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REALIZATION OF THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL IN THE CONTEXT OF THE PANDEMIC-ECONOMIC CRISIS

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Abstract. The *subject* of the study are public relations in the sphere of ensuring the constitutional right to a fair trial in the modern judicial proceedings in Europe and Ukraine. *Methodology*. The methodological basis of the study are methods of induction and deduction, dialectical-materialistic method, the method of analysis and synthesis, the historical method, which allowed to objectively understand the content and essence of the issues under study. The *aim* of the article is a theoretical and practical study of the aspects of realization of the constitutional right to a fair trial in the conditions of the pandemic economic crisis. The *results* of the study showed that the use of any digital technology for tasks related to the administration of justice under anti-epidemic restrictions requires an appropriate legal framework, since the principle of legality should apply to all procedural actions, including remote questioning using messengers. The digitalization of the judiciary itself carries significant risks that lie in the realm of cybersecurity and certain constitutional and even ethical constraints. In particular, both Ukrainian and foreign experience of digital monitoring of persons subject to quarantine restrictions revealed the first threats of leakage of personal information and large-scale government interference in private life, incorrect assessment of information by artificial intelligence, followed by the imposition of controversial fines. *Conclusion*. The author considers it possible to consider the right to a fair trial in Ukraine as a legal tradition, since this right is not enshrined at the constitutional level. This situation presents several problems: the right to a fair trial depends entirely on the beliefs and sense of justice of the individual law enforcement officer, and complainants are deprived of their constitutionally guaranteed ability to invoke a violation of the right to a fair trial if their substantive and procedural rights are not respected. In today's environment, litigators with authority need to improve both their digital and health culture in order to be able to use information tools to address litigation and procedural decision-making, taking into account the health risks to individuals in an adverse epidemic situation. Solving these and other interrelated tasks will ultimately contribute to the smooth operation of the epidemic in accordance with international standards and the adaptation of Ukrainian judicial proceedings to European standards of justice.

Key words: constitutional law, justice, the right to a fair trial, judicial proceedings, epidemic crisis, economic crisis, digital technologies.

JEL Classification: K10, K38, K40, K41

1. Introduction

The genesis of the doctrine of the category of justice indicates that the search for the good both for the individual and for society as a whole is based on a sustainable balance of equality and freedom. In this connection, the dualism of choice takes on special significance: the individual is primary and society is secondary (liberals); or society is primary and the individual is secondary (communitarians). Depending on the solution of the main ontological problem, the choice of value priorities is made – either the freedom of the individual or the good of society. The problem of the correlation between private and public interests is outlined above. The category of justice underlying the right to a fair trial in this case must not allow the loss of liberty of some to be justified by the greater good of others.

The fairness of a trial requires that those involved in a case have an equal opportunity in the process, which is not equivalent to formal procedural equality. As M. Savchin notes, "justice is not only about equality, but also about appropriate situations and about right, progressive inequality" (Savchin, 2009).

In exploring the relationship between formal and real justice, American philosopher and founder of the liberal-state concept of domestic and international

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law, J. Rawls believed that the category of justice is based on two principles:
– everyone should have equal rights with respect to the broadest scheme of equal fundamental freedoms compatible with similar schemes of freedoms for others;
– social and economic inequality should be organized in such a way that it can reasonably be expected to benefit everyone, and access to positions and offices should be open to all (Rawls, 2001).

In addition to the existence of formal and real justice, when considering the right to a fair trial, one must remember the existence of general and private justice. General justice is understood as the idea of justice, while private justice is more formalized, instrumental and is provided through the implementation of certain distributional programs. General justice provides legitimation of the existing social order on the basis of the correlation of this or that social phenomenon with the accepted system of values. Private justice, on the other hand, is a specific set of political and legal principles governing social relations.

2. Constitutional and legal category of fair trial in the context of the pandemic-economic crisis

In the study of problems of implementation of the category of justice there are questions related to the existence of the category of justice only in its formal embodiment, as well as the sufficiency of only the legislative consolidation of justice in the state of law. As J. Rawls wrote: "If we hold that justice always expresses a certain kind of equality, then formal justice requires that laws and institutions be applied equally (i.e., in the same way) to members of the classes they define... Formal justice is adherence to principle, or, as is often said, obedience to the system" (Rawls, 2001). The effective existence of justice in general and the realization of the right to a fair trial in particular is largely dependent on the level of the rule of law in the state.

