in 2016 and further amendments to procedural legislation in 2017, which resulted in a reduction of the prosecutor's powers in the non-criminal proceedings (Art. 56 of the Civil Procedure Code of Ukraine, Art. 53 of the Commercial Procedure Code of Ukraine, Art. 53 of the Code of the Administrative Procedure of Ukraine).

The current legal regulation of the grounds for the prosecutor's participation in the non-criminal sphere is in connection with the adoption of the Law of Ukraine "On Amendments to the Constitution of Ukraine (Regarding Justice)" № 1401-VIII of 02 June 2016, which updated the regulation of the constitutional status of the public prosecutor's office. According to Art. 131-1 of the Constitution of Ukraine, the public prosecutor's office is responsible for: 1) assisting the prosecution in court; 2) organising and conducting pre-trial investigations, resolving other issues in criminal proceedings in accordance with the law, supervising undercover and other investigative and detective activities of law enforcement agencies; 3) representing the interests of the state in court in exceptional cases and in accordance with the procedure established by law. The organisation and activities of the prosecutor's office are regulated by law.

The Constitution of Ukraine establishes the fundamental tenets governing the prosecutor's involvement in civil, commercial, and administrative proceedings. Primarily, it stipulates that the prosecutor may represent solely the interests of the state, thereby limiting the scope of their authority beyond the domain of criminal proceedings. This legal regulation has resulted in a narrowing of the scope of the prosecutor's representation in non-criminal proceedings. This is primarily due to the influence of the provisions of Para 1 of Art. 6 of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR), as well as general trends towards reducing the powers of the prosecutor in the non-criminal sphere in European countries.

The Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine and the Code of Administrative Procedure of Ukraine contain identical provisions regarding the grounds and forms of the prosecutor's participation. In cases specified by law, the prosecutor may take the following actions:

- a) file a claim to the court and participate in the consideration of cases on the basis of such a claim;
- b) enter into a case in which proceedings have been initiated by another person before the commencement of the consideration of the case on the merits, on his or her own initiative;
- c) file an appeal, a cassation appeal, or an application for review of a court decision due to newly discovered or exceptional circumstances.

A prosecutor who claims to the court in the interests of the state is required to provide a detailed and well-reasoned argument in support of such an application. The claim should include a clear and concise statement of the specific violation of the state's interests, the necessity to protect them, and the grounds for the prosecutor's application to the court as defined by law. Additionally, the prosecutor should indicate the specific state authority empowered to perform the relevant functions (part 3-4 of the Art. 56 of the Civil Procedure Code of Ukraine, part 3-4 of the Art. 53 of the Commercial Procedure Code of Ukraine and part 3-4 of the Art. 53 of the Code of Administrative Procedure of Ukraine). The specifics of the exercise of the prosecutor's powers in the non-criminal area are enshrined in the Law of Ukraine "On the Public Prosecutor's Office" No. 1697-VII of 14 October 2014. Conversely, an examination of the most recent case law of the ECHR reveals that the practice of prosecutors participation in non-criminal proceedings may, in certain circumstances, contravene the stipulations pertaining to the right to a fair trial and the right to the peaceful enjoyment of possessions.

The present article seeks to analyse the national case law in civil, commercial and administrative proceedings in terms of Para 1 of the Art. 6 of the European Convention on Human Rights (ECHR) and Art. 1 of the Protocol No. 1 to the ECHR, as well as the case law of the European Court of Human Rights (ECtHR).

## **Materials and Methods**

In the literature the issues of participation of prosecutors in civil, commercial and administrative proceedings were examined by many authors, among which special attention should be paid to the studies of S.O. Belikova [1], O.V. Glushkov [2], K.A. Huze [3], M.V. Rudenko [4], I.V. Soboleva [5] and others. At the same time, these studies do not reflect the most recent practice of the ECHR in cases involving prosecutors out of criminal justice. This determines the relevance of the chosen topic of the article and its methodology. In the article the author uses the methods of analysis and synthesis, systemic-structural and logical-legal methods, as well as the methods of teleological and evolutionary interpretation of ECHR jurisprudence. Structurally, the article consists of three parts, the first of which is devoted to a general description of the European standards of the participation of the public prosecutor in judicial proceedings outside the criminal justice system, the second – deals with an analysis of the case-law of the ECtHR on the participation of the public prosecutor in terms of the guarantees of the right to a fair trial enshrined in Para 1 of Art. 6 of the ECHR, and in the third part the author makes an analysis of one of the most recent judgments of the ECHR in the case of "*Shmakova v. Ukraine*",

which raises the issue of the legitimacy of the prosecutor's application on the State interests in the context of Art. 1 of the Protocol No. 1 to the ECHR.

