Artículo de investigación

The formation and current tendencies of international human rights protection concerning the right of a person to a fair trial, and their impact on Ukraine

Становлення та сучасні тенденції міжнародного захисту прав людини в контексті права особи на справедливий судовий розгляд, а також їх вплив на Україну

La formación y las tendencias actuales de la protección internacional de los derechos humanos en relación con el derecho de una persona a un juicio justo y su impacto en Ucrania

Recibido: 19 de agosto del 2019 Aceptado: 27 de septiembre del 2019

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Abstract

This research is about the problem of the legal regulation of the right of a person to a fair trial. So, it could be said, that the relevance of this research is the need for a legislative definition of the right of a person to a fair trial in the context of human rights. Moreover, the object of study is the public relations of litigation in courts. The subject of the study were the judgments of European Court of Human Rights, international normative-legal acts, and legal acts of Ukraine.
The authors used the method of dialectics, the method of formal logic, the comparative-legal method, the method of induction, the method of analysis and the historical method in this research.
In conclusion, the authors highlighted that every judge has his or her own conception of justice is not so much theoretically conscious as intuitive, sometimes with a subconscious understanding of it. Therefore, the content of the concept of "fair trial" in cases before the court covers the

Анотація

Данна дослідницька робота присвячено дослідженню правової регламентації права людини на справедливий судовий розгляд його справи. Актуальність даного наукового дослідження полягає у необхідності законодавчого визначення поняття "право на справедливий суд", в контексті забезпечення прав людини. Об'єктом дослідження виступають суспільні відносини щодо розгляду спорів у судах. Предметом дослідження виступили рішення Європейського суду з прав людини, міжнародні нормативно-правові акти та України.
Під час написання наукового дослідження авторами були використані метод діалектики, метод формальної логіки, порівняльно-правовий метод, метод індукції, метод аналізу та історичний метод.
У висновку автори підкреслили, що кожен суддя має своє уявлення про справедливість,

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requirements for equal access to justice, publicity of cases, to guaranty the right of a defendant, by which a defendant must be informed in detail about the nature and motives of the charges against him, giving him sufficient time and opportunity to prepare his defense, to defend himself personally, or to choose a defense counsel for that defense, including free of charge, to question the prosecution and defense witnesses.

Keywords: International protection, the right to a fair trial, human rights, constitutional rights, international law.

яка в свою чергу не стільки усвідомлюється на теоретичному рівні, а сприймається на рівні інтуїції, враховуючи, що може мати місце і певне розуміння на рівні підсвідомості. Тому зміст поняття «справедливого судового розгляду» у справах, що їх розглядає Суд, охоплює, зокрема вимоги щодо рівного доступу до правосуддя, публічності розгляду справ, гарантування права обвинуваченому у вчиненні кримінального правопорушення бути детально повідомленим про характер і мотиви висунутого проти нього обвинувачення, необхідності надання йому достатнього часу та можливостей для підготовки свого захисту, можливості захищати себе особисто або обрати для цього захисника, у тому числі безкоштовно, допитувати свідків обвинувачення й захисту.

Ключові слова: міжнародний захист, право на справедливий суд, права людини, конституційні права, міжнародне право.

Resumen

Esta investigación trata sobre el problema de la regulación legal del derecho de una persona a un juicio justo. Entonces, podría decirse que la relevancia de esta investigación es la necesidad de una definición legislativa del derecho de una persona a un juicio justo en el contexto de los derechos humanos. Además, el objeto de estudio son las relaciones públicas de litigio en los tribunales. El tema del estudio fueron las sentencias del Tribunal Europeo de Derechos Humanos, los actos normativos legales internacionales y los actos jurídicos de Ucrania.
Los autores utilizaron el método de la dialéctica, el método de la lógica formal, el método comparativo-legal, el método de inducción, el método de análisis y el método histórico en esta investigación. En conclusión, los autores destacaron que cada juez tiene su propia concepción de la justicia, no es tanto teóricamente consciente como intuitiva, a veces con una comprensión subconsciente de la misma. Por lo tanto, el contenido del concepto de "juicio justo" en los casos ante el tribunal cubre los requisitos para la igualdad de acceso a la justicia, la publicidad de los casos, para garantizar el derecho del acusado, por el cual el acusado debe ser informado en detalle sobre la naturaleza. y los motivos de los cargos en su contra, dándole el tiempo y la oportunidad suficientes para preparar su defensa, defenderse personalmente o elegir un abogado defensor para esa defensa, incluso de forma gratuita, para interrogar al fiscal y a los testigos de la defensa.

