

# ESTABLISHMENT OF CONSTITUTIONAL GUARANTEES OF OPENNESS OF THE ADMINISTRATION OF JUSTICE AS THE BASIS OF THE RIGHT TO A FAIR TRIAL IN CONDITIONS OF ECONOMIC TURBULENCE DUE TO MILITARY ACTIONS

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**Abstract.** The *subject* of the study is social relations in the field of establishing constitutional guarantees of openness of the administration of justice as the basis of the right to a fair trial in conditions of economic turbulence due to military operations. *Methodology.* The methodological basis of the study is the methods of induction and deduction, dialectical-materialistic method, method of analysis and synthesis, historical method, which allowed to objectively comprehend the content and essence of the issues under study. The *purpose* of the article is to study the constitutional guarantees of openness of the administration of justice as the basis of the right to a fair trial in the conditions of economic turbulence due to military operations, and then to propose mechanisms for their effective functioning. The *results* of the study showed that there are two main types of procedures for the application of constitutional norms in the field of ensuring the right to a fair trial. It seems that the optimization of the application of constitutional norms in the field of ensuring the right to a fair trial involves achieving a balance between these two types of procedures, which ultimately ensure the proper implementation of the constitutional right to a fair trial. Based on the results of the application of the constitutional norm in the field of the right to a fair trial by the courts, two groups of legal consequences of the adoption of acts of application were identified. *Conclusions.* The idea of justice has been enshrined in the constitutional text as a legal idea rather than a principle of law. At the same time, in modern Ukrainian jurisprudence there is a paradoxical situation when the formally subjective right to a trial has a greater internal content than the principle of "justice" used in various, including procedural, branches of Ukrainian law. Modern Ukrainian legislation rarely operates with the category of "right to a fair trial", but in this case we are dealing with the legitimization at the level of sectoral Ukrainian legislation of the legal construction already established in domestic science and practice, which came from international law, and not an attempt to give the principle of fairness of judicial activity a real formal legal nature. The fact that the modern Ukrainian legislator failed to systematically and conceptually reflect its attitude to the idea of judicial justice in the conditions of the military-economic crisis also has a negative impact on the relevant judicial practice.

**Key words:** constitutional law, constitutional norms, justice, the right to a fair trial, judicial proceedings, economic turbulence, military actions.

**JEL Classification:** K10, K38, K40, K41

## 1. Introduction

In recent years, researchers have increasingly used the technical term "turbulence" to describe the current economic situation. It is used along with such terms as "post-industrial society", "knowledge economy", "innovation economy", "new reality", "economy of rapid change" (Brown, 2006).

Globalization and strengthening of interconnection between countries, scientific and technical progress

and new technological base transform the economic system into a diversified and competitive one, with increasing innovation activity, increasing the share of high-tech and intellectual production. In this special, new, knowledge-based economy, knowledge plays a key role. It is the main productive force.

An economy based on social and legal relations is an economy that allows transforming knowledge into income, and not only in high-tech industries.



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A characteristic feature of such an economy is that relations have become an independent powerful factor of production that cannot be replaced by other factors.

The economy based on social and legal relations is characterized by a higher level of risks faced by the subjects of this economy. The increasing pace of change in the modern economy leads to the fact that the emergence of new knowledge not only depreciates tangible elements and factors of production more and more rapidly, but also makes many intangible factors of production unnecessary, investments in which may not pay off in full or lead to losses. The risks associated with the high pace of technological and managerial change are thus becoming higher. Risk in modern society is becoming an all-encompassing phenomenon also due to the increase of innovativeness, which is set as a goal of development, as innovations can be used in actions that are traumatic for society and individuals.

Thus, in the author's opinion, the change of technological modes, development of innovations and economy based on social relations generates a large number of new risks, mobility and mobility of economic processes, their growing uncertainty and unpredictability, contradictory trends. The combination of these characteristics of the economy can be called "turbulence" ("turbulence" – from Latin – "troubled", "disordered") (Brown, 2006).

At the present time the role and importance of military scientific substantiation of decisions of public administration bodies in all spheres of the economy and law is significantly increasing in the course of solving the challenges they face to ensure the military security of the state.

The development of the judiciary, like the judicial process itself, is not immune to these trends. The judiciary is adapting to the prevailing conditions, making every effort to do so and clearly requiring the use of the latest applied scientific approaches in the relevant direction. One of the most pressing constitutional and legal issues in today's reality is ensuring the right to a fair trial, which is a fundamental element of the set of human and civil rights.