## **Results and Discussion**

### ***1. European Standards of Prosecutor's Participation in the Non-Criminal Proceedings: Common Core***

The participation of the prosecutor in the non-criminal proceedings has been addressed in the documents of many international institutions, including the Parliamentary Assembly of the Council of Europe (PACE), the Committee of Ministers of the Council of Europe (CoE), the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE).

In its Recommendation 1604 (2003) 1 of 27 May 2003 on "The Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law", PACE expressed its concern about a number of features inherent in the national practice of different States in the process of exercising various functions of the public prosecutor's office outside the criminal justice system, with regard to their compliance with the basic principles (subpara V, Para 7) [6]. On this basis, PACE proposed that the governments of the Council of Europe member states should ensure the implementation of the following recommendations on the functions of public prosecutors outside the criminal justice system in order to: *"a) that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights; b) that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and c) that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions"* [6].

In Para 29 of its Opinion No. 3 (2008) "The Role of Prosecution Services Outside the Criminal Law Field" of 21 October 2008, the CCPE emphasized that the activities of the public prosecutors outside the criminal justice system are primarily determined by society's need for adequate protection of human rights and public interests; there are no general international legal rules and regulations governing the tasks, functions and organisation of the work of the public prosecutor's office outside the criminal justice system, as the State has the sovereign right to determine its institutional and legal procedures for the exercise of its defence functions [7]. In Para



34 of this Opinion, the CCPE called on participating States where the public prosecutor's office performs functions outside the criminal law to ensure that they are carried out in accordance with the following principles: "a) the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights; b) the respect of impartiality and fairness should characterise the action of prosecutors acting outside the criminal law field as well; c) these functions are carried out "on behalf of society and in the public interest", to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court; d) such competencies of prosecutors should be regulated by law as precisely as possible; e) there should be no undue intervention in the activities of prosecution services; f) when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms); g) the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court; h) the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law; i) the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured; j) the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments" [7].

Para 66 of the Opinion No. 12 (2009) of the CCJE and the Opinion No. 4 (2009) of the CCPE draws the attention of the Council of Europe to the relationship between judges and prosecutors in a democratic society, which contains the Bordeaux Declaration on Judges and Prosecutors in a Democratic Society: "According to the rule of law in a democratic society, all these competences of public prosecutors as well as the procedures of exercising these competences have to be precisely established by law. When prosecutors act outside the criminal law field, they should respect the exclusive competence of the judge or court and take into account the principles developed in particular in the case-law of the European Court of Human Rights as follows: i) the participation of the prosecution in court proceedings should not affect the independence of the courts; ii) the principle of separation of powers should be respected in connection with the prosecutors' tasks and

*activities outside the criminal law field, on the one hand, and with the role of courts to protect human rights, on the other hand; iii) without prejudice of their prerogatives to represent the public interest, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms principle); iv. the action of prosecutors' services on behalf of society to defend the public interest and the rights of individuals shall not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court" [8].*

According to Paragraphs 2-4 of the Council of Europe Recommendation CM/Rec (2012)11 on the role of public prosecutors outside the criminal justice system of 19 September 2012, the duties and powers of a prosecutor outside the criminal proceedings are to represent the general and public interest, to protect human rights and fundamental freedoms, and to uphold the rule of law. Such duties and powers should always be established and clearly defined by law to avoid any abuse of power. Prosecutors should always proceed in accordance with the principles of legality, objectivity, fairness and impartiality [9].

