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# ACCESS TO JUSTICE IN EASTERN EUROPE

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About the Special Issue on the Occasion
of the 70th Anniversary of
the European Convention on Human Rights

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Judicial Reforms in Eastern Europe:
Ensuring the Right to a Fair Trial or
an Attack on the Independence of the Judiciary?

# ACCESS TO JUSTICE IN EASTERN EUROPE

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# ABOUT THE SPECIAL ISSUE ON THE OCCASION OF THE 70TH ANNIVERSARY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This AJEE issue begins with a special note written by *Victor Muraviov and Nataliia Mushak* about the ratification of the Convention in 1997 and its implementation in Ukraine. In particular, the authors draw attention to essential issues related to the implementation of the Convention in Ukraine and the concept of 'judicial precedent' since judicial practice is more traditional for Ukraine's legal system, as well as the most influential ECtHR decisions against Ukraine. The authors make some concluding remarks about the reality of human rights protection in Ukraine and provide a relevant internal policy that may be useful for further legal research.

There are seven contributors to the main research articles in this issue. In the first article, readers may find original research results prepared by *Marcin Dziurda, Agnieszka Gołąb, and Tadeusz Zembrzuski,* the main focus of which is the impact of the Convention of the Polish Law Development. In particular, issues of the institutional and procedural components of the right to a fair trial were deeply studied.

One of the most difficult points of the trial is the reasonable length of the procedure, which has been under the scholarly spotlight for centuries. In the article written by *Tatjana Zoroska-Kamilovska*, the right to an effective remedy is linked to a reasonable length of a trial, and the author answers the question of whether this legal remedy exists in Northern Macedonia.

A few research articles in this issue are devoted to the Ukrainian experience of applying the Convention. In particular, *Vyacheslav Komarov and Tetiana Tsuvina* deeply analysed the impact of the case-law of the ECtHR on Ukrainian civil procedure development. Specific attention was drawn to the impact of pilot judgments on the legal instruments, as well as the specific circumstances of the review of the case after the ECtHR decision and the procedure for providing advisory opinions of the ECtHR. The positive influence of the rule of law principle in civil procedural legislation was considered grounds for a new approach of the Supreme Court – the opposite f a purely dogmatic interpretation of the law and excessive formalism, which should be assessed as highly positive.

In *Oksana Kaplina* and *Anush Tumanyants*' article, the impact of the Convention on Ukrainian criminal procedure was studied. The achievements of t he human rights evolution in Ukraine since its independence have made significant progress, specifically in criminal procedure, which had been adopted and influenced by one of the most authoritarian states half a century ago and was not in line with the very idea of human rights. The authors provided a thorough analysis and incisive opinions on the development of the criminal procedure reforms in Ukraine from the first steps to the final achievements.

The next research article focused on the independence of the judiciary in Eastern Europe as a prerequisite of the right to a fair trial. Although procedural issues have been the primary focus of research thus far, the organisation and functioning of the judiciary is the key point for implementing access to justice. The judicial reforms in Ukraine were deeply analysed by *Olena Boryslavska* from

the perspectives of the constitutional states and European models of constitutionalism, and her conclusions are worth attention and useful for various groups, especially legislators.

Some interesting issues were found in the study of *Nazar Bobechko, Alona Voinarovych, and Volodymyr Fihurskyi,* whose attention was drawn to the procedure of referring a criminal case to the highest division of the Supreme Court with the aim of maintaining unified court practice in criminal proceedings. Comparative analyses of other European states' legislation gave the authors solid grounds for conclusions that contribute to the national doctrine, as well as to facilitating unity in court practice.

The European Convention does not only impact procedural law in Ukraine; therefore, we welcome the contribution of *Iryna Sakharuk* on the right of protection, which was substantially influenced by the Convention.

A few notes have been added to this issue due to their relevance to the Convention's anniversary. In particular, the note related to the current law reforms in the field of the right to a fair trial was written by *Maryna Stefanchuk, Oleksandr Hladun and Ruslan Stefanchuk*.

In her case note, *Natalia Sakara* argued for the implementation of Art. 6 in a triad of proceedings: 'disputable', 'conditionally disputable', and 'indisputable'. The widely used case-law of the ECtHR gave her grounds to contribute to the discussion of the right to a fair trial.

Specific attention was drawn to the administrative, procedural development in Ukraine under the Convention and ECtHR practice in *Yana Sandul and Andriy Strelnykov's* note, in which our audience may read about these interesting issues.

Legal translation is a highly requested area of scholarly research. Current projects show us the difficulties of single understandings of legal texts, and the interpretation of legal terms is a particularly interesting and important issue. In the special note written by *Yuliia Baklazhenko,* readers may find the results of studies related to the terms 'small claims' and 'insignificant cases', which were recently introduced in Ukrainian legislation. Instead of using highly popular and widely recognised terms for cases with low values, it was necessary to determine a more accurate term in the legislation of Ukraine and related procedure. The author's method of resolving this is worth attention and useful for comparative research.

In the last part of my note, let me kindly draw your attention to our cover, where we have tried to illustrate the sense of the Convention and its role in civil society evolution during the last seven decades. Art gives us additional tools to feel rather than think about some essential issues of everyday life since artists always open new horizons and discover new aspects of humanity before they are conceptualised or even sketched up. Even though our cover uses a piece of art created by Pete Mondrian a century ago, the piece was a counterpoint of a new stage – unified art without national boundaries. The Convention became Mondrian's point for legal development and harmonisation, especially in Eastern Europe, where traditional approaches were and are very powerful.

Following this new direction, Mondrian wanted to 'denaturalize' art, to move from natural forms to pure abstraction, which would unite different visions of the same phenomena of the surrounding world. The main tools for the image are lines filled with primary colours. Likewise, the provisions of the Convention have incorporated basic human rights, moving away from those differences that have formed in the law of different states over the past centuries. Simplifying the forms and making them ascetic and pointless, the artist achieved understanding without the subjective, as he himself later wrote: 'Neoplasticism asserts justice, because the equality of plastic tools in a composition shows that everyone can be equal among equals.'[1]

1 *The new art – the new life: The collected writings of Piet Mondrian,* ed. and trans. Harry Holtzman and Martin S James (GK Hall, 1986).

Minimalist in its essence, the article on the right of every person to a fair trial gave impetus to the development of common principles both in the organisation of courts and in the procedure of a trial of Member states, ensuring access to justice for all.

Mondrian's influence on world culture is widely recognised and limitless – it goes beyond the visual arts and art in general and has become one of the starting points for globalist trends. Today, we are surrounded by reflections on Mondrian's theme, from website design to architecture. Paraphrasing his message about the new art of a new life and applying it to our main theme, we can only add 'a new law'.

Art is a harbinger of all the significant changes that occur in society. Artists and musicians transform new needs accumulated in society through the prism of their consciousness and create new visions of the future. Artists do not see the world around us objectively, but as a kaleidoscope of subjective reflections of our society, a mix of its illnesses and successes. Before Mondrian, art was replete with the traditional clichés prevailing in the visual arts. However, a hundred years ago, he was one of the first to single out a point that gave a reference to a whole direction – a vision of the world around us, common for all regardless of cultural and national characteristics, a universal and harmonious approach to depicting the reality around us. After him, Italian or Dutch painting was no longer relevant since universalism became an immanent feature of contemporary art. The soil of a modern artist is the whole world – he is a part of a single human society, and not a particular part of it, painted with national colours.

The approach introduced by the General Declaration and the European Convention is unique – whatever the law of the Member States, everyone is guaranteed the rights enshrined in these documents. These are rights that unite all people and not ones that divide national and ethnic attitudes and traditions. Few projects are so difficult to unify as the implementation of the right to a fair trial.[2]

In each country, even within each jurisdiction, different approaches have been formed that are seemingly impossible to resolve at first glance. Yet, the Convention gave us a clear example, in which common views prevail over national characteristics and even shape them.

Last, we are happy to announce that professor *Anatoliy Getman* is joining AJEE Editorial Board as a new member. We greatly welcome our team leading scholars and professionals who contribute to the high academic standards of scholarly research and help us to develop a journal!

As usual, I would like to express my endless gratitude to all my team who help to go through the whole publishing process – to communicate with our authors, to assist in peer review, to facilitate editing, proofreading and correcting the final versions, all together we make a great job! Thanks to our authors, who trust us in publishing, our reviewers for their professional attention and help, our Editorial Board members for their support.

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2 Model European Rules of Civil Procedure (with the International Institute for the Unification of Private Law, UNIDROIT) <https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/completed-projects-sync/civil-procedure/> accessed 18 February 2021. On the role of Convention in the harmonisation of judiciary law in Europe, see M Storme, *A single civil procedure for Europe: A cathedral builders' dream* <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr22/STORME.pdf> accessed 18 February 2021.

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# LEGAL ISSUES OF THE IMPLEMENTATION OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950 IN UKRAINE

*Victor Muraviov and Nataliia Mushak*

**Summary:** 1. Introduction. – 2. Key Ideas and Principles of the Council of Europe. – 3. The Impact of the Convention on Legal Systems of its Member States. – 4. Ukraine and the Convention. – 5. Concluding Remarks.

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## CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist.

## CONTRIBUTORS

The authors contributed equally to the intellectual discussion, case-law exploration, writing and editing underlying this paper and accept responsibility for the content and interpretation.

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# LEGAL ISSUES OF THE IMPLEMENTATION OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950 IN UKRAINE

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***Abstract*** *This note is devoted to the study and analysis of legal issues of the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) in Ukraine. The research states that the Convention is one of the first human rights documents based on the principles of ensuring objective standards and providing protection to individuals against abuse of state power. The note proves that the Convention, which is inherently a new generation treaty, not only establishes rights and obligations for states that are traditional for sources of classical international law but also enshrines the obligations of Member States to its citizens, individuals, and legal entities – all those under its jurisdiction.*

*The research stipulates that with its accession to the Council of Europe in 1995, Ukraine not only showed its recognition of the rule of law but also undertook the commitments to ensure human rights and fundamental freedoms, thereby confirming its European democratic choice. In 1997, with the ratification of the Convention, a new stage began in the development of human rights and fundamental freedoms in Ukraine.*

*The note states that Ukraine takes third place among the 47 Member States of the Council of Europe in terms of the number of appeals to the European Court of Human Rights. A negative tendency to increase the submission of complaints by citizens of Ukraine to the European Court of Human Rights is intensifying every year. This indicates that nowadays, the need to achieve maximum compliance of Ukrainian legislation with European standards in the field of human rights and the prevention of their violations remains urgent.*

*The note concludes that at the present stage, among the most problematic issues of Ukraine's cooperation with the Council of Europe is the reform of the judiciary – in particular, bringing it in line with European norms in accordance with the recommendations of the Councils of Europe institutions, strengthening the fight against corruption, etc.*

*The authors offer a set of proposals and recommendations on the necessity of achieving maximum compliance of Ukrainian legislation with the European standards of the Council of Europe in the field of human rights and prevention of their violations to reduce the number of appeals of Ukrainian citizens to the European Court of Human Rights.*

*The research emphasises that the construction of a democratic legal state and Ukraine's accession into the European system of human rights protection should exist in reality, as*

*well as be supported by the relevant internal and external policy of the country in regard to human rights, the harmonised system of legislative acts, and the real mechanisms of guarantees of fundamental freedoms.*

**Keywords:** *Human Rights, European Values, Fundamental Freedoms, Judicial System, European Vector, Legal Instruments, European Court of Human Rights, Implementation Process.*

## 1 INTRODUCTION

Seventy years have passed since the European states signed the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereafter – the Convention). Ukraine joined the Convention on 17 July 1997[1]. Thus, Ukraine became a member of a large community of states that share European values, such as the rule of law, respect for human rights, freedom, and democracy. Adherence to these values plays a crucial role in the implementation of the strategic course for Ukraine's membership in the European Union and the North Atlantic Treaty Organization.

Ukraine is a party to the most important international conventions on human rights – in particular, the Universal Declaration of Human Rights 1948,[2] the International Covenant on Civil and Political Rights 1966,[3] the International Covenant on Economic, Social and Cultural Rights 1966,[4] the Convention on the Elimination of All Forms of Discrimination against Women 1979,[5] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 1984,[6] the Convention on the Rights of the Child 1989,[7] the Convention on the Rights of Persons with Disabilities 2006,[8] and others. This is primarily due to Ukraine's overall commitment to promoting and respecting human rights and fundamental freedoms, as well as their observance.

The participation of Ukraine in the Council of Europe plays a key role in this process.[9] The creation of the Council of Europe began immediately after the end of World War II when the leaders of European countries began to take measures to ensure that such death and suffering of people did not happen again. Due to the initiative of British Prime Minister Winston Churchill on 5 May 1949 in London, governments of ten European countries gathered to establish the Council of Europe. Its purpose was to achieve a greater unity

1 Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 30 January 2021.

2 The Universal Declaration of Human Rights 1948 <https://www.un.org/en/universal-declaration-human-rights/> accessed 4 February 2021.

3 International Covenant on Civil and Political Rights 1966 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed 4 February 2021.

4 International Covenant on Economic, Social and Cultural Rights 1966 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> accessed 4 February 2021.

5 Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> accessed 4 February 2021.

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 1984 <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> accessed 4 February 2021.

7 Convention on the Rights of the Child 1989 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> accessed 30 January 2021.

8 Convention on the Rights of Persons with Disabilities 2006 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> accessed 30 January 2021.

9 P Martynenko, 'The Constitution and Constitutionalism in Ukraine' in Collection of Scientific Works by the Members of the Association of the Constitutional Law on the Occasion of the 10th Anniversary of the Constitution of Ukraine, (Istyna 2007) 211–213.

between its members through agreements and joint activities in the economic, social, cultural, scientific, legal, and administrative spheres, as well as in the field of preservation and further development of human rights and fundamental freedoms.[10] Obviously, at that time, the main goal of the Council of Europe was to prevent the disappearance of the idea of fundamental human rights from the political landscape of the Old World, and therefore, the leaders of European countries decided to unite the efforts of all the European countries.

Among other reasons for the creation of an international organisation in Europe was the need to establish a European idea. Such an idea was directed at the establishment of a single political organisation of countries and peoples of Europe.[11] In our opinion, this view is fateful, if we take into account the political situation in post-war Europe, because, for the first time in international relations within the European continent, there was a desire to create such an organisation, the main task of which would be not only the usual declaration of human rights but also the further consolidation them as one of the important principles of its activities.[12] This intention was subsequently embodied in the Statute of the Council of Europe. In accordance with Art. 3 of the latter, all Member States of this organisation would recognise the principle of the rule of law and the principle that any person under their jurisdiction should enjoy human rights and fundamental freedoms.[13] Moreover, Art. 8 of the Convention provides the suspension of membership in the Council of Europe. Furthermore, in some cases of serious violations of this principle, the Members of the organisation could even be excluded entirely.

## 2 KEY IDEAS AND PRINCIPLES OF THE COUNCIL OF EUROPE

In accordance with Art. 1 of the Council's of Europe Statute, the main goal of this international organisation is to achieve a greater unity between its Member States in order to preserve and implement common ideals and principles. In addition to this goal, the Council of Europe statutory documents include a set of main objectives. They are: the protection and strengthening of pluralistic democracy and human rights; the promotion of awareness and development of the European cultural identity; the search of common ways to solve social problems (in particular, the protection of national minorities, combating xenophobia, religious, racial, and ethnic intolerance, the protection of the environment, fighting AIDS, drug addiction, etc.); assisting Central and Eastern European countries in intensifying the process of political, legislative, and constitutional reforms; enormous political and legal activities; the unification and harmonisation of the European legislation; the adoption of the conventions that have a binding character for Member States of the Council of Europe.[14]

In our opinion, the establishment of the Council of Europe is a unique phenomenon. Immediately after its creation, there was the question of the adoption of a legally binding document, that is, an international treaty that would fix basic human rights and freedoms

10 Statute of the Council of Europe 1949 <https://assembly.coe.int/nw/xml/rop/statut_ce_2015-en.pdf> accessed 4 February 2021.

11 S Gromko, 'Formation of a Unified European Approach to the Concept of Human Rights and the Prerequisite for its Normative Consolidation in EU law' *Ukrainian Journal of International Law (2004) 8, 17–24.*

12 V Muraviov, N Mushak, *Judicial Control of Public Power as Legal Instrument for Protection of Human Rights and Fundamental Freedoms in Ukraine. Rule of Law, Human Rights and Judicial Control of Power* (Springer 2017).

13 Statute of the Council of Europe 1949 (n 10).

14 R Arnold, 'Anthropocentric Constitutionalism in the European Union: Some Reflections', in *The European Union – What Is Next?* (Wolters Kluwer 2018) 112–13.

at the European level. We explain this situation as follows: from the very beginning of its creation, the Council of Europe considered it necessary to act as an international organisation that would serve as a comprehensive standard for the protection and human rights, regardless of certain circumstances (peace or war) over the following centuries. And this indicates the farsightedness of the founders of this organisation.

## 3 THE IMPACT OF THE CONVENTION ON LEGAL SYSTEMS OF ITS MEMBER STATES

The Convention was the first international legal document on human rights that not only proclaimed human rights and called for their observance but also imposed certain legal obligations on the parties. It also introduced a system of control over the exercise and observance of human rights in Member States of the Council of Europe.

For decades, the Convention has been amended and supplemented by a set of protocols (16 protocols to it have been signed to date), thereby improving the mechanism of its action. Nowadays, the status of this document, its significance, and its impact on the internal legal systems of the Council of Europe Member States, as well as the development of international law as a whole, are difficult to overestimate.[15] The European human rights protection system was formed within the framework of the Council of Europe. The main instruments of this organisation ensure the protection of all categories of human rights. In general, the Convention and the system of international judicial control over the fulfilment of human rights duties by states have several characteristics. For instance, unlike classic international treaties, the Convention goes beyond mutual relations between Member States. In addition, objective obligations to the network of bilateral contractual obligations are created, which are provided by a collective guarantee.

The objective duty means a duty that in its content is related to a certain standard and scope of human rights from which the state cannot retreat.[16] In addition, this duty is permanent (in the universal or regional community of states), does not depend on the behaviour of other states, and makes it impossible to refer to this behaviour as an excuse for its misconduct. Recognising the objective nature of the state's obligations to protect human rights is a condition for the functioning of the European public order, which is a part of the system of human rights protection.[17] A separate issue of the system of the Convention is also the conditions under which its Member States exercise the provisions of this international treaty. The principle of *pacta sunt servanda* is enshrined in modern international law and requires Member States of the Convention to commit their obligations to the control of the European Court of Human Rights (hereafter: ECtHR).

## 4 UKRAINE AND THE CONVENTION

In 1997, Ukraine ratified the Convention, not only from a diplomatic point of view but also in the interests of the entire Ukrainian people. This event was a new and important stage in the development of Ukrainian jurisprudence in matters of the legal protection of

15 S Shevchuk, *The Judicial Protection of Human Rights: The Practice of the European Court of Human Rights in the Context of the Western Legal Tradition* (2nd edn, ammend., cor. Referat 2007).

16 V Evintov, 'Implementation of Decisions of the European Court of Human Rights: International and Ukrainian experience' in VN Denisov (ed) *Interaction of International Law with the Internal Law of Ukraine* (Justinian 2006) 184–197.

17 L Huseynov, *International Responsibility of States for Human Rights Violations* (int. by VM Koretsky, NAS of Ukraine 2000).

human rights and fundamental freedoms.[18] The event marked the beginning of the transfer of European legal values to Ukrainian culture.[19]

Ukraine's ratification of the Convention was a recognition that the state received additional, legally enshrined guarantees of its democratic development, and all Ukrainian citizens received an additional opportunity to defend their rights and legitimate interests. The sphere of human rights is the most important area in the construction of any independent, democratic, and legal state. According to the well-known international lawyer, G. Lautertracht, starting from 1950, a human being changed from an object of certain international compassion to the most important actor of international law.[20]

Ukraine's accession to the Convention was not only a guarantee of the full range of rights and freedoms but also ensured effective judicial control over their observance. Therefore, the normative legal grounds for application of the Convention are: the Constitution of Ukraine (Arts. 8-9, 22, 55-56, etc.),[21] the Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950', First Protocol and Protocol Nos. 2, 4, 7, and 11 to the Convention (title – as amended by the Law of Ukraine 'On Amendments to Certain Laws of Ukraine' No. 3436-IV of 9 February 2006[22]), and the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' of 23 February 2006.[23]

At the same time, the implementation of the provisions of the Convention is monitored by the ECtHR, whose jurisdiction has key importance for the understanding of the peculiarities of its activities. The peculiarities of the ECtHR jurisdiction determine its place and role in the system of international institutions in general and in the system of monitoring mechanism of the Convention.[24] In particular, in accordance with Art. 32 of the Convention, the jurisdiction of the Court applies to all matters relating to the interpretation and application of the Convention and its protocols. According to Arts. 33–34 of the Convention, the Court may consider two types of cases: interstate, ie, cases initiated upon the application of one Member State in regard to the violation by any other State of the provisions of the Convention and its protocols, and cases initiated by individual applications. At the same time, in accordance with part 2 of Art. 32 of the Convention, only the Court may decide all disputes regarding the effective protection of human rights in the process of considering a particular case through a flexible understanding of its jurisdiction limits.

In regard to the legal nature of the ECtHR decisions, there are different views among Ukrainian scholars who examine the key peculiarities of these judicial decisions. The basis for the discussion is, logically, the question of whether such a court decision is a precedent.[25]

18 S Shevchuk, 'European Court of Human Rights and the Ukrainian Judiciary: The Need to Coordinate Judicial Practice' *Law of Ukraine* (2011) 7, 88–92.

19 S Holovatyi, 'New opportunities for the protection of human rights in Ukraine' *Practice of the European Court of Human Rights* (1999) 1, 11–18.

20 PA Leino, 'European Approach to Human Rights: Universality Explored' *Nordic Journal of International Law* (2002) 71, 455–495.

21 The Constitution of Ukraine 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80http:/www.zakon.rada.gov.ua> accessed 30 January 2021.

22 Law of Ukraine 'On Amendments to Certain Laws of Ukraine' of 9 February 2006 No 3436-IV <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3436-15> accessed 25 January 2021.

23 Law of Ukraine 'On the Enforcement of Decisions and Application of Practice of the European Court of Human Rights' <https://zakon.rada.gov.ua/laws/show/3477-15> accessed 25 January 2021.

24 K Andrianov, 'The Question of Jurisdiction of the European Court of Human Rights' *Law of Ukraine* (2000) 8, 46–51.

25 E Shyshkina, 'Some Aspects of the Legal Nature of Decisions of the European Court of Human Rights' *Law of Ukraine* (2005) 4, 102–104.

Concerning the foreign experts in the field of jurisprudence, there is an opinion among British scholars that the legal nature of the Court's decisions should be considered mainly through the prism of judicial precedent in their inherent understanding. For example, the ECtHR's judicial practice in Anglo-American legal terminology is considered case-law and applies the definition of case-law. In contrast to the countries under the Anglo-American legal system, French researchers, such as Jean-François Renucci[26] and Frederick Sudre,[27] analyse the Court's decisions through the prism of a doctrinal view of judicial practice, defined by the French term jurisprudence. This term was historically developed in continental Europe and indicates that judicial practice is not a source of law.

In our opinion, the concept and content of judicial practice should not be replaced by the concept of 'judicial precedent' since judicial practice can constantly change due to the conditions for the development of society. In addition, it is judicial practice that serves as a source of law in rare cases in Ukraine, while judicial precedent is not recognised. Furthermore, the content of the rights enshrined in the Convention is constantly supplemented and clarified through the judicial practice of the ECtHR. Therefore, most scholars consider the ECtHR's judicial practice to be the second important source of the European human rights standards *de facto*.[28] Some Ukrainian scholars believe that the Convention does not provide legal grounds for giving these decisions the status of precedent in the understanding of English doctrine. Yet other scholars consider the ECtHR's decisions as precedent. S. Shevchuk argues that European case-law on human rights serves as an additional source of law when applying and interpreting the constitutional human rights norms that coincide with the fundamental rights enshrined in the Convention.[29]

It should be noted that we share the point of view of those scholars who recognise the creation of case-law by the ECtHR since this right is binding for all Member States of the Council of Europe. After all, when considering disputes on human rights violations, only the ECtHR has autonomy in matters of interpretation of the Convention. Furthermore, only the ECtHR does not depend on the domestic legislation and practice of national courts. When applying the norms of the Convention, revealing the categories of this document and the spirit of law laid down therein, the ECtHR reveals its essence not from the point of view of positivist law but from the point of view of the rule of law and human rights principle.[30] This approach provides grounds to conclude that the special status of the ECtHR has stemmed precisely from the ability to make an extraordinary decision. The peculiarities of such decisions determine their nature.

In turn, the decisions of ECtHR have key importance for Ukrainian legislation and its relationship with the wide range of human rights enshrined in the Convention. Despite the fact that more than 24 years have passed since Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, an important contribution to improving the system of human rights protection in Ukraine, today, there are still unresolved issues related to the recognition of the legal force of decisions of the ECtHR and the need to introduce a mechanism for the effective implementation of its decisions at the legislative level. The problem of Ukraine's failure to comply with the ECtHR's decisions has

26 Jean-Franois Renucci, *Droit europeen des droits de l'homme* (2nd edn, Librairie Generale de Droit et de Jurisprudence, EJA 2001).

27 Frederic Sudre, *Droit international et europeen des droits de l'homme* (5th edn, Presses Universitaires de France 2001).

28 V Rumyantseva, 'Appeal of Ukrainian citizens to the European Court of Human Rights: Review of the State' *Law of Ukraine* (2004) 3, 145–146.

29 S Shevchuk (n 18).

30 L Deshko, O Bodnar, 'Legal Nature of Decisions of the European Court of Human Rights' *Donetsk University Legal Journal* (2008) 2, 76–80.

become a challenge to the whole system of human rights protection built on the basis of the Convention. In addition, this issue has repeatedly become the subject of consideration by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

According to the Ukrainian scholar S. Shevchuk, the impact of ECtHR practice on the national judiciary is decisive not only in the context of the implementation of individual decisions in regard to Ukraine but also because this system has a general (*erga omnes*) nature, which, in its turn, is determined by the normative (precedent) nature of ECtHR decisions. These decisions of a general nature not only affect the change of the positive paradigm of law in the field of human rights protection to the natural and legal one but also necessarily require public authorities of Ukraine to consider the established (precedent) practice of the ECtHR in law-making and law-enforcement activities.[31]

The first pilot decision of the ECtHR in regard to Ukraine entered into force on 15 January 2010 in *Yuri Ivanov v Ukraine*.[32] This case stated a violation of the Convention concerning the continued failure to comply with the decision of the national court. This position of the ECtHR is a completely natural reaction to the systematic failure to comply with the decisions of national courts and the state's failure to take effective measures to overcome this problem, taking into account the fact that since 2006, the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' has been in force in Ukraine. Almost immediately after the decision in this case to eliminate the problem, Ukraine took a number of legislative measures. Thus, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On State Guarantees for the Enforcement of ECtHR Decisions'[33] in 2012, and the Cabinet of Ministers adopted a Resolution 'On Approval of the Procedure for Repayment of Debts by ECtHR Decisions, the implementation of which is guaranteed by the State' in 2014.[34] However, despite these steps, the situation with the implementation of decisions by national courts has not changed in the last seven years. In particular, between 2013 and 2017, 12,143 cases were submitted to the ECtHR in *Burmich and others v Ukraine*.[35] These cases were united by one common systemic problem – non-compliance with the decision of national courts, which was previously mentioned in *Yuri Ivanov v Ukraine*.

It should be noted that the regulatory framework in the mechanism of implementation of ECtHR decisions is Art. 46 of the Convention. It contains a legal provision according to which 'the High Contracting Parties undertake to comply with the final judgment of the Court in any case in which they are parties'. A reference to this note is also contained in Art. 2 of the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights'. However, the regulatory framework itself is not enough, and practical implementation is also necessary. Nevertheless, the situation for practical implementation in Ukraine is extremely difficult.

At the end of 2020, almost 10,100 complaints in which Ukraine is the defendant were submitted to the ECtHR. The total amount of Ukrainian complaints was 16.5% out of all the ECtHR's workload. Therefore, Ukraine ranked third by the number of complaints against it. Russia was in

31 S Shevchuk (n 18).

32 Yuri Ivanov v Ukraine App No 40450/04 (ECtHR, 15 October 2009) <https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/> accessed 9 February 2021.

33 Law of Ukraine 'On State Guarantees for the Enforcement of Judicial Decisions' <https://zakon.rada.gov.ua/laws/show/4901-17#Text> accessed 4 February 2021.