## **2. Constitutional and legal characteristics of economic turbulence resulting from military actions**

In economic literature, turbulence is understood as a situation in the economy characterized by the following features:

- uncertainty and the impossibility of a clear description, prediction of events;
- complexity, interconnectedness and heterogeneity of factors affecting the economy, variability of their impact;

- unpredictability of consequences and risks of technological achievements of mankind;
- high speed of ongoing changes, etc. (Burlachkov, 2009).

The study of turbulence takes place in different aspects:

- in relation to global economic systems, for example, where its impact on the country's economy and society as a whole is considered (macro level);
- at the micro level, for example, as a certain characteristic of the external environment in which enterprises and organizations operate. Here the emphasis is on the classification of environmental factors, measuring the level of turbulence, developing strategies for the behavior of bodies depending on the level of turbulence, the adaptability of organizations and its subsystems to the ever-growing turbulence.

Almost all authors are of the opinion that the increase of turbulence in the economy is a trend and is caused by many factors, including military actions (Yanickij, 2011). Thus, the change of technological modes, the development of the knowledge economy and the innovation sector produce many risks that affect the state of all economic systems.

According to the author, turbulence becomes an integral characteristic of the surrounding space, which transforms and changes the usual course of things, requires society to make adequate changes to the current situation. All this determines the relevance of the study, including constitutional and legal, of various systems in conditions of economic turbulence.

The ongoing changes directly put forward a number of requirements to the quality of justice. To begin with, it must be adaptive and able to change rapidly in response to the dynamics of the external environment, while maintaining strict compliance with constitutional and legal requirements. All this, in turn, requires clarification and definition of the main categories that allow the most adequate description of the development of the phenomena under study (Yanickij, 2011).

The study of the institute of constitutional and legal status of man and citizen under martial law occupies one of the leading places in the field of theoretical and legal research from the point of view of direct action of the constitution of the state as a normative legal act that has the highest legal force in its territory. During martial law, restrictions on the rights and freedoms of citizens must be carried out in strict accordance with the constitutional norms and legislation. According to the author, the improvement of the regulatory framework in the field of constitutional and legal affirmation of human and civil rights and freedoms, and most importantly – the corresponding implementation, under martial law, should take place within the framework of specifying the norms

of international law relating to certain issues, including the right to a fair trial.

In a broader context, it should be noted that the lack of access to basic quality services, government policy, legislation and practice of judicial and law enforcement bodies should not negatively affect the rights of the conflict-affected population, in particular freedom of movement, access to pensions and social benefits and, of course, the right to a fair trial.

### **3. Constitutional and legal consolidation of the right to a fair trial in modern economic and political conditions**

Justice is often considered as one of the basic principles of law and legislation. The principles of law are a dynamic phenomenon. They are improved in the process of development of human civilization and, in particular, the development of political and legal thought. The latter circumstance does not contradict the statement that by their nature the principles of law are much more stable and durable than "ordinary" legal provisions. Principles of law reflect the view of law and the nature of legal phenomena both at the universal (international) and domestic levels. At the same time, law can be considered in a broad sense and include both specific areas of legislative regulation of social relations and general approaches to the organization of public power, ensuring rights and freedoms, etc. Different legal principles may be characteristic of different stages of development of human civilization, state and society. The principles of law should be disclosed on the basis of an integrated approach to understanding the essence of legal processes both at the basic and specifying levels. This approach makes it possible to distinguish general and sectoral (intersectoral) principles of law characteristic of certain branches of law or certain branches of legislation (Marochkin, 2010).

Objective difficulties in developing a common understanding of the principles of law are explained by the large proportion of subjective in their content. The latter circumstance does not prevent the formation of a relatively well-established system of legal principles. At the same time, we should not forget about the traditional "basic" division of law into natural and positive law (an extremely simplified view of a large number of different types of law understanding), that is, the conceptual approach to the principles of law, if they are understood as natural law and positive law, will be significantly different.

The principle of justice is enshrined in the text of the Constitution of Ukraine, in particular, in its preamble. The question remains whether it is enshrined as a principle of law (legal principle,

constitutional principle) or as an initial system-forming constitutional idea. The right to a fair trial (court verdict), traditional for international law, was indirectly obtained at the level of the Basic Law. And even if this wording was not formally mentioned in the text of the Constitution of Ukraine, however, most of the principles and powers that fill this legal construction were presented at the level of the Basic Law (Fritsky, 2004).