The involvement of prosecutors outside of the criminal justice system has been the subject of extensive analysis by international organisations, with a particular emphasis on the necessity to safeguard human rights, public interests, and the rule of law. The participation of prosecutors in civil, commercial and administrative cases is to be guided by principles of legality and legal certainty, as well as fair trial standards, ensuring compliance with democratic standards of human rights. It is imperative that legal frameworks delineate the powers of prosecutors with precision, thereby preventing any abuse of power and ensuring accountability. It is imperative that prosecutors act impartially, respect judicial independence, and uphold the separation of powers while maintaining equality with other parties in legal proceedings. Their actions should not undermine final court judgements, except under conditions permitted by the law in ordinary and extraordinary appeals with respect to the principle of *res judicata*. In conclusion, it is vital that prosecutors' roles outside the criminal justice system strike a balance between the interests of the public and fairness and accountability, whilst respecting the legal boundaries established by international standards.

## **2. Participation of Public Prosecutors in Non-Criminal Proceedings in terms to the Right to a Fair Trial (para 1 of the Art. 6 of the ECHR)**

Para 1 of the Art. 6 of the ECHR enshrines that in the determination of his civil rights and obligations or of any criminal charge against him,

everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The right to a fair trial is a complex structure, consisting of several guaranties directly enshrined in Para 1 of Art. 6 of the ECHR and developed in the case law of the ECtHR. These guaranties include: access to a court, an independent and impartial tribunal established by law, public hearing, a reasonable time of a trial and a fair hearing (the latter presuppose equality of arms and adversarial proceedings, legal certainty, *res judicata*, enforcement of court judgements, prohibition of legislative interference in the administration of justice, prohibition of imposing an excessive burden of proof on a party, etc.) [10; 11; 12]. It is important to note that the development of European standards for the participation of prosecutors outside the criminal justice system was most significantly influenced by the practice of the ECtHR in interpreting and applying this article.

The ECtHR has provided jurisprudence on the participation of prosecutors in non-criminal proceedings in terms of various aspects of Para 1 of Art. 6 of the ECHR, particularly the right of access to a court, independent and impartial tribunal, equality of arms, adversarial process and the principle of *res judicata*. In 2008, the ECHR published a study on the participation of prosecutors outside the criminal law field, an updated version of which was published in 2011 [13]. However, the practice of the ECHR regarding the participation of public prosecutors in non-criminal proceedings has been developed since that time. In the context of this study, the most relevant practice is that of observing the equality of arms in non-criminal proceedings involving the prosecutor in terms of the Para 1 of Art. 6 of the ECHR.

The principle of equality of arms is widely recognised as a fundamental guarantee of the right to a fair trial [14; 15;16]. The ECtHR has observed that the concept of equality of arms necessitates a fair balance between the parties involved in legal proceedings. In the legal sense, this means that each party should be given the opportunity to present its arguments on terms that do not put it at a disadvantage compared to its procedural opponent [17]. The ECtHR further elaborates that the onus is on the parties to evaluate whether a particular procedural application deserves a reaction. The ECtHR asserts that it is unacceptable for one party to file an application with the court without the knowledge of the other, as this would effectively prevent the other party from commenting on such application [18].

In terms of ensuring principle of equality of arms, the ECtHR pays particular attention to the issue of the prosecutor's involvement in non-criminal proceedings [19; 20]. An examination of the case law of the ECtHR pertaining to Para 1 of Art. 6 of the ECHR enables the differentiation of cases



in which the prosecutor: a) engages in court proceedings as a representative of one of the parties involved; or b) functions as an autonomous participant in the proceedings, acting in the interest of the public [13, p. 5-10].

### ***a) Prosecutor as a representative of one of the parties in non-criminal proceedings***

In circumstances where a prosecutor participates in non-criminal proceedings as a representative of one of the parties, the prevailing stance of the ECtHR can be summarised as follows: *"since a prosecutor or comparable officer, in undertaking the status of a procedural plaintiff, becomes in effect the ally or opponent of one of the parties, his participation was capable of creating a feeling of inequality in respect of one of the parties [...]. While the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances [...]. That the fact that a similar point of view is defended before a court by several parties or even the fact that the proceedings were initiated by a prosecutor does not necessarily place the opposing party in a position of 'substantial disadvantage' when presenting her case. It remains to be ascertained whether, in the instant case, in view of the prosecutor's participation in the proceedings, the 'fair balance' that ought to prevail between the parties was respected"* [16].