34 Resolution of the Cabinet of Ministers of Ukraine 'On Approval of the Procedure for Repayment of Debts by ECtHR Decisions, the implementation of which is guaranteed by the State' 2014 <https://zakon.rada.gov.ua/laws/show/440-2014-%D0%BF#Text> accessed 4 February 2021.

35 Burmich and others v Ukraine App No 46852/13 (ECtHR, 12 October 2017) <https://hudoc.echr.coe.int/fre#{%22itemid%22[%22001-178082%22]}> accessed 4 February 2021.

the first place with 14,050 complaints, and Turkey was in second place with 10,150 complaints. It is noteworthy that in comparison with the previous years, the number of complaints against Ukraine has increased. At the end of 2018, there were more than 7,200 complaints against Ukraine (or 12.9% of all the ECtHR's workload). In 2019, the number of complaints increased up to 8,850. Thus, the percentage of 'Ukrainian' cases increased to 14.8%.[36]

The main issues raised in statements submitted against Ukraine are: violation of Art. 3 of the Convention (prohibition of torture) – statements mostly relate to conditions of detention in prisons of persons sentenced to an exceptional degree of punishment – the death penalty is replaced by life imprisonment; violation of Art. 5 of the Convention (right to liberty and security) – these statements relate to human rights violations during detention and arrest; violation of Art. 6 of the Convention (right to a fair trial); violation of Art. 1 of Protocol No. 1 (right to free possession of property); violation of Art. 8 of the Convention (right to respect for family life), etc. In addition to these violations of the articles of the Convention, a significant number of complaints to the ECtHR coming from Ukraine also concern certain issues related to the penitentiary system, conditions of detention of accused persons in penitentiary institutions, treatment of prisoners, protection of their rights, etc.

One of the recent decisions of the ECtHR in regard to Ukraine's violation of Art. 3 of the Convention is the decision of 28 February 2019 in *Pankiv v Ukraine*.[37] The applicant insisted that he had been abused by the police and was forced to sign a 'remorse turnout', in which he confessed to stealing from the house of B. He was also forced to write a note that no physical force was used against him. In addition, the applicant cited medical evidence and claimed that it was established that he had suffered injuries while in police custody. He also claimed that while the authorities denied using force against him, they did not provide any credible explanation for the origin of his injuries. The authorities also selectively relied on a medical report of 23 January 2012 without providing a satisfactory explanation of the results of previous forensic examinations that supported his statement. The government denied any connection between the treatment of the applicant by the police and the fracture of his foot, explaining this injury by the fact that he accidentally turned his foot while going up the stairs. At the same time, the authorities relied on written statements of the applicant, given on the day of the alleged abuse, that the police did not treat him cruelly and that he turned his foot on the stairs. Authorities also cited the findings of a forensics report dated 23 January 2012.

On 28 February 2019, the ECtHR ruled that there had been a violation of Art.3 of the Convention in its procedural and material aspects and Art.6 § 1 of the Convention. In addition, the ECtHR obliged Ukraine to pay 16,000 EUR as compensation for moral damages incurred by the applicant due to violation of Art. 3 of the Convention to be paid to the applicant; 470 EUR as compensation for legal costs incurred in national proceedings; 2,200 EUR as compensation for legal costs incurred in court proceedings for payment to the bank account of the applicant's representative.

In the same year, the ECtHR also found violations of para. 1 and para. 3 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms *Vasyl Yakuba v Ukraine*.[38] In 2007, after a number of unspoken measures with fixation by technical means, Vasyl Yakuba was arrested with the use of physical force in connection with the sale of drugs.

36 Annual Report 2020 of the European Court of Human Rights, Council of Europe 2021 <https://www.echr.com.ua/wp-content/uploads/2021/02/ECHR_Annual_report_2020_ENG.pdf> accessed 4 February 2021.

37 Pankiv v Ukraine App No 37882/08 (ECtHR, 28 February 2019) <https://laweuro.com/?p=1207> accessed 4 February 2021.

38 Vasyl Jakuba v Ukraine App No 1452/09 (ECtHR, 12 May 2019) <https://laweuro.com/?p=1207> accessed 4 February 2021.

Subsequently, the examination showed characteristic features on the body, but the court decided that the force was applied within the limits of the law. The ECtHR found the accused person guilty of the crime, using video footage and written testimony from the agent as evidence. Although Mr Jakuba asked for a review of the video and the questioning of the witness, the relevant motions were not satisfied by the court. Appealing the verdict in the high courts was also unsuccessful.

In a statement submitted in 2009, the applicant claimed on the content of the provisions of Art.3 of the Convention that he was subjected to strict treatment by law enforcement agencies during his arrest, and he was not granted permission to review a video containing evidence of his sale of drugs to a secret agent (procurer) in accordance with Art.6 of the Convention, and that national courts did not provide him with the right to interrogate the procurer, in accordance with Art.34 of the Convention. The applicant denied the fact of selling drugs and complained that he was the victim of a provocation of the crime. His defence attorney persistently tried to prove that the applicant had purchased drugs for his own consumption and consumption of his friend only once, on 9 March 2007. In other words, the applicant tried to prove that he had committed a crime related to drugs, but he did not participate in three episodes of their acquisition, for which a stricter punishment was established. Consequently, the ECtHR faced the question of whether a criminal case against the applicant was indeed legally initiated, considering the inability to verify the identity of this person and view the video of the operational purchase.

The applicant also complained that the authorities refused to provide him with copies of the documents necessary to justify his application to the ECtHR. The ECtHR stated it was appropriate to consider this complaint under Art.34 of the Convention, which stipulates:

The Court may accept applications from any person, non-governmental organization or group of persons who consider themselves victims of the violation of the rights set forth in the Convention or protocols committed by one of the High Contracting Parties. The High Contracting Parties undertake not to impede in any way the effective exercise of this right.

The ECtHR concluded that the state authorities had not fulfilled their obligations under Art. 34 of the Convention due to the refusal to provide the applicant with copies of documents for an appeal to the Court. The applicant demanded 20,000 EUR for moral damages. Then, on 12 February 2019, the ECtHR noted that Ukraine violated para. 1 and para. 3 of Art. 6 of the Convention in regard to the recognition of unverified testimony of the agent as evidence against the applicant and not opening a video recording of operational procurement. The ECtHR also obliged Ukraine to pay 2,500 EUR in moral damages.

In addition to Ukraine's violation of Art. 3 of the Convention, the state often infringed on Art. 8 thereto on the protection of the human right to respect for its privacy. In this context, it should be noted the first decision made by the European Court of Human Rights regarding domestic violence in September *2020 in Levchuk v Ukraine*.[39] After the birth of triplets, the Levchuks were provided with social housing by the Rivne city council. The applicant's husband abused alcohol and threatened and caused physical violence against her. After the divorce, custody of all the children was transferred to the applicant. However, the applicant continued to live with her ex-husband in the same apartment. The father neglected his parental duties, did not carry out any financial participation in the upbringing of children, and continued ill-treatment of the mother of his daughters. The family often saw Mr Levchuk in a state of alcoholic intoxication and feared his unpredictable and aggressive behaviour. In 2016, Mrs Levchuk filed a lawsuit in the national local court to evict her ex-husband from

39 *Levchuk v Ukraine App No 17496/19* (ECtHR, 9 July 2020) <https://www.cde.ual.es/ficha/case-of-levchuk-v-ukraine-application-no-17496-19/> accessed 4 February 2021.

the apartment, claiming that living together in an apartment was incompatible with normal life. Judicial proceedings in the national legal system lasted more than two years at three levels of jurisdiction. The local court satisfied the claimant's claim. The Court of Appeal noted that under these circumstances, there was no reason to apply such a last resort as eviction, although the ECtHR noted the need to warn the offender that he needs to change his attitude to the rules of common living with family members after divorce. The Supreme Court upheld the conclusions of the appellate court.

In the decision in *Levchuk v Ukraine*, the ECtHR referred to the decision in *Volodina v Russia* (App No 41261/17) of 9 July 2019.[40] The ECtHR noted that its decision contained a summary of relevant international materials. In *Volodina v Russia*, the ECtHR relied on universally applicable standards in the field of combating violence against women, in particular, the Convention on the Elimination of Discrimination against Women (CEDAW) of 1979,[41] reports of the UN Special Rapporteurs, Recommendation of the Committee of Ministers of the Council of Europe 'On the Protection of Women from Violence' of 30 April 2002,[42] the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul of 11 May 2011,[43] etc.

The ECtHR also cited certain data from the OSCE study on violence against women. In conformity with this research, more than a quarter of women (26%) in Ukraine experienced physical and/or sexual abuse by a current or former partner. Two-thirds of women (65%) experienced psychological violence by intimate partners. This exceeds the gender-based violence average across the EU by 43% and is higher than in any other EU country. However, only 7% of women who experienced violence from their current partner and 12% of survivors of violence from their previous partner reported their experiences to the police.[44]

The ECtHR concluded in its decision that Ukraine had violated positive obligations to protect human rights to respect for privacy, ie, violation of Art. 8 of the Convention. In this decision, the ECtHR noted that by rejecting the woman's claim to evict her ex-husband, the national courts demonstrated an inability to conduct a comprehensive analysis of the situation and assess the risk of future psychological and physical violence against the applicant and children, and the duration of the trial put them at risk of further violence. The ECtHR stated that such a response of the courts to the applicant's claim for the eviction of her ex-husband did not meet the positive obligation of the state to ensure effective protection of the applicant from domestic violence.

There are many legal arguments supporting the recognition of the mandatory practice of the ECtHR for Ukraine. The most important legal acts are: the Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950', the First Protocol and Protocol Nos. 2, 4, 7, and 11 to the Convention of 17 July 1997, which states that Ukraine fully recognises the validity of Art. 46 of the Convention on the recognition of the jurisdiction of the European Court of Human Rights in all matters relating to the interpretation and application of the Convention, and Art. 17 of the Law of Ukraine 'On Enforcement of Decisions and Application of The Practice of the European Court of

40 *Volodina v Russia* App No 41261/17 (ECtHR, 9 July 2019) <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/volodina-v-russia-2019/> accessed 4 February 2021.

41 Convention on the Elimination of All Forms of Discrimination against Women 1979 (n 4).

42 Recommendation of the Committee of Ministers of the Council of Europe 'On the Protection of Women from Violence' of 30 April 2002 <https://rm.coe.int/16805c7d22> accessed 24 January 2021.

43 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 11 May 2011 <https://rm.coe.int/168008482e> accessed 24 January 2021.

44 O Kharitonova, *Court and Gender: ECHR issued its first decision against Ukraine regarding domestic violence, 2020* <https://50vidsotkiv.org.ua/sud-i-gender-yespl-vynis-pershe-rishennya-proty-ukrayiny-shhodo-domashnogo-nasylstva/> accessed 24 January 2021.

Human Rights' of 23 February 2006, which states that 'courts apply the Convention and the practice of the ECHR as a source of law when considering cases'.

Thus, the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' established a system of institutional mechanisms for the implementation of ECtHR decisions at the legislative level. In particular, on 1 April 2020, the Cabinet of Ministers of Ukraine adopted a Resolution on the establishment of a Commission on the implementation of decisions of the European Court of Human Rights. This decision is aimed at involving different public authorities to ensure the implementation of ECtHR decisions and to ensure the coordinated interaction of all branches of power – legislative, executive, and judicial. It is envisaged that in the future, the Commission's activities will contribute to the improvement of the situation related to the proper fulfilment of Ukraine's international obligations, which will significantly reduce the state budget expenditures for the implementation of ECtHR decisions. At the same time, the establishment of the Commission will have a positive result only if the implementation of ECtHR decisions will take into account the financial aspect of the implementation of decisions, the restoration of violated rights, and the prevention of new violations. The need for such measures is justified by the fact that the decisions of the ECtHR should become a model and guideline in the judiciary of our state. Based on the practice of international bodies, citizens of Ukraine have to be ensured the proper protection at the national level.

As of 2020, Ukraine ratified 16 protocols to the Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, on 1 August 2018, Protocol No. 16 to the Convention of 2 October 2013 came into force, allowing national courts to receive consultations in human rights cases in the ECtHR. The protocol was ratified by Ukraine with the application by Law No. 2156-VIII of 5 October 2017. Its adoption aims to strengthen the role of the ECtHR. In turn, it will contribute to the further implementation of the Convention in the national legal system. In particular, para. 1 of Art.1 of Protocol No. 16 states that the highest judicial institutions of one of the parties, as defined in accordance with Art.10, may apply to the ECtHR to provide advisory opinions on fundamental issues relating to the interpretation or application of the rights and freedoms defined by the ECtHR or its protocols. Art.1 of Protocol No. 16 also defines the circumstances under which national Higher Judicial Institutions can apply to the ECtHR. First, the case should be in the proceedings of the national high judicial institution, which has applied for an advisory opinion. Secondly, the national high judicial institution should indicate the reasons for its request and provide information on the relevant legal and factual circumstances of the case in the proceedings.

Protocol No. 16 entitles States Parties to the Convention independently – during its signing or submission to the storage of the ratification document – to determine in the application to the Secretary-General of the Council of Europe those higher courts that will have the right to apply to the ECtHR for advisory opinions. In accordance with Art.10 of Protocol No. 16, it is also determined that the Supreme Court is the highest court that is able to appeal to the European Court of Human Rights. Art.2 of Protocol No. 16 regulates that a panel of five judges of the Grand Chamber decides whether to accept a request for an advisory opinion. However, if a decision is made to refuse an advisory opinion, the Collegium should substantiate it.

The requirements for the ECtHR advisory opinions are set out in Art.4 of Protocol No. 16. Advisory opinions should be motivated and published. If the advisory opinion does not fully or partially express the unanimous opinion of the judges, each judge has the right to give a separate opinion. The advisory opinions are transferred to the requesting court and the High Contracting Party to which such a judicial institution belongs. In accordance with Art.5 of Protocol No. 16, advisory opinions are not binding.

With the entry into force of Protocol No. 16 due to the advisory opinions of the ECtHR, its case-law may significantly expand. Although the latter will not be binding on states whose

courts applied for their receipt (Art.5 of Protocol No. 16), they will create 'indisputable legal consequences' (Art. 11 of the Preliminary Conclusion on this PACE Commission Protocol) and will have binding force for the ECtHR itself. They will become part of its case-law along with decisions and decisions on the merits (judgments) of statements: 'The interpretation of the Convention and its protocols contained in such advisory opinions shall be similar in its effect to the correctly interpreted provisions established by the ECtHR in its decisions and rulings' (Art.27 of Comment No. 16). Therefore, the scope of the concept marked by the term 'Practice of the ECtHR' in the Law of Ukraine 'On the Enforcement of Decisions and Application of the Practice of the ECtHR' will require appropriate adjustment.[45]

## 5 CONCLUDING REMARKS

One of the most effective instruments for the protection of human rights within the Council of Europe is the ECHR with 16 protocols. The Convention has become the foundation of the whole complex of international legal regulation in the field of human rights, its legitimate interests and needs, and the starting point for civilized European states to implement universal human values.

In 2020, Ukraine continues to occupy third place among 47 Member States of the Council of Europe in terms of the number of appeals to the ECtHR. This situation is very disappointing, as it indicates numerous instances of improper protection of citizens' rights in their own state. In particular, the main issues raised in applications directed against Ukraine are violations of conditions of detention in prisons, the right to liberty and personal inviolability, the right to a fair trial, the right to free possession of their property, the right to respect for family life, etc. Non-compliance with these rights indicates not only the presence of problems at the national level but also ineffective judicial protection and significant gaps in domestic legislation.

Every year, there is an increasing number of complaints submitted to the ECtHR by citizens of Ukraine. It indicates that an urgent need to achieve maximum compliance of Ukrainian legislation with European standards in the field of human rights and prevent their violations still remains. This, in its turn, will help to reduce the number of appeals to the ECtHR. In particular, the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' in regard to payment and reimbursement, which currently do not correspond to the European requirements, and therefore, deprive Ukrainian citizens of the right to timely and fully compensation delivered by the ECtHR. Taking into account the fact that, according to statistics, the total or average duration of implementation of general measures against Ukraine (amendments to legislation and judicial or administrative practice, institutional changes) is approximately seven and a half years, there is an urgent problem of ensuring compliance with the Convention at the national level. Among the systemic problems stated by the ECtHR practice towards Ukraine, it is also necessary to indicate the lack of budget financing in Ukraine aimed at the implementation of the ECtHR decisions. In order to overcome this problem, in our opinion, it is necessary to create an appropriate register, which will contain confirmed information about the funds necessary to ensure the enforcement of court decisions.

The implementation of ECtHR decisions by Ukraine is a key and extremely important issue for the country. First of all, we are talking about the issue of Ukraine's international legal

45 Novelties of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms <https://ukrainepravo.com/international_law/european_court_of_human_rights/novely-protokolu-16-do-konventsiyi-pro-zakhyst-prav-lyudyny-i> accessed 25 January 2021.

responsibility, its obligations from the point of position of international law, and the ability to comply with its obligations in relations with international partners and the Council of Europe. Following the European integration course, Ukraine should take more responsibility for the implementation of decisions of international organisations and take the ECtHR proceedings as a basis.

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# EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: IMPACT ON POLISH LAW DEVELOPMENT

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## CONFLICT OF INTEREST

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## CONTRIBUTORS

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# EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: IMPACT ON POLISH LAW DEVELOPMENT

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***Abstract*** *The European Convention of Human Rights along with the case law elaborated by the European Court of Human Rights set an international procedural standard of a fair trial. It exerts a predominant influence not only on the creation and interpretation of European regulations connected with access to court and basic principles of the European justice system, but also on the interpretation of national constitutional laws in the realm of civil procedure.*

*Any evaluation of the impact of protecting human rights and fundamental freedoms on the form, shape and daily practice of the Polish justice system in terms of the remedies mechanism demands that a number of issues be taken into account, not only with regard to the imperative of securing the right to an effective remedy, but also the form and functioning of the same in Poland. They should be adequate in terms of protecting the interests of individual parties as well as public interest.*

The impact of Art. 10 of the Convention on the evolution of Polish law on protection of freedom of expression is invaluable. According to the analysis, ECtHR case law under Art. 10 of the ECHR has had a major influence on the decisions of Polish courts; in fact, in certain instances it led to significant changes in Polish legislation.

***Keywords:*** *European Convention on Human Rights; civil procedure; right to a fair trial; Poland.*

## 1 INTRODUCTION

The European Convention of Human Rights (hereinafter – the ECHR),[1] along with the case law elaborated by the European Court of Human Rights (hereinafter – the ECtHR),[2] set an international procedural standard of a fair trial. It exerts a predominant influence not only on the creation and interpretation of European regulations connected with access to

1 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5.

2 Strasbourg Court, ECtHR.

court and basic principles of the European justice system,[3] but also on the interpretation of national constitutional laws in the realm of civil procedure. Although Poland has been a party to the ECHR since 19 January 1993,[4] its impact on the Polish law has been significant even prior to this date.[5] The ECHR procedural standard comprises the guarantees of a *right to a court,* access to the court, fair trial, obtaining a judgement within a reasonable period of time and various sub-rights determining effectiveness of the proceedings. The components of a fair trial within the meaning of Art. 6 para. 1 ECHR, such as a right to a public hearing, equality of arms, adversarial principle, stability and finality of rulings (*res iudicata*), are congruent with the rules incorporated in Art. 45 (1) of the Polish Constitution, which only enhances their role by providing them with a double legal basis stemming from both the ECHR and the Constitution of the Republic of Poland.[6] The requirement of a fair trial applies to proceedings in their entirety. Thus, in order to take the reality of the domestic legal order into account, the Strasbourg Court has always attached a certain importance to judicial practice in examining the compatibility of domestic law with Art. 6 para. 1 ECHR.

## 2 INSTITUTIONAL COMPONENTS OF THE RIGHT TO A FAIR TRIAL

Right to a court along with a right to a fair trial are based on both institutional and procedural requirements. As regards the latter, the right to a fair hearing under Art.6 para. 1 ECHR demands that a case be heard by an independent and impartial tribunal. The concepts of 'independence' and 'impartiality' are closely linked and, depending on the circumstances, may require joint examination. The ECHR has consistently stressed that the scope of the State's obligation to ensure a trial by an 'independent and impartial tribunal' under Art. 6 para. 1 of the ECHR is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, to respect judgments and decisions of the courts, even when they do not agree with them. Thus, respecting the authority of the courts by the State is a prerequisite for public confidence in the courts and the rule of law. Therefore, the constitutional safeguards of independence and impartiality of the judiciary, i.e. theoretical guarantees, are not sufficient. They must be effectively incorporated into attitudes and practices at all levels of Government and legislature.[7] Compliance with this requirement is assessed on the basis of statutory criteria such as: the manner of appointment of the members of the court or tribunal and the duration of their term of office, the existence of sufficient safeguards against the risk of outside pressures and an appearance of independence.[8] However, the mere fact that judges are appointed by the executive does

3 Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR *I-01935*; Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc And CIBC Mellon Trust Company* [2009] ECR *I-02563*.

4 Polish Journal of Laws (Dziennik Ustaw) 1993, no 61, item 285.

5 P Grzegorczyk, K Weitz in L Bosek, K Safjan (eds), *Constitution of the Republic of Poland:* Commentary to article 45, note 3-4 (CH Beck 2016).

6 P Grzegorczyk, 'O konstytucjonalizacji prawa procesowego cywilnego' [On constitutionalisation of civil procedural law] (2012) 2 Kwartalnik Prawa Prywatnego 293; M Kutwin, 'Prawo do sądu w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka' [Right to a court in the case law of the Constitutional Tribunal and the the European Tribunal of Human Rights] (2018) 76 Studia Iuridica 266; A Łazarska, *Rzetelny proces cywilny (Fair civil trial)* (Lex 2012)*;* Z Czeszejko-Sochacki, 'Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)' [Right to a court in the light of the Constitution of the Republic of Poland] (1977) 11-12 Państwo i Prawo 86; J Wróblewski, 'Z zagadnień pojęcia ideologii demokratycznego państwa prawnego (analiza teoretyczna)' [From the realm of the meaning of ideology of a democratic legal state (a theoretical analysis] (1999) 6 Państwo i Prawo 9.

7 *Agrokompleks v Ukraine* App no 23465/03 (ECtHR 6 October 2011); *Beaumartin v France* App no 36813/97 (ECtHR 24 November 1994); *Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984).

8 *Ramos Nunes de Carvalho e Sá v Portugal* App nos 55391/13, 57728/13 and 74041/13 (ECtHR 6 November 2018).

not *per se* amount to a violation of Art. 6 para. 1 ECHR. The appointment of judges by the executive is permissible provided that the appointees are free from influence or pressure when carrying out their adjudicatory role. Cases involving intervention of the Minister of Justice in the appointment and removal from office of members of a decision-making body have also been addressed in the proceedings before the Strasbourg court.[9] It examined the specific case of judges' independence in relation to a decision by the judges' disciplinary body where judges appealing against a decision by that body come under the authority of the same body as regards their careers and disciplinary proceedings against them.[10] The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, in relation to their judicial superiors, may lead the Court to conclude that an applicant's doubts with regard to the independence and impartiality of a court have been objectively justified.[11]

As regards the situation in Poland,[12] amendments of systemic regulations governing the organization and functioning of judiciary bodies (in particular, judicial appointments, implemented since the effective date of the Act of December 8th 2017, amending the Act on the National Council for the Judiciary and certain other Acts[13] as well as the practical application of solutions implemented by the legislature) have given rise to doubts that they may depart too far from the standards for courts set in international and national law. The criteria to be met by judges who adjudicate cases are essential to compliance with those standards, specifically, independence and impartiality of judges and independence of the court as a public body which administers justice. Such doubts have been referred nationally[14] and – under Art. 267 of the Treaty on the Functioning of the European Union – to the Court of Justice of the European Union.[15] Similar questions will also be reviewed by the Strasbourg Court, which has recently accepted to examine the application of a Polish judge who was adversely affected by the abovementioned legislative amendments.[16]

Polish questions and applications referred both to the European Court of Human Rights and the Court of Justice of the European Union essentially focused on the compliance of regulations governing the appointment of judges of common courts and the Supreme Court which define the systemic position of the Disciplinary Chamber of the Supreme Court with international law, as well as the effect of the departure from the previously applicable procedures of judicial appointment and the status of persons who took office after appointment in proceedings carried out since the effective date of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. The applicants raised doubts as to whether the changes to the system of judicial appointments and the new method

9 *Brudnicka and others v Poland* App no 54723/00 (ECtHR 3 March 2005).

10 *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018); *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR judgement, 9 January 2013).

11 *Agrokompleks v Ukraine* (n 7); *Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009).

12 J Sobczak, 'Niezawisłość sędziowska i niezależność sądów. Problem ważny i ciągle aktualny' [Independence of judges and independence of courts. A valid and incessantly present problem] (2015) 4 Gdańskie Studia Prawnicze – Przegląd Orzecznictwa 79; Łazarska (n 6); A Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach: wymiar sprawiedliwości w pułapce sprawności* (Wolters Kluwer Polska 2018).

13 Polish Journal of Laws (Dziennik Ustaw) 2018, item 3.

14 Case III KO 154/18 [2019] Polish Supreme Court.

15 Case III CZP 25/19 [2019] Decision of a formation of seven judges of the Polish Supreme Court OSNC 10:99; Case II PO 3/19 [2019] Polish Supreme Court; Case III PO 7/18 [2018] Polish Supreme Court; Case III PO 8/18 [2018] Polish Supreme Court; Case III 9/18 [2018] Polish Supreme Court; Case II GOK 2/18 [2019] Polish Supreme Administrative Court; Case I Aca 649/19 [2019] Appeal Court of Kraków.

16 M Jałoszewski, M Pankowska, 'Trybunał w Strasburgu zbada nielegalne rozwiązanie przez PiS starej KRS' (*Oko.press*, 19 May 2020) <https://oko.press/trybunal-strasburgu-zbada-nielegalne-rozwiazanie-przez-pis-starej-krs/> accessed 22 January 2021.

of appointing judges to the office affect the status of persons who were appointed as judges in that period of time.

In the meantime, the abovementioned issues were also examined by the Polish Supreme Court in a resolution of the combined Civil Chamber, Criminal Chamber and Labour and Social Security Chamber of 23 January 2020.[17] The combined chambers ruled that a court is unduly appointed within the meaning of Art. 439(1)(2) of the Polish Code of Criminal Procedure or a court formation is unlawful within the meaning of Art. 379(4) of the Polish Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017[18] if the defective appointment causes, under given circumstances, a breach of standards of independence within the meaning of Art. 45(1) of the Constitution of the Republic of Poland, Art. 47 of the Charter of Fundamental Rights of the European Union and Art. 6 para. 1 of the ECHR.

As regards the possible outcome of the pending Polish cases, it is worth mentioning that the Strasbourg Court stated a violation of Art. 6 para. 1 ECHR in a judgement of 12 March 2019, *Guðmundur Andri Ástráðsson v. Iceland*.[19] It concluded that the process by which A.E. was appointed a judge of the Court of Appeal – taking account of the procedural violations of domestic law as confirmed by the Supreme Court of Iceland – was a flagrant breach of the applicable rules at the time. The executive exercised undue discretion in the choice of four judges, including A.E., which was coupled with the Parliament failing to adhere to the legislative scheme enacted to secure an adequate balance between the executive and legislative branches in the appointment process. According to the Strasbourg Court, this situation was to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law. Possibly, the Court might adopt a similar approach while examining the Polish application.

The impartiality of courts and tribunals is determined on the basis of the objective test connected with the court itself (its composition, appearance of impartiality etc.) as well as a subjective test, dealing with the personal conviction and behavior of a particular judge.[20] Thus, in some cases where it may be difficult to prove judge's subjective impartiality, the requirement of objective impartiality provides an additional guarantee. As the Strasbourg Court put it, 'justice must not only be done, it must also be seen to be done.'[21] This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, it is decisive whether this fear can be objectively justified.

On several occasions the Strasbourg Court examined Polish applications concerning grounds for exclusion of a judge and its impact on civil proceedings.[22] The assessment of whether the participation of the same judge at different stages of a civil case complies with the requirement of impartiality laid down by Art. 6 para. 1 ECHR is to be made on a case-by-case basis, taking into account circumstances of the individual case.[23] As the Court stated in

17 Case no BSA I-4110-1/20 [2020] Resolution of the joined Chambers of the Supreme Court.

18 Polish Journal of Laws (Dziennik Ustaw) 2018, item 3.

19 *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR 12 March 2019).