Meanwhile, even with these criteria in place, the likelihood of a violation of the principle of fairness in the protection of individual rights and freedoms remains, since a particular law enforcement officer may not resort to the relevant rules or interpretations when dealing with disputes.

The legal literature notes that justice is ensured primarily by the fact that the measure of freedom must be equal in relation to everyone. At the same time, the requirement of equality not only does not contradict, but is part of the principle of the welfare state.

The social policy of the state implies social protection of the individual, smoothing the actual social inequality of people by redistributing income among the population through taxation, subsidies from the state budget, social programs, which is designed to promote social justice and to overcome unjust forms of inequality.

In the judicial process, fairness can be seen in two aspects: as fairness of procedure (i.e., making a decision in compliance with the requirement of equality of procedural opportunities of the parties) and fairness of decision (i.e., compliance with the decision to the rules of law, moral requirements, in a broad and narrow sense). It is worth disagreeing with this view of the authors on the dual manifestation of the category of justice, since the procedural rules of decision-making are unified and static and do not depend on the specific circumstances of the case under consideration. The final decision of the court, of course, must conform to the principle of justice and depends entirely on the circumstances of the case.

Some authors note that a fair trial in the Convention implies the fairness of the trial itself, which should not be equated with the notion of fairness of the outcome of the trial (Fritsky, 2004).

It seems that the right to a fair trial presupposes an internal balance of the parties' interests, taking into account the specifics of a particular case, the evidence presented and the possibility of challenging the decision. The external manifestation consists in the norms of publicity of proceedings within a reasonable time by an independent and impartial court. The judge's discretion in this regard takes on a special role, since the criteria of fairness are subjective. Fairness should be characterized as a property (quality) of law; accordingly, the objectivity of the decision depends on how correctly the court understands the circumstances of the case and brings them into conformity with the law.

The principle of fairness permeates virtually the entire content of the Constitution of Ukraine. In general, the principle of fairness is implicit in the Constitution of Ukraine and is reflected in the interpretation of its provisions by the judicial authority of constitutional review. As I. Marochkin writes, the principle of justice is enshrined at various levels of the Basic Law, including democracy, the social state, forms of ownership, and public associations (Marochkin, 2010).

The existence of true justice is conditioned on its formalization in legal legislation in order to level out the risk of arbitrariness, particularly in the judicial system. It should be emphasized that justice can only exist where there is legal law, since the vagueness of laws in general and the broad scope of their interpretation contributes to arbitrary decisions. In this regard, it is appropriate to quote R. von Jhering: "The law is used in two senses: objective and subjective". (Jhering, 2017) In the objective sense, law is the totality of legal principles applied by the

state, the legal order of life. The concrete transformation of an abstract norm into a concrete human entitlement is law in the subjective sense. "In both directions", Jhering emphasizes, "the right meets resistance, in both directions it must overcome it, that is, by fighting to conquer or defend its existence" (Jhering, 2017).

Terminologically in the Constitution of Ukraine the principle of justice is expressed in the following formulations: "equal duties", "equal", "equal before the law", "equal opportunities", "equal access", "equal right and obligation", "everyone is guaranteed", "everyone has the right", "no one can", "no one is obliged", "on equal grounds" (Constitution of Ukraine, 1996).

The right to a fair trial is not directly enshrined in the Constitution of Ukraine, there is no such wording in the Ukrainian procedural legislation. In this regard, legal science has expressed opinions on the need for a direct textual enshrinement of the right to a fair trial.

An important condition for the fairness of a trial is the impartiality of the court, which also serves as a condition for an effective judicial defense.

At the same time, the Constitution of Ukraine contains only general indications concerning the principle of justice. The role of the Constitutional Court of Ukraine in this case is to guarantee the legal harmonization and distinction of social and political interests, to form a reasonable legal balance between social security, embodied in the requirements of justice, and personal freedom, support for the needy and economic efficiency, ensuring social peace and creating conditions for dynamic development (Constitution of Ukraine, 1996).