Unlike constitutional norms, constitutional principles may compete with each other. As for the substantive differences between the categories of "constitutional norms" and "constitutional principles", the latter serve as an objective or subjective criterion for the adequacy of the application of the former, i.e., a way of purposeful correlation with the moral requirements recognized in society, for example, justice. For similar reasons, we can distinguish constitutional principles in the sense of "general" and "sectoral" principles enshrined in the text of the Basic Law. In the practice of constitutional justice of Ukraine, the principle of justice is considered both as a constitutional and as a general legal principle. This confirms the assumption that, firstly, justice is a general legal principle. Secondly, fairness is also a constitutional principle, despite the fact that it is not explicitly stated as such in the text of the Basic Law of the country (Macdonald, 2021).

In its legal positions, the Constitutional Court also uses the phrase "constitutional right to judicial protection and fair trial", thereby designating the latter as "constitutional", despite the fact that it is not directly enshrined in the Constitution of Ukraine. In the scientific literature, one can find a proposal to enshrine the latter in the second section of the Constitution of Ukraine, however, given the pronounced unwillingness of the political elite to resort to the procedure of revision of the Basic Law, which was manifested during the last constitutional reform, it is clearly not to be expected in the near future.

It should be noted that with regard to fair trial the Constitutional Court of Ukraine prefers to use such a legal construct as "subjective right", i.e., speaks about "the right to a fair trial" or "constitutional right to a trial". According to I. Timchenko, the right to a fair trial is closely interrelated with the right to judicial protection (Timchenko, 2018). On the one hand, the right to judicial protection is specific to the right to a fair trial. On the other hand, a proper understanding of the right to judicial protection is possible only on condition of an adequate understanding of the essence and content of the right to a fair trial, i.e., the latter serves as a guideline for the former. One can disagree with this point of view. After all, the right to judicial protection outside the context of fairness of the trial loses any meaning. Once again the attention is drawn to the excellent

semantic content of the Constitution of Ukraine – everyone is guaranteed judicial protection of his rights and freedoms, access to justice for victims. In the second case, justice is understood not literally as access to judicial protection, but in a broader sense of the category "fairness", close to the concept of justice. In fact, it is about the victim's right to justice.

The question of the place of the right to a fair trial as a relatively independent legal construct among other subjective rights, similar concepts and categories is of undoubted interest. The relevance of the problem increases in view of the fact that modern Ukrainian legislation rarely operates with the category of "right to a fair trial", unlike, for example, representatives of science. In cases where this term is used, it refers to the right to a fair trial based on the principle of competition and equality of rights of the parties. Today it is impossible to say that the legislator at least tried to reveal the semantic content of the relevant legal construction. Most likely, it is about legitimization at the level of sectoral Ukrainian legislation of the legal structure already established in domestic science and practice, which came from international law.

Recall that subjective rights, freedoms and obligations, as is commonly said, embody the core of the legal status of a person, form its core. However, the structure of the legal status itself, that is, a specific list of elements that should be included in it, each author (scientist) determines individually. There is no consensus among scholars on the inclusion in the legal status of a set of procedural rights (legal guarantees of rights, rights that characterize the legal status of a person in the judicial process). In particular, M. Entin points out that the inclusion of the principles of judicial procedure in the legal status of an individual is unjustified. And even if the legal status consists, among other things, of procedural rights, for example, the right to appeal to the court, the "objective legal principles" of these procedures (administrative, judicial, constitutional) go beyond the legal status and are guarantees of its provision (Entin, 2003).

It is not difficult to notice that a significant part of the so-called legal guarantees reveals the "right to a fair trial" in the interpretation of the proposed Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, 2010). In other words, even if the Constitution of Ukraine does not formally contain the "right to a fair trial", some of its components that fall within the competence are quite voluminously or partially (at the choice of the researcher) presented in the text of Section Two of the Basic Law (Savchin, 2009).

It should also be noted that not all the components of the right to a fair trial, which are enshrined in the

text of the Constitution, are formulated as subjective rights, which gives grounds to consider them, including as principles (in this case – sectoral principles). Indicative in this sense is the provision that no one is obliged to testify against himself, his spouse and close relatives, the circle of which is determined by law. The absence of an indication that this is a "subjective right" allows interpreting this provision as a principle of judicial activity, a principle of justice. For comparison, in the criminal procedure legislation this principle is presented as a subjective right – the right not to testify against oneself, one's spouse and other close relatives. Thus, at least in the above example, the difference between the sectoral principle and the subjective right is extremely insignificant (Weissbrodt, 2020).