20 *Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009); *Morel v France* App no 34130/96 (ECtHR 6 June 2000); *Wettstein v Switzerland* App no 33958/96 (ECtHR 21 December 2000).

21 *Olujic v. Croatia* App no 22330/05 (ECtHR 5 February 2009) note 63.

22 J Barcik, 'Wyłączenie sędziego w orzecznictwie ETPCz w świetle spraw polskich, Iustitia' [Exclusion of a judge in the ECHR case law in the light of Polish applications] (2014) 4 Iustitia 173.

23 *Pasquini v San Marino* App no 50956/16 (ECtHR 2 May 2019).

*Toziczka v. Poland,*[24] it is necessary to consider whether the link between substantive issues determined at various stages of the proceedings by same judge is so close as to cast doubt on the impartiality of the judge participating in the decision-making process at all these stages.[25] The Court found a violation of the principle of impartiality as a judge who had already ruled on the case was required to decide whether or not he had erred in his earlier decision.[26] As regards the case *Warsicka v. Poland,*[27] the ECtHR stated that the requirements of a fair hearing, such as guaranteed by Art. 6 para. 1 of the ECHR, do not automatically prevent the same judge from successively performing different functions within the framework of the same civil case. In particular, it is not *prima facie* incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined. The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Art. 6 para. 1 ECHR is to be made with regard to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge. It is worth mentioning in this context that the Polish Constitutional Tribunal ruled in a judgement of 20 July 2004, SK 19/02, that Art. 48 para. 1 (5) of the Polish Code of Civil Procedure – which states that 'a judge shall be excluded by operation of this Act in cases where he/she co-issued in the court of a lower instance the ruling that is subject to appeal, as well as in cases relating to the validity of a legal act co-issued by the judge or heard by the judge, or in cases where the judge acted as the prosecutor' – shall be subject to an extensive interpretation. Namely, the exclusion shall concern not only judges *directly* subordinate to the court of appeal, but to all judges of lower instance who had connection with the case.

## 3 PROCEDURAL COMPONENTS OF THE RIGHT TO A FAIR TRIAL

The right to a court is not absolute. It may be subject to limitations,[28] but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.[29] A limitation will not be compatible with Art. 6 para. 1 ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In this context, a number of cases involving Polish nationals concerned the effectiveness of legal aid, representation and costs. Among the judgements which concerned these issues, the case *Siałkowska v Poland*[30] should be

24 *Toziczka v Poland* App no 29995/08 (ECtHR 24 July 2012).

25 M Jankowska-Gilberg, A Rutkowska, 'Udział tego samego sędziego w rozpoznawaniu danej sprawy w różnych fazach postępowania a gwarancja bezstronności sądu' [Participation of the same judge in examining a case at different stages of proceedings versus the guarantees of impartiality of the court] (2013) 18 Monitor Prawniczy 1000.

26 See also *Driza v Albania* App no 33771/02 (ECtHR 13 November 2007).

27 *Warsicka v Poland* App no 2065/06 (ECtHR 16 January 2007).

28 N Półtorak in A Wróbel (ed), *Karta Praw Podstawowych Unii Europejskiej. Komentarz [The Charter of Fundamental Rights of the European Union. Commentary]:* Commentary to article 6 (CH Beck 2013) 1225.

29 *De Geouffre de la Pradelle v France* App no 12964/87 (ECtHR 16 December 1992); *Naït-Liman v Switzerland* App no 51357/07 (ECtHR 18 March 2018).

30 *Siałkowska v Poland* App no 8932/05 (ECtHR 22 March 2007); *Staroszczyk v Poland* App no 59519/00 (ECtHR 22 March 2007); *Smyk v Poland* App no 8958/04 (ECtHR 28 July 2009); *Żebrowski v Poland* App no 34736/06 (ECtHR 3 November 2011). See also MA Nowicki, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń* (Wolters Kluwer 2008) 97; M Górski, 'Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 3.11.2011 r. w sprawie Kazimierz Żebrowski v. Polska, skarga nr 34736/06' 2011 LEX/el.

mentioned. The Polish law of civil procedure requires that a party to civil proceedings be assisted by an advocate or legal counsel in the preparation of his or her cassation against a judgment issued by a second-instance court and that a cassation drawn up by the party herself, without legal representation, will be rejected by the court. The ECtHR accepts that this requirement cannot *per se* be regarded as contrary to the requirements of Art. 6 of the ECHR. In the *Siałkowska* case the Court of Appeal allowed the applicant's request for legal aid for the purpose of cassation proceedings. Subsequently, the local bar assigned advocate Z.W. to represent the applicant. The copy of the second-instance judgment was served on him on 9 November 2004. Under the applicable provisions of the Polish law the thirty-day time-limit for lodging the cassation appeal started to run from that date. It was to expire on 9 December 2004. The lawyer advised the applicant, by a written opinion dated 3 December 2004 that, in his view, a cassation against the judgment of the appellate court did not offer reasonable prospects of success. Subsequently, he met with the applicant in his office on 6 December 2004. During this meeting he reiterated that he believed that there were no grounds on which to prepare the appeal.

As regards the *Siałkowska* case, the Strasbourg Court considered that it is not the role of the State to oblige a lawyer, whether appointed *ex officio* or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion concerning the prospects of success of such an action or remedy. However, it remarked that it is necessary to set requirements for a decision to fully forgo an appeal by a lawyer in order to protect the appellant's right to access higher courts. One such requirement is a reasonable time-frame to communicate the decision to the appellant. The European Court of Human Rights emphasized that it is the responsibility of the State to ensure a requisite balance between effective enjoyment of access to justice on one hand and the independence of the legal profession on the other. Consequently, the Court observed that the applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation. When the applicant and the lawyer met, the time-limit for lodging of a cassation appeal was to expire in three days. The ECtHR remarked that in the circumstances of the *Siałkowska* case, it would have been impossible for the applicant to find a new lawyer under the legal-aid scheme. Consequently, the shortness of time left to the applicant to undertake any steps to have the cassation appeal in her case prepared did not give her a realistic opportunity of having her case brought to and argued before the cassation court. In the light of the circumstances of the case seen as a whole, the Strasbourg Court was of the view that the applicant was put in a position in which her efforts to have access to a court secured in a 'concrete and effective manner' by way of legal representation appointed under the legal aid system, failed.

Under the circumstances of subsequent cases, *Staroszczyk v. Poland*[31] and *Tabor v. Poland,*[32] the ECtHR reiterated that the refusal of a legal aid by a lawyer should meet certain quality requirements, which at the time were lacking in Polish law. In particular, the refusal of an *ex officio* attorney to grant legal aid must not be formulated in such a way as to leave the client in a state of uncertainty as to its legal grounds. The Court observed that under the applicable Polish regulations the lawyer was not obliged to prepare a written legal opinion on the prospects of the appeal, nor did the law set any standards as to the legal advice he was supposed to give in order to justify his refusal to lodge a cassation. As a result, the lawyer in the *Staroszczyk* case did not prepare such an opinion and only informed the applicants orally about his refusal to lodge a cassation on their behalf. The ECtHR remarked that if the requirements concerning the written form of refusal to draw up a cassation had existed in Polish law, they would have rendered possible an objective *post hoc* assessment of whether the refusal to prepare the cassation appeal in a given individual case had been arbitrary. This is particularly important in view of the difficulties involved in such an assessment.

31 *Staroszczyk v Poland* (n 30).

32 *Tabor v Poland* App No 12825/02 (ECtHR 27 June 2006).

Consequently, the lack of the written form of refusal left the applicants without necessary information as to their legal situation and, in particular, the chances of their cassation to be accepted by the Supreme Court. The mere fact that the timing of the refusal seemed unobjectionable could not cure this deficiency.

In order to overcome these problems, Art. 118 of the Polish Code of Civil Procedure (hereinafter – PCCP) was subject to an amendment by Act of 17 December 2009, in which the requirements stipulated by ECHR were addressed. Art. 118 para. 5-6 PCCP presently states that:

> Where an attorney or legal advisor appointed *ex officio* in connection with cassation proceedings or action at a plea of illegality of a non-appealable ruling does not find any grounds to file a claim, he/she shall promptly notify the party and the court, however no later than two weeks from the date of being notified of the appointment. A notice by an attorney or legal advisor shall be accompanied by their opinion on the lack of grounds to file a claim. Such an opinion is not attached to the case files and is not served on the opposite party. If an opinion referred to in para. 5 is not drawn up with due diligence, the court shall report this fact to the relevant legal self-governing body. In this case, the competent Regional Bar Council or Council of the Regional Chamber of Legal Advisors shall appoint another attorney or legal advisor. If a party does not agree with a negative opinion of an attorney appointed *ex officio*, she still has sufficient time to find an attorney of her choice, who will submit the cassation on her behalf and at her cost.[33]

Hence, a legal aid system may exist which selects cases which qualify for it. However, the system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness.[34] It is therefore important to have due regard to the quality of a legal aid scheme within a State and to verify whether the method chosen by the authorities is compatible with the ECHR. It is essential for the court to give reasons for refusing legal aid and to handle requests for legal aid with diligence.

The strict requirement to be represented by a professional lawyer before the cassation court is not in itself contrary to Art. 6 ECHR, as stated in *Tabor v. Poland*.[35] In addition to that, it is worth mentioning that Art. 6 ECHR does not provide, as such, a right to appeal to a higher court from a decision of a lower court. Only where the domestic procedure foresees such a right, Art. 6 ECHR will apply to the superior stages of court jurisdiction – the ability to apply for two or more stages of court review is therefore a non-autonomous requirement of Art. 6 ECHR.[36] By contrast to the stance adopted by the Strasbourg Court, the Polish Constitutional Tribunal and the Polish legislator offer to a party a much wider possibility of appealing judgements and other procedural decisions, which does not contribute the stability and finality of court rulings in Poland.

The right to a fair trial, as guaranteed by Art. 6 para. 1 ECHR, requires that litigants should have an *effective* judicial remedy enabling them to assert their civil rights. Art. 6 para. 1 may therefore be relied on by anyone who considers that an interference with the exercise of one of his or her civil rights is unlawful. As already mentioned, the 'right to a court' may be subject to limitations only as long as these limitations do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. In this context a significant number of cases filed by Polish nationals before the

33 M Sieńko in M Manowska (ed), *Kodeks postępowania cywilnego [Code of civil procedure]:* commentary to article 118 (Lex 2020).

34 *Del Sol v France* App no 46800/99 (ECtHR 26 February 2002); *Aerts v Belgium* App no 61/1997/845/1051 (ECtHR 30 July 1998).

35 *Tabor v Poland* (n 32).

36 *Delcourt v Belgium* App no 2689/65 (ECtHR 17 January 1970).

ECHR concerned the problem of excessive cost of the proceedings[37] or the court's failure to correctly assess the grounds for a party's exemption from incurring court fees.[38] In cases such as *Kreuz v. Poland*[39] and *Podbielski and PPU Polpure v. Poland,*[40] the practical and effective nature of the right of access to a court was at risk, in particular, due to the prohibitive cost of the proceedings in view of the individual's financial capacity. In these cases, the ECtHR considered the question of court fees which had the effect of hindering access to the first-instance court or at a subsequent stage of the proceedings for applicants who were unable to pay. The Court has held that the requirement to pay fees to civil courts in connection with claims, or appeals, generally cannot be regarded as a restriction on the right of access to a court that is incompatible *per se* with Art. 6 para. 1 of the ECHR. However, the amount of the fees assessed in the light of the circumstances of a particular case, including the applicant's ability to pay, and the phase of the proceedings at which that restriction has been imposed constitute the factors which are crucial in determining whether a person was unjustly deprived of access to court.

In the circumstances of these cases and having regard to the prominent place held by the right to a court in a democratic society, the ECtHR considered that the judicial authorities failed to secure a proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts. The Strasbourg Court therefore concluded that the imposition of court fees on the applicant constituted a disproportionate restriction on his right of access to a court. Unfortunately, the recent developments in Polish Civil Procedure can be negatively evaluated in this respect, as either new court fees are introduced or the existing ones are raised.[41]

Nevertheless, the judgement in the case *Podbielski and PPU Polpure* has been frequently cited in the Polish case law, including in a decision of the Polish Constitutional Tribunal of 17 November 2008, SK 33/07. It is worth mentioning that the problem of excessive costs and legal aid is among the most common issues examined by this court.[42] In its rulings it tends to enlarge the scope of admissibility of legal aid. It has also examined on many occasions technical procedural issues in order to eliminate excessive procedural formalism. These issues included sanctions connected with the incorrect usage of procedural forms, service of judicial documents, preclusion.[43] In this way the Polish Constitutional Tribunal prompted amendments in civil procedure with a view to render the right to court in a more practical and effective way.

The parties to civil proceedings are required to show diligence in complying with the procedural steps relating to their case. In assessing whether the 'requisite diligence' was displayed in pursuing relevant procedural actions, it should be established whether or not the applicant was duly represented during the proceedings. This also applies to prisoners,

37 A Rutkowska, 'Koszty polskiego procesu cywilnego a prawo do sądu – analiza orzecznictwa krajowego oraz ETPCz' (2015) 18 Monitor Prawniczy 997.

38 *Sepczyński v Poland* App no 78352/14 (ECtHR 26 April 2018); *Mogielnicki v Poland* App no 4268/09 (ECtHR 15 September 2015); *Teltronic – CATV v Poland* App no 48140/99 (ECtHR 10 January 2006); *Kreuz v Poland* App no 28249/95 (ECtHR 19 June 2001); *Jedamski and Jedamska v Poland* App no 73547/01 (ECtHR 26 July 2005).

39 *Kreuz v Poland* App no 28249/95 (ECtHR 19 June 2001).

40 *Podbielski and PPU Polpure v Poland* App no 39199/98 (ECtHR 26 July 2005).

41 A Mendrek, '*Nowe unormowania kosztów sądowych w sprawach cywilnych wynikające z nowelizacji z 4.07.2019*' *[New court fees regulations in civil matters as amended by the Act of 4.07.2019] (2019) 11-12 Palestra* 215.

42 Grzegorczyk (n 6) 327-328.

43 Case P 37/07 [2008] Judgement of the Polish Constitutional Tribunal; Case SK 89/06 [2008] Judgement of the Polish Constitutional Tribunal; Case SK 9/02 [2003] Judgement of the Polish Constitutional.

because the concept of 'diligence normally required from a party to civil proceedings' is a matter to be assessed in the context of imprisonment, as examined in *Parol v. Poland,*[44] and *Kunert v. Poland,*[45] with regard to prisoners who were not assisted by a lawyer. The principle of 'equality of arms' in the sense of a 'fair balance' between the parties is inherent in the broader concept of a fair trial and is closely linked to the adversarial principle. As regards cases opposing the prosecuting authorities and a private individual, the prosecuting authorities may enjoy a privileged position justified for the protection of the legal order. However, this should not result in a party to civil proceedings being put at an undue disadvantage vis-à-vis the prosecuting authorities, as stated in *Stankiewicz v. Poland.*[46]

Art. 6 para. 1 ECHR lays down, among others, the right to a public hearing. The Strasbourg Court often states that litigants have a right to a public hearing because this protects them against the administration of justice in secret and with no public scrutiny. By rendering the administration of justice visible, a public hearing contributes to the achievement of the aim of Art. 6 para. 1, namely a fair trial. While a public hearing constitutes a fundamental principle enshrined in Art. 6 para. 1, the obligation to hold such a hearing is not absolute.[47] The right to an oral hearing is not only linked to the question whether the proceedings involve the examination of witnesses who will give their evidence orally. To establish whether a trial complies with the requirement of publicity, it is necessary to consider the proceedings as a whole.[48]

As regards the right to a public hearing, the Polish Code of Civil Procedure has recently been subject to one of the vastest amendments since its enactment in 1964.[49] The legislative action was aimed at simplifying and accelerating court proceedings.[50] In order to fulfil this goal, the lawmaker resolved to reform selected aspects of civil procedure which, in his/her view, hindered the effective course of the proceedings and a relatively quick adjudication of the case. Some of these changes adversely affect the right to a public hearing, which is significant considering the prominent role of this fundamental procedural right. The Act of 4 July 2019 widened the spectrum of situations in which the Polish Code of Civil Procedure allows the court to pass a judgement on the merits in camera, i.e. without conducting a public hearing.[51] The Act of 4 July 2019 introduced amendments also when it comes to examining an appeal at the court session held in camera. Situations in which the court passes the verdict without holding a public hearing should happen under exceptional circumstances because they diverge from the 'right to public hearing' guaranteed under art. 6 para. 1 ECHR, art. 45 (1) of the Constitution of the Republic of Poland, Art. 9 para. 1 sentence 1 *in principio* PCCP and Art. 148 para. 1 *in fine* PCCP. Therefore, some amendments introduced to the Polish civil procedure by the Act of 4 July 2019 are worth praising as they help to speed up the civil process in a good way. Others are more controversial as they overlook important aspects of the right to a fair and public hearing. The legislator should always keep in mind that parties to the proceedings are interested in a transparent judicial process. Therefore, adjudicating the case in camera should be regarded as an exception to the rule. The right to a fair trial as well as public control over it, constitute an indispensable element of the proper functioning

44 *Parol v Poland* App no 65379/13 (ECtHR 11 October 2018).

45 *Kunert v Poland* App no 8981/14 (ECtHR 4 April 2019).

46 *Stankiewicz v Poland* App no 46917/99 (ECtHR 6 April 2006).

47 *De Tommaso v Italy* App no 43395/09 (ECtHR 23 February 2017).

48 *Axen v Germany* App no 8273/78 (ECtHR 8 December 1983).

49 The Act of 4 July 2019 on the amendment of the Polish Code of Civil Procedure and other laws, Polish Journal of Laws 2019, item 1469.

50 Cf. the written explanation accompanying the Government's bill on the amendment of the Polish Code of Civil Procedure and other laws, Sejm's legislative materials no 3137.

51 See in detail A Gołąb, 'Recent developments in Polish civil procedure in the field of public hearing' 2020(1) Access to Justice in Eastern Europe.

of judicial system. Hopefully, Polish courts will exercise restraint in taking advantage of the new possibilities of adjudicating civil cases in camera.

The guarantees enshrined in Art. 6 para. 1 include the obligation for courts to give sufficient reasons for their decisions. A reasoned decision shows the parties that their case has truly been heard. The reasons given must be such as to enable the parties to make effective use of any existing right of appeal. The Court has accepted summary reasoning where the appeal on the merits itself had no prospect of success, such that a reference for a preliminary ruling would have had no impact on the outcome of the case,[52] for example where the appeal did not satisfy the domestic admissibility criteria.[53] However, higher courts with responsibility for filtering out unfounded appeals and cassations are required to give reasons for their refusal to accept an appeal for adjudication.[54] In order to comply with these requirements, set by the ECHR and also in connection with the judgement of the Polish Constitutional Tribunal of 30 May 2007, SK 68/06, Art. 398[9] para. 2 of the Polish Code of Civil Procedure is interpreted in such a way that the Polish Supreme Court is obliged to provide written grounds when it refuses to accept a cassation for further examination on the merits.

The ECHR does not lay down rules on evidence as such. The admissibility of evidence, as well as the probative value of evidence, the burden of proof and the way it should be assessed, are primarily matters for regulation by national law and for assessment by the national courts. However, the proceedings in their entirety, including the way in which the evidence is permitted, must be 'fair' within the meaning of Art. 6 para. 1 ECHR. Where courts refuse requests to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the litigant's ability to present arguments in support of his/her case, as confirmed in *Wierzbicki v. Poland*. Although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions. As the evidence proceedings should respect the guarantees of fair trial, the Polish Supreme Court, as well as the Polish legal doctrine present a rather reserved stance towards accepting illicit means of evidence such as tapes of secretly recorded conversations.[55] In the deliberations on the admissibility of such evidence they often refer to the ECtHR case law on Art. 6 para. 1.

The case law of ECtHR had an impact on Polish procedural law also in respect of partially incapacitated individuals, which is evidenced by the judgement of 16 October 2012, *Kędzior v. Poland*.[56] ECtHR stated that the right of access to court by its very nature calls for regulation

52 *Stichting Mothers of Srebrenica and Others v the Netherlands* App no 65542/12 (ECtHR 11 June 2013).

53 *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v Greece* App nos 29382/16 and 489/17 (ECtHR 9 May 2017).

54 A Torbus, 'W sprawie braku obowiązku uzasadnienia postanowienia Sądu Najwyższego o odmowie przyjęcia skargi kasacyjnej w kontekście prawa do sądu' [On the lack of duty to provide a statement of reasons in the Supreme Court's decisions refusing to accept a case for further examination] (2007) 1 Przegląd Sądowy 46.

55 D Korszeń, 'Zakres zakazu przeprowadzania w postępowaniu cywilnym dowodów legalnych (bezprawnych)' [The scope of the prohibition to collect illicit (unlawful) evidence in civil proceedings] (2013) 1 Monitor Prawniczy 5; E Wengerek, 'Korzystanie w postępowaniu cywilnym ze środków dowodowych uzyskanych sprzecznie z prawem' [Using unlawful means of evidence in civil proceedings] (1997) 2 Państwo i Prawo 40; F Zedler, 'Dopuszczalność dowodu z taśmy magnetofonowej w postępowaniu cywilnym' [Admissibility of a tape recording evidence in civil proceedings] in E Łętowska (ed), *Proces i Prawo. Księga pamiątkowa ku czci Profesora Jerzego Jodłowskiego [Process and Law. A collection of essays dedicated to Professor Jerzy Jodłowski] (*Wrocław 1989) 539, A Laskowska, 'Dowody w postępowaniu cywilnym uzyskane sprzecznie z prawem' [Unlawful evidence in civil proceedings] (2003) 12 Państwo i Prawo 96; M Krakowiak, 'Potajemne nagranie na taśmę w postępowaniu cywilnym' [A secret tape recording in civil proceedings] (2005) 24 Monitor Prawniczy 1250.

56 *Kędzior v Poland* App no 45026/07 (ECtHR 16 October 2012).

by the State and may be subject to limitations. Nevertheless, the limitations applied must not restrict the individual rights in such a way or to such an extent that the very essence of that right is impaired. A limitation will violate the ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. As regards the partially incapacitated individuals, the ECtHR has stated that given the trends emerging in national legislation and the relevant international instruments, Art. 6 para. 1 of the ECHR must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity.[57] In other words, there is a trend at European level towards granting legally incapacitated individuals direct access to the courts to seek restoration of their capacity.

In *Kędzior* case, the applicant, who has been totally deprived of legal capacity, complained that between March and October 2007 he was prevented from directly applying to a court to have his capacity restored in spite of the Polish Constitutional Court's judgment of 7 March 2007. The ECtHR has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of 'civil rights and obligations.' In this case the question concerned admissibility of legally incapacitated persons to *directly* institute proceedings to have a legal incapacitation order varied on their own motion. The Strasbourg Court reiterated that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty.[58] The Court concluded that the applicant was deprived of a clear, practical and effective opportunity to have access to court in respect of his request to restore his legal capacity. All in all, the system was therefore not sufficiently coherent and clear.[59] The infringement of Art. 6 para. 1 was eliminated by the amendment of the Polish Code of Civil Procedure of 9 May 2007, which entered into effect on 7 October 2007. The amendment concerned Art. 559 of the Polish Code of Civil Procedure, to which a new para. 3 was added ('An application to set aside or change the state of legal incapacity may also be filed by the incapacitated person herself').

Another important issue has to do with the length of civil proceedings, as justice delayed is, in fact, justice denied. Therefore, the Member States to the ECHR are required to organise their judicial systems in such a way that their courts are able to guarantee everyone's right to a final decision on disputes concerning civil rights and obligations within a reasonable time.[60] The reasonableness of the length of proceedings coming within the scope of Art. 6 para. 1 ECHR must be assessed in each case according to the particular circumstances, which may call for a global assessment of the proceedings as a whole, such as performed for instance in the case *Majewski v. Poland*.[61] In order to combat the excessively long civil proceedings the Polish legislator introduced changes aimed at simplifying and accelerating the proceedings. Some of these changes concerned the possibility of filing procedural documents via Internet,

57 *Stanev v Bulgaria* App no 36760/06 (ECtHR 17 January 2012).

58 *Shtukaturov* App no 44009/05 (ECtHR 27 March 2008).

59 Cf P Rylski, 'Legitymacja osoby, której dotyczy wniosek do żądania ubezwłasnowolnienia samej siebie' [Legitimation of a person to apply for her own legal incapacitation] in A Laskowska-Hulisz, J May, M Mrówczyński (eds), *Honeste Procedere. Księga jubileuszowa dedykowana Profesorowi Kazimierzowi Lubińskiemu [Honeste procedure. A jubilee book dedicated to Professor Kazimierz Lubiński]* (Wolters Kluwer 2017) 451 ff; M Walasik, 'Skuteczność pełnomocnictwa procesowego udzielonego przez osobę z zaburzeniami psychicznymi' [Effectiveness of a power of attorney granted by a mentally unstable person] (2015) 23 Monitor Prawniczy 1259.

60 R Arnold, 'Prawo do rozpatrzenia sprawy w rozsądnym terminie (art. 6 Europejskiej Konwencji Praw Człowieka)' [Right to having a case examined within reasonable time (art. 6 of the European convention of Human Rights)] (1999) 2 Monitor Prawniczy 41; K Mazurek, 'Przewlekłość postępowania w sprawach cywilnych' [Excessive length of proceedings in civil cases] (2018) 3 Edukacja Prawnicza 24.

61 *Majewski v Poland* App no 52690/99 (ECtHR 11 October 2005).

transmitting procedural documents in an electronic form via electronic transmission bureau.[62] They also included the possibility of holding a court session by means of technical devices which allow to hear a witness at distance; adjudicating certain cases in camera and combating abusive practices of parties to the civil proceedings.[63]

Art. 6 para. 1 ECHR also protects the implementation of final, binding judicial decisions. The right to execution of such decisions, given by any court, is an integral part of the 'right to a court.' Otherwise, the provisions of Art. 6 para. 1 ECHR would be deprived of all useful effect. The refusal of an authority to take account of a ruling given by a higher court – leading potentially to a series of judgments in the context of the same set of proceedings, repeatedly setting aside the decisions given – is also contrary to Art. 6 para. 1 ECHR, as stated in *Turczanik v. Poland*.[64]

In contrast to the ECtHR, as of today the Polish Constitutional Tribunal did not examine the issue of the potential clash between the right to access to court and the procedural immunities of public international law.[65] As regards the Supreme Court of Poland,[66] it stated that given basic congruency between the scope of Art. 6 (1) ECHR and Art. 45 (1) of the Polish Constitution, the right to court is not infringed when a foreign state is given immunity in a case concerning a claim *ex delicto* with regard to a deed performed by German armed forces in Poland during WWII.[67] This case law is in compliance with the stance presented by the Strasbourg Court, which asserted that the doctrine of foreign State immunity is generally accepted by the community of nations.[68] Measures taken by a member State which reflect generally recognized rules of public international law on State immunity do not automatically constitute a disproportionate restriction on the right of access to court.[69]

## 4 RIGHT TO AN EFFECTIVE REMEDY

Art. 13 of the ECHR references an effective remedy.[70] The ECtHR case law points out that it ought to be interpreted as a provision guaranteeing *'effective remedy'* to the benefit of anyone claiming alleged violation of his or her rights and/or freedoms guaranteed under the ECHR.[71]

62 A Kościółek, '*Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym*' *[Electronic procedural activities in court civil proceedings]* (Lex 2012).

63 P Grzegorczyk, M. Walasik, F. Zedler (eds.), *Nadużycie prawa procesowego cywilnego (Abuse of civil procedural law),* Warsaw 2019, *passim.*

64 ECtHR judgement of July 5th 2005 in the case of Turczanik v. Poland, Application No. 38064/97.

65 ECtHR judgement of 14 January 2014 in the case of Jones and Others v. the United Kingdom, Application Nos. 34356/06 and 40528/06.

66 Decision of the Polish Supreme Court of October 29th 2010, OSNC 2011, No. 2, item 22.

67 P Lewandowski, *Cywilnoprawny immunitet jurysdykcyjny państwa pozwanego przed sądem innego państwa w zakresie czynów popełnionych w czasie konfliktu zbrojnego na terenie tego państwa (The civil jurisdiction immunity of a state sued before the court of a different state with regard to deeds performed at the time of an armed conflict on the territory of that state), Państwo i Prawo* 2011, No. 10, p. 129 *et seq.;* P Grzegorczyk, *Immunitet państwa w postępowaniu cywilnym (State immunity in civil proceedings),* Warsaw 2010, *passim.*

68 ECtHR judgement of June 11th 2013 in the case of Stichting Mothers of Srebrenica and Others v. the Netherlands, Application No. 65542/12.