It seems that the criteria of justice should be established by the norms of law and only then manifest in specific legal relations, affecting the legal consciousness.

It should be noted that the principle of justice is prescribed not only in procedural law, but is also reflected in substantive law.

3. Pandemic-economic peculiarities of ensuring the constitutional right to a fair trial in European proceedings

The COVID-19 pandemic, announced in early 2020, has made significant adjustments to government agencies, including becoming a kind of test for the judicial systems of most states. Anti-epidemic measures naturally limited the ability of citizens to seek judicial protection, while the protection of everyone's life and health took precedence over state obligations to ensure unimpeded access to court. Forced restrictions in one form or another were also subject to the right to a fair trial enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention) (Convention for the Protection of Human Rights and Fundamental Freedoms, 2010). As M. Entin emphasizes, "this right occupies a special place, since it guarantees the realization of all the other rights enshrined in the Convention" (Entin, 2003). The most acute issue of its implementation is in criminal proceedings. This is partly due to the specifics of criminal procedural legal relations, and partly – to the less digitalization of this type of legal proceedings.

In criminal proceedings, ensuring the right to a fair trial implies: a reasonable period of proceedings; guarantees of publicity and publicity of the trial; respect for the presumption of innocence; the defendant's comprehensive right to a defense. At the same time, the European Court of Human Rights (hereinafter – the European Court) adheres to a systemic interpretation of the concept of "fair trial" and "recommends not only to consider violations of specific elements of Article 6, but also to assess the process as a whole for compliance with the standard of fairness" (Kononenko, 2008). This "combined" nature of this right always complicates the mechanism for its implementation, even in normal, non-quarantine conditions, because, firstly, it is necessary to balance the rights of individual participants, and secondly, to coordinate the elements of the right to judicial protection themselves, since "the existence of these rights forms in the officials responsible for the proceedings corresponding obligations, aimed at creating conditions for the real provision and implementation of these rights". (Magrelo, 2013) Pandemic restrictions have made such challenges even more difficult and have highlighted the common problem of the conflict between the right to a fair trial and everyone's right to health and safety.

Each state solved this problem on the basis of its own organizational, digital resources and existing legal and regulatory framework. Each state has dealt with this problem based on its own organizational and digital resources and existing legal and regulatory framework. The quarantine restrictions and monitoring technologies that have been imposed have forced the legal community to take a fresh look at the components of the right to a fair trial. The experience accumulated by states in the functioning of criminal proceedings under pandemic conditions requires preliminary analysis and relevant conclusions that can influence the determination of further ways to optimize the criminal process (Gardashuk, 2003).

The European Commission for the Efficiency of Justice of the Council of Europe reached similar conclusions in a special Declaration of June 10, 2020. While commending the efforts of European states to adapt their judicial systems to deal with the epidemic

threat, the Commission noted that such situations can recur, which means that preventive measures must be taken to ensure the smooth functioning of courts and an adequate level of judicial protection of individual rights in such emergencies. The Declaration articulates important principles that, if adhered to, will meet this daunting challenge (the Declaration of Health Emergencies has been extended to June 10, 2020). Of particular importance in this context is the principle of the rule of law and human rights, since the right to a fair trial must always be protected and the possibility of its realization becomes particularly important in the context of a pandemic. All emergency measures taken must comply with the principles of legality, legal certainty, proportionality and necessary review. In particular, court closures should be proportionate to the epidemic threat and offset by alternative means of access to justice, including remote access.