Once again, not all "human rights" that are traditionally considered as such are enshrined as "rights" in the text of the Constitution. The question of whether it is appropriate to call those constitutional provisions that are not designated as such rights remains open. For example, the "right to judicial protection", which is often used in domestic jurisprudence, is derived from the constitutional "everyone is guaranteed judicial protection of his rights and freedoms." On the other hand, for example, the right to access to justice – from "the State provides victims with access to justice. The constitutional provision that "all are equal before the law and the court" is often transformed into the right to equality before the law and the court. The provision that the accused is not obliged to prove his innocence is also often transformed into the right not to prove innocence. There are many such examples, and in some cases the necessary prefix "law", as already noted, is proposed by the legislator itself in the process of sectoral regulation. Thus, it can be concluded that even if the legislator does not use the phrase "right", it can be subjective rights. The same logic applies to the basic and sectoral principles of jurisprudence. The latter fact actualizes the problem of delimitation of subjective rights, legal principles, procedural requirements, etc. For example, the legislator's indication that the sentence must be fair is often regarded as the right to a fair trial.

In conclusion, the following should be noted. The modern scientific debate on the principles of law is characterized by the problem of the primary and secondary nature of legal principle and formal law: legislation is based on the principles of law or the principles of law should be distinguished on the basis of the analysis of the current legislation. Such a statement of the problem, of course, touches upon the problem of different types of legal understanding.

The idea of justice should be considered as a general legal principle (general principle of law); constitutional principle (as such it is enshrined in

the legal positions of the Constitutional Court of Ukraine); inter-branch principle, which was mediated in the form of the right to a fair trial and the block of its powers; branch principle characterizing justice in various, including procedural branches of law of Ukraine (Constitution of Ukraine 1996). A careful analysis of the special literature and relevant legislation also shows that the principle of justice is often the basic principle (the main idea), through the prism of which, in turn, the rule of law, legality, equality are considered. The right to a fair trial, in its turn, as a legal guarantee of the right to liberty and security of person, characterizing the negative aspect of freedom, formally does not belong to them. In theoretical and practical terms, constitutional principles, unlike constitutional norms, can compete with each other, as well as act as an objective or subjective criterion for the adequacy of the application of constitutional norms, that is, a way to purposefully correlate the latter with the requirement of justice.

According to the author, the idea of justice was enshrined in the constitutional text as a legal idea, not a principle of law. At the same time, in modern Ukrainian jurisprudence there is a paradoxical situation when the formally subjective right to a trial has a greater internal content than the principle of "justice" used in various, including procedural, branches of Ukrainian law. Modern Ukrainian legislation rarely operates with the category of "right to a fair trial", but in this particular case one is dealing with the legitimization at the level of sectoral Ukrainian legislation of the legal construction already established in national science and practice, which came from international law, and not an attempt to give the principle of fairness of judicial activity a real formal legal nature. The fact that the modern Ukrainian legislator has failed to reflect its attitude to the idea of judicial justice in a systematic and conceptual way also has a negative impact on the relevant judicial practice.

#### **4. Application of the constitutional and legal idea of fair trial in the conditions of unstable economy caused by military actions**

A significant number of scientific events and published scientific works now confirm the relevance of the issue of applying the Constitution of Ukraine in the field of ensuring rights and freedoms, especially the right to a fair trial.

The implementation of the provisions on the supremacy and direct effect of the Constitution of Ukraine in judicial practice shows that in order to make a constitutional, lawful, reasonable and fair decision in a case, it is necessary to carry out its mandatory assessment primarily from the standpoint of constitutional norms. Inaction in this direction

may affect the implementation of constitutional rights and freedoms, as they must be applied directly – by virtue of their supremacy and direct effect.

Almost all procedural codes oblige courts to decide cases based on the Constitution of Ukraine. At the same time, the legislation states that if a normative legal act does not comply with a normative legal act that has greater legal force, for example, the law does not comply with the Constitution of Ukraine or the Decree of the President of Ukraine does not comply with the law, the court applies the norms of the act that has greater legal force. Ensuring the implementation of these provisions can be a significant factor that will protect the right of citizens to a fair trial and effectively implement the principles of the Constitution of Ukraine (Gardashuk, 2003).

The courts, fulfilling their duties to protect rights, effectively protected rights and freedoms and created preconditions for the development of the practice of applying the Constitution of Ukraine.

According to the Constitution of Ukraine, it has the highest legal force, direct effect and is applied throughout the territory of the state, and laws and legal acts adopted on its territory must not contradict the Constitution of Ukraine, in addition, the legislation emphasizes the need for direct application of the Constitution of Ukraine in judicial practice (Constitution of Ukraine, 1996).