69 ECtHR judgement of November 21st 2001 in the case of Fogarty v. the United Kingdom, Application No. 37112/97.

70 *"Everyone whose rights and freedoms are violated shall have an effective remedy before a national remedy notwithstanding that the violation has been committed by persons acting in an official capacity"*.

71 ECtHR judgment of September 6th 1978 in the case of Klass and others v. Germany, Application No. 5029/71; ECtHR judgment of June 16th 2011 in the case of Ciechońska v. Poland, Application No. 19776/04.

Guarantees expressed under said provision ought to be interpreted as a consequence of the fundamental principle of a democratic society, that is the rule of law. This provision – similarly to Art. 35 clause 1 of the ECHR – lays out the obligation of the state (derived from the subsidiarity principle) to protect every individual's human rights under the domestic legal system.[72] Consequently, any measures offering an option of remedying the effects of violations to freedoms and/or rights guaranteed under the ECHR should be exhausted before a case is filed in Strasbourg.[73] It shall be concluded that all respective remedies have been exhausted if the appellant had formerly advanced pleas before national courts of law, which pleas may subsequently be renewed in an application filed with the ECtHR.[74]

Furthermore, the regulation stipulated in Art. 13 references Art. 6 of the ECHR, which combines the right to one's case being resolved with no undue delay with the right to a fair trial, thus establishing an essential procedural standard, the delivery of or failure to adhere to which shall be subject to examination by the Court in Strasbourg, whereas the outcome of proceedings shall directly determine the existence, boundaries, and/or manner of exercising the right sought.[75] The subsidiarity principle does not imply a waiver of the ECtHR's control of Polish legal remedies. The effectiveness and efficiency of legal measures applied in Poland should be assessed from the viewpoint of key standards resulting from the ECHR and created by ECtHR case law. The Court's power to assess whether the formulation, interpretation and/or application of national law produce effects consistent with the principles of the ECHR is not called into question. In Poland, the consensus prevails that the subsidiarity principle in Strasbourg case law should provide for constant supervision of the outcomes of applying domestic measures.

Over the years, the largest number of violations identified by the ECtHR in Poland[76] concerned the violation of the right to have a case heard by a court within a reasonable time, and the right to a fair trial.[77] The question whether the rights guaranteed by the ECHR in the field are implemented in the practice of civil judicial proceedings should give rise to reflection. From such vantage point, it would be worthwhile to approach the issue of counteracting the protracted nature of proceedings, as well as the proper forming and functioning of the system of appeals in terms of the right to a fair trial.

72 MA Nowicki, *Komentarz do art. 13 Konwencji o ochronie praw człowieka i podstawowych wolności* (*Commentary to Article 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms*),[in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* (*Concerning the European Convention. Commentary to the European Convention on Human Rights*), *Lex* 2017.

73 M Krzyżanowska-Mierzejewska, *Krajowe środki odwoławcze przewidziane przez prawo polskie jako warunek dopuszczalności skargi indywidualnej do Europejskiego Trybunału Praw Człowieka. Wybór orzecznictwa organów kontrolnych Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności* (*Domestic Remedies under Polish Law as the Condition of Individual Application Admissibility before the European Court of Human Rights. Selected Case Law of Supervision Authorities of the European Convention on the Protection of Human Rights and Fundamental Freedoms*), [in:] H. Machińska (ed.), *Polska w Radzie Europy. 10 lat członkostwa. Wybrane zagadnienia* (*Poland in the Council of Europe. Ten Years of Membership. Selected Issues*), Warsaw 2002, p. 267 *et seq*.

74 ECtHR judgment of December 9th 2008 in the case of Dzieciak v. Poland, Application No. 77766/01.

75 M Romańska, *Skarga na naruszenie prawa strony do rozpoznania sprawy bez nieuzasadnionej zwłoki* (*Action concerning the Infringement of a Party's Right to Fair Trial without Undue Delay)* [in:] T. Ereciński (ed.), *System Prawa Procesowego Cywilnego* (*System of Procedural Civil Law*),vol. 3, *Środki zaskarżenia* (*Appeals*), J. Gudowski (ed.), Warsawa 2013, p. 1756.

76 M Górski, *Najnowsze wyroki ETPCz stwierdzające naruszenie Konwencji przez Polskę (Recent ECtHR Judgments to the Effect of Poland Violating the Convention), Europejski Przegląd Sądowy* 2012, No. 5, p. 31 *et seq*.

77 Other major cases concerned the conditions of serving prison terms, application of pre-trial detention (remand custody), and patient rights violation.

## 5 EFFECTIVE REMEDY VS. PROTRACTED PROCEEDINGS

One of the important issues is the approach of the Polish legislator and judicial practice to the issue of the speed and efficiency of civil proceedings from the means of redress perspective. The speed of resolving cases usually ties in with the effectiveness of a fair settlement.[78] Yet swifter proceedings should not be the main objective in any court proceedings, especially since ECtHR case law stipulates that the speed of proceedings should be *'reasonable'*, and that swifter proceedings should not be pursued at the expense of the court's findings.[79] It has been emphasised that any speed in handling individual stages of proceedings should be moderate, and subject to proper case examination.[80]

The length of proceedings remains one of the most serious *'diseases'* afflicting judicial proceedings in numerous countries, giving rise to a debate on an international level with regard to values and rights guaranteed under the ECHR.[81] Notably, proceedings against Poland – ECtHR judgment of 26 October 2000 in the case of *Kudła v. Poland*[82] became an incentive for all Member States setting up a system of remedies against protracted proceedings. This was the result of the ECtHR pointing to the need for an effective remedy before national authorities in the event of a breach of the right to a fair trial within a reasonable time, although the ECHR does not require the authority hearing the case to be judicial in nature.[83] While the Court's ruling referred to the lengthiness of criminal procedures, its implementation required solutions to be introduced for criminal, civil and administrative court case purposes.[84] It was argued that the right to fair trial, comprising the requirement of a reasonable proceeding time, shall be less effective if the internal legal order does not provide for the pre-emptive option of bringing an action against national authorities on such grounds.[85]

78 P Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym* (*Exercise of the Right to Trial in Civil Proceedings*), Warsaw 2005, p. 11 *et seq*.

79 ECtHR judgment of 21 February 2006 in the case of Seker v. Turkey, Application No. 52390/99.

80 ECtHR judgment of 24 March 2009 in the case of Mosiejew v. Poland, Application No. 11818/02.

81 Cz.P. Kłak, *Skarga na przewlekłość postępowania a rozwiązania przyjęte w wybranych krajach europejskich jako „środki odwoławcze" na nadmierną długość postępowania – podobieństwa i różnice (cz.1)* (*Action Regarding Protracted Proceedings vs. Solutions Adopted in Selected European Countries as "Remedies" against Protracted Proceedings – Similarities and Differences, Part One*), *Palestra* 2012, Nos. 3-4, p. 49 *et seq*.

82 ECtHR judgment of October 26th 2000 in the case of Kudła v. Poland, Application No. 30210/96. More on the subject: M. Sykulska, *Prawo do skutecznego środka odwoławczego na przewlekłość postępowania – skutki wyroku przeciwko Polsce dla polskiego prawa i praktyki* (*Right to an Effective Remedy against Protracted Proceedings – Outcomes of the Ruling against Poland for Polish Law and Practice*), [in:] J. Zajadło (ed.), *Prawa człowieka: wczoraj, dziś, jutro* (*Human Rights: Yesterday, Today, Tomorrow*), *Gdańskie Studia Prawnicze* 2005, No. 13, p. 390 *et seq*.

83 M. Balcerzak, *Konstrukcja prawa do skutecznego środka odwoławczego (Right to an effective remedy) w uniwersalnym i regionalnych systemach ochrony praw człowieka* (*Right to an Effective Remedy in the Universal and Regional Systems of Human Rights Protection*), [in:] J Białocerkiewicz (ed.), M Balcerzak (ed.), A Czeczko-Durlak (ed.), *Księga Jubileuszowa Profesora Tadeusza Jasudowicza* (*Anniversary Commemorative Book of Professor Tadeusz Jasudowicz*), Toruń 2004, p. 52 *et seq*.; M Gąsiorowska, *Skuteczność skargi na przewlekłość postępowania w świetle Europejskiej Konwencji Praw Człowieka* (*Effectiveness of Action against Protracted Proceedings under the European Convention on Human Rights*), *Palestra* 2005, Nos. 5-6, p. 196 *et seq*.

84 L Garlicki, *Implementacja orzecznictwa Europejskiego Trybunału Praw Człowieka w ustawodawstwie krajowym (problemy przewlekłości postępowania)* (*Implementing European Court of Human Rights Case Law in Domestic Legislation (Protracted Proceedings Issues)*), Council of Europe Information Office. Bulletin 2002, No. 1, p. 7 *et seq*.

85 T Zembrzuski, *Skuteczny środek odwoławczy przed organami krajowymi a prawo do rozpoznania sprawy sądowej w rozsądnym terminie – rozważania na tle wyroku Europejskiego Trybunału Praw Człowieka z 24.06.2014 r. w sprawie Grzona przeciwko Polsce (skarga nr 3206/09)* (*Effective Remedy before National Authorities vs. the Right to Fair Trial in a Reasonable Time – Deliberations on Basis of the European Court of Human Rights Judgment of June 24th 2014 in the case of Grzona v. Poland (Application No. 3206/09)*), *Europejski Przegląd Sądowy* 2015, No. 3, p. 14 *et seq*.

It follows from ECtHR case law that any appeal serving the purpose of making proceedings more expedient should prevent their excessive duration, as well as preventing the perpetuation and/or recurrence of the infringement of a party's rights.[86] Legal remedies should serve the purpose of challenging protracted proceedings; furthermore, they should serve both a preventive and compensatory function by securing so-called adequate relief.[87] Spurred on by that body's case law, an appropriate remedy was introduced in many European countries, best-known solutions including the so-called Pinto Law in Italy.[88] In Poland, a decision was made to adress complaints concerning the length of proceedings as incidental procedures forming part of proceedings regarding the substance of the given case.[89]

Poland introduced the complaint concerning protracted proceedings under a Law of 17 September 2004,[90] amended but a few times over the years. Importantly, its contents include a statement to the effect that *'provisions of the Law shall be applied in conformity to standards arising from the Convention for the Protection of Human Rights and Fundamental Freedoms.*' The notion of *'protracted proceedings'* is defined as a set of circumstances wherein proceedings serving the purpose of passing a closing decision in any given case last longer than would be necessary to clarify relevant factual circumstances, or longer than would be necessary to settle an enforcement case (Art. 2 of the Law). The Polish legislator has directly referenced values established under ECtHR case law; according to said values, whenever determining whether proceedings were protracted in a given case, it shall be necessary to account for i.a. the timeliness and correctness of actions taken by the court, the entire duration of proceedings, the nature of the case, the degree of its factual and legal complexity, the importance of the case to the party concerned, and the conduct of the party alleging protracted proceedings. The Polish legislator has thus directly referenced ECtHR case law, wherein the concept of *'reasonable time'* is interpreted on basis of assorted criteria.[91]

In Poland, complaints regarding protracted proceedings are heard by the court of law superior to the court the action pertains to. The ruling does not affect the substantive decision passed in the principal case. The court does not address issues arising from material law, nor shall it adjudicate with regard to the claims or statements of parties to proceedings. Any analysis is limited to the issue of swiftness, i.e. the efficacy of any procedural action taken.[92]

Under Polish law, the court of law examining the complaint or action shall not in its duties be limited to establishing protraction of proceedings. The first outcome of such legal solution – frequently underestimated in practice – is that the court hearing the case with regard to its substance shall be recommended to take appropriate action within a specified time

86 ECtHR judgment of March 29th 2006 in the case of Scordino v. Italy, Application No. 36813/97.

87 M Kłopocka *Skarga na przewlekłość w postępowaniu sądowym (ze szczególnym uwzględnieniem przepisów postępowania karnego)* (*Action against Protracted Judicial Proceedings (with Particular Focus on Provisions of Criminal Proceedings)*), [in:] L. Bogunia (ed.) *Nowa kodyfikacja prawa karnego* (*New Codification of Criminal Law), vol.* 19, Wrocław 2006, p. 150 *et seq*.

88 CP Kłak, *Skarga na przewlekłość postępowania karnego a Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* (*Action against Protracted Criminal Proceedings vs. the European Convention on the Protection of Human Rights and Fundamental Freedoms*), Rzeszów 2011, p. 106 *et seq*.

89 M Sykulska, *Prawo do skutecznego środka odwoławczego*…, p. 403; T Zembrzuski, *Niezaskarżalność orzeczeń w przedmiocie skargi na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* (*Non-contestability of Judgments Concerning Actions Regarding the Infringement of a Party's Right to Fair Trial without Undue Delay), Palestra* 2006, Nos. 9-10, p. 36 *et seq*.; M Krakowiak, *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego* (*Action to Establish Protracted Enforcement Proceedings*), *Przegląd Prawa Egzekucyjnego* 2005, Nos.1-6, p. 26 *et seq.*

90 Law of June 17th 2004 of action regarding the infringement of a party's right to have a case examined in preparatory proceedings conducted or supervised by a Prosecutor and in judicial proceedings without undue delay (uniform text: *Journal of Law* 2018, item 75 as amended).

91 T Zembrzuski, *Skuteczny środek odwoławczy*…, p. 15.

92 T Zembrzuski, *Niezaskarżalność orzeczeń*…, p. 8 *et seq*.

limit. Secondly, on demand of the appellant, the court may award him/her a sum of no less than PLN 2,000 and no more than PLN 20,000, payable by the State Treasury.[93] [94] In an effort to ensure that appellants receive sums adequate to those adjudged by the ECtHR, the Polish legislator clarified that the sum awarded shall not be less than PLN 500 per year of proceedings; concurrently, courts are expected to award higher amounts whenever a case is of particular importance to the appellant, and had he/she through his/her conduct not culpably contributed to further protraction of the proceedings in question. While the sum awarded due to protraction of proceedings is compensatory in nature, it is not intended to remedy any damage to property; consequently, Polish case law has classified such sum as remittance not recognised as compensation or indemnification,[95] but rather a special-purpose benefit not classifiable as any typical notion under civil law.[96]

The legal system in place respects the subsidiary nature of applying the ECHR system on the understanding that actions against protracted proceedings are originally heard by domestic courts, and only then filed before the ECtHR.[97] The Court has repeatedly pointed out that any party intending to bring a case before that European body shall be required to adhere to the necessary earlier recourse to a domestic legal measure.[98] Notably, the ECtHR has in the past recognised that extraordinary circumstances may occasionally arise, exempting the applicant from exhausting remedies available under domestic law;[99] yet doubts concerning the effectiveness of domestic remedies alone shall not be recognised as such circumstances.[100]

The practice of employing the Polish complaint against procedural protraction raises no fundamental objections. Yet while it does constitute a key component of the legal remedies system under Polish procedural law, the practical interest of parties in using it is insignificant. Such condition is partly due to the lack of awareness that such instrument – born of ECtHR case law and ECHR standards – is actually available, and partly to the occasionally tabled belief that the use of a protraction-preventing measure may sometimes – paradoxically – contribute to the underlying protraction. Importantly, the effectiveness of this remedy has been positively verified by the ECtHR, if only following an analysis of the Polish law.[101]

It should also be borne in mind that – in addition to the complaint against protracted legal proceedings – Polish law provides for action for damages under Art. 417 of the Civil Code, pursuant to which the State Treasury, local government unit, or another legal entity exercising public authority shall be held liable for damage caused by an unlawful act or omission in the

93 Or by a court bailiff, in case of protracted enforcement proceedings.

94 EUR 1.00: ca. PLN 4.44.

95 K. Gonera, *Przewlekłość postępowania w sprawach cywilnych (Protracted Proceedings under Civil Law), Przegląd Sądowy* 2005, Nos. 11-12, p. 13 *et seq.*; A. Laskowska, *Przyznanie odpowiedniej sumy pieniężnej wskutek uwzględnienia skargi na przewlekłość postępowania egzekucyjnego* (*Awarding Adequate Sums Following the Recognition of Action against Enforcement Proceedings as Justified*), *Przegląd Prawa Egzekucyjnego* 2007, No. 9, p. 30; J. Kuźmicka-Sulikowska, *Suma pieniężna przyznawana z tytułu przewlekłości postępowania* (*Sums Awarded for Protracted Legal Proceedings*), [in:] E. Marszałkowska-Krześ, *Aktualne zagadnienia prawa prywatnego* (*Current Issues in Private Law*), Warsaw 2012, p. 92 *et seq.*

96 A Góra-Błaszczykowska, *Skarga na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* (*Action against the Infringement of a Party's Right to Have a Case Heard in Judicial Trial without Undue Delay*), *Monitor Prawniczy* 2005, Nos. 11, p. 537; T Zembrzuski, *Skuteczny środek odwoławczy*…, p. 16.

97 M Romańska, *Skarga na naruszenie prawa strony*…, p. 1765 *et seq.*; T. Zembrzuski, *Skuteczny środek odwoławczy*…, p. 14 *et seq.*

98 ECtHR decision of March 1st 2005 in the case of Charzyński v. Poland, Application No. 15212/03; ECtHR decision of May 31st 2005 in the case of Ratajczyk v. Poland, Application No. 15212/03.

99 ECtHR judgment of September 24th 2007 in the case of Kukówka and Wende v. Poland, Application No. 56026/00.

100 ECtHR decision of March 1st 2005 in the case of Michalak v. Poland, Application No.24549/03.

101 M Romańska, *Skarga na naruszenie prawa strony*…, p. 1773.

exercise of public authority. Action[102] may be brought after the close of proceedings in the case;[103] concurrently, the sum awarded by the court in proceedings concerning a protraction-related complaint shall not be credited towards any compensation sought in the course of a separate trial. The citizen may choose from legal remedies as he/she considers appropriate; in case of remaining dissatisfied with decisions before Polish courts, he/she shall be entitled to pursuing his/her case before the ECtHR. The above conforms with an assumption arising from ECtHR case law, pursuant to which the use of a single legal remedy shall be recognised as tantamount to the non-imperative of reaching for another measure serving an identical or similar objective.[104]

An aggregate of both Polish instruments: the complaint against protracted proceedings (as a remedy and compensatory measure) and the action for damages (as a compensatory measure) offers grounds to claim that all requirements set out in Art. 6 and 13 of the ECHR regarding the issue of the right to fair trial being breached through protracted proceedings have been met.[105] One should account for the belief encapsulated in ECtHR case law, pursuant to which a *'set'* or package of remedies may jointly meet the requirement of effectiveness, even should individual remedies not meet such requirement when assessed separately.[106] From day one, Poland has followed a belief that the state has duly fulfilled its obligation to adapt its legislation to the requirements of the ECHR.[107]

## 6 THE REMEDIES SYSTEM IN THE CONTEXT OF THE RIGHT TO A FAIR TRIAL

Guarantees and principles arising from the ECHR justify perceiving the issue of legal remedies in Poland from a perspective broader than that of Art. 13 of the ECHR. Remedies available to parties in individual countries should always have the attribute of *'effectiveness'*, i.e. they have to be adequate and accessible. In terms of ECHR standards, there is no doubt that the use of remedies should not be unjustifiably hindered. Appealing against judgments ties in also with the right to a fair trial as stipulated in Art. 6 of the ECHR.

The issue of the right to a fair trial is often combined with the right of appeal, which involves interference with the citizens' rights by independent and impartial judicial authorities only.[108] The general outline of the remedies system is one of the key issues affecting the reliability, effectiveness and comprehensiveness of legal protection in civil law cases.[109] It has been deliberated on numerous occasions whether the establishing of appeal mechanisms combined with restricted access to legal solutions does not tie in with denying citizens their

102 Attempts to identify in such action a construct of an efficient and effective remedy as defined by Article 13 of the ECHR were something of a misunderstanding. For more detailed information, see T. Zembrzuski, *Skuteczny środek odwoławczy*…, p. 16 *et seq*.

103 Z Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej* (*Liability for Damage Caused in the Course of Exercising Public Authority*), Warsaw 2012, p. 102 *et seq*.

104 ECtHR decision of July 7th 1997 in the case of Wójcik v. Poland, Application No. 26757/95.

105 T Zembrzuski, *Skuteczny środek odwoławczy*…, p. 17 et seq.

106 ECtHR judgment of October 6th 2005 in the case of Lukenda v. Slovenia, Application No. 23032/02.

107 P Grzegorczyk, *Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym* (*Consequences of European Court of Human Rights Judgments to the Domestic Legal Order*), *Przegląd Sądowy* 2006, No. 5, p. 25 *et seq*.

108 J Gołaczyński, A Krzywonos, *Prawo do sądu* (*Right to fair Trial*) [in:] *Prawa i wolności obywatelskie w Konstytucji RP* (*Civic Rights and Freedoms in the Constitution of the Republic of Poland*), Warsaw 2002, p. 725 *et seq*.

109 T Zembrzuski, *Dokąd zmierza apelacja w postępowaniu cywilnym* (*The Future of Appeals in Proceedings under Civil Law*), *Przegląd Sądowy* 2019, Nos. 7-8, p. 48 *et seq.*

right to fair trial.[110] Another indispensable question is whether contemporary standards of operating the remedies system in Poland today are fully guaranteed and respected.

Regardless of the system transformations over the years, the remedies system in Polish judicial has always been extensive – yet problems associated with appealing judgments have been many,[111] in particular with regard to affirming the final stage of judicial activity.[112] It is generally agreed that the number of instances and remedies available should be a trade-off between the tendency to secure a fair and orderly judicial decision, and that leaning towards reaching a swift and definitive settlement of the dispute.[113] Systemic, social and economic changes in post-1989 Poland had major impact on the process of establishing remedies, the said process reflective of attempts to account for the right to fair trial and intent to implement the postulate of flawlessness in all judicial judgments,[114] as well as recognise respect for the role and importance of their validity and stability.[115]

The principle of the right to appeal is recognised among the key rules of the judiciary.[116] The two-tier principle of judicial proceedings in Poland is considered a measure reinforcing the right to fair trial.[117] It has been ruled under ECtHR case law that the ECHR shall not secure the right for a case to be heard by courts of several instances.[118] Notwithstanding the above, the two-tier principle of judicial proceedings and the right to appeal against the ruling of a court of the first instance have both been reflected in the Constitution of the Republic of Poland. Pursuant to Art. 78 of the Constitution, each party shall have the right to appeal against decisions and judgments issued by a court of first instance, exceptions to the rule and potential course of appealing to be stipulated by an act of law.[119] The term 'appeal' extends to assorted legal remedies in Poland, united in the common feature of the first-instance rulings being subject to verification. Pursuant to Art. 176 clause 1 of the Constitution, judicial proceedings shall comprise no less than two instances. This provision protects a party to legal proceedings from being deprived of the option of its case being heard by a court of second instance, either through a direct mechanism, i.e. by excluding the possibility to lodge a complaint (appeal), or indirectly – through the introduction of formal appeal requirements sufficient to make such action excessively

110 ECtHR judgment of October 16th 2001 in the case of Zmaliński v. Poland, Application No. 52039/00.

111 W Siedlecki, *System środków zaskarżenia według nowego kodeksu postępowania cywilnego* (*The Remedies System under the new Civil Proceedings Code*), *Państwo i Prawo* 1965, Nos. 5-6, p. 693 *et seq*.

112 S Hanausek, *Orzeczenie sądu rewizyjnego w procesie cywilnym* (*Review Court Rulings in Proceedings under Civil Law*), Warsaw 1967, p. 49 *et seq*.

113 A Oklejak, *Z problematyki zaskarżalności orzeczeń sądowych w postępowaniu cywilnym* (*From the Issues of Contestability of Judicial Rulings in Proceedings Under Civil Law*), *Studia Cywilistyczne* 1975, vol. XXV-XXVI, p. 222 *et seq*.

114 H. Pietrzkowski, *Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej* (*Right to fair Trial in Light of Amended Civil Law Proceedings*), *Przegląd Sądowy* 2005, No. 10, p. 53 *et seq*.

115 P. Grzegorczyk, *Stabilność prawomocnych orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych* (*Stability of Valid Judicial Rulings in Civil Law Cases in Light of Constitutional and International Standards*) [in:] T Ereciński, K Weitz (ed.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego* (*Constitutional Tribunal Case Law vs. Civil Proceedings Code*), Warsaw 2010, p. 151 *et seq*.

116 A Zieliński, *Konstytucyjny standard instancyjności postępowania sądowego* (*The Constitutional Standard of Multi-Tier Judicial Proceedings*), *Państwo i Prawo* 2005, No. 11, p. 3 *et seq*.

117 Z Czeszejko-Sochacki, P*rawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (Ogólna charakterystyka)* (*Right to Fair Trial in Light of the Constitution of the Republic of Poland (General Descriptiuon)*), *Państwo i Prawo* 1997, Nos. 11-12, s. 89 *et seq*.

118 ECHR judgment of October 26th 2004, case of Międzyzakładowa Spółdzielnia Mieszkaniowa Warszawscy Budowlani v. Polska, Application No. 13990/04.

119 While the Polish legislator has a modicum of freedom in terms of establishing procedural regulations, the option is not tantamount to acting at complete discretion.

difficult.[120] Constitutionally speaking, the Polish legal system gives full-blown guarantees of introducing legal regulation to secure fair, equitable and possibly swift trial of any case.[121] From such vantage point, Polish solutions seem to suffice in terms of achieving the goal that any system of appeals against judicial decisions should reach, whether from the perspective of constitutional requirements or standards guaranteed by the ECHR. However, circumstances merit a brief presentation of the evolution of Polish solutions in the field.

One of the most important changes to Polish procedural law involved the 1996 abandonment of the revision system, originally based on a second-instance court review and supplemented with extraordinary reviews as a non-instance mechanism of challenging final rulings. This was when the Polish legislator brought back the appeal and cassation system, in emulation of pre-war solutions.[122] The appeal replaced the revision system, extraordinary reviews – a measure not conforming to standards of the rule of law – substituted for cassation.[123] In 2004, the cassation was transformed into an extraordinary measure of appeal against final rulings of courts of the second instance.[124]

The appeal is the fundamental and ordinary measure of contesting decisions regarding substantive matters in Poland; decisions regarding matters other than substantive can be appealed against under circumstances stipulated by law. Extraordinary measures of appeal against formally binding decisions include a cassation complaint, action to reopen proceedings, and action to establish the unlawfulness of a final judicial ruling. The workings of the remedies system in civil proceedings under Polish law have been assessed favourably over the years. Not only the right to fair trial as stipulated under Art. 6 of the ECHR – but also the related right to appeal against judicial judgments[125] seem to be fully secured in the Polish legal order. It even seems that the constitutional standard (model) of the right to appeal against and contestability of judgments[126] exceeds the expectations and requirements stipulated under the ECHR. This system has evolved beyond international obligations, beyond European Union requirements, and even beyond the needs of procedural standard addressees.[127]

120 T Zembrzuski, *Zaskarżanie orzeczeń incydentalnych wydanych po raz pierwszy w toku instancji* (*Appealing against Incidental Rulings Passed for the First Time in a Given Instance*), *Przegląd Sądowy* 2007, No. 9, p. 18 *et seq*.

121 H Izdebski, *Perspektywy dostępu obywateli do europejskiego wymiaru sprawiedliwości* (*Perspectives of Civic Access to the European Justice System*) [in:] *Dostęp obywateli do europejskiego wymiaru sprawiedliwości* (*Civic Access to the European Justice System),* Warsaw 2005, p. 154 *et seq*.

122 S. Rudnicki, *Nowy środek odwoławczy: apelacja* (*New Remedy: the Appeal*), *Przegląd Sądowy* 1993, No 6, p. 42 *et seq*.; J. Gudowski, *Pogląd na apelację* (*Opinion Concerning the Appeal*), [in:] J. Gudowski, K. Weitz (ed.), *Aurea raxis. Aurea Theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego* (*Aurea raxis. Aurea Theoria. Book Commemorating Professor Tadeusz Ereciński*), vol. 1, Warsaw 2011, p. 246.

123 T Ereciński, *O nowelizacji kodeksu postępowania cywilnego w ogólności* (*General Comments on Amendments to the Civil Proceedings Code*), *Przegląd Sądowy* 1996, No. 10, p. 8 *et seq*., T. Zembrzuski, *Skarga nadzwyczajna w polskim postępowaniu cywilnym* (*Extraordinary Complaint in Civil Proceedings under Polish Law*), *Państwo i Prawo* 2019, No. 6, p. 124 *et seq*.