4. Internet technologies of court proceedings in the context of ensuring the constitutional right to a fair trial

It is no exaggeration to say that the pandemic also revealed a problem common to European states – the lack of legal, technical and informational preparedness of courts to work under quarantine restrictions and social distance. For example, Spain, where the reform of the judiciary has been long delayed, found itself in a situation where the right to a fair trial became very difficult to ensure due to the introduction of a "worrying situation" in March 2020 (Weissbrodt, 2020). In fact, the courts considered only those cases that had the characteristic of urgency. The urgency was associated with the threat of irreparable damage to any rights, so this category included cases of arrests, detentions, certain investigative actions, contesting the arrest of property, and issuing protective orders. The rights of parties to apply to the court online for protection were also limited by these categories. Because Spain has a very high degree of decentralization of power, including the judiciary, individual regions can adjust the order of proceedings, including in urgent cases. In particular, on March 20, 2020, the Supreme Court of Murcia suspended the procedure under which every suspect must appear in court, allowing its use only in exceptional cases where the suspect tries to flee. An alternative to appearing in person for suspects, including those on bail, was the use of email and telephone. In this case, the courts proceeded from the need to ensure social distance and minimize the risk of illness for both judges and other participants in the process.

However, Spain's conservative judicial system has demonstrated a lack of flexibility and willingness to use alternative information and communication resources. Shortage of personnel in the court administration, their insufficient technical equipment, incompatibility of information systems in courts of different regions, limited material and legal opportunities for conducting court hearings via videoconferencing led to the fact that it is impossible to ensure reasonable time of court proceedings, even in criminal cases. The overall situation with respect to case processing times remains tense even after the relaxation of quarantine measures. interestingly, compliance with reasonable time limits for such cases is difficult and will obviously be difficult for some time to come, not only because of the certain backlog of cases, but also because of the employment of judges and courtrooms to reduce the huge backlog of civil cases, which Spanish courts have always handled more than, for example, France or Germany.

In Great Britain, although it has left the European Union, but adheres to the norms and principles enshrined in the Convention, during the pandemic and the economic crisis there has also been an increase in the use of information technology to facilitate access to justice. Individual cases began to be handled using Skype and the Cloud Video platform. Their use required appropriate instruction and technical support from the public. In general, the UK has retained the pan-European approach, according to which the urgency of the trial is the basis for active court activity (possibly in remote mode, i.e., in the format of "remote justice"). All these measures ensured the consideration of those materials, the violation of the terms of consideration of which leads to a violation of human rights, primarily materials on the release of the accused on bail or the extension of the period of detention. The pandemic simultaneously served as a catalyst for more legislative activity aimed at expanding the use of video recording of testimony in court proceedings (Macdonald, 2021).

The author considers it necessary to make the following reservation. While it is a question of ensuring the right to a fair trial in the sense and content invested in it by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court, this problem is in many ways not limited to the European space. Since the COVID-19 epidemic and the economic crisis swept the world, most states have faced the enormous challenge of maintaining an acceptable level of access to justice for their citizens in the face of social distancing and quarantine measures in place.

In particular, digital opportunities in the context of the pandemic are actively used by China, which since 2017 has been actively working on the project of online justice. A unified online platform of court decisions has been created, with more than

12,000 courts connected to it. At the same time, legal professionals with the level of information competence to work with online services have been trained. All of these measures enabled China to handle many cases remotely in 2020, including some criminal cases. A report in the press about a trial in which the judge, dressed in a medical gown, single-handedly, without the participation of the parties, considered a case of violation of anti-epidemic rules and sentenced the defendant to nine months in prison caused a great resonance. According to the president of China's Supreme People's Court, by the end of May alone, Chinese courts had completed 2,736 cases related to the epidemic, a large portion of which were handled using the "smart court" system (Vitkauskas, 2018).

In the U.S., many courts have limited the personal presence of participants in the process and have begun to use virtual or hybrid technology. Various nongovernmental organizations, such as the Criminal Justice Council, among others, have promoted their active use. Although the use of videoconferencing has also revealed certain problems associated with limiting the publicity of trials guaranteed by the First and Sixth Amendments to the U.S. Constitution.

During the pandemic, Ukrainian courts faced the same problems as courts in other states. Ukrainian courts faced a difficult task: to ensure judicial protection of the rights and freedoms of citizens, access to justice in the current situation, while preserving the safety of participants in the process and court employees. To some extent, the sharp corners of this issue are smoothed out, because over the past decade Ukraine has been actively pursuing the digital modernization of the courts, and such activities are fully consistent with the Strategy for Development of Ukraine 2030 (Timchenko, 2018).