However, the scope of application of constitutional norms should not be absolutized. In constitutional law enforcement there are also paradoxes when the frequency of application of the norm is undesirable, in any case, the effectiveness of the relevant norm is questionable. For example, is it worth rejoicing that voters will often recall deputies of representative bodies of local self-government? Is it worth to be happy that the President of Ukraine will regularly remove from office senior officials? It seems that in all such cases, the law enforcement, which is not defective in itself, gives a signal of a defect in the application of another norm – in the selection and nomination of candidates for deputies or for the position of a senior official.

In practice, the direct application of constitutional norms in the field of rights and freedoms is not always possible or even impossible in the absence of a law that directly relates to the constitutional right to a fair trial. In certain situations, a court cannot resolve a dispute without a law regulating the legal relations that have arisen (Simmons, 2021).

Summarizing the above, it seems important to emphasize the following.

The application of constitutional norms in the field of ensuring the right to a fair trial is carried out using two main types of procedures:

- in an imperative (strictly established) procedural order;
- in the discretionary regime, where judges have a relative freedom of discretion in the exercise of procedural actions or in the interpretation or interpretation of constitutional norms.

It seems that the optimization of the application of constitutional norms in the field of rights and freedoms involves achieving a balance between these two types of procedures, which ultimately ensure the proper implementation of the constitutional right to a fair trial.

As a result of the application of the constitutional norm in the field of rights and freedoms by the courts, the following two groups of legal consequences of the adoption of acts of application can be distinguished:

- recognition of a legal norm as constitutional or unconstitutional (Constitutional Court of Ukraine);
- recognition of the decision as lawful, establishing the need for its revision or cancellation (courts of general jurisdiction).

The differences in legal consequences allow to understand, on the one hand, the differentiated role of Ukrainian courts in the application of constitutional norms in the field of ensuring the right to a fair trial, and, on the other hand, actualizes the task of improving the coordination of the activities of various parts of the judicial system of Ukraine to achieve a common goal – the proper implementation of constitutional rights and freedoms of citizens in wartime and the resulting economic turbulence.

## 5. Conclusions

The growth of turbulence in the economy is a trend and is caused by many factors, including military actions. Thus, the change of technological modes, the development of the knowledge economy and the innovation sector produce many risks that affect the state of all economic systems. Judicial authorities are adapting to the current conditions, making every effort to do so and obviously need to use the latest applied scientific approaches in this area. One of the most acute constitutional and legal issues in modern realities is ensuring the right to a fair trial, which is a fundamental element of the complex of human and civil rights.

The study of the institute of constitutional and legal status of man and citizen under martial law occupies one of the leading places in the field of theoretical and legal research from the point of view of direct action of the constitution of the state as

a normative legal act that has the highest legal force in its territory.

In the author's opinion, the idea of justice has been enshrined in the constitutional text as a legal idea rather than a principle of law. At the same time, in modern Ukrainian jurisprudence there is a paradoxical situation when the formally subjective right to a trial has a greater internal content than the principle of "justice" used in various, including procedural, branches of Ukrainian law. Modern Ukrainian legislation rarely operates with the category of "right to a fair trial", but in this case it is about legitimization at the level of sectoral Ukrainian legislation of the legal construction already established in national science and practice, which came from international law, and not an attempt to give the principle of fairness of judicial activity a real formal legal nature. The fact that the modern Ukrainian legislator has failed to reflect its attitude to the idea of judicial justice in a systematic and conceptual way also has a negative impact on the relevant judicial practice.

The application of constitutional norms in the sphere of ensuring the right to a fair trial is carried out using two main types of procedures: in a mandatory (strictly established) procedural order; in a discretionary mode, when judges have a relative freedom of discretion in the implementation of procedural actions or in the interpretation or interpretation of constitutional norms. It seems that the optimization of the application of constitutional norms in the field of rights and freedoms involves achieving a balance between these two types of procedures, which ultimately ensure the proper implementation of the constitutional right to a fair trial.

As a result of the application of the constitutional norm in the field of rights and freedoms by the courts, the following two groups of legal consequences of the adoption of acts of application can be distinguished: acknowledgment of the norm of law as constitutional or unconstitutional (Constitutional Court of Ukraine); recognition of the decision as justified, establishing the need for its revision or cancellation (courts of general jurisdiction). Differences in legal consequences allow us to understand, on the one hand, the differentiated role of the courts of Ukraine in the application of constitutional norms in the field of ensuring the right to a fair trial, and on the other hand, it actualizes the task of improving the coordination of the activities of different parts of the judicial system of Ukraine to achieve a common goal – the proper implementation of constitutional human rights and freedoms in wartime and the turbulence of the economy caused by it.

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