Palabras clave: Protección internacional, derecho a un juicio justo, derechos humanos, derechos constitucionales, derecho internacional.

Introduction

In 1997, namely on July 17, the legislature of Ukraine ratified, by special Law, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (2019) (hereinafter – the Convention). Moreover, to recognize by this Law the power of the European Court of Human Rights (hereinafter – the Court) concerning the idea of the possibility of the interpretation and application of this Convention. Thus, under Article six of paragraph one of the Convention (2019), all people have the right to a fair and the right to public hearing in his or her case is enshrined. At the level of national legislation of Ukraine, the Constitution (Constitution of Ukraine of 1996, 2019) (Article

9.1) stipulates that the Convention is part of the national legislation of our country. It is also worth noting that Article forty-six of the Convention (2019) provides for duty of Ukraine to comply with the judgments of the Court.

Besides, a similar provision is also contained in Article 2 of the Law of Ukraine named "On the enforcement of judgments and the application of the case-law of the European Court of Human Rights" (2012). In addition, Article 17 of this Law stipulates that courts are obliged to use the Convention (2019) and also to use in the national court decisions the case-law of the Court. In the context of deepening European integration processes in our country, the chosen topic of research seems relevant and timely.

Methodology

In preparing the research work, the dialectic research method was used. The system analysis method was used by the authors when analyzing the decisions of the Court (Yaremenko v. Ukraine..., 2009; Shabelnik v. Ukraine..., 2010; Borotyuk v. Ukraine..., 2012).

The authors in the research about the development and also evolution of basic human rights used also the historical method. The comparative legal method has helped to reveal the features of national legislation of Ukraine in comparison with international standards and norms. The method of formal logic made it possible to reveal the general characteristics and distinctive features of the concept of the right of a person to a fair trial.

Moreover, the induction method helped bring together the decisions of the Court concerning the secure of the right of a person to a fair trial and furthermore to derive the criteria of the concept of the right of a person to a fair trial.

Analysis of recent research

First of all, it should be noted that among the famous scientific scholars, there are separate works in which the analysis of related problematic issues is carried out. Among the authors of such works should be noted, in particular, Gvozdik, P., & Maleev, A., Savchuk, O., Sakara, N. However, the scientific analysis of the outlined issues was not conducted separately. Based on the analysis of scientific results, it is established that the main goal of this article is to investigate the emergence and current directions of international human rights protection concerning the right of a person to a fair trial, as well as their impact on Ukraine. So, to reach this goal, we need to establish the next tasks:

- Firstly, to investigate the development of the defining principles of the international human rights protection;
- Secondly, to identify current trends in international human rights protection concerning the right of a person to a fair trial;
- Thirdly, to identify the current state of the outlined research problem in Ukraine based on the normative-legal framework, theoretical foundations, as well as court practice.

Presentation of key research findings

The challenges of the modern world reflected in the world of law as excessive pragmatism, mercantile, lack of spiritual guidance, apparent religiosity, moral "blurry", etc. Such realities require an appropriate change in legal priorities and values, and, at the same time, a sense of justice that should be given spiritual and cultural significance (Kharytonov, Kharytonova, O., Kharytonova, T., Kolodin, & Tolmachevska, 2019).

One of the fundamental rights of every person is the right of a person to a fair trial. Moreover, it should be noted that the first origins of this fundamental human right were enshrined in the Grand Charter of Liberties, England, in 1215. The text of this worldwide legal memo stipulates that no free person can be imprisoned or arrested except under the law of their equals and the law of the state. According to the same document, a free person could not be deprived of his possessions or otherwise deprived of his possessions (Article 39) (The Magna Carta (The Great Charter), 2019).

The next legal note that defined human rights and, in particular, the right of a person to a fair trial, should be considered Habeas Corpus Act 1679 ("Petitions on Rights") (Savchuk, 2001).