The ECtHR operates under the assumption that a prosecutor in non-criminal proceedings may represent the interests of the State, the public interest or the interests of vulnerable groups within society [16]. In each case the ECtHR assesses whether the grounds for such participation were justified. For instance, in the case of *"Menchinskaya v. Russia"*, the prosecutor, who had not participated in the proceedings at the court of first instance, intervened in the trial at the second instance by filing an appeal on behalf of the Employment Centre, a party to the case. Despite the appeal being directed towards the applicant, who was afforded the opportunity to respond to the prosecutor's arguments, the ECtHR determined a violation of equality of arms. The ECtHR judgement was based on the fact, that the prosecutor was representing the state, and his arguments were similar to those in the Employment Centre's appeal. It is evident that the prosecutor's involvement was disproportionate and constituted a violation of the right to a fair trial [15].

The scenario is analogous to that of *Korolev v. Russia (no. 2)* case, wherein the applicant contended that the principle of equality of arms had been violated due to the involvement of a prosecutor in a civil dispute in a court of appeal concerning the compensation for airfare costs by the military

department. The Court determined that there was no justification for the prosecutor's involvement, as actions of the latter merely reiterated the defendants' arguments without serving a legitimate public interest. This, the ECtHR concluded, constituted a breach of the principle of equality of arms [21].

In contrast, the ECtHR determined that the involvement of the prosecutor was justified in the case of *"Mukiy v. Ukraine"*. In this case the applicant raised the question of the legality of the prosecutor's participation in the dispute about the authorities' refusal to allow privatisation of the applicant's apartment, which was located in the territory of the nature reserve. The applicant contended that the lodging of an appeal by the prosecutor and his further participation in the appeal proceeding were unjustified, given that the prosecutor had appealed against the initial favourable for the applicants first instance court judgment. The prosecutor's interventions were substantiated by the necessity to safeguard the economic and social interests of the state, which are associated with the preservation of the reserve area. Furthermore, the ECtHR observed that the interference complained of by the applicant did not place him in a 'significantly disadvantaged position' in comparison to the opposing party. The ECtHR found no indication of any privileged treatment by the domestic courts of the prosecutor's statements or any procedural advantages granted to him in this case. In determining whether the prosecutor's intervention in the case constituted an excess of authority, the ECtHR observed that the prosecutor evidently favoured the applicant's procedural opponent, namely the reserve administration. This intervention also ensured that the adverse decision was subject to appeal, given that the reserve itself had its appeal of the judgement denied on procedural grounds. In consideration of the aforementioned factors, the ECtHR concluded that the right to a fair trial had not been violated in this case [22].

The ECtHR reached the same conclusion in the case of *"Batsanina v. Russia"*, in which the prosecutor acted in the protection of the public interest on behalf of the Oceanological Institute, a state institution and a private individual, against the applicant and her husband in a suit to evict them from their apartment. The ECtHR determined that the involvement of the prosecutor, acting in the public interest, was indeed justified primarily because the applicant and her husband had legal representation and were therefore able to present their case, both verbally and in written form, on the merits of the proceedings. Consequently, the ECtHR observed that in this instance, the groundlessness of the prosecutor's application to the court was not substantiated, hence the principle of equality of arms was upheld [16].