124 T Zembrzuski, *Ewolucja charakteru skargi kasacyjnej w polskim postępowaniu cywilnym* (*Evolution of the Nature of the Cassation Complaint in Civil Proceedings under Polish Law*) [in:] H Dolecki, K Flaga-Gieruszyńska (ed.) *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych* (*Evolution of Civil Proceedings under Polish Law in the Context of Political, Social and Economic Transformation*), Warsaw 2009, p. 329 *et seq*.

125 F Zedler, *Zagadnienia instancyjności postępowania sądowego* (*Issues of Multi-Tier Judicial Proceedings*) [in:] *Prace z prawa prywatnego. Księga pamiątkowa ku czci sędziego Janusza Pietrzykowskiego* (*Private Law Writings. Book Commemorating Justice Janusz Pietrzykowski*),Warsaw 2000, p. 378 *et seq*.

126 A Jakubecki, *Kilka uwag o instancyjności postępowania cywilnego na tle orzecznictwa Trybunału Konstytucyjnego* (*Several Comments on Multi-tier Civil Law Proceedings in Light of Constitutional Tribunal Case Law*) [in:] T Ereciński, K Weitz (ed.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego* (*Constitutional Tribunal Case Law vs. Civil Proceedings Code*), Warsaw 2010, p. 81 *et seq*.

127 A Góra-Błaszczykowska, *Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017 r.* (*Extraordinary Complaint and Action to Establish*

An additional extraordinary measure introduced in Poland in the year 2017 – the extraordinary complaint, allowing for any final judgment to be contested – merits reflection from the perspective of standards and guarantees arising from the ECHR.[128] The complaint has triggered grave doubts[129] for reasons of i.a. the form of establishing eligibility for its filing, and its broad-spectrum subject matter and temporal range.[130] It allows for final judicial decisions to be contested, regardless of whether and what kind of legal measures had been applied in the course of earlier proceedings. The general foundation for the complaint is that of ensuring compliance with the rule of a democratic state of law embodying the principles of social justice, whereas Art. 89 para.1 of the Law lists three specific grounds tying in with the following circumstances: a) a ruling violating the principles or freedoms and human and civil rights set out in the Constitution (item 1); b) a ruling found to be in gross violation of the law through its misinterpretation or misapplication (item 2); c) manifest contradiction occurring between the essential findings of the court and the content of evidence collected in the case (item 3).

The scope of an extraordinary complaint is partly consistent with that of other extraordinary remedies. A similarity may be identified between grounds for an extraordinary appeal and selected grounds for a cassation complaint, action to establish the unlawfulness of a final judicial ruling, and action to reopen proceedings. Instruments available to citizens seeking compensation from the State for unlawful activity include action to establish the unlawfulness of a final judicial ruling, said action tried before the Supreme Court. The role and importance of this action in Poland were marginalised in the wake of introducing the extraordinary complaint in 2017.[131] This is a grave flaw since the Polish legislator has to date taken no action to properly organise relations between extraordinary remedies.

In terms of principles and guarantees arising from the ECHR, greatest doubt is raised by the fact that the decision to file an extraordinary complaint is not at the discretion of the parties. A party to proceedings is not authorised to file an extraordinary complaint; the power to challenge any final ruling has been vested in public bodies and institutions only. An extraordinary complaint may be filed by the Prosecutor General, the Ombudsman and – within their respective remits – the President of the General Attorney's Office of the Republic of Poland, Ombudsman for Children, Ombudsman for Patient Rights, Chairman of the Polish Financial Supervision Authority, Financial Ombudsman, Ombudsman for Small and Medium Enterprises, and President of the Office of Competition and Consumer Protection. A citizen may only apply to a duly authorised body, or a number of such bodies; all may approve or reject the party's application, in certain cases going as far as to leave it

*the Unlawfulness of a Final Ruling Pursuant to the Supreme Court Law of December 8th 2017*) [in:] A. Barańska, S. Cieślak (ed.), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (*Ars in vita. Ars in iure. Anniversary Commemorative Book Dedicated to Professor Janusz Jankowski*), Warsaw 2018, p. 58.

128 T Zembrzuski, *Extraordinary Complaint in Civil Proceedings under the Polish Law* in Access to Justice in Eastern Europe, 2019, No. 1 (2), p. 31 *et seq*.

129 M Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka* (*Extraordinary Complaint Brought before the Supreme Court in the Context of an Application Filed with the European Court of Human Rights*), *Palestra* 2018, Nos. 1-2, p. 11 *et seq*.; D. Gruszecka, *Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście „wypełniania luk w systemie środków zaskarżania" (Grounds for Extraordinary Complaint in Criminal Law Proceedings – Comments in the Context of "Filling Gaps in the Remedies System"), Palestra* 2018, No. 9, p. 27 *et seq*.; T. Ereciński, K. Weitz, *T. Ereciński, K. Weitz, Skarga nadzwyczajna w sprawach cywilnych* (*Extraordinary Complaint in Proceedings under Civil Law*), Przegląd Sądowy 2019, No. 2, p. 18.

130 The complaint shall be filed no later than within a term of 5 years as of the date of the contested ruling becoming final; should a cassation complaint have been filed against such ruling – no later than within a term of one year as of the date of the hearing.

131 T Zembrzuski, *Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* (*Influence of Introducing the Extraordinary Complaint on the Action to Establish the Unlawfulness of a Final Judicial Ruling*), *Przegląd Sądowy* 2019, No. 2, p. 28 *et seq*.

unexamined. This means that a party challenging a decision ruling on his/her rights and responsibilities may only act as petitioner to state authorities. Denying influence over the initiation or course of proceedings against an extraordinary complaint to parties to a civil trial resembles solutions adopted in the socialist process of the People's Republic of Poland; it also constitutes a breach of the right to fair trial.[132] Doubts have arisen in contemporary Poland with regard to whether the mechanism of controlling final judicial rulings should primarily serve the public interest, or rather the interest of persons seeking legal protection in proceedings before courts of law.

Notwithstanding the above, numerous changes were made to Polish judicial proceedings in 2019, with intent to improve their expedience and swiftness.[133] All individual solutions have been bound with the goal of reducing the length of appeal proceedings. As far as remedies are concerned, the intent has been particularly clear in case of the appeal – the fundamental measure of contesting judgments of courts of first instance – and of the complaint to control the correctness of resolving in formal issues. The *prima facie* realisation of the postulate to improve the swiftness of appeal proceedings reflects the guarantees and standards arising from the ECHR. It goes without saying that delayed justice stands in opposition thereto.[134] The effectiveness of contesting judicial decisions should comprise the initiation of fair appeal proceedings.[135] Yet no improvement of court proceedings should come at the expense of the right to fair trial or procedural fairness, both of which are linked to predictability, legalism and trust in the law.[136] Under the changes recently introduced, these values are occasionally pushed into the background,[137] as proven i.a. in restrictions to the openness of appeal proceedings, or the right to justify selected rulings. Claims that the vision of appeal proceedings in Poland occasionally lacks the attribute of reliability are a cause for concern.[138] Although at present it would be difficult to identify any inconsistencies between individual solutions and the ECHR, the Polish legislator should always take care for any transformation to remain in line with the *'spirit'* of the ECHR.

## 7 RIGHT TO AN EFFECTIVE REMEDY: SUMMARY

Any evaluation of the impact of protecting human rights and fundamental freedoms on the form, shape and daily practice of the Polish justice system in terms of the remedies mechanism demands that a number of issues be taken into account, not only with regard to

132 T Zembrzuski, *Skarga nadzwyczajna*…, p. 131 *et seq*.

133 M Klonowski, *Kierunki zmian postępowania cywilnego w projekcie Ministra Sprawiedliwości ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw z 27.11.2017 r. – podstawowe założenia, przegląd proponowanych rozwiązań oraz ich ocena* (*Directions of Amendments to Civil Law Proceedings in the Justice Minister's Draft Law to Amend the Civil Proceedings Code and Selected Other Laws of November 27th 2017 – Basic Assumptions, Review of Proposed Solutions, and their Assessment*) *Polski Proces Cywilny* 2018, No. 2, p. 180 *et seq*.

134 M Borucka-Arctowa, *Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawa* (*Procedural Justice in the Context of Constitutional Tribunal Case Law and its Role in Times of Changes to the Legal System*) [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzeskiej* (*The Constitution and Related Compliance Guarantees. Book Commemorating Professor Janina Zakrzeska*), Warsaw 1996 p. 28 *et seq*.

135 A Zieliński, *Konstytucyjny standard*…, p. 8 *et seq*.

136 T Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym (Cassation Complaint. Accessibility in Proceedings under Civil Law),* Warsaw 2011, p. 82 *et seq*.

137 T Zembrzuski, *Dokąd zmierza apelacja*…, p. 64 *et seq.*

138 T Wiśniewski, *Czy potrzebne są zmiany w systemie środków zaskarżenia w postępowaniu cywilnym (Are Changes to the Remedies System in Proceedings under Civil Law Necessary), Polski Proces Cywilny* 2011, No. 2, p. 9.

the imperative of securing the right to an effective remedy, but also the form and functioning of the same in Poland. They should be adequate in terms of protecting the interests of individual parties as well as public interest.

The existence of solutions to counteract protracted judicial proceedings in Poland – in direct reference to Art. 13 of the ECHR – raises no fundamental objections. Some controversy does, however, arise from the abundance of recent changes to procedural law, all stemming from intent to accelerate and streamline judicial proceedings (somewhat mechanically); while desirable in itself, such activity should not take place at the expense of standards of the right to fair trial. Amendments to the state of Polish legislation with regard to access to measures of legal redress, especially through the development of an extraordinary remedies system, occasionally seem to be overlooking or underestimating the importance of the key assumption pursuant to which legal certainty requires respect for the principle of formal legality of rulings, and the outcomes and gravity of the *res iudicata*. In terms of ECHR standard implementation, doubt may arise as to the introduction of an additional extraordinary remedy: the extraordinary complaint, unavailable to parties to judicial proceedings, accessible to the State only.

It goes without saying that the impact of the ECHR on the development of Polish procedural law and the organisation of the judiciary is significant and must be appreciated. ECtHR case law has contributed significantly to the development and strengthening of standards and guarantees of rights protection. Such backdrop, however, serves to highlight contemporaneous disputes and doubts raised by various entities – the European Commission, among others – with regard to Poland's compliance with the rule of law and state of law standards, including guarantees of judicial independence.[139]

## 8 EVOLUTION OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER POLISH LAW

The regulation enshrined in Art. 10 of the ECHR which provides for the right to freedom of expression is one of the most lively and most frequently used provisions of the ECHR. It is of particular importance for countries such as Poland that acceded to the ECHR during the political transformation. The changes that began in 1989 included, among other things, ensuring freedom of expression. Before that date, when the government had no political mandate, the political system was imposed by force, freedom of expression was not really guaranteed; in fact, the state authorities intentionally tried to deprive the citizens of their right to freedom of expression in order to keep the political system. Any attempts to take advantage of that right which is quite an obvious one in free countries were repressed by the authorities.

It is therefore not surprising that guaranteeing freedom of expression was one of the main objectives and assumptions of the political transformation. The first changes that were introduced were of formal nature. The office of censorship, which had been set up back in 1946 and which had been renamed in 1981 as the Central Office for the Control of Publications and Public Performances[140] was liquidated first. Under the political system of that time, persons who took advantage of freedom of speech and freedom of press in publications and

139 P Bogdanowicz, M. Taborowski, *Brak niezależności sądów krajowych jako uchybienie zobowiązaniu w rozumieniu art. 258 TFUE (cz.1)* (*Deficiencies in the Independence of Domestic Courts of Law as a Breach to Obligations under Article 258 of the TFEU (Part One)*), *Europejski Przegląd Sądowy* 2018, No. 1, p. 4 et seq.

140 Pursuant to the decree of 5 July 1946 of the Central Office for the Control of Press, Publications and Public Performances (Journal of Laws No. 34, item 210).

public performances[141] were not allowed (*inter alia*) to 'call for the overthrow of, vituperate, deride or degrade the constitutional order of the Polish People's Republic,' in accordance with Art. 2(1) of the Control of Publications and Public Performances Act of 31 July 1981. The provision was by definition used for suppressing freedom of expression, particularly as censorship at that time was preventive.

The Central Office for the Control of Publications and Public Performances was liquidated as of 7 June 1990 pursuant to the Act of 11 April 1990 on Repealing the Publications and Public Performances Control Act, Lifting the Control Authorities and Amending the Press Law Act.[142] Consequently, preventive censorship was lifted in Poland.

However, lack of censorship by itself does not automatically mean that freedom of expression is guaranteed. Mere legal provisions, even at the constitutional level, do not suffice to ensure such freedom. Art. 71(1) of the Constitution of the Polish People's Republic of 1952[143] provided for a declaration that the Polish People's Republic guaranteed its citizens freedom of speech, the press, meetings and assemblies, processions and demonstrations. However, it was far from reality. As a result of the provisions of ordinary statutes, not only those concerning preventative censorship but also the criminal law regulations, freedom of expression was not provided for in Poland. Even though subsequent regulations (particularly during the later period of the Polish People's Republic) declared broader freedom of expression, the lack of independent judiciary, including the lack of constitutional court,[144] did not provide for any actual guarantees that those verbal guarantees would be kept.

The existing Constitution of the Republic of Poland of 1997,[145] notably Art. 54(1), reads as follows: 'The freedom to express opinions, acquire and disseminate information shall be ensured to everyone.' Under Art. 54(2) of the Polish Constitution preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station. It is evident that the scope of that provision largely overlaps with Art. 10 of the ECHR.

## 9 POLISH CONSTITUTIONAL TRIBUNAL'S POINT OF VIEW

The Polish constitutional court has evaluated the compliance of the provisions of ordinary statues with Art. 54(1) of the Polish Constitution on several occasions. In the majority of those cases, the Constitutional Tribunal did not find any incompatibility of the provisions being reviewed with the constitutional regulations. It needs to be pointed out that in some cases the review covered both Art. 54(1) of the Polish Constitution and Art. 10(1) of the ECHR which were used as benchmarks, and the Polish constitutional court did not find any incompatibility in either case.

It also needs to be noted that in exceptional cases Art. 10 was used as a benchmark of review (by the Constitutional Tribunal) together with the provisions of the Polish Constitution

141 The original text as published in Journal of Laws No. 20, item 99.

142 Journal of Laws No. 29, item 173.

143 Constitution of the Polish People's Republic enacted by the Legislative Sejm on 22 July 1952 (the original text as published in the Journal of Laws No. 33 item 232).

144 The Constitutional Tribunal did not come into being until 1 January 1986, in accordance with the Constitutional Tribunal Act of 29 April 1985 (the original text as published in Journal of Laws No. 22 item 98).

145 Constitution of the Republic of Poland of 2 April 1997 (the original text as published in Journal of Laws No. 78. Item 493).

other than Art. 54(1). In its judgment of 28 January 2003, K 2/02,[146] the Constitutional Tribunal concluded that Art. 13[1] (3) and (4) of the Education in Sobriety and Alcoholism Prevention Act of 26 October 1982,[147] which is understood as not including a ban on advertising and promotion, provided they use an advertising image that is only incidentally convergent with an advertising image typical for alcohol products or alcohol manufacturers, is compatible with the provisions of the Polish Constitution and with Art. 10 of the ECHR. In the statement of reasons, the Polish constitutional court concluded that there was no doubt that commercial speech (which includes advertising) was subject to protection under Art. 10 of the ECHR. There was also no doubt that the law was not of absolute nature and could be effectively restricted under internal law. The Tribunal also observed that, under the Polish Constitution, Art. 54(1) was the equivalent of Art. 10 of the ECHR. While the provision was not cited as a benchmark in the case under review, the Polish constitutional court found it irrelevant because the subject matter and the scope of those two benchmarks were identical (at least in terms of the scope covered by the charge). The Constitutional Tribunal also noted that Polish bans on alcohol advertising and promotion were not the most restrictive ones in Europe.[148] However, no violation of the ECHR was raised in other countries, even in case of more stringent restrictions in that regard. Restrictions on commercial speech (in case of which there is more regulatory freedom among the European countries than in the case of restrictions on freedom of information referring to issues other than advertising and promotion)[149] must be mandated by a statute. In its judgment of 28 January 2003, K 2/02, the Constitutional Tribunal found that a restriction must be necessary in a democratic society, subject to the proportionality principle.

The provisions of the Press Law were also subject to judicial review.[150] In its judgment of 20 February 2007, P 1/06,[151] the Constitutional Tribunal concluded that Art. 45 of the Press Law insofar as it read that 'whoever publishes a daily newspaper or a magazine without registration is subject to a fine or restriction of liberty,' was compatible with Art. 31(3) of the Polish Constitution[152] and its Art. 54. The Polish constitutional court also found that the reviewed provision was compatible with Art. 10(2) of ECHR which reads that the exercise of freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.' In this context, the Polish constitutional court referenced the ECtHR judgment of 6 May 2003 in the case of *Appleby and Others v. the United Kingdom.*[153] However, in the subsequent judgment of 14 December 2011, P 42/09,[154] the Constitutional Tribunal

146 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 1 Item 4. (*Constitutional Tribunal Case Law. Official Bulletin*)

147 Journal of Laws No. 35, item 230 as amended.

148 The scope of restrictions has increased in certain ways over the years; however, Article 13[1] of the Education in Sobriety and Counteracting Alcoholism still permits beer advertising albeit with certain restrictions.

149 Constitutional Tribunal judgement of 8 April 1998, K 10/97 (Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. /*Constitutional Tribunal Case Law. Official Bulletin Series A 2015 No. 3 Item 29*) and C Mik, Reklama w prawie międzynarodowym praw człowieka (*Advertising in International Human Rights Law)*, Kwartalnik Prawa Prywatnego 1995 No. 1, p. 116 et seq.

150 Press Law Act of 26 January 1984 (the original text as published in Journal of Laws No. 5, item 24).

151 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 2 Item 11. (*Constitutional Tribunal Case Law. Official Bulletin*)

152 The provision of Article 54(1) of the Polish Constitution which provides for the freedom of expressing opinions is typically used as a benchmark for judicial review in conjunction with Article 31(3) of the Polish Constitution which provides for the proportionality principle.

153 Application No. 44306/98, ECHR 2003/VI, § 43.

154 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 10 Item 118. (*Constitutional Tribunal Case Law. Official Bulletin*)

concluded that Art. 45 of the Press Law Act insofar as it imposed criminal liability for the publication of a printed magazine without registration was not compatible with Art. 31(3) read together with Art. 54(1) of the Polish Constitution. The Tribunal also emphasised that it was not the violation of freedom of expression that underlaid such a verdict but the disproportionality of the legal sanction. As a consequence of that verdict, the sanction for publishing a magazine without registration, as envisaged under Art. 45 of the Press Law, was reduced to a fine, as of 19 July 2013, and the legislator resigned from the restriction of liberty as a penalty in that regard.[155]

The Constitutional Tribunal's judgement of 5 May 2004, P 2/03 addressed other issues relating to the Press Law.[156] In the judgment, the Tribunal concluded that, insofar as it prohibited commenting upon a correction in the same issue or broadcast in which the correction was published, Art. 32(6) of the Press Law was compatible with Art. 31(3) read in conjunction with Art. 54(1) of the Polish Constitution, Art. 10 of the ECHR and Art. 19 of the International Covenant on Civil and Political Rights.[157] In that same judgment, the Polish constitutional court concluded, however, that, insofar as it did not define the term 'correction' and 'response,' and also prohibited commenting upon the correction in the same issue or broadcast in which the correction was published under the pain of penalty, Art. 46(1) in conjunction with Art. 32(6) of the Press Law was incompatible with Art. 2 and Art. 42(1) of the Polish Constitution because it was not precise when defining the criteria of an offence, as required.

In its judgment of 21 September 2015, K 28/13,[158] the Constitutional Tribunal determined that Art. 49 para. 1 of the Code of Petty Offences,[159] whereby anyone who conspicuously shows disregard to the constitutional authorities of the state shall be subject to detention or a fine, was compatible with Art. 54(1) read in conjunction with Art. 31(3) of the Polish Constitution and with Art. 10 of the ECHR. The Constitutional Tribunal did not share the view of the applicant (the Commissioner for Human Rights) and concluded that isolating that offence was intended to protect the authority of the constitutional authorities of the state. The Polish constitutional court argued that 'lowering their prestige which leads to decreasing identification of the citizens is detrimental to the Republic of Poland which is a common good of all citizens.' The Constitutional Tribunal cited similar reasons when it determined that Art. 135 para. 2 of the Criminal Code,[160] whereby 'anyone who insults the President of the Republic of Poland in public is liable to deprivation of liberty for up to three years,' was compatible with Art. 54(1) read in conjunction with Art. 31(3) of the Polish Constitution and Art. 10 of the ECHR (the Constitutional Tribunal judgment of 6 July 2011, P 12/09.)[161]

In few cases, the Polish constitutional court found that a provision subject to judicial review was incompatible with Art. 54(1) of the Polish Constitution. In this context, it is worth noting the judgment of 12 May 2008, SK 43/05,[162] whereby the Constitutional Tribunal determined that, insofar as it excluded punishability of an offence of raising or publicising true allegation

155 That change was introduced pursuant to Article 1(1) of the Act of 10 May 2013 Amending the Press Law Act (Journal of Laws item 771).

156 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 5 Item 39. (*Constitutional Tribunal Case Law. Official Bulletin*)

157 International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, and ratified by Poland on 3 March 1977. (Journal of Laws No. 38, item 167).

158 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 8 Item 120. (*Constitutional Tribunal Case Law. Official Bulletin*).

159 Petty Offences Code Act of 20 May 1971 (Journal of Laws of 2015, item 1094).

160 Criminal Code Act of 6 June 1997 (the original text as published in Journal of Laws No. 88, item 503).

161 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2011 No. 6 Item 51. (*Constitutional Tribunal Case Law. Official Bulletin*).

162 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2008 No. 4 Item 57. (*Constitutional Tribunal Case Law. Official Bulletin*).

concerning a public person only if it was made 'in defence of a justifiable public interest,' Art. 213 para. 2 of the Criminal Code (where it refers to Art. 212 para.1 of the Criminal Code that penalises defamation) was incompatible with Art. 14 of the Polish Constitution[163] and its Art. 54(1) read in conjunction with Art. 31(3) of the Polish Constitution. The Constitutional Tribunal concluded that there was no sufficiently founded reason for such a restriction of justification in a democratic state that respected freedom of expression as a fundamental value from the perspective of civil liberties. People who hold public functions and who have the possibility of influencing broader social groups with their behaviours, decisions, attitudes and views, must accept the risk that they will be subjected to a more stringent evaluation by the public.

The Constitutional Tribunal judgment led to a change in regulations;[164] as a result, in keeping with Art. 213 para. 2(2) of the Criminal Code in the current wording, anyone who raises or publicises a true allegation concerning a publication is not deemed to have committed an offence and does not need to prove that they acted in defence of a justifiable public interest. It needs to be pointed out, however, that – despite a lively debate as to whether or not it was not excessively intruding on freedom of expression – Art. 212 paras. 1 and 2 of the Criminal Code continues to apply, and anyone who slanders another person (including a business entity) about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence commits an offence. It raises controversy that, where such defamatory statements are made via the mass media, the veracity of the allegation does not exclude punishability, in keeping with Art. 213 para.2 of the Criminal Code (an exception is made for public persons, as mentioned before). It is argued that protection, if any, against public (i.e. using the mass media) presentation of true allegations, or actually excesses in that regard, should be afforded in civil proceedings rather than criminal ones. An analysis of that issue in view of Art. 10 of the ECHR will be presented hereinafter.

It needs to be stated at this point that the introduction of Art. 54(1) of the Polish Constitution (and also the evolution of the modern case law of Polish courts, including the Constitutional Tribunal, that accounts for the importance of freedom of expression) did not diminish the role of protection provided by ECtHR based on Art. 10 of the ECHR in terms of protection of freedom of expression. The ECtHR case law in that regard continues to be more stable, and the standards it adopts to protect freedom of speech continue to be higher, than in the case law of Polish courts.

## 10 ECtHR CASE LAW CONCERNING ARTICLE 10 OF ECHR IN CASES AGAINST POLAND – GENERAL COMMENTS

It should be noted, as a preliminary observation, that initially there were certain difficulties with interpreting the provision subject to review herein as a result of the Polish translation of the first sentence of Art. 10(1) of the ECHR (as published in the Polish Journal of Law), which is imprecise and narrows the sense of the original text.[165] While according to the English version of that regulation it is the 'freedom of expression' that is subject to protection, the Polish version only refers to the 'freedom of expressing opinions' (*wolność wyrażania opinii*).[166] Therefore, the Polish version does not refer to the form of expressing opinions as

163 In keeping with Article 14 of the Polish Constitution, the Republic of Poland shall ensure freedom of the press and other means of social communication.

164 Pursuant to Article 1(27) of the Act of 5 November 2009 Amending the Criminal Code Act, the Criminal Procedure Code Act, the Criminal Enforcement Code Act, the Fiscal Penal Code Act and Certain Other Acts (Journal of Laws No. 206, item 1589 as amended).

165 Journal of Laws of 1993, No. 61, item 284.

166 As regards the Polish regulations, the phrase used in Art. 54(1) of the Polish Constitution is that everyone

much as it refers to their content. It is considered a mistranslation.[167] However, ECtHR case law relies on the authentic texts (in English and in French) which is backed by Art. 59 of the ECHR. As already mentioned, the English version of Art. 10(1) uses the term 'freedom of expression,' while the French version uses the equivalent term 'la liberté d'expression.'

In cases concerning Poland in relation to Art. 10 of the ECHR, the ECtHR also refers to the category of 'freedom of expression' and its consistent stance in that area has had a material impact on the practice of Polish courts. There are two aspects that need to be distinguished in this regard. First of all, it is because of the ECtHR case law that Polish courts have more and more frequently made a distinction between statements of facts and opinions, recognising that opinions by themselves will not stand the test of truth. Second, following the ECtHR, Polish courts have more and more frequently acknowledged that persons who hold public functions (particularly politicians) must recognise that they will be subject to more intense criticism, both in terms of the content and in terms of the form.

For a long time, there has not been sufficient distinction between statements of facts and opinions in the decisions taken by Polish courts. As a consequence, evaluative statements, particularly those criticising political opponents, were subjected to the test of truth.[168] There is still a tendency in the Polish courtroom practice to evaluate such statements in terms of true vs false, which should not take place.[169] That is because those are statements that express the beliefs and assessments of their authors concerning their activity and the criticism of actions taken by the opposing political parties.[170] That issue is of major significance because the burden of proof in cases concerning infringement of personal rights is reversed in Art. 24 of the Civil Code.[171] It is therefore assumed that where it is impossible to determine whether the allegations made in a press publication were true or false (a situation described as *non liquet*), the person who makes those allegations will, as a rule, bear civil liability.[172]

That view is softened in the ECtHR case law because the ECtHR makes a distinction between statements of facts and assessments. The ECtHR also applies those established standards in cases against Poland. In the judgment of 17 January 2017 in the case of *Zybertowicz v. Poland*[173] the ECtHR evaluated whether or not a certain statement made [by the applicant] within the framework of a public debate was a statement of facts or a subjective assessment. The Polish courts considered that statement to be a statement concerning facts and because they concluded that the author failed to prove it was true, the courts ordered the applicant to pay PLN 10,000 (approx. EUR 2,380) in compensation for moral loss and obliged him to publish an apology at his own cost and expense.

is ensured "the freedom to express their opinions (*poglądów)*, to acquire and to disseminate information".

167 MA Nowicki, *Komentarz Konwencji o ochronie praw człowieka i podstawowych wolności* (*Commentary to the Convention on the Protection of Human Rights and Fundamental Freedoms*), [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, (Concerning the European Convention. Commentary to the European Convention on Human Rights),* 7th ed., Warsaw 2017, thesis 1 in regard to Article 10.

168 J Sadomski presented numerous examples arising from an analysis of specific court case files in *Rozstrzyganie sporów wyborczych – analiza praktyki sądowej (Resolving Electoral Disputes – An Analysis of Courtroom Practice),* Prawo w działaniu. Sprawy cywilne 2011 No. 10, pp. 118-123.

169 D Bychawska-Siniarska, Rola Europejskiego Trybunału Praw Człowieka w kształtowaniu standardów ochrony wolności słowa w Polsce (*Role of the European Court of Human Rights in Shaping Protection of Freedom of Expression in Poland)*, Europejski Przegląd Sądowy 2017 No. 2 p. 37.