At the same time, they received their new round of human rights development in the twentieth century, in the post-war era. Therefore, after the end of World War II, the UN was created. Resolution 217A of this international organization adopted, by their decision, the Universal Declaration of Human Rights at the date of December 10, 1948 (2019) (hereinafter – the Declaration). So, under the Article eight of the Declaration (2019) everybody has the right to an effective remedy by the competent national

courts in the event of a violation of his fundamental rights provided to person by the constitution (of each country) or by law.

Another international legal act that not only proclaimed but also obliged countries to guarantee everyone the right of a person to a fair trial we need to considered the International Covenant on Civil and Political Rights from the date of 16 December 1966 (2019) (hereinafter – the Covenant), adopted by UN Resolution 2200A. So, the content of Article two, paragraph 2, of this Covenant (2019) establishes a provision requiring each State Party to ude the measures which is necessary under its constitutional procedures and provisions (Sakara, 2004).

A decisive step towards the institutionalization of the right a person to a fair hearing as an integral part of the another right to access to fare justice was the adoption by the Council of Europe under the Convention (2019). So, the key issue in this issue is Article 6 of the Convention, the content of which is set out above (2019).

A number of international legal acts of the twentieth century have invariably influenced the rules of national law of each State Party as unchallenged standards of access to justice. Ukraine is no exception. Thus, in the third part of Art. 3 of the Law “On Judiciary and Status of Judges” (2016) it is determined that the judicial system ensures access to justice for each person in the manner established by the Constitution of Ukraine (2019) (in Art. 55).

At the same time, neither the Convention nor other international legal instruments enshrining the natural rights of citizens, including the right of a person to a fair trial, do not define "fair trial". There is no exhaustive definition of this concept in the scientific literature, even though there are many scientific articles and monographs devoted to the study of the category of "justice" in the context of judicial proceedings (Savchuk, 2001; Sakara, 2004; Sakara, 2004a). The question, therefore, arises as to the substance of the concept of 'fair trial' and its constituents in the context of the Court's rulings.

It should be noted that as for now the court's case-law is not governed by certain procedural documents, such as the Criminal or Civil Procedure Codes of each country, which exhaustively define each stage of the relevant type of litigation. Instead, the general principles of the court's activities in criminal, civil and other matters are contained in the Convention, the Protocols thereto, and the Rules of court. As a judicial stage, "trial" is a major part of the process in which the case is decided. Nevertheless, to the extent that it is applied in the domestic process, the stage of the trial is not inherent in the case before the Court. Consequently, the trial of a case before the Court is nothing more than a set of specific sequential actions by that court to hear and resolve a case at the request of a person. Thus, it can be said that the essence of the concept of "trial" concerning the exercise of the right of a judge referred to the implementation of the Convention (2019), as well as the relevant Protocols to it and moreover the Rules of the court. In this regard, given the content of Article six of the Convention (2019), a judicial review within the national judicial system of the Parties to the Convention has its defining characteristic – a sign of justice.

Therefore, the question arises of finding criteria that would determine the trial in the Court to be fair. A deep analysis of the Court's judgements gives rise to certain criteria, which underlie the concept of "fair trial". Thus, in the famous case of Balytskyi contre Ukraine (2012) the Court found that in violation of Article six of the Convention (2019), to deprive a suspect of a proper legal assistance of the investigating authorities, the applicant's actions under the Criminal Code, which does not require the obligatory participation of the defense counsel in conducting the inquiry and pre-trial investigation, were qualified. In addition, the affidavit was obtained under duress in this case. In the cases of Yaremenko v. Ukraine (2009), Shabelnik v. Ukraine (2010), Borotyuk v. Ukraine (2012) and other cases, the Court gave attention to the violation of the right of a person not to testify against himself/herself determined by the Constitution of Ukraine (2019). Thus, in these decisions, the Court attempted to highlight the criteria for criminal proceedings by the Ukrainian courts, which formed the basis for a holistic perception of the concept of justice as the highest legal value.

It should be agreed that there is an opinion in the literature that a trial, which is based on the fundamental international principles of the equality of parties in trial, including equal access to justice, will also be fair; competitiveness; publicity of justice; independence and impartiality of the court; effective involvement of the parties in the case; observance of the right to protection; reasonable time of trial, observance of the right to legal counsel, presumption of innocence, etc. (Sakara, 2004).