The following generalisations can be made about the participation of the prosecutor in civil proceedings in the context of the principle of equality of arms, as demonstrated by an analysis of the ECHR case law:

1) while the independence and impartiality of a prosecutor or similar official should not be attacked, the increased public attention to the fair administration of justice justifies increased attention to the appearance of the prosecutor as independent and impartial [19];

2) when acting on behalf of one of the parties, the prosecutor is vested with the procedural rights of the party, and the court may not grant the public prosecutor certain privileges over other participants in the case, for example, disclosure of case files and information to the public prosecutor but not to a party to the case [23], or suspension of time limits for prosecutor as a representative of the State during court adjournments, but their continuation for other parties [24];

3) presence of the prosecutor during the discussion and the adoption of the court's judgment by the judges violates the right to a fair trial, regardless of the nature of the prosecutor's participation in this stage of the proceedings [20];

4) the establishment of more restrictive time limits for appealing against a decision for a party than for the prosecutor or the availability of certain types of appeals only for the prosecutor does not constitute the violation of Para 1 of the Art. 6 of the ECHR [25-27];

5) the prosecutor's right to reimbursement of court costs is justified by the need to protect public order and does not violate the right to a fair trial [28].

### ***b) Prosecutor as an autonomous participant of the non-criminal proceedings, involved to give an opinion in a case***

Furthermore, the prosecutor may engage in non-criminal proceedings not as a representative of one of the parties involved, but as an independent participant in the process. In this capacity, the prosecutor's role is to provide an opinion on the case to perform his functions. In case "*Kramareva v. Russia*", following the termination of her employment contract, the applicant filed a lawsuit against her former employer, seeking a declaration that the termination of the contract was unlawful, her reinstatement, compensation for lost earnings and non-pecuniary damages, and an obligation on the company to provide her with copies of documents relating to her work. In accordance with national legislation, the Public Prosecutor was involved in this category of cases as an independent State official whose participation was necessary to represent the interests of the State and ensure compliance with the legality principle. In this case, the ECtHR stressed that there was nothing to suggest that the prosecutor had acted as an opposing party in the case or had gone beyond his powers. His role

was limited to making an oral opinion in the case in which the prosecutor stated that the applicant's claims may be granted in part. Following the hearing, the national court granted the applicant's claim in part, including for copies of documents and non-pecuniary damage, but held that the termination of her employment contract was lawful. The applicant argued that the prosecutor's influence in this case violated the guarantees of Para 1 of the Art. 6 of the ECHR. In this case, the ECHR found that the applicant's argument that the undue influence of the prosecutor's opinion on the court was of particular importance was not true and was not supported by specific and convincing evidence, as well as by references to the relevant legal provisions. Furthermore, in the context of full compliance with the requirements of an adversarial procedure, the ECtHR emphasised that the prosecutor's opinion was publicly expressed, on the record, and that the parties were aware of its contents, so that they had a real and effective opportunity to express their objections to such an opinion. In view of the above, the ECtHR found no violation of the right to a fair trial [29]. However, in another case of *Yvon v. France*, the ECtHR recognised that the participation of a prosecutor in an expropriation case, acting both as an expert and as a party of the case, i.e. combining two procedural statuses, caused a harmful imbalance in relation to the other party of the proceedings, incompatible with the requirement of equality of arms [30].

The question arises as to the distinction between the concepts of 'equality of arms' and 'adversarial process', which are closely linked elements of the right to a fair trial in the case law of the ECtHR. The ECtHR notes that the concept of a "fair trial" implies an adversarial process in which the parties to a civil case are informed of all the evidence attached to the case or produced by the other party and can present their case in response thereto. A party to the proceedings should generally be guaranteed free access to the submissions of the parties to the civil proceedings and a real opportunity to comment on those submissions. "Adversarial" means that the relevant materials and evidence should be available to both parties [31]. For example, a violation of the adversarial principle has been found where the parties were denied access to reports of executive bodies which were of exceptional importance in a child custody case, but which were nevertheless considered by the court and became the basis for the court's judgment [32].

In several judgments, the ECtHR distinguishes between the concepts of "equality of arms" and "adversarial process". In the case *Krcmar and Others v. the Czech Republic*, where the court's judgment was based on evidence gathered by the court *ex officio*, to which the parties to the case did not have access, the ECtHR emphasised that there was no violation of equality

of arms, as the parties did not participate in the gathering of the evidence. However, there was a violation of the adversarial principle, as the parties did not have the opportunity to present their objections to the evidence gathered [33]. However, in case "*Niderost-Huber v. Switzerland*" the ECtHR found a violation of the equality of arms principle because only one of the parties did not have access to written evidence, and therefore the rights of the claimant and the defendant were unequal. The ECtHR drew attention to the difference between the guarantees of equality of arms and the adversarial principle, emphasizing that this situation should be distinguished from cases where both parties are unable to obtain the necessary information about the evidence to which the judge has access, which constitutes a violation of the adversarial process in terms of the right to a fair trial [17].