Courts have become more active in accepting documents through electronic Internet reception rooms, they consider mainly urgent cases, and they use videoconferencing systems more often. Obviously, the constant increase in the information support of the courts has allowed at least partially to ensure the so-called "urgent proceedings".

In general, this approach to the organization of judicial activity in not quite normal conditions of social life is consistent with the global vector. However, ensuring a criminal justice process that fully meets the criterion of a "fair trial" has proven to be no easy task under the conditions of the pandemic. The author agrees with the researchers who note that "the results of the Ukrainian judicial system in this short period have not only revealed new, but also exposed pre-existing problems". A significant range of these problems is associated with the implementation of judicial control, the need to optimize which has long been recognized at the level of both academics and law enforcement officials. Pandemic also raised the issue of further digitalization of the judicial process because "those who live by numbers can be saved by numbers" (Marochkin, 2010).

Of course, modern information technology, which allows remote participation in court hearings, can to some extent resolve the contradiction between the right to a fair trial and the right to safety and health, which should also be ensured by the courts while the epidemic situation remains unfavorable. This is not a purely Ukrainian problem, but a general global one, developed with the onset of the economic and pandemic crises, as the judicial process must adapt to new social norms in the face of viral danger and a balance between protecting public safety and protecting the health of participants in criminal proceedings, including officials and judges.

However, their effectiveness will largely depend on a number of factors that cannot be ignored.

5. Conclusions

Speaking of fair trial, it should be noted that it requires equal opportunity for those involved in the process, which is not equivalent to formal procedural equality.

The right to a fair trial, guaranteed by Article 6 of the Convention, is a complex right that encompasses a whole system of rights, freedoms and principles. This right includes the right of access to a court, the right to execution of a court decision. In turn, the right of access to a court covers:

– the right to initiate legal proceedings;

– the right to a resolution on the merits of a case concerning civil rights and obligations;

– the right to the inadmissibility of unjustified revision of a court decision that has finally entered into legal force.

At the same time, the right not to unreasonably review a judgment that has finally entered into force must meet certain minimum conventional criteria. Accordingly, review is only possible within a reasonable time, the trial must be fair and public in light of the facts of the case, the trial should be conducted by a court established by law, and finally, the court must be impartial and independent.

The author considers it possible to consider the right to a fair trial in Ukraine as a legal tradition, because this right is not enshrined at the constitutional level. Nevertheless, judicial acts still contain references to the constitutional right to a fair trial.

At the same time, the Constitution of Ukraine guarantees judicial protection of rights and freedoms to everyone. It should be noted that the practice follows the path of considering the right to a fair trial as an integral part of the constitutional right to judicial protection. Thus, the law enforcement

officer has to interpret the Basic Law, draw his own conclusions, and ensure that the right to a fair trial is protected. Several problems arise in such a situation: first, the right to a fair trial depends entirely on the beliefs and sense of justice of the individual law enforcement officer, and second, complainants are deprived of the constitutionally guaranteed opportunity to invoke a violation of the right to a fair trial if their substantive and procedural rights are not respected.

The use of any digital technology for tasks related to the administration of justice under anti-epidemic restrictions requires an appropriate legal framework, since the principle of legality should apply to all procedural actions, including remote questioning using messengers.

The digitalization of the judiciary itself carries significant risks that lie in the realm of cybersecurity and certain constitutional and even ethical constraints. In particular, both Ukrainian and foreign experience of digital monitoring of persons subject to quarantine restrictions revealed the first threats of leakage of personal information and large-scale government interference in private life, incorrect assessment of information by artificial intelligence, followed by the imposition of controversial fines. Obviously, the automatic transfer of such events into the sphere of legal proceedings would make it very difficult to comply with the principle of the presumption of innocence and would not allow to ensure the fairness of the process as a whole.

In today's environment, litigators with authority need to improve both their digital and health culture in order to be able to use information tools to address litigation and procedural decision-making, taking into account the health risks to individuals in an adverse epidemic situation.

Solving these and other interrelated tasks will ultimately contribute to the smooth operation of the epidemic in accordance with international standards and the adaptation of Ukrainian judicial proceedings to European standards of justice.

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