170 J Sadomski, *Rozstrzyganie sporów wyborczych… (Resolving Electoral Disputes...)*, p. 123.

171 Civil Code Act of 23 April 1964 (Journal of Laws of 2019, item 1145 as amended).

172 P Sobolewski in: Kodeks cywilny. Komentarz (ed. K. Osajda) (*Civil Code. Commentary)*, 25th edition, Legalis 2020, note 84 to Article 24.

173 Application No. 59138/10.

The ECtHR found the complaint about that decision to be valid. In the said judgment of 17 January 2017, 59138/10, the ECtHR made a reservation that the expression used by the applicant (the defendant in the case before the domestic courts) cannot be subject to a clear categorization as it was not a simple statement of fact or a subjective assessment. However, the ECtHR was of the view that the impugned phrase could be understood as the applicant's interpretation of statements made by the plaintiff (A.M.) and his stance in the public debate. Consequently, the critical issue for the proportionality of the interference was the question of a reasonable basis for the interpretation, since even a value judgment without any factual basis to support it may be considered as an infringement of personal rights subject to civil liability. However, the ECtHR concluded that the domestic courts failed to take into account the particular nature of the impugned utterance (which was within the framework of public debate) and consequently did not examine the question whether the evidence available to them could be considered as a reasonable basis for the interpretation proposed by the applicant. The ECtHR added that the reasons given by the domestic courts could not be regarded as a sufficient justification for the interference with the applicant's right to freedom of expression. The domestic courts therefore failed to strike a fair balance between the competing interests. That conclusion could not be affected by the fact that the incriminated proceedings were civil rather than criminal in nature. Accordingly, in the opinion of the ECtHR, the interference complained of was not 'necessary in a democratic society' within the meaning of Art. 10(2) of the ECHR. There had therefore been a violation of Art. 10 of the ECHR.

Similar view is becoming more and more popular in the decisions of Polish courts. In the judgment of 19 July 2019, V ACa 539/18,[174] the Court of Appeal in Warsaw concluded that the impugned statements rarely had an unambiguous 'clear-cut' form in practice. Most frequently, such statements combined factual elements and evaluative judgments (in different proportions) and the proportions in which those elements appear form the basis for determining the nature of the statement. In such cases, it was necessary to examine whether or not there were any elements in the statement that could be tested according to the true or false criterion. The Court of Appeal noted that such a confrontation line needed not be so clear-cut, it may also account for the criterion used in the ECtHR judgments.[175] The ECtHR permits the possibility of examining whether or not 'the facts on the basis on which the applicant formulated their judgment were substantially true' or, in other words, whether the judgments expressed took advantage of a 'sufficient factual ground.' That approach is also more and more frequently adopted by Polish courts.

It should also be taken into consideration that in its judgment of 4 November 2014 in the case of *Braun v. Poland*[176] the ECtHR reiterated that freedom of expression, as secured in paragraph 1 of Art. 10, constituted one of the essential foundations of a democratic society and one of the basic conditions of its progress and each individual's self-fulfilment. Subject to Art. 10 (2) of the ECHR, freedom of expression was applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such were the demands of that pluralism, tolerance and broadmindedness without which there was no 'democratic society.' There was little scope under Art. 10 (2) of the ECHR for restrictions on political speech or on debate on questions of public interest.

In the said judgment of 4 November 2014, 30162/10, ECtHR determined that the applicant had clearly been involved in a public debate on an important issue. Therefore,

174 LEX No. 2704192.

175 ECHR judgements: of 28 August 1992, Application No. 13704/88, Schwabe v. Austria; of 27 May 2001, Application No. 26958/95, Jerusalem v. Austria, and also 12 July 2001, Application No. 29032/95, Feldek v. Slovakia

176 Application No. 30162/10.

the domestic courts' approach that required the applicant to prove the veracity of his allegations could not be accepted. It was not justified, in the light of the ECtHR case-law and in the circumstances of the case, to require the applicant to fulfil a standard more demanding than that of due diligence only on the ground that the domestic law had not considered him a journalist. The ECtHR held that the domestic courts, by following such an approach, had effectively deprived the applicant of the protection afforded by Art. 10 of the ECHR. The Court added that although the national authorities' interference with the applicant's right to freedom of expression may have been justified by a concern to restore the balance between the various competing interests at stake, the reasons relied on by the domestic courts cannot be considered relevant and sufficient under the ECHR. That conclusion could not be altered by the relatively lenient nature of the sanction imposed on the applicant. There had therefore been a violation of Art. 10 of the ECHR in the opinion of the ECtHR.

ECtHR case law is also of major importance insofar as it acknowledges that one of the most important standards arising from Art. 10 of the ECHR is the duty of politicians and persons holding public functions to display a greater degree of tolerance for criticism against them than in case of ordinary citizens.[177] As far as decisions in cases involving Poland are concerned, one needs to note the ECtHR judgments: of 2 February 2010 in case of *Kubaszewski v. Poland*,[178] and of 22 June 2010 in case of *Kurłowicz v. Poland*.[179]

Due to the limited scope of this paper, it is impossible to present the full impact of Art. 10 of the ECHR and of the ECtHR case law on Polish law and the practice of Polish courts. It should, however, be signalled that Art. 10 of the ECHR was also applied in cases brought against Poland which concerned, among other things, a medical doctor's freedom of expression on medical errors made by his peers,[180] as well as the rights of public media employees to criticise the programming policy of their employer. [181][182]

Presented below in more detail are ECtHR judgments that had the greatest impact on Polish law or on the practice of Polish courts.

## 11 ABROGATING THE DUTY TO SEEK AND OBTAIN AUTHORISATION (QUOTE APPROVAL)

ECtHR case law concerning Art. 10 of ECHR has had an impact on Polish law-making. Art. 14(2) of the Press Law Act was repealed as of 12 December 2017; under that provision, 'a journalist may not deny authorisation (quote approval) by a source of information unless it was published before.' As a consequence of that decision, the lack of

177 IC Kamiński, *Swoboda wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu (Freedom of Expression in Case Law of the European Court of Human Rights in Strasbourg)*, Warsaw 2006, p. 113.

178 Application No. 571/04.

179 Application No. 41029/06.

180 ECHR judgment of 16 December 2008 in case of Frankowicz v. Poland, Application No. 53025/99.

181 ECHR judgment of 16 July 2009 in Wojtas-Kaleta v. Poland, Application No. 20436/02.

182 In addition, it is also worth noting the new Article 107 §1(3) of the Common Court System Act of 14 February 2020, whereby a judge is liable to disciplinary action for "actions questioning the existence of a professional relationship of a judge, the effectiveness of a judge's appointment or the empowerment of a constitutional body of the Republic of Poland". The amendment was introduced by way of the Act of 20 December 2019 Amending the Common Court System Act, the Supreme Court Act and Certain Other Acts (Journal of Laws item 190). The preamble reads that "each judge appointed by the President of the Republic of Poland should be afforded conditions that will allow him or her to perform the judicial profession in a dignified manner; particularly, effective procedures should be ensured that will not allow for any unlawful undermining of a judge status by any executive, legislative or judicial body, or by any persons, institutions, including other judges".

seeking and obtaining such quote approval by a journalist is no longer an offence within the meaning of Art. 49 of the Press Law.[183] As indicated in the rationale behind the bill of 27 October 2017 on amending the Press Law Act,[184] the amendment was dictated by the need to implement the judgment of the European Court of Human Rights of 5 July 2011 in *Wizerkaniuk v. Poland*.[185]

In the aforesaid judgment of 5 July 2011, 18990/05, ECtHR concluded that sentencing a journalist for publishing statements made by a Member of Parliament (MP) without obtaining authorisation (quote approval) had been a violation of Art. 10 of the ECHR. The sentence was issued based on the mere lack of obtaining authorisation (quote approval). The criminal sanction was not imposed because the MP's words were distorted or quoted out of context or conveyed in the manner which could have misled readers or depicted the MP in a negative light. In the Court's Assessment, the ECtHR emphasised that the applicant's criminal conviction was based exclusively on a breach of a technical character, namely on the fact that he had published the interview despite the MP's refusal to give his authorisation. The Court observed that the Press Act was adopted in 1984, that is before the collapse of communist system in Poland which took place in 1989. Under that system, the media were subjected to preventive censorship. The provisions of the Press Act, on which the applicant's conviction was based, were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. The ECtHR pointed out that it was not for the Court to speculate about the reasons why the Polish legislature had chosen not to repeal those provisions. However, as applied in the said case, the provisions of the Press Act could not be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.

In the Court's assessment in regard to the judgment of 5 July 2011, ECtHR was critical of the Polish Constitutional Tribunal's judgment of 29 September 2008, SK 52/05,[186] where the Constitutional Tribunal concluded that Art.49 and Art. 14(1) and (2) of the Press Act were compatible with Art. 54(1) in conjunction with Art. 31(1) of the Polish Constitution. In the statement of reasons, the Polish constitutional court held that authorisation (quote approval) was one of the simplest means to ensure veracity of the message and that failure to approve sources' quotes gave rise to the 'risk of confusticating or, in extreme cases, distorting their statements. Such a state of affairs may lead to consequences that are undesirable for the society.' The court also added that the duty to seek and obtain approval only applied to exact quotes; it did not, however, apply to their treatment because this is how Art. 14(2) of the Press Law was interpreted in practice. The ECtHR noted that such an approach of the Polish constitutional court was paradoxical. The more faithfully journalists rendered the statements of interviewed persons, the more they were exposed to the risk of criminal proceedings being brought against them for failure to seek authorisation. The ECtHR found it to be equally paradoxical that Art. 14 of the Press Act obliged journalists to seek authorisation only in respect of interviews recorded in a phonic or visual form whereas no such obligation was imposed where a journalist only made notes of an interview.

183 In keeping with Article 49 of the Press Law Act, whoever violates the provisions of Article 14 (amongst others) thereof, shall be subject to a fine or restriction of liberty.

184 Journal of Laws Item 2173.

185 Application No. 189ф90/05.

186 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 7 Item 125. (*Constitutional Tribunal Case Law. Official Bulletin*)

## 12 DEFAMATION

As already mentioned, there are concerns about the compatibility of Art. 212 para. 2 read in conjunction with Art. 213 para. 2 of the Criminal Code, which regulate the punishability of defamation, with Art. 10 of the ECHR. Even after the changes introduced as a consequence of the Constitutional Tribunal judgment of 12 May 2008, SK 43/05, the regulations read that 'slandering' a specific person (including a business entity) 'about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence that is required for a specific position, profession or type of activity' (as long as made through the mass media) is subject to a fine, the penalty of restriction of liberty, deprivation of liberty up to one year, even if the allegation was true. An exception is made only for allegations concerning the conduct of a person who holds a public function, and allegation in defence of a justifiable public interest.

It is emphasised in the legal doctrine that even though Poland keeps losing defamation cases before the ECtHR, the number of criminal cases under Art. 212 of the Criminal Code in Poland keeps growing.[187] However, the ECtHR case law did have an impact in that the penalty of restriction or deprivation of liberty is imposed much less frequently in such cases; if there is a conviction, it usually amounts to a pecuniary penalty (a fine). It is emphasised in the ECtHR judgments that, in light of Art. 10 of the ECHR, the penalty of deprivation of liberty may be considered permissible only in extraordinary cases.[188] In the case of *Długołęcki v. Poland,*[189] the proceedings for defamation against the local journalist were conditionally discontinued; however, while determining that there was a violation of Art. 10 of the ECHR, the ECtHR observed that it remained open to the court to resume the proceedings and impose a full penalty on the journalist.

Furthermore, the literature on the topic points out that the ECtHR seems to soften its approach to criminal sanctions in the more recent judgments concerning cases against Poland, and the Court seems to recognise that the application of a fine may be proportionate in certain cases, especially if the journalist acted in an unreliable manner.[190] Therefore, it is pointed out that such softening in the ECtHR approach has undoubtedly had an impact on the growing number of convictions to a fine in defamation cases.[191]

## 13 RIGHT OF FREEDOM: SUMMARY

The impact of Art. 10 of the ECHR and Fundamental Freedoms on the evolution of Polish law on protection of freedom of expression is invaluable. According to the analysis, ECtHR case law under Art. 10 of the ECHR has had a major influence on the decisions of Polish courts; in fact, in certain instances it led to significant changes in Polish legislation.

187 D Bychawska-Siniarska Rola Europejskiego Trybunału Praw Człowieka (*Role of the European Court of Human Rights)*, pp. 35-37.

188 ECHR judgment of 17 December 2004 in Cumpana and Mazare v. Romania, Application No. 33348/96.

189 ECHR judgment of 24 February 2009 in Długołęcki v. Poland, Application No. 23806/03.

190 Cf. ECHR judgments: of 19 July 2016 in Dorota Kania v. Poland, Application No. 49132/11 and of 13 January 2015 in Łozowska v. Poland, Application No. 62716/09.

191 D Bychawska-Siniarska Rola Europejskiego Trybunału Praw Człowieka (*Role of the European Court of Human Rights*), pp. 36-37.

The importance of ECtHR case law in cases against Poland may become even greater as Poland has been falling every year in the press freedom rankings compiled by Reporters Without Borders. In 2020, Poland was ranked 62nd.[192]

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# EFFECTIVE REMEDY FOR EXCESSIVE LENGTH OF PROCEEDINGS: A MACEDONIAN PERSPECTIVE

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# EFFECTIVE REMEDY FOR EXCESSIVE LENGTH OF PROCEEDINGS: A MACEDONIAN PERSPECTIVE

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***Abstract*** *In the spirit of Latin maxim* Ubi jus, ibi remedium, *it is claimed that the right to an effective remedy permeates the entire European Convention human rights system, giving it a real and effective dimension. An argument is also made for a right to a trial within a reasonable time, meaning that an excessive length of proceedings can be remedied as well. As the principle of subsidiarity lies at the heart of the jurisdiction of the European Court of Human Rights, the establishment of an effective remedy before the national bodies/authorities is required. In the light of these general considerations, while celebrating the 70th anniversary of the European Convention of Human Rights, the underlying idea of this article is to highlight the fundamental standards of assessing the effectiveness of the remedies with regard to the length of proceedings established in European Court of Human Rights case-law. The focus is placed on the development, current status and functioning of the remedy for excessive length of proceedings in North Macedonia as a Member State of the Council of Europe. The article attempts to answer the question of whether the legal remedy for excessive length of proceedings that exists in Northern Macedonia can be considered effective within the meaning of the European Convention of Human Rights and the European Court of Human Rights case-law.*

***Keywords:*** *a right to a trial within a reasonable time; excessive length of proceedings; undue delays; an effective remedy; an effective length-of-proceedings remedy; ECtHR case-law; jurisprudence of the Supreme Court of North Macedonia.*

## 1 INTRODUCTION

The development of procedural law over the last few decades has been profoundly marked by the penetration of the idea of fairness and, consequently, by the affirmation of the concept of a fair trial as an aggregate notion of the basic principles of administration of justice. The concept is articulated and realised through an essential minimum of procedural guarantees/values as permanent and invariable elements of the civilised system of the proper administration of justice.[1] Among them, the reasonable time requirement is one of the most frequently invoked

1 In this regard, recall the words of Robert S Summers that every legal process can be seen not only from the perspective of its result but also from viewpoint of the process Articleitself. Thus, he used the phrase 'process values' 'to refer to standards of value by which we may judge a legal process to be good as a process, apart from any "good result efficacy" it may have'. See Robert S Summers, '*Evaluating and Improving Legal Process – A Plea for "Process Values"*' (*1974*) 60 (1) *Cornell Law Review 1 and 3*.
In a similar vein, in *Golder v the United Kingdom*, dating back to 1975, it has been outlined that 'Article 6 … enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right': thus, the right to a court is coupled with a string of 'guarantees laid down … as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing'. See *Golder v the United Kingdom* App No 4451/70 (ECtHR, 21 February 1975) para.para. 28 and 36 <http://hudoc.echr.coe.int/eng?i=001-57496> accessed 11 January 2020.

components of a fair trial. Its conceptual substratum is the demand that the subjects whose rights are protected in court proceedings should not be exposed to long-lasting uncertainty for the final outcome of the proceedings and that they should have their legal matters resolved within a foreseeable and relatively predictable time period. Excessive delays in the administration of justice constitute an important danger, particularly as regards the rule of law.[2] Hence, the reasonable time guarantee serves to ensure public trust in the administration of justice and to protect parties to proceedings against excessive procedural delays.

Under the influence of numerous international documents, especially the Convention for the Protection of Human Rights and Fundamental Freedoms – commonly referred to as the ECHR,[3] nowadays, the standard of 'a trial within a reasonable time' is a procedural ideal that shapes the procedural and, even more so, the judicial system in each European State. Art. 6(1) of the ECHR reads as follows: '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 […]'. Hence, States should organise their respective judicial systems so as to enable their courts to guarantee the right to obtain a final decision within a reasonable time. As a regulative rule with a high level of abstraction, the standard of 'a trial within a reasonable time' is a principle that should be followed by the legislator in the creation of procedural rules. It is also a direction that should be succeeded by the courts in the application of such rules. From a perspective of the subjects of rights, this standard aggregates their legitimate right to have the proceedings for the protection of the rights completed in a time period that excludes undue delays. It is generally accepted that the notion of reasonableness must reflect the necessary balance between prompt and fair proceedings. The standard of 'a trial within a reasonable time' affirms the celerity of the proceedings to the extent that it excludes undue delays.[4]

Contrary to the set standard, the length of proceedings is a very complex problem that many European States experience with different degrees of gravity: for some of them, it is a generalised problem, a 'systemic' one, whereas, for others, it must rather be seen as an occasional dysfunction of an otherwise effective system of administration of justice.[5]

No doubt, a first guarantee that a right to a trial within a reasonable time will be granted is the proper application of procedural rules by the courts in terms of preparing a case and the speedy conduct of a trial. It also includes due diligence by the parties in the proceedings. These are important preconditions for the timely realisation of the right that is being decided on in the proceedings. But, what happens when the application of the procedural rules and due diligence does not provide the expected results? The reasonable speed in taking procedural steps has to be provided by other means, ie, remedies designed to expedite the proceedings in order to prevent them from becoming excessively lengthy or to order adequate reparations. Hence, it follows that the right to a trial within a reasonable time is an autonomous right that *per se* deserves protection, irrespective of the protection of the right on which the court decides in the proceedings. The right to a trial within a reasonable time itself should be reinforced by a right to an effective remedy in cases of its violations.

2 Interim Resolution DH (97)336 of 11 July 1997 concerning the length of civil proceedings in Italy: supplementary measures of a general character – Group of cases CETERONI.

3 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953).

4 See CH van Rhee (ed), *The Law's Delay. Essays on Undue Delay in Civil Litigation* (Intersentia 2004).

5 European Commission for Democracy through Law (Venice Commission), Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings CDL-AD (2006)036rev (Venice, 15–16 December 2006) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)036rev-e> accessed 11 January 2021.

The European human rights system has not only influenced the national legal systems to proclaim the fundamental right to a trial within a reasonable time (providing at the same time procedure and sanctions in the cases of violations on a supranational level), but has also provided an impetus in the establishment of effective domestic legal procedures for the protection of that right, and given guidelines for their further improvement. This article is not intended to provide a detailed description of the development of the effective length-of-proceedings remedies in Member States following the relevant ECtHR case-law, but rather to recall some leading cases that have paramount importance in establishing such remedies. In light of this, the focus is on the development, current status, and functioning of the remedy for excessive length of proceedings in North Macedonia as a Member State of the Council of Europe.

## 2 THE NOTIONS OF AN 'EFFECTIVE REMEDY' AND AN 'EFFECTIVE REMEDY FOR EXCESSIVE LENGTH OF PROCEEDINGS'

The establishment of an effective remedy before the national bodies/authorities for the protection of any right guaranteed by the ECHR is an obligation for the Contracting States under Art. 13 of the ECHR. It states that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Even though the effectiveness of human rights largely depends on the effectiveness of the remedies provided to redress their violation, almost three decades from the beginning of the implementation of the ECHR, the controlling bodies in Strasbourg had a rather indifferent position toward the application of this provision. They avoided analysing and interpreting it, and the provision became one of the most unclear provisions of the ECHR.

At the beginning of the 1980s, in the judgment rendered in the case of *Silver and others v United Kingdom*,[6] the ECtHR established several principles that were considered a necessary critical mass of requirements for the applicability of Art. 13 of the ECHR. The ECtHR held that in cases 'where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have *a remedy before a national authority* in order both to have his claim decided and, if appropriate, to obtain redress'. According to the Court, the term 'national authority', 'may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective'. The Court further considered that 'although no single remedy may itself entirely satisfy the requirements of Art. 13, the aggregate of remedies provided for under domestic law may do so'. Finally, the Court noted that 'neither Art. 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention – for example, by incorporating the Convention into domestic law'.[7]

In regard to the protection of the right to a trial within a reasonable time, the dominant position in early case-law of the Convention bodies was that the question of an effective remedy for the protection of this right is absorbed in Art. 6(1), which requires a trial within a reasonable time and even provides for stricter guarantees than Art.13 of the ECHR. As a

6 *Silver and others v United Kingdom* App Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 March 1983) <http://hudoc.echr.coe.int/eng?i=001-57577> accessed 11 January 2021.

7 ibid para 113.

result, Art. 6(1) was deemed to constitute a *lex specialis* in relation to Art. 13, so the latter Article was not considered even when Art. 6(1) was found to be violated.[8]

However, this approach was not immune to criticism. In their separate dissenting opinions in the case of *Airey v Ireland*, Judges O'Donoghue, Thór Vilhjálmsson, and Evrigenis state that in their opinion, the Court should have examined the complaint under Art. 13 of the ECHR as well, since there was not any overlapping or absorption as regards the provisions of Art. 6(1) and Art. 13.[9] Several years later, this criticism was expressed again by Judges Pinheiro Farinha and De Meyer in their joint separate opinion in the *W v the United Kingdom*.[10] They noted:

> We are not quite sure that such examination was made superfluous by the finding of a violation, in the case of the applicant, of the entitlement to a hearing by a tribunal within the meaning of Article 6 para. 1. Are the "less strict" requirements of Art.13 truly "absorbed" by those of Art. 6 §1? Do these provisions really "overlap"? It appears to us that the relationship between the right to be heard by a tribunal, within the meaning of Art. 6§1, and the right to an effective remedy before a national authority, within the meaning of Art. 13, should be considered more thoroughly.

The judgment rendered in the case of *Kudla v Poland*[11] is a turning point in the practice of the European control mechanism, as, for the first time, the ECtHR considered that it was necessary to examine an application under Art. 13 when a violation of Art. 6(1) had been found. Therefore, the correct interpretation of Art. 13 should be that it guarantees an effective remedy for an alleged breach of the right to have a court case determined within a reasonable time. The ECtHR held that

> The question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground.[12]

Furthermore, the ECtHR observed that the subsidiary character of the Convention machinery is articulated in Art. 13 and Art. 35(1), and the former gives direct expression to the States' obligation to protect human rights primarily within their own legal systems. With this in mind, the Court has decisively stated that

> If Art. 13 is […] to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Art. 6§1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise […] have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened.[13]

Although after the *Kudla* case, the ECtHR started to insist on the need to establish effective national remedies applying Art. 13 of the ECHR to all length of proceedings cases, the

8 David John Harris, Michael O'Boyle, Ed Bates, Carla Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2014) 777. See also *Airey v Ireland* App No 6289/73 (ECtHR, 9 October 1979) para 35 <http://hudoc.echr.coe.int/eng?i=001-57420 accessed 11 January 2021; *Kamasinski v Austria* App No 9783/82 (ECtHR, 19 December 1989) para 110 <http://hudoc.echr.coe.int/eng?i=001-57614> accessed 11 January 2021.

9 See *Airey v Ireland* (n 8).

10 See *W v the United Kingdom* App No 9749/82 (ECtHR, 8 July 1987) <http://hudoc.echr.coe.int/eng?i=001-57600> accessed 11 January 2021.

11 *Kudla v Poland* App No 30210/96 (ECtHR, 26 October 2000) <http://hudoc.echr.coe.int/eng?i=001-58920> accessed 11 January 2021.

12 ibid para 147.

13 ibid para 155.

increasing number of applications to the ECtHR for excessive length of proceedings cast doubts as to the effectiveness of the existing national remedies.

Following the impetus given by the ECtHR in *Kudla* judgment, the Committee of Ministers of the Council of Europe has adopted the Recommendation (2004)6 on the improvement of domestic remedies,[14] which has emphasised the subsidiary character of the control mechanism in Strasbourg, recommending the member States to establish effective legal remedies for the protection of the rights guaranteed by the ECHR in their national legal system, with particular emphasis to the right of a trial within a reasonable time.[15] According to this Recommendation, the member States should provide domestic legal remedies that must be 'effective' in law as well as in practice,[16] and more importantly, these remedies must deal with the substance of any 'arguable claim under the Convention and to grant appropriate redress for the violation suffered'. Each Member State has a discretionary power to choose the particular legal remedies: 'It is for Member States to decide which system is most suited to ensuring the necessary protection of Convention rights, taking into consideration their constitutional traditions and particular circumstances'.[17] Additionally, in the ECtHR's view, the protection afforded by Art. 13 does not go so far as to require any particular form of remedy since Member States are afforded a margin of discretion in conforming to their obligations under this provision. However, the nature of the right at stake has implications for the type of remedy the States is required to provide under Art. 13.[18]

In this latter context, the existence of an effective remedy for the protection of a right of a trial within a reasonable time primarily encompasses its effectiveness in the course of the proceedings, whose length is brought into question. It means that the remedy is effective if it prevents the alleged violation or its continuation (*mechanism of preventing delays or accelerating proceedings*). In *Apicella v Italy*, the ECtHR clearly stated that

> The best solution in absolute terms is indisputably, as in many spheres, prevention. As the Court has stated on many occasions, Art. 6 para 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time […] Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution.[19]

However, the effectiveness of the remedy is not disputed even in cases when there are procedures providing redress for unreasonable delays in proceedings, whether ongoing or concluded (*mechanism of compensation*). Therefore, Art. 13 offers an alternative: a remedy is 'effective' if it can be used either to expedite a decision by the courts dealing with the

14 Recommendation Rec (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies (adopted 12 May 2004).

15 The purpose of this Recommendation was to provide the future unloading of the ECtHR from the enormous influx of applications for violations of the Convention rights, especially from cases referring to the same problem (*repetitive/clone cases*), as were the cases for undue delay of the court proceedings.

16 According to the Recommendation, 'the "effectiveness" of a "remedy" within the meaning of Art. 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness'.

17 For the different legal remedies in different Member States see CH van Rhee (n 4); Alan Uzelac, 'Legal Remedies for the Violations of the Right to a Trial Within a Reasonable Time in Croatia: in the quest for the holy grail of effectiveness' (2010), 35(180) Revista de Processo, 159–193; and particularly Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings (n 5).

18 *Budayeva and Others v Russia* App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) paras 190–191 <http://hudoc.echr.coe.int/eng?i=001-85436> accessed 11 January 2021.

19 See *Apicella v Italy* App No 64890/01 (ECtHR, 29 March 2006) paras 72–80 <http://hudoc.echr.coe.int/eng?i=001-72935> accessed 11 January 2021.

case or to provide the litigant with adequate redress for delays that have already occurred.[20] Moreover, in different national legal systems, there can be more remedies for the protection of the right of a trial within a reasonable time, which individually might not be effective, but altogether have that quality.[21] It is incumbent on the States authorities to prove, in each case submitted to the ECtHR, the effectiveness of the remedy relied upon in support of the objection of non-exhaustion of domestic remedies or the rebuttal of a complaint of a violation of Art. 13 of ECHR. By producing examples of domestic case-law, the States can have the Court accept the effective nature of the remedy. However, it is important to stress that the recognition of the effectiveness of the remedy is not obtained once and for all. It may subsequently be reviewed and challenged by the Court, either generally or in light of the particular circumstances of a given case.[22]

The domestic legal remedy for excessive length of the proceedings must be exhausted before initiating a procedure in Strasbourg. On the contrary, the application would be declared inadmissible for non-exhaustion of domestic remedies within the meaning of Art. 35 of the ECHR.[23] The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case.[24]

To conclude this issue, reference will be made to another Recommendation (2010)3 of the Committee of Ministers of the Council of Europe to Member States, accompanied by a Guide to Good Practice,[25] as an exceptional source of information on the fundamental legal principles that apply to effective remedies for excessive length of proceedings and examples of good practices. They can help the Member States to anticipate problems that may lead to

20 See *Kudla v Poland* (n 11), para 159, but also *Cocchiarella v Italy* App No 64886/01 (ECtHR, 9 March 2006) paras 74–78 <http://hudoc.echr.coe.int/eng?i=001-72929> accessed 11 January 2021; *Ištván and Ištvánová v Slovakia* App No 30189 (ECtHR, 12 June 2012) <http://hudoc.echr.coe.int/eng?i=001-111400> accessed 11 January 2021.