It is clear that these requirements for the proceedings of the courts are, so to speak, the "basics" of justice, but their violation will also underpin the motivation of the applicants who apply to the Court for the unfairness of the judgments given by the national courts. It is precisely these requirements that led to the interest of the Court in the case of "Suda", by which a shareholder with a smaller shareholding complained about the lack of access to the national judicial system in connection with an arbitration clause between a larger shareholder and a public property agency, which did not allow the applicant to lodge a complaint with the national courts concerning the amount of compensation. In deciding in favor of this shareholder, the Court pointed out that such an approach was not suitable for a "fair trial" because such an arbitration clause made it possible to have a confidential trial in breach of the (2019) on its publicity (Sakara, 2004).

Similar findings form the basis for a positive decision against the applicant in Luchaninov v. Ukraine (2012), in which she complained about her unfair trial, in particular, of a violation of the requirements of open trial, which was not held in a courtroom, but in the ward of the hospital where the applicant was with her six-year-old grandson; not giving her the opportunity and sufficient time to prepare her defense and the inability to secure the appearance and interrogation of witnesses on her part, the case was heard at the premises of a medical facility with only the prosecution witnesses, since she had not been informed in advance of the date and also time of the court hearing; depriving the applicant of the right to consult a lawyer; the appellate and cassation courts' violation of the right to review an unfair, in her view, judgement of the court (for example, of first instance). Moreover, in the mentioned case, the Court finds that the domestic courts of Ukraine have violated Paragraph 1 and subparagraphs (b) and (c) of Article 3 § 3, as well as article six of the Convention (2019).

It also should be emphasized that in both of the above decisions, justice, as a requirement for judicial review, is linked to ensuring equal access to justice for citizens. In these and other cases, justice seems to appear precisely as the equality of citizens before the law and the court, as one of its manifestations in law. It is a matter of formal justice, the essence of which is the need for equal treatment of people without discrimination. It is therefore correct to believe that formal justice is implicitly implemented in law; thanks to it, the right plays the role of a third, disinterested person who resolves conflicts that arise between people.

This kind of disinterest requires consideration of controversial cases, regardless of a person; this is the core of any type of legal process. Therefore, it is about impartiality or the independence of judges in the hearing of cases as a fair trial criterion.

However, since the Court does not define impartiality, its meaning can be determined on the basis of the notion of "bias", which means favoring one of the parties to the dispute. Therefore, impartiality as a criterion for a fair trial appears as an equal attitude of the court to the parties to the dispute, the resolution of the latter without favoring either party, the neutrality of the court.
This criterion underlies many decisions of the Court, which draw the attention of the governments of the States Parties to the Convention (2019) not to respect the impartiality requirements not only of national courts but also of other bodies.

Conclusions

Given the multifaceted nature and uncertainty of the concept of "fairness" in the decisions of national courts (Ukrainian courts) and the European Court of Justice, because it does not define the needed criteria for a "fair trial", citing instead an approximate list of criteria, concerning the content of Article six of the Convention (2019).

Moreover, the fact that every judge has his or her own conception of justice is not so much theoretically conscious as intuitive, as well as sometimes – with a subconscious. So, it should be said that people, according to life experience, feel and consider the validity of a judicial act to be fair. Therefore, the content of the concept of "fair trial" in cases before the court covers the requirements for equal access to justice, publicity of cases, to guaranty the basic right of a defendant to be informed about the detail of the nature and motives of the charges against him, giving him sufficient time and opportunity to prepare his defense, to defend himself personally, or to choose a defense counsel for that defense, including free of charge, to question the prosecution and defense witnesses.

We consider that, in addition to the above criteria of a fair trial, they also include all those rights enshrined in the relevant codes of conduct and the observance of which, in the course of conducting the relevant type of trial, will satisfy the interests of the suspect, accused, injured party, applicant, plaintiff. A fair trial from the

point of view of the case-law of the Court consists of a series of sequential actions to consider and decide on the merits of the case referred to the court and which fall within its competence, characterized by impartiality to the parties to the proceedings and equal treatment of the rights and interests of each of them. This definition can also be fully applied to the activities of national courts, since they are appealed to in order to find justice. The criteria for a fair trial are those requirements that underlie any court case and are enshrined in Article six of the Convention (2019) and the relevant Articles of The Procedure Codes of each country.