It can thus be concluded that, in the context of Para 1 of Art. 6 of the ECHR, the adversarial nature of civil proceedings is intended to ensure that the parties involved are informed of the evidence in the case and have real access to such evidence. In the context of the prosecutor's participation out of criminal justice field, the ECtHR emphasises the need to ensure that the parties to the proceedings can review all the evidence and comments on their case, even if they are submitted by the prosecutor, which can influence judgements [31; 34; 35; 36; 37; 38; 39; 40]. Meanwhile, the principle of equality of arms is to provide equal procedural opportunities to the claimant and the defendant to present their position in the case. As previously emphasized in our publications, the adversarial process unfolds during the interaction "court – parties", while the principle of equality of arms is manifested in the interactions "court – claimant" and "court – defendant" [10, p. 174-175].

In this category of cases, the ECtHR examined whether, for example, the opinions of the prosecutor acting as an independent third party were communicated to the parties and whether the parties had the opportunity to respond to them. In cases where the parties were able to comment at least in writing on such opinions of the prosecutor, the ECtHR found no violation of Para 1 of the Art. 6 of the ECHR. Therefore, violations of the adversarial nature in cases of involvement of the prosecutor and submission of certain conclusions or evidence in the case relate primarily to those cases when the prosecutor does not act on the side of one of the parties to the case but enters the proceedings in the public interest as an *amicus curiae* [13, p. 6].

### **3. The latest Ukrainian context: case "*Shmakova v. Ukraine*" and grounds for prosecutor's participation in non-criminal proceedings**

In the case of "*Shmakova v. Ukraine*" the applicant contended that she was unlawfully deprived her property rights. The applicant argued that,



following the reorganisation of a factory (the original title holder), the latter could no longer retain its title to the permanent use of the land. She also claimed that the deprivation of her property had no legitimate aim and was disproportionate. The applicant argued that she had obtained the land in good faith, with all the necessary permits and documentation, and that the deprivation violated her rights under Art. 1 of Protocol № 1 to the ECHR. Before the national court, the prosecutor claimed that the applicant's land title had been granted illegally and sought its revocation in order to return the land to state ownership. The prosecutor argued that the land in question was intended for public use, in particular to facilitate the construction of a school and a kindergarten. However, the ECtHR determined that the Government had not demonstrated the necessity or urgency of using the land for the stated purposes. In particular, the land had been left unused for a considerable period, and there was an absence of evidence indicating an urgent social need for the proposed projects. The ECtHR concluded that the expropriation of the applicant's property constituted a violation of Art. 1 of Protocol № 1 to the ECHR. While acknowledging the legality and basis of the deprivation in domestic courts, the ECtHR determined that the Government had not achieved a fair balance between the requirements of the public interest and the applicant's right to peaceful enjoyment of her possessions. The applicant, as a *bona fide* acquirer of the land, was subjected to an undue burden because of the revocation of her title without any form of compensation or adequate reparation. The ECtHR emphasised that the deprivation of property without adequate compensation generally constitutes a violation of the fair balance required by Art. 1 of Protocol № 1 to the ECHR. It was further noted that the prosecutor's claim, although ostensibly in the public interest, did not sufficiently consider the practical impact on the applicant's rights or the lack of continuity with the intended public use of the land. The ECtHR concluded that the expropriation did not strike a fair balance and therefore violated Art. 1 of Protocol № 1 to the ECHR. This case underscores the importance of ensuring that claims made in the interest of the State, by prosecutors, are accompanied by concrete and timely public benefits and are balanced against the property rights of individuals. It is incumbent upon states to provide compensation or other reparation when they interfere with property rights, thus ensuring that the principle of "good governance" is upheld [41].