21 The ECtHR itself has adopted a directive approach to which remedy is considered effective within the meaning of Art. 13 of the ECHR, giving explicit indications as to the characteristics that effective domestic remedies for the length of proceedings should have. See *Scordino v Italy (No 1)* App No 36813/97 (ECtHR, 29 March 2006) para 183 <http://hudoc.echr.coe.int/eng?i=001-72925> accessed 11 January 2021; *Sürmeli v Germany* App No 75529/01 (ECtHR, 8 June 2006) paras 79–117 <http://hudoc.echr.coe.int/fre?i=001-75689> accessed 11 January 2021; *Abramiuc v Romania* App No 37411/02 (ECtHR, 24 February 2009) para 119 <http://hudoc.echr.coe.int/eng?i=001-91440> accessed 11 January 2021; *Tagayeva and Others v Russia* App No 26562/07 and 6 other applications (ECtHR, 13 April 2017) para.621 <http://hudoc.echr.coe.int/eng?i=001-172660> accessed 11 January 2021.

22 European Commission for the Efficiency of Justice (CEPEJ), Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, adopted at the CEPEJ 31st plenary meeting (Strasbourg), 3–4 December 2018, at 14 <https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b> accessed 11 January 2020.

23 In numerous judgements, the Court reiterates that 'under Art. 35 para. 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Art. 35 para. 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient'. See, for example *McFarlane v Ireland* App No 31333/06 (ECtHR, 10 September 2010) para 107 <http://hudoc.echr.coe.int/eng?i=001-100413> accessed 11 January 2021.

24 See *Baumann v France* App No 33592/96 (ECtHR, 22 May 2001) para. 47 <http://hudoc.echr.coe.int/eng?i=001-59470> accessed 11 January 2021.

25 Recommendation CM/Rec (2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings (adopted by the Committee of Ministers on 24 February 2010) and the Guide to Good Practice accompanying this recommendation.

the Court finding a violation and taking prompt action at a national level to prevent such problems and remedy them, should they arise.[26]

## 3 CREATING AN EFFECTIVE REMEDY FOR EXCESSIVE LENGTH OF PROCEEDINGS IN NORTH MACEDONIA

### *3.1 Some General Facts and Figures about the Macedonian Human Rights Dossier at the ECHR*[27]

The accession of North Macedonia to the ECHR was achieved in a relatively short period after it became the 38th Member State of the Council of Europe on 9 November 1995. It signed the Convention on 9 November 1995 and ratified it on 10 April 1997, when the ECHR entered into force in respect to North Macedonia.[28] In that respect, it should be noted that pursuant to Art. 118 of the Constitution of North Macedonia, international treaties ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law. It means that they are superior to national legislation and receive an immediate application in case of conflict with national legislation. From this perspective, the ECHR enjoys a direct effect on the domestic legal system.

The ECtHR began to examine cases against North Macedonia two years after the Convention entered into force, and the first judgment was rendered in 2001.[29] According to the ECtHR statistics for the 1959–2019 period, the Court delivered 165 judgements in respect to North Macedonia. Of course, the structure and issues raised by cases changed over time. In the first ten years, more than 75 % of the admissible cases were on length of proceedings.[30] In the following years, for reasons that will be explained below, this figure is significantly lower. Hence, all things considered, the Court's statistics show that out of 165 judgements delivered in respect to North Macedonia during that period, 65 judgments concerned the length of proceedings violation, while ten judgments concerned the right to an effective remedy.[31]

### *3.2 No Effective Length-of-Proceedings Remedy until 2005*

The analysis of the constitutional and statutory framework of the right of a trial within a reasonable time in North Macedonia before the judicial reforms initiated by the Constitutional Amendments of 2005 leads us to the conclusion that the provisions establishing the right of a trial within a reasonable time in Macedonian legislation were *lex imperfecta*, meaning that there was no effective legal remedy for the violations of this fundamental procedural right.

Unlike some other Member States, the right to a trial within a reasonable time has never

26 ibid para 4.

27 For more details on this issue, see M Lazarova Trajkovska, I Trajkovski, 'The impact of the European Convention on Human Rights and the case law on the Republic of Macedonia', I Motoc, I Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge University Press, 2016) 266–288.

28 According to the agreement of 17 June 2018, which entered into force on 12 February 2019, as notified to international organisations on 14 February 2019, 'the former Yugoslav Republic of Macedonia' (FYR Macedonia) became the Republic of North Macedonia – short name, North Macedonia.

29 See *Solakov v the FYR Macedonia* App No 47023/99 (ECtHR, 31 October 2001) <http://hudoc.echr.coe.int/eng?i=001-59869> accessed 15 January 2021.

30 Mirjana Lazarova Trajkovska, Ilo Trajkovski (n 27).

31 See Statistics of the ECtHR, Violations by Article and by State 1959–2019 <https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf> accessed 15 January 2021.

been enshrined in the Constitution of North Macedonia. However, the provision that established that right could be found in different statutes, starting from the Law on Courts of 1995.[32] Art. 7 of this Law stated that everyone has a right to a fair, impartial, honest, and reasonable trial. On the other hand, by virtue of the same law, the issue of remedying the excessive length of judicial proceedings was deemed to be problematic, although, within the judicial administration, there were certain mechanisms for accelerating the proceedings. In order to accelerate the judicial proceedings, the parties had the possibility to address, ie, to file a complaint to the President of the competent court or to the Ministry of Justice under Art. 76, 77, and 81 of the Law on Courts. The issue of whether these complaints were effective remedies for the length of proceedings arose before the ECtHR in the case of *Janeva v the FYR Macedonia.*[33] The Court held that the stated possibilities refer to the 'questions of the methods which might be used to accelerate the proceedings', but do not address the 'question which affects the problem of exhaustion of all legal remedies in the proceedings'. When analysing the legislation in force in North Macedonia, the Court reached a conclusion that in regard to the length of proceedings, the issue of the methods with which the applicants might have accelerated the proceedings is not an issue that concerns the problem of exhaustion of the domestic legal remedies. The remedies called upon by the Government of North Macedonia (*requests for administrative supervision*) do not represent an effective legal remedy as referred to in Art. 13 of the ECHR.[34]

In spite of the fact that the *Janeva* case was struck out of the list of cases as a result of a friendly settlement,[35] the conclusion that in the Macedonian legal system, there is no effective legal remedy for excessive length of proceedings was reached by the ECtHR again in the judgement on the merits in *Atanasovic and others v the FYR Macedonia.*[36] As stated by the Court in the judgement:

> The Court notes that the remedies cited by the Government, that is a request to the President of the Kumanovo Municipal Court, the Ministry of Justice and the Republican Judicial Council to speed up the proceedings, effectively consist of submitting a complaint to a supervisory organ with the suggestion that it make use of its powers if it sees fit to do so. If such an appeal is made, the supervisory organ might or might not take up the matter with the official against whom the complaint is directed if it considers that the complaint is not manifestly ill-founded. Otherwise, it will take no action whatsoever. If action is taken, they would exclusively involve the supervisory organ and the officials concerned. The applicants would not be a party to any proceedings and would only be informed of the way in which the supervisory organ has dealt with their complaint.[37]

Therefore, the ECtHR found that the remedies referred to by the Government cannot be

32 Law on Courts [Закон за судовите] (Official Gazette of the Republic of Macedonia Nos 36/95, 45/95 and 64/2003).

33 See *Janeva v the FYR Macedonia* App No 58185/00 (ECtHR, Decision as to the Admissibility, 23 October 2001).

34 ibid. In its communication to the ECtHR, the Representative of the Government of North Macedonia has categorically requested the Court to dismiss the complaint for non-exhaustion of the domestic legal remedies, arguing that the applicant has had the opportunity in accordance with the Law on Courts, in order to accelerate the proceedings, to address the President of the court, or the Ministry of Justice, or, more specifically with respect to the behavior of the judge from the Municipal Court in Štip, to file a complaint to the President of the court or the Republican Judicial Council. Pursuant to the Government's opinion, these actions would have accelerated the course of proceedings.

35 In this case, a friendly settlement was reached, and the Macedonian Government was obliged to pay 77,000 EUR to Ms Sofka Janeva, covering any pecuniary and non-pecuniary damage, as well as costs. See *Janeva v the FYR Macedonia* App No 58185/00 (ECtHR, Judgment [Friendly Settlement] 3 October 2002) <http://hudoc.echr.coe.int/eng?i=001-60663> accessed 15 January 2021.

36 *Atanasovic and others v the FYR Macedonia* App No 13886/02 (ECtHR, 22 December 2005) <http://hudoc.echr.coe.int/eng?i=001-71813> accessed 15 January 2021.

37 ibid para 31.

considered to be effective legal remedies for the protection of the right to trial within a reasonable time and consequently found a violation of Art. 13 of the ECHR.[38]

### *3.3 A First Step towards Creating an Effective Remedy*

As a result, the introduction of an effective legal remedy for excessive length of proceedings in the domestic legal system became one of the priorities of the judicial reform started in 2005. Faced with the dilemma of which model of legal remedy should be accepted, the lawmakers chose the model of legal remedy within the regular judicial system (not taking into account the Constitutional Court), which provides for the adequate compensation of the damages caused by the delay of proceedings.

Art. 36 of the new Law on Courts of 2006[39] stated that:

> (1) The party who deems that the competent court has violated the right to a trial within a reasonable time, may submit to the immediately higher court a request for protection of the right to a trial within a reasonable time.
> (2) The immediately higher court shall consider the request no later than six months of its submission and shall determine whether the lower court has violated the right to a trial within a reasonable time.
> (3) In case the immediately higher court determines violation of the right to a trial within a reasonable time, it shall decide for a just satisfaction to be paid to the submitter of the request.
> (4) The just satisfaction shall be provided from the judicial budget.

Seen from a comparative perspective, this model of legal remedy was closest to the one set in the Italian judicial system[40] and thus (partly) satisfied the criteria of the ECtHR regarding the requirements of Art. 13 of the ECHR.[41] Nevertheless, from the very first moment of enacting the new Law on Courts, several questions arose: Was the choice was the most rational? Was an additional enhancing of the chosen procedural model necessary, or would it have been more rational to introduce the model of constitutional complaint for the protection of the right to trial within a reasonable time?

At first glance, it was little surprising why, in profiling the length-of-proceedings remedy, the lawmakers did not choose the possibility to secure the mechanism of accelerating the proceedings through the same legal remedy,[42] following, for example, the Austrian *Fristsetzungsantrag*.[43] Scholars have pointed out that it might have been a better solution if the introduced legal remedy was strengthened in the following manner: during the course of proceedings, if the party deems that there is an unreasonable delay in the taking of a particular procedural action (for example, holding a hearing, obtaining an expert's report,

38 The Court took the identical position in several other cases. See, for example, *Kostovska v the FYR Macedonia* App No 44353/02 (ECtHR, 15 June 2006) <http://hudoc.echr.coe.int/eng?i=001-75831> accessed 15 January 2021; *Rizova v the FYR Macedonia* App No 41228/02 (ECtHR, 6 July 2006) <http://hudoc.echr.coe.int/eng?i=001-76267> accessed 15 January 2021.

39 Law on Courts [Закон за судовите] (Official Gazette of the Republic of Macedonia No 58/2006).

40 Pinto Act, No 89, 24 March 2001, which is the first special national act regarding the protection of the right to a trial within a reasonable time.

41 In *Brusco v Italy* App No 69789/01 (ECtHR-IX, 6 September 2001) <http://hudoc.echr.coe.int/fre?i=001-22642> accessed 15 January 2021, the ECtHR has already held that the remedy before the courts of appeal introduced by the Pinto Act was accessible and that there was no reason to question its effectiveness.

42 It seems that the lawmakers counted on the previous novelty of procedural legislation directed towards acceleration of the proceedings, which is *per se* a sufficient guarantee that the application of the new procedural rules would secure a reasonable speed of proceedings, and therefore no additional procedural remedies are required.

43 See para 91 of Austrian *Gerichtsorganisationsgesetz* (GOG – Court Organization Act).

issuing another necessary order or taking an action which the concerned authority has failed to take), he/she may apply to a higher court for setting a time limit by which the lower court should take the required procedural action.[44] This scholar's position was based on the ECtHR's opinion that a combined remedy that unites expediting and compensatory relief is probably the most effective one.[45]

The scholars had also pointed out several open questions that endangered the practical effectiveness of the legal remedy for just satisfaction in cases of violation of the reasonable time requirement. It was obvious that the law was not completely precise when determining the essential elements of this remedy. For example, it was not determined when the request for protection of the right to a trial within a reasonable time can be submitted: only during the course of proceedings or after its termination? And accordingly, in which time limit after the termination? It was also unclear what could be included in the just satisfaction: material or non-material damage, or both? Furthermore, the procedure for deciding upon these requests was not regulated, etc.

All these shortcomings, practical problems, and doubts became visible when the new legal remedy was put into effect (1 January 2007). The Supreme Court of North Macedonia (Supreme Court) came out with a report in which the lack of clarity of the 2006 Law and the effectiveness of the remedy were criticised. Two years later, in the case of *Parizov v the FYR Macedonia*,[46] the ECtHR held that the length-of-proceedings remedy that was introduced by the 2006 Law and became operational on 1 January 2007 cannot be considered as effective in practice since no court decision has been taken, even more than twelve months have elapsed after the introduction of the remedy.[47] Therefore, the Court considers that it would be disproportionate to require the applicant to try that remedy.[48]

### *3.4 Other Steps Forward*

The same year, the Macedonian Government decided to make a proposal for amending

44 Tatjana Zoroska Kamilovska, 'The Lengths of Civil Proceedings and the Right of a Trial within a Reasonable Time' (Skopje, 2006, doctoral dissertation) 421.

45 See *Apicella v Italy* (n 19), paras 72–80 and also *Cocchiarella v Italy* App No 64886/01 (ECtHR, 9 March 2006) <http://hudoc.echr.coe.int/eng?i=001-72929> accessed 15 January 2021.

46 *Parizov v the FYR Macedonia* App No 14258/03 (ECtHR, 7 February 2008) <http://hudoc.echr.coe.int/eng?i=001-84968> accessed 15 January 2021.

47 See also *Horvat v Croatia* App No 51585/99 (ECtHR, 26 July 2001) paras 37–39, where the ECtHR held that a national 'complaint about delays' must not be merely theoretical: there must exist sufficient case-law proving that the application can actually result in the acceleration of a procedure or in adequate redress <http://hudoc.echr.coe.int/eng?i=001-59616> accessed 15 January 2021.

48 In *Parizov v the FYR Macedonia* (n 46, paras 43–44) 'the Court notes, first, that section 36 of the 2006 Act provides for a compensatory remedy – a request for just satisfaction – through which a party may, where appropriate, be awarded just satisfaction for any non-pecuniary and pecuniary damage sustained. A compensatory remedy is, without doubt, an appropriate means of redressing a violation that has already occurred […]'. The Court further observes that the expression 'the court considers the application (постапува по барањето) within six months' is susceptible to various interpretations (see, mutatis mutandis, *Horvat v Croatia*, no. 51585/99, para 43, ECHR 2001-VIII). It remains open to speculation whether the proceedings upon such application should terminate within that time-limit. In addition, the 2006 Act defines two courts which may decide upon such remedy: the immediately higher court and the Supreme Court. It does not specify which court would be competent to decide if a case is pending before the Supreme Court, as it is in the present case […] Even though the Court accepts that statutes cannot be absolutely precise and that the interpretation and application of such provisions depend on practice (see, mutatis mutandis, *Kokkinakis v Greece*, judgment of 25 May 1993, Series A no 260-A, p 19, para. 40), the fact remains that no court decision has been taken although more than twelve months have elapsed after the introduction of the remedy. The absence of any domestic case-law appears to confirm that ambiguity'. See also *Krsto Nikolov v the FYR Macedonia* App No 13904/02 (ECtHR, 23 October 2008) paras 29–33 <http://hudoc.echr.coe.int/eng?i=001-89153> accessed 15 January 2021.

the provisions regarding the length-of-proceedings remedy. The amendments to the Law on Courts were enacted in March 2008,[49] revising, among others, Art. 36 of this Law. The fundamental novelty was the establishment of an exclusive competence of the Supreme Court of North Macedonia for deciding upon the requests for protection of the right of a trial within a reasonable time. Several other provisions were added to Art. 36: *first*, it prescribes the time limit for submitting the request – in the course of the proceedings or not later than six months after the court decision becomes final; *second,* the content of the request for protection was set;[50] *third*, the duration of the proceedings before the Supreme Court was limited to six months from submitting the request; *fourth*, when deciding upon the request, the Supreme Court has to take into consideration the rules and principles of ECHR, especially the complexity of the case, the conduct of the applicant and the conduct of the court in question;[51] *fifth*, if the Supreme Court finds the violation of the right of a trial within a reasonable time, the Court shall set (with a decision) the time limit for the court before which the impugned proceedings are pending to decide on the right, obligation, or criminal responsibility of the claimant and award just satisfaction for the claimant in respect of the violation found; *sixth*, the satisfaction shall be paid from the Judicial budget within three months after the Supreme Court's decision becomes final; and *seventh*, several other questions of the procedure before the Supreme Court were also prescribed.[52]

The question of whether the revised length-of-proceedings remedy is effective was soon raised before the ECtHR. In *Šurbanoska and others v the FYR Macedonia*,[53] the Court found that it was still too early to deliver a judgment on the effects of the new legal remedy introduced by the amendments to the Law on Court in 2008. For that reason, the Court declared the application inadmissible. However, the Court found that that the applicants, who meanwhile used the length-of-proceedings remedy successfully, could no longer claim to have victim status. Analysing the whole background of this case, the Court stated that it is satisfied with the Supreme Court's decision of 20 October 2008, which provided the applicants with sufficient and appropriate redress capable of removing their victim status within the meaning of Art. 34 of the Convention. In addition to awarding just satisfaction, the Supreme Court set the three-month time-limit for the Bitola Court of Appeal to decide the applicants' claim in the substantive proceedings, with which the latter court had complied.[54]

After this positive feedback from the ECtHR, the Law on Courts was amended once again in 2010.[55] New provisions concerning the execution of the Supreme Court's decisions for

49 Official Gazette of the Republic of Macedonia No 35/2008.

50 The request shall contain: information about the claimant and his or her representative; information about the case and proceedings complained of; indication of the reasons for the alleged violation of the right to a hearing within a reasonable time; any claim for just satisfaction; and the signature of the claimant (Art 36(3)).

51 It is obvious that the legislator has failed to mention the other relevant criterion for assessing the reasonableness of the length of proceedings – what was at stake for the applicant in the dispute. As we are familiar with the Supreme Court's practise, this criterion is leading under 'the conduct of the applicant'.

52 Namely, a new Art. 36-A was inserted in the Law on the Courts, which reads as follows:
'(1) After receiving the request from the Art. 36(1) of this law, the Supreme Court, shall immediately or within 15 day at the latest, request the first-instance court to forward the case file to it, and if necessary, request the higher court to indicate the reasons for the length of the proceedings pending before it.
(2) A three-judge panel of the Supreme Court, sitting in private, shall decide on the length-of-proceedings remedy. In exceptional cases, the Supreme Court may decide to hear the applicant and the representative of the court concerned.
(3) Within 8 days after receipt, the party concerned may can appeal against the panel's decision before the Supreme Court, which shall decide in accordance with Art. 35(1) of this law'.

53 *Šurbanoska and others v the FYR Macedonia* (App No 36665/03), Decision as to the admissibility, 31 August 2010.

54 ibid paras 39 and 44.

55 Official Gazette of the Republic of Macedonia No 150/10.

payment of compensation were added in order to make this mechanism more effective in practice.[56] With these amendments, the legislative process for introducing the effective legal remedy for violations of the reasonable time requirement seems to be encircled.

Until 2011, the ECtHR saw no reason to depart from its earlier case-law, in which it found a violation of Art. 13, taken in conjunction with Art. 6, due to lack of an effective remedy concerning length-of-proceedings cases. Finally, in the case of *Adži-Spirkoska and others v the FYR Macedonia*,[57] the Court found that a length-of-proceedings remedy introduced in 2008 could be regarded as effective *ex nunc.* In the Court's view

> The purpose of the 2008 Act is twofold. In the first place, the Supreme Court's order setting a time limit for a decision is designed to ensure the acceleration of pending proceedings […] Secondly, the 2008 Act also provides for a compensatory remedy through which a party may be awarded just satisfaction for any damage sustained as a result of the inordinate length of the impugned proceedings […] In such circumstances, and on the basis of the practice established by the Supreme Court, the ECtHR considers that the length remedy provided for by the 2008 Act is to be regarded, in principle, as effective within the meaning of Art. 35 para 1 of the Convention. Consequently, applicants should be required to avail themselves of it before submitting their length complaints to the Court.

Nevertheless, the ECtHR did not fail to conclude that in view of the drawbacks noted in the decision, in particular, the level of just satisfaction awarded by the Supreme Court, the Court's position may be subject to review in the future and the burden of proof as to the effectiveness of the remedy in practice remains on the respondent Government. Still, it is worth mentioning that based on this decision, in 2011, the Court disposed of several hundred length-of-proceedings cases against North Macedonia.[58]

## 4 FOLLOW UP: SOME ASPECTS OF PRACTICAL IMPLEMENTATION OF THE LENGTH-OF-PROCEEDINGS REMEDY IN NORTH MACEDONIA

Available statistical data shows that as of 1 January 2007, when the length-of-proceedings remedy before the Supreme Court was put into effect, the number of requests submitted to the Supreme Court was constantly increasing. In regard to the first period, until 2011, when the ECtHR issued the ground-breaking decision in *Adži-Spirkoska and others* case finding that a length-of-proceedings remedy as revised in 2008 could be regarded effective, the Supreme Court received 828 requests for the length of proceedings protection: 741 of these requests were in regard to civil proceedings, 147 in regard to criminal proceedings, and 90 to administrative proceedings. In 218 cases, the Supreme Court found that the requests were justified.[59] The case flow of requests for protection of a right to a trial within a reasonable time in the following period can best be traced through the annual reports on the work of the Supreme Court published on its website.[60] The largest number of newly submitted requests

56 It was a reaction to the ECtHR's view in *Scordino v Italy* (n 21) that 'the Court can accept that the authorities need time in which to make payment. However, in respect of a compensatory remedy designed to redress the consequences of excessively lengthy proceedings, that period should not generally exceed six months from the date on which the decision awarding compensation becomes enforceable' (para 198).

57 *Adži-Spirkoska and others v the FYR Macedonia* App No 38914/05 (ECtHR, 3 November 2011) <http://hudoc.echr.coe.int/fre?i=001-107569> accessed 15 January 2021.

58 Mirjana Lazarova Trajkovska, Ilo Trajkovski (n 27) 276.

59 Judge Nikolco Nikolovski, 'The Right to a fair trial, Application of the principles and standards determined with Article 6 of the ECHR – a right to a trial within a reasonable time period' (2011) 24 *Business Law, Edition of law theory and practice,* 77.

60 See Annual Reports <https://www.vsrm.mk> accessed 15 January 2021.

was registered in 2012 – 676 requests – so that in the next five years (2013–2017), there was a relatively constant influx of 400–450 requests. In the last two reporting years, the number of submitted requests has decreased: 307 requests in 2018 and 241 requests in 2019. The figures alone do not answer whether the decrease in the number of requests is due to the reduced enthusiasm of users of the judicial system for this remedy or to the general increase in the efficiency of the judicial system and the shortening of the duration of court proceedings. It requires additional research, which goes beyond the scope of analysis in this paper.

Apart from these statistics, with regard to the substance, no serious studies or other research that could objectively evaluate the Supreme Court's case-law can be found. However, the ECtHR's jurisprudence has doubtless had a great impact on the Supreme Court's daily dealing with these cases, and there is no significant divergence between the Supreme Court's case-law and the ECtHR's jurisprudence regarding the right to a trial within a reasonable time. Since its earlier cases, the Supreme Court started to take into consideration the criteria that the ECtHR has established for assessing the reasonableness of the length of proceedings: the complexity of the case, the conduct of the applicant, and the conduct of the court/courts in question, applying them in each decision,[61] and we will not make any further comments on this issue.

On this occasion, our analysis will be limited to several issues regarding the Supreme Court's case-law: *first*, the sphere of applicability of the length-of-proceedings remedy; *second*, the Court's assessment of excessive length of proceedings; *third*, the effectiveness of the orders to expedite proceedings; *fourth*, the sufficiency of the amount of just satisfaction; and *fifth,* the length of the proceedings before the Supreme Court.

Very soon after the amended Law on Courts was put into effect, the Supreme Court clearly indicated that the length-of-proceedings remedy applies only to the violations of the reasonable time requirement in court proceedings (civil, criminal, administrative disputes, etc.), but it is not available for violation of this standard in administrative proceedings. In this respect, an analysis of the case-law of the Supreme Court reveals that in its view

> the request for protection of the right of a trial within a reasonable time is an institute established by the Law on Courts, which provides the protection of such a right violated by the competent court, i.e., when the violation is carried out in judicial proceedings, and therefore the applicant has no right to apply for protection according to Art. 36(1) of the Law on Courts, when the proceedings is conducted before the Commission for denationalization [which is an administrative body].[62]

However, the length of the administrative stages of proceedings is taken into consideration by the Supreme Court when assessing the reasonableness of the overall length in the cases when the administrative proceedings preceded the recourse for an administrative dispute to a court.[63] It could be noted that on this issue, there is no divergence between the jurisprudence of the Supreme Court and the ECtHR's case-law. Furthermore, regarding the proceedings that have been initiated before the administrative bodies and later continued before the Administrative Court, the Supreme Court considers that from the perspective of the guarantees given by Art. 6 of the ECHR, in order to be taken into account, the administrative procedure (for example, the procedure for issuing approval for urban and remedial measures, procedure for the privatisation of construction land, etc.) should have a direct, decisive influence in relation to the personal rights to ownership and use of that

61 This is evident even from a cursory review of decisions made by the Supreme Court, which are published on its website <https://www.vsrm.mk> accessed 15 January 2021.

62 Decision of the Supreme Court PSRR No 48/2009. See also Decision of the Supreme Court PSRR No 40/2014, where it is stated that 'protection of the right to a trial within a reasonable time cannot be sought within the meaning of Art. 36(1) of the Law on Courts, for a procedure that has finally ended before the administrative bodies, without initiating an administrative dispute'.

63 Decision of the Supreme Court PSRR No 67/2009.

right on the property in question, as civil rights and obligations are not always created in the relations of involvement between the individual and the States (administrative bodies).[64] This is also in line with the above-mentioned Recommendation (2010)3 on effective remedies for excessive length of proceedings, which recommends the governments of the Member States to 'take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights and obligations or of any criminal charge, are determined within a reasonable time'.[65]

Regarding the assessment of excessive length of proceedings, it is well known that the ECtHR has established a principle according to which 'the reasonableness of the duration of proceedings covered by Art. 6 of ECHR must be assessed in each case according to its circumstances'.[66] It is evident from the analysis of the Supreme Court's relevant decisions that the Court applies this principle. Yet, due to its relativity, there is no precise, fixed time period that should always be considered a reasonable or excessive one. For example, the Supreme Court considers that 'the period of 10 years and 10 months for the civil proceedings while 34 court hearings were held in violation of a right of a trial within e reasonable time'.[67] In the same case, the Supreme Court held that

> Although the claimants ' – applicants ' behavior contributed to eleven years duration of civil proceedings, abusing his rights provided for in the Law on Civil Proceedings, and at the same time having the contribution of the respondent with his absence from hearings, it is the court's omission for not using its authority given with the Law on Civil Proceedings, and thus the Supreme Court found the violation of the right to a trial within a reasonable time.