As concerning the implementation of the right of a person to a fair trial within Ukraine, it is appropriate to state that, as of today, the provisions of the Convention (2019) are generally in compliance with the norms of the Ukrainian Constitution (2019). In several cases, the sectoral national legislation regarding many cases does not allow full exercise of the right of a person to a fair trial in the security of fundamental human rights and freedoms, which, in turn, is connected with the unstable political situation in the country, which will be supported by the conflicting economic interests of certain groups the population and the political parties that represent them at the level of all branches of government.

References

Case “Balytskyi v. Ukraine” (Application no. 12793/02): Judgment, Case / European Court of Human Rights / 03.11.2011 No. 974_726. (2012). *Verkhovna Rada of Ukraine*. Retrieved from https://zakon.rada.gov.ua/laws/show/974_726.

Case “Borotyuk v. Ukraine” (Application No. 33579): Judgment, Case / European Court of Human Rights / Case No. 974_704 of 16 December 2010. (2012). *Verkhovna Rada (Ukrainain Parlament)*. Retrieved from https://zakon.rada.gov.ua/laws/show/974_704.

Case “Luchaninov v. Ukraine” (Application no. 16347/02): Judgment, Case / European Court of Human Rights / 09.06.2011 No. 974_788. (2012). *Verkhovna Rada (Ukrainain Parlament)*. Retrieved from https://zakon.rada.gov.ua/laws/show/974_788.

Case “Shabelnik v. Ukraine” (Application no. 16404/03): Judgment, Case / European Court of Human Rights / No 974_457 of 19.02.2009. (2010). *Verkhovna Rada (Ukrainain Parlament)*. Retrieved from https://zakon.rada.gov.ua/laws/show/974_457.

Case “Yaremenko v. Ukraine” (Application No. 32092/02): Judgment, Case / European Court of Human Rights / 12.06.2008 No. 974_405. (2009). *Verkhovna Rada (Ukrainain Parlament)*. Retrieved from https://zakon.rada.gov.ua/laws/show/974_405.

Constitution of Ukraine of 1996. (2019). *Verkhovna Rada (Ukrainain Parlament)*. Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

Convention for the Protection of Human Rights and Fundamental Freedoms. (2019). *Verkhovna Rada (Ukrainain Parlament).* Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

International Covenant on Civil and Political Rights. (2019). *The Office of the High Commissioner for Human Rights*. Retrieved from https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx.

Kharytonov, E., Kharytonova, O., Kharytonova, T., Kolodin, D., & Tolmachevska, Y. (2019). Human rights as the basic value of the concept of private law in modern Europe. Amazonia Investiga, 8(20), 477-485. Retrieved from https://www.amazoniainvestiga.info/index.php/amazonia/article/view/177.

On the Enforcement of Judgments and the Practice of the European Court of Human Rights: The Law of Ukraine of 23 February 2006. (2012). *Verkhovna Rada of Ukraine*. Retrieved from https://zakon.rada.gov.ua/laws/show/3477-15.

Sakara, N. (2004). The proper curt process as an element of accessibility of justice. Legal Ukraine, 3, 36-42.

Sakara, N. (2004a). *The Reasonable Time for Trial as an Element of Access to Justice in Civil Cases. Current Issues in Jurisprudence*. Kharkiv: Nat. lawyer. Acad. Ukraine.

Savchuk, O., Gvozdik, P., & Maleev, A. (2001). *On some issues of organization and consideration of court cases on the restriction of citizens' rights.* Ivano-Frankivsk: Play.

The Law of Ukraine “On Judiciary and Status of Judges” of 2 June 2016. (2016). *Verkhovna Rada (Ukrainain Parlament)*. Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19.

The Magna Carta (The Great Charter). (2019). *Constitution Society*. Retrieved from https://www.constitution.org/eng/magnacar.htm.

Universal Declaration of Human Rights. (2019). *The United Nations*. Retrieved from https://www.un.org/en/universal-declaration-human-rights.