Notwithstanding the fact that the present case deals with the violation of the right to peaceful enjoyment of possessions, it also allows for a broader discussion in the context of procedural grounds for the participation of prosecutors in civil, commercial and administrative proceedings in Ukrainian legislation and practice. A thorough analysis of the Supreme

Court's case law reveals that the grounds for the participation of prosecutors are currently interpreted in a relatively expansive manner. This allows for significant discretion of the court when determining the admission of prosecutors to participate in such proceedings.

The Supreme Court has repeatedly emphasised that the participation of the prosecutor in non-criminal proceedings is not an alternative but a subsidiary form of protection in civil, commercial and administrative procedure. Furthermore, it has been stated that the prosecutor should not replace public authorities as a claimant in such proceedings, as the latter are primarily responsible for protecting the interests of the state in particular legal relationship [42]. The subsidiary nature of this form of protection is also reflected in the procedural rules, which clearly state that the prosecutor has the right to represent the interests of the state in court only in cases where: a) the protection of such interests is not performed or is performed improperly by a public authority, local self-government body or other subject of power whose competence includes the relevant powers, or b) in the absence of such a public authority (part 3 of the Art. 23 of the Law of Ukraine "On the Public Prosecutor's Office" No. 1697-VII of 14 October 2014).

At the same time, when it comes to specific court cases, the number of cases in which the prosecutor provides representation in non-criminal proceedings is impressive. Thus, according to the data of the Office of the Prosecutor General, in 2023: 7073 cases were pending in court where the prosecutor represented the interests of the state in civil, commercial and administrative proceedings; 6512 claims of prosecutors in civil, commercial and administrative proceedings were satisfied; prosecutors filed 1789 appeals and 846 cassation appeals against the judgments of the lower courts [43].

At the same time, an analysis of the Supreme Court's practice shows that in many cases the prosecutor actually substitutes for the activities of other public authorities that are supposed to protect the state's interests in a particular area but do not act for one reason or another, including when such authorities do not have sufficient funds to pay the court fee or when such authorities do not intend to apply to the court in a particular case. In view of the above, the question arises as to whether, in such circumstances, the representation of the state's interests in court by the prosecutor can be considered a subsidiary and exceptional form of protection, or whether the prosecutor continues to exercise the so-called "general control of legality" (as has been the case for many years), despite the fact that the public prosecutor's office is currently deprived of this function?

It is evident that the prevailing judicial practice gives rise to numerous issues pertaining to the approaches developed at the national level regarding the participation of prosecutors in non-criminal proceedings. These issues include the grounds and forms of prosecutor participation, the calculation of limitation periods in cases involving prosecutors, the use of appropriate and effective remedies in such cases, the interpretation of the concept of 'state interests', etc. The solution to these problematic issues should be primarily provided by the case law of national courts and the Supreme Court as the highest judicial body, which is responsible for ensuring the uniformity of case law. However, it is already evident that some approaches that have developed in judicial practice may be at odds with the provisions of the ECtHR.

## **Conclusion**

In its case-law, the ECtHR has developed a rather consistent approach to the participation of prosecutors in court proceedings outside the criminal justice field. It states that the participation of prosecutors should be considered as an exceptional measure aimed at protecting the interests of the state, the public interest or the interests of vulnerable groups who are unable to protect their interests on their own. At the same time, the participation of a prosecutor in proceedings in which he or she is acting on the side of one of the parties should not lead to a violation of the right to a fair trial, in particular such guarantees as the principle of equality of arms and the adversarial process. The latest practice of the ECtHR raises broader concerns about prosecutors' roles in civil, commercial, and administrative proceedings in Ukraine. Despite legal provisions limiting prosecutorial participation to exceptional cases, current practices demonstrate frequent intervention, often replacing the responsibilities of public authorities. This raises questions about whether such involvement aligns with the subsidiary nature of prosecutors' roles as envisioned in Ukrainian law and ECtHR standards. The courts should therefore focus on clearer criteria for prosecutors' participation, ensuring compliance with international standards and preventing violations of the right to peaceful enjoyment of possessions (Art. 1 of Protocol No 1 to the ECHR) and the right to a fair trial (para 1 of the Art. 6 of the ECHR).

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