On the other hand, the period of two years and seven months in the proceedings for disturbing possession is not considered to be an excessive one, although according to the Law on Civil Proceedings, this procedure is urgent and has to be terminated within six months after lodging the action.[68]

As far as the effectiveness of the orders to expedite proceedings is concerned, it seems that it is generally endangered since, in the majority of cases, when the Supreme Court set a time limit for a decision (from three to six months based on the complexity of the case and the stage of proceedings), the court in question did not comply with it. For example, according to statistical data, in only 36 out of 87 cases where the Supreme Court set a time limit for the decision did the courts in question comply with the Supreme Court orders.[69]

As regards the sufficiency of the amount of just satisfaction, analysis of the ECtHR's case-law shows that the criteria for the determination of the amount of just satisfaction depend considerably on the nature and extent of the violations the Court has found, the particular features of each case, and whether any of the damage was caused by the actions of the applicant. The Court also takes into account the local economic circumstances of the country concerned. It is the Court's settled case-law that where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within

64 Decision of the Supreme Court PSRR No 92/2013; Decision of the Supreme Court PSRR No 6/2014.

65 Recommendation CM/Rec (2010)3 (n 25) para 1.

66 A similar or identical sentence occurs in a number of ECtHR's judgments. See, for example *Zimmermann and Steiner v Switzerland* App No 8737/79 (ECtHR, 13 July 1983) para 24 <http://hudoc.echr.coe.int/eng?i=001-57609> accessed 18 January 2021; *Frydlender v France* App No 30979/96 (ECtHR, 27 June 2000) para 43 <http://hudoc.echr.coe.int/eng?i=001-58762> accessed 18 January 2021.

67 Decision of the Supreme Court PSRR No 106/2008.

68 Decision of the Supreme Court PSRR No 131/2009.

69 Judge Nikolco Nikolovski (n 59) 77.

the meaning of Art. 34 of the Convention.[70] In the light of the aforementioned criteria, assessing whether the amount of compensation awarded under the domestic remedy was appropriate and sufficient, in *Scordino v Italy*,[71] the ECtHR has clearly stated that the Court can also perfectly well accept that a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, will award amounts which – while being lower than those awarded by the Court – are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly.[72]

In that vein, it should be highlighted that in the Court's view, the amount of compensation can also depend on the availability of the domestic remedies that could accelerate the proceedings, in which case, the Court accepted that the compensation awarded at the domestic level (if a combined remedy is introduced) would be somewhat lower than the usual compensation awarded before it.

According to the Information on the Supreme Court's case-law in length-of proceedings cases submitted by the Macedonian Government in *Šurbanoska and others v the FYR Macedonia* 'in cases where a violation of the "reasonable time" requirement was found, the Supreme Court awarded just satisfaction, the amount of which was in the range of EUR 80 (ПСРР.бр.86/08) and EUR 4.000 (the applicants' case)'.[73] Finding that the total amount of compensation awarded in 46 cases was EUR 40,610, which is 15–20% of the overall amount that the ECtHR would have awarded in comparable cases, the Court considers that 'only in a very limited number of cases was the level of just satisfaction awarded by the Supreme Court acceptable, while in the vast majority of cases the awards were below or even far below the Court's standards'.[74] The latest available statistics of the Supreme Court show an increase of the maximum amount awarded to 500,000 denari (about 8,000 Euro), while the minimum amount remains unchanged (5,000 denari or 80 Euro).[75] Still, even in the most recent case before the ECtHR, *Sinadinovska v North Macedonia*,[76] the Court found that the compensation awarded at the domestic level cannot be regarded as adequate in the circumstances of the case, and therefore, the applicant has not lost her status as a victim within the meaning of Art. 34 of the Convention.[77] It should be noted that in assessing the appropriateness of the compensation awarded, the Court took into consideration the fact that the available domestic remedy failed to accelerate the proceedings since the domestic courts did not comply with the time-limit set by the Supreme Court.

70 *Apicella v Italy* (n 19) para 70.

71 *Scordino v Italy* (n 21).

72 ibid para 206.

73 *Šurbanoska and others v the FYR Macedonia* (n 53) para 24.

74 ibid para 38. Nevertheless, in this case, the Court is satisfied that the amount awarded to the applicants (EUR 4,000 jointly for a delay of over seventeen years, of which over eleven years elapsed after the ratification of the Convention by North Macedonia) is not manifestly unreasonable compared to what the Court generally awards in similar cases against the respondent State. ibid para 39.

75 Report on the Work of the Supreme Court of the Republic of North Macedonia for 2019 <https://www.vsrm.mk> accessed 18 January 2021.

76 *Sinadinovska v North Macedonia* App No 27881/06 (ECtHR, 16 January 2020) <https://laweuro.com/?p=10650> accessed 18 January 2021. See also *Ogražden Ad and others v the FYR Macedonia* App Nos 35630/04, 53442/07 and 42580/09 (ECtHR, 29 May 2012) <http://hudoc.echr.coe.int/eng?i=001-110943> accessed 18 January 2021.

77 *Sinadinovska v North Macedonia* (n 76), para 49–50. The Court noted that for a period of six years and six months of the enforcement proceedings, just satisfaction was awarded at the domestic level in the total amount of MKD 60,000 (equivalent to approximately EUR 970). It does not correspond to what the Court would have been likely to award under Art. 41 of the Convention in respect to the same period. Furthermore, the domestic courts did not comply with the time-limit set by the Supreme Court.

Finally, we will address the issue of the length of proceedings before the Supreme Court in regard to the length-of-proceedings remedy. The ECtHR pointed out that a remedy designed to address the length of proceedings may be considered effective only if it provides adequate redress speedily. According to the Court, particular attention should be paid to the speediness of the remedial action itself: it not being excluded that the adequate nature of the remedy can be undermined by its own excessive duration.[78]

As was mentioned above, according to the Law on Courts as revised in 2008, the duration of the proceedings before the Supreme Court is terminated to six months from submitting the request. The annual reports on work of the Supreme Court in the last decade show a constant exceeding of this time limit in more than 60% of the total number of this type of cases, stating as a reason the late submission of the case files by the court that acted in a specific case. The Supreme Court itself came out with a view that there is no legal tool by which the Supreme Court will impose itself on the lower courts for faster submission of the case files, especially in cases where the procedure relating to the request for protection of the right to a trial within a reasonable time is still in progress, whereas the essence is to create conditions to continue with the proceedings and not to wait for the decision on the request for protection of the right to a trial within a reasonable time.[79] Obviously, a review should be conducted of the procedural rules for resolving this type of case before the Supreme Court, as well as the objectivity of the established time framework, which does not correspond to the ECtHR's case-law. Otherwise, there is an opportunity for the parties to complain about the excessive length of the proceedings before the Supreme Court.

## 5 CONCLUDING REMARKS

Art. 6(1) of the ECHR requires judicial proceedings to be conducted within a reasonable time, and therefore, Member States are obliged to make every effort to avoid its excessive length. The fulfilment of this obligation largely depends not only on the proper application of procedural rules and due diligence in the proceedings but also on the effectiveness of the remedies that are provided to redress violations of the reasonable time requirement. Hence, Members States have obligations in respect of the length of proceedings stemming not only from Art. 6(1) but also from Art. 13 of the ECHR. The guarantee of an effective legal remedy, including the length-of-proceedings remedy, implies that a States has a primary duty to protect the right to a trial within a reasonable time within its own legal system. As a consequence, the ECtHR exerts its supervisory role only after domestic remedies have been exhausted or when domestic remedies are unavailable, ineffective, or insufficient.

The analysis above shows that generally speaking, at the moment, the model of remedy that has been created and gradually improved in the Macedonian legal system is considered to be effective within the meaning of the ECHR. It combines the mechanism of accelerating proceedings and mechanism of compensation and doubtless has produced positive results and success in speeding up the proceedings. Nevertheless, some observations clearly indicate that creating an effective length-of-proceeding remedy is not a definitive normative activity in North Macedonia. Further improvements are required, as the ECtHR's case-law consistently evolves and the Courts adjoin new elements to the very complex notion of an effective remedy, taking into account complaints regarding the law and practice of Member States, including

78 See, for example, *Vidas v Croatia* App No 40383/04 (ECtHR, 3 July 2008) para 37 <http://hudoc.echr.coe.int/eng?i=001-87356> accessed 18 January 2021.

79 Report on the Work of the Supreme Court of the Republic of North Macedonia for 2019 (n 75).

North Macedonia. Moreover, it seems that no Member State has achieved perfection in creating an effective legal remedy regarding the length of proceedings, even though 'membership itself implies an obligation to strive constantly for self-improvement.'[80] Of course, all the possible improvements regarding the availability and effectiveness of the remedy must be the result of serious study, rather than a provisory and partial solution. Guidelines can be found in the documents of the relevant bodies of the Council of Europe, as well as in the ECtHR's case-law. Finally, it should not be overlooked that solving the issue of an effective length-of-proceedings remedy is not important only due to its compliance with the ECHR and respect to the European control mechanism, ie, the ECtHR and the authority of its decisions, but primarily because of the interests of Macedonian citizens in the proper and efficient administration of justice.

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# THE IMPACT OF THE ECHR AND THE CASE LAW OF THE ECtHR ON CIVIL PROCEDURE IN UKRAINE

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**Summary:** 1. Introduction. – 2. The Harmonization of National Legislation with ECHR Requirements as a Desideratum for Civil Justice Reforms in Ukraine. – 3. The Rule of Law as a Principle of Civil Procedure and the Application of the Case Law of the ECtHR . – 4. Right to a Fair Trial: the Ukrainian Context. – 5. Pilot Judgments of the ECtHR and Civil Procedure Practice. – 6. The Review of a Case on Exceptional Circumstances after the Judgment of the ECtHR. – 7. Conclusions.

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## CONFLICTS OF INTEREST

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# THE IMPACT OF THE ECHR AND THE CASE LAW OF THE ECTHR ON CIVIL PROCEDURE IN UKRAINE

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***Abstract*** *The article addresses the impact of the ECHR and the case law of the ECtHR on civil procedure in Ukraine. In the context of the provisions of national legislation and judicial practice, the authors analyse the areas of the harmonization of national legislation with the requirements of the ECHR and the practice of the ECtHR in light of the 2016 constitutional reform of justice and the new edition of the Civil Procedure Code of Ukraine. Special attention is paid to the embodiment of the rule of law principle during a trial in civil cases and the implementation of international standards of the right to a fair trial (para. 1 Art. 6 of the ECHR). From the point of view of institutional interaction between the ECtHR and national courts, the procedures of pilot judgments, the review of the case in exceptional circumstances was analysed.*

***Keywords:*** *Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, right to a fair trial, rule of law, pilot judgment, review of the case in exceptional circumstances, Ukraine.*

## 1 INTRODUCTION

The ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR) in 1950 was a landmark event for the Council of Europe member states which heralded the conception of a single European space in which a person and a person's rights are recognized as the highest legal value. Since then, we can observe how the ECHR affects the national case law through the national courts' application of the ECtHR judgments. In this regard Michele de Salvia notes that 'since that time a national judge is bound to proclaim law as a human rights judge, and everybody who applies to the court should know that he or she has the right to refer to the ECHR as it is interpreted by the ECtHR.'[1]

The ECHR was ratified by Ukraine in 1997,[2] which paved the way for the harmonization of the national civil procedural legislation and the practice of civil procedure with international

1 M de Salvia, *Precedents of the European Court of Human Rights. Guidelines for case law relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Judicial practice from 1960 to 2002* (Yuridicheskiy tsentr Press 2004) 21.

2 The Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No 2, 4, 7 and 11 to the Convention' No 475-97-BP [1997] Vidomosti of the Verkhovna Rada 40/263 <https://zakon.rada.gov.ua/laws/show/475/97-вр/card2#Card> accessed 01 December 2020.

standards. The ECHR and the practice of the ECtHR are recognized as sources of law in Ukraine (para. 1 Art. 17 of the Law of Ukraine 'On Enforcement of Decisions and Application of the Case Law of the European Court of Human Rights'.[3] Under the Civil Procedure Code of Ukraine (hereinafter – CPC) international treaties to which the parliament consented shall be recognized as sources of civil procedural law (para. 1 Art. 3 of the CPC), and if such international treaties provide other provisions than that which are established in the CPC, provisions of international treaty shall apply (para. 2 Art. 3 of the CPC). Besides this, para. 4 Art. 10 of the CPC also recognizes the ECHR and the practice of the ECtHR as sources of law and prescribes judges to apply them during the trial and when delivering a judgment.

Notwithstanding the above-mentioned provisions of civil procedure legislation, ECtHR statistics point to a systemic problem connected with the non-enforcement of international obligations at the human rights protection area which were undertaken by Ukraine according to the ECHR. Thus, in 2019 Ukraine took the third place (after the Russian Federation and Turkey) in the number of applications submitted to the ECtHR which added up to 14.8 % of the total number of applications submitted to the ECtHR and was ranked in third place after the abovementioned countries by the number of judgments against it (109 judgments, accounting for 12.33 % of all judgments delivered in 2019).[4] As of 31 October 2020, 10,100 applications were filed against Ukraine which accounted for 16.5 % of all the applications submitted to the ECtHR.[5]

Among the judgments delivered against Ukraine in 2019, 24.76 % were connected with a violation of para.1 Art. 6 of the ECHR, in particular with the right to a fair hearing or reasonable time for a trial and the execution of court decisions.[6] During the entire period of the ECtHR's existence (as of 2020), 96,791 complaints were filed against Ukraine.[7] Particularly significant in this context is the situation with the problem of the non-enforcement of the decisions of Ukrainian courts where the debtor is the state, which was recognized by the ECtHR in 2009 in the case *Yuriy Nikolaevich Ivanov v. Ukraine,*[8] and subsequently reiterated in the case of *Burmych v. Ukraine,*[9] where the ECtHR brought together more than 12,000 complaints in one proceeding. In this regard, there is an urgent need to bring both civil procedural legislation and the practice of civil justice in line with international standards of civil procedure in order for Ukraine to fulfill its international obligations in the area of human rights.

## 2 THE HARMONIZATION OF NATIONAL LEGISLATION WITH ECHR REQUIREMENTS AS A DESIDERATUM FOR CIVIL JUSTICE REFORMS IN UKRAINE

The ratification of the ECHR obliges the state to bring its legislation in line with European human rights standards. In this context, the ECtHR notes that 'the domestic law must itself be

3 The Law of Ukraine 'On Enforcement of Decisions and Application of the Case Law of the European Court of Human Rights' No 3477-IV [2006] Vidomosti of the Verkhovna Rada 30/260 < https://zakon.rada.gov.ua/laws/show/3477-15/card2#Card> accessed 01 December 2020.

4 European Court on Human Rights, 'The ECHR in Facts and Figures 2019' (2020). < https://www.echr.coe.int/Documents/Facts_Figures_2019_ENG.pdf> accessed 01 December 2020.

5 European Court on Human Rights, 'Pending applications allocated to a judicial formation, 31 October 2020'. <https://www.echr.coe.int/Documents/Stats_pending_month_2020_BIL.PDF> accessed 01 December 2020.

6 European Court on Human Rights (n 4).

7 European Court on Human Rights, 'Overview 1959-2019 ECHR' (2020), p 5. < https://www.echr.coe.int/Documents/Overview_19592019_ENG.pdf > accessed 01 December 2020.

8 *Yuriy Nikolaevich Ivanov v Ukraine* App No 40450/04 (ECtHR 15 October 2009).

9 *Burmych v Ukraine* App No 46852/13 (GC ECtHR 12 October 2017).

in conformity with the ECHR, including the general principles expressed or implied therein'.[10] Taking into account this approach, constitutional reform, which was initiated with the adoption of the Law of Ukraine 'On Amendments to the Constitution of Ukraine (Regarding Justice)' No. 1401–VIII adopted on 2 June 2016,[11] was held under the slogan of Europeanization of the Ukrainian civil procedure and its approximation to the best European models. In this regard the provisions of the ECHR and the practice of the ECtHR play a key role.

First of all, constitutional reform laid the grounds for changes both in the judicial system of Ukraine and in the administrating of justice in civil cases. The most significant innovation of the Law of Ukraine 'On Amendments to the Constitution of Ukraine (Regarding Justice)' in terms of the judiciary was the liquidation of higher specialized courts and the Supreme Court of Ukraine and the introduction of a new Supreme Court as the highest judicial body in the country.

Before the amendments, the judicial system in Ukraine consisted of local, appellate courts, the highest specialized courts (the High Specialized Court of Ukraine for Civil and Criminal Cases, the Highest Economic Court of Ukraine and the Highest Administrative Court of Ukraine) and the Supreme Court of Ukraine. This system of judiciary has been repeatedly criticized by the Venice Commission for Democracy through Law, mainly because the Supreme Court of Ukraine did not in fact function as a cassation court, but instead was confined to reviewing the highest courts' judgments on the grounds of a lack of cassation case law unity.[12]

As a result of the constitutional reform, the highest specialized courts and the Supreme Court of Ukraine were liquidated, and the new Supreme Court was established. According to current legislation, the Supreme Court performs the function of a cassation instance and is responsible for ensuring the unity of judicial practice. There are four courts of cassation in the structure of the Supreme Court, particularly the Administrative Cassation Court, the Commercial Cassation Court, the Criminal Cassation Court, the Civil Cassation Court and the Grand Chamber of the Supreme Court. This restructuring of the judiciary was applauded by international experts,[13] since it resulted in the Supreme Court regaining the cassation function and not only a nominal but also a real recognition of its status as the highest judicial body.

One of the prominent changes is a new set of rules for judicial jurisdiction (para. 3 Art. 124 of the Constitution of Ukraine). The previous provision, according to which the jurisdiction of the courts extended to all legal relations arising in the state, effectively set a model of full or unlimited judicial jurisdiction. Currently, the law contains a provision that judicial jurisdiction extends to any legal dispute and criminal charge, and in cases provided by law,

10 *Winterwerp v Netherlands* (App No 6301/73) ECHR 24 October 1997, para 45.

11 The Law of Ukraine 'On Amendments to the Constitution of Ukraine (Regarding Justice)' No 1401-VIII [2016] Vidomosti of the Verkhovna Rada 28/532 < https://zakon.rada.gov.ua/laws/show/1401-19#Text> accessed 01 December 2020.

12 Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, 'Joint Opinion on the Draft Law "On the Judicial System and the Status of Judges of Ukraine"' (Venice, 12–13 March 2010) < https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)003-e> accessed 01 December 2020; Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, 'Joint opinion on the draft law amending the Law "On the judiciary and the status of judges and other legislative acts of Ukraine"' (Venice, 14–15 October 2011) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)033-e> accessed 01 December 2020.

13 Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, 'Joint Opinion on the draft amendments to the Law "On the Judiciary and the Status of Judges" and certain Laws on the activities of the Supreme Court and Judicial Authorities (Draft Law no. 3711)' (8–9 October 2020) < https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)022-e> accessed 01 December 2020.

to other legal relationships. Further restrictions on judicial jurisdiction are allowed if the law establishes a mandatory pre-trial procedure for settling a dispute (para. 4 Art. 124 of the Constitution of Ukraine).

Such changes to the constitutional provisions on jurisdiction were caused by the influence of the provisions of para. 1 Art. 6 of the ECHR, according to which the scope of the right to a fair trial is defined through such concepts as the 'determination of civil rights and obligations' and 'criminal charge', which have autonomous interpretation in the practice of the ECtHR. Thus, the civil limb of Art. 6 of the ECHR can be applied only if 'dispute over civil rights and obligations' exists, which can be established on the basis of criteria such as: a) the existence of a dispute ('contestation') over a right; b) such a right can be said, at least on arguable grounds, to be recognized under domestic law; c) the outcome of the proceedings must be directly decisive for the right in question; d) 'civil' character of the disputable right or obligation.[14] Trying to bring the general constitutional formula of judicial jurisdiction closer to the provisions of para. 1 Art. 6 of the ECHR, the legislator defined the sphere of judicial jurisdiction through the concept of 'legal dispute' with certain limitations and exceptions. New constitutional provision indicates the transition to a limited model of judicial jurisdiction and emphasizes the immanent function of courts which is resolving legal disputes.

The other important constitutional innovations inspired by the influence of the ECHR include: the changes in the catalogue of principles of justice, the constitutional provisions on professional legal aid held by the bar, limiting the role of prosecutors in civil procedure, restrictions on the right of access to courts in cassation proceedings and the implementation of so called 'filters of cassation appeal' etc.

Such fundamental constitutional changes were further specified in the civil procedure legislation with the adoption of a new edition of the CPC in accordance with the Law of Ukraine 'On Amendments to the Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure of Ukraine and other legislative acts' № 2147–VIII on 3 October 2017, which entered into force on 15 December 2017.[15] Amendments to the CPC actually marked the reform of civil procedure, which generally reflects European trends in terms of the harmonization of national procedural systems to international standards of a fair trial and access to justice. The main consequences of this reform, which indicate the efforts of the national legislator to bring domestic civil procedural law to international standards in this area, include:

- a recognition of the effective protection of violated, unrecognized or disputed rights, freedoms or interests of individuals, the rights and interests of legal entities, and the interests of the state as a goal of civil procedure;
- updating the catalogue of principles of civil procedure and inserting it in the CPC;
- a differentiation of civil procedure at the level of the court of first instance due to the introduction of small claim proceedings as a separate simplified procedure;
- an expansion of a court's powers with regard to managing the course of court proceedings and ordering the disclosure of evidence, and the introduction of elements of judicial case management;
- strengthening the procedural discipline of the parties by introducing at the legislative level a prohibition of procedural rights abuses and providing mechanisms to prevent them;

14 *Hamer v France* App No 19953/92 (ECtHR, 07 August 1996); *Le Compte, Van Leuven and De Meyere v Belgium* App No 6878/75 (ECtHR 23 June 1981).

15 The Law of Ukraine 'On Amendments to the Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure of Ukraine and other legislative acts' No 2147-VIII [2017] Vidomosti of the Verkhovna Rada 48/436 < https://zakon.rada.gov.ua/laws/show/2147-19#Text> accessed 01 December 2020.

- strengthening the consensual principles of civil procedure by introducing a dispute settlement procedure with the participation of a judge, aimed to reach a pre-trial settlement of the dispute between the parties;
- limiting the grounds for the prosecutor's participation in civil proceedings to cases where representation is made in the interests of the state;
- enhancing the role of the bar and legal aid institutions;
- the 'digitalization' of civil procedure;
- strengthening the classic three-instance model of civil procedure with the creation of a new Supreme Court as the single highest court of the state, which functions as a cassation instance and is responsible for ensuring the unity of judicial practice among different types of proceedings (civil, commercial, administrative) through the possibility of conducting cassation proceedings in the joint chambers or the Grand Chamber of the Supreme Court.

It is obvious that the changes in civil procedural law had objective reasons and, despite differing views and discussions on the expected consequences of judicial reform, were a response to existing challenges to improve the efficiency of civil procedure. These changes were caused by the direct influence of the ECHR and the case law of the ECtHR as well as the conclusions and recommendations of the Council of Europe, and generally reflected pan-European trends in civil procedure. In this sense, we can talk about the direct impact of the ECHR on the reform of civil justice in Ukraine in terms of updating civil procedural law, and the further possibility of building the experience of national courts related to its application.

## 3 THE RULE OF LAW AS A PRINCIPLE OF CIVIL PROCEDURE AND THE APPLICATION OF THE CASE LAW OF THE ECtHR

The principles of civil procedure are considered as one of the most fundamental concepts of civil procedural law on a par with the goal and objectives of civil procedure. From this point of view, the principles are the fundamental grounds of civil justice that set the direction of scientific research and the dimensions of modern civil procedure in democratic societies with their orientation to the respect and protection of human rights and the rule of law. In view of the above, special attention should be paid to the changes related to the catalogue of civil procedural principles at the constitutional level as well as in the CPC, which was obviously designed under the influence of the case law of the ECtHR. These changes determine the administration of justice and directly affect the model of civil procedure and its effectiveness.

The updated catalogue of justice principles, without reference to its type (civil, commercial, administrative or criminal), is contained in Art. 129 of the Constitution of Ukraine, according to which a judge, who administers justice, is independent and guided by the rule of law. The main principles of justice are: 1) the equality of all participants of the trial before the law and the court; 2) the assuring proof of guilt; 3) the adversarial principle and freedom of the parties in presenting evidence to the court and proving their persuasiveness before the court; 4) supporting criminal charges in court by the prosecutor; 5) providing the accused with the right to defence; 6) publicity of the trial and its complete fixation by technical tools; 7) the trial taking place within a reasonable time; 8) ensuring the right to an appellate review of the case – and in cases specified by law – to a cassation appeal of a court decision; 9) the binding nature of the court decision. The law may also determine other principles of justice. According to Art. 129[1] of the Constitution of Ukraine, the court delivers decisions on behalf of Ukraine. The court decision is binding. The state ensures the execution of a court decision in the manner prescribed by law. The court exercises control over the execution of the court decision.

These constitutional provisions are detailed in civil procedural law. Thus, in accordance with para. 3 of Art. 2 of the CPC, last amended in 2017, the main principles of civil procedure are: 1) the rule of law; 2) respect for honour and dignity, the equality of all participants of the trial before the law and the court; 3) publicity and openness of the trial and its complete fixation by technical tools; 4) the adversarial principle; 5) disposition; 6) proportionality; 7) the binding nature of the court decision; 8) ensuring the right to an appellate review of the case; 9) ensuring the right to a cassation review in cases established by law; 10) reasonable time for a trial; 11) a prohibition of procedural rights abuse; 12) the reimbursement of court fees to the party in whose favour the court decision was delivered.

A fundamental issue in the context of legal technique and procedural law-making is the implementation of the rule of law in the national legal system. In foreign literature it is common to distinguish between formal and substantive conceptions of the rule of law.[16] Formal concepts usually make a 'distinction between law and justice',[17] and therefore exclude any evaluation of the content of legal norms and focus primarily on the law adopting procedure, their structure, the requirements for the text of legislative provisions, requiring that the latter should be general, clear, non-retrospective, sustainable, and so on. Instead, substantive conceptions of the rule of law involve substantive requirements for the legislative provisions. From this perspective, the rule of law also demands guarantees of individual and political human rights and freedoms, a compliance with general principles of law, moral requirements, substantive justice, considerations of general welfare and elements of political morality, etc. At the same time, it is noted in the literature that formal conceptions of the rule of law originate from legal positivism and deal, so to speak, with '*law as it is*', while substantive conceptions based on natural law thinking focus on '*law as it should be*'.[18]

Though the principle of the rule of law is enshrined in Art. 8 of the Constitution of Ukraine, in doctrine its interpretation was often reduced to the requirements of formal legality, which is incompatible with the modern understanding of the rule of law. Recently, however, some positive developments in this regard have been noted. Thus, the interpretation of the rule of law given by the European Commission for Democracy through Law (Venice Commission) is recognized as an authoritative interpretation of rule of law in Ukraine. According to its report, the key elements of the rule of law are: 1) legality, including a transparent, accountable and democratic process for the enactment of law; 2) legal certainty; 3) a prohibition of arbitrariness; 4) access to justice before independent and impartial courts, including a judicial review of administrative acts; 5) respect for human rights; 6) non-discrimination and equality before the law.[19]

The rule of law is mentioned as a principle of civil procedure in para. 3 Art. 2 of the CPC. Also, para. 1 Art. 10 of the CPC, entitled 'The rule of law and the law according to which the court decides cases', contains a provision that the court conducting the trial is guided by the principle of the rule of law. However, there is no further exposition on how the principle should be implemented in civil procedure, because other parts of this article are devoted only to the legislation according to which the court decides cases. Along with this, Art. 10 of

16 P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467; B Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004) 91-113; RS Summers 'A Formal Theory of the Rule of Law" (1993) 27 Ratio Juris 127.

17 TRS Allan 'Constitutional justice: a liberal theory of the rule of law' (Publishing House 'Kyiv-Mohyla Academy' 2008) 35.

18 M Bennett 'The Rule of Law Means Literally What it Says: The Rule of Law' (2007) 32 Australian Journal of Legal Philosophy 90, 91.

19 European Commission for Democracy Through Law (Venice Commission), 'Report On The Rule Of Law' (Venice, 25-26 March 2011). < https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e> accessed 01 December 2020.

the CPC states that the court decides cases in accordance with the Constitution of Ukraine, laws of Ukraine, international treaties, the binding nature of which was approved by the Verkhovna Rada of Ukraine (para. 2), and the court applies the case law of the ECtHR as a source of law (para. 4).

Since the CPC provisions on the rule of law are rather vague, the exact content of the principle shall be derived from the ECHR and from the case law of the ECtHR, in particular concerning the interpretation of para. 1 Art. 6 of the ECHR. These provisions are fundamental for the theory and practice of civil procedure, because despite the fact that the rule of law was fixed in the Preamble of the Universal Declaration of Human Rights, and in the Preamble and Art. 3 of the Statute of the Council of Europe, only the enshrinement of the rule of law in the Preamble of the ECHR and further interpretation of it in the case law of the ECtHR allowed to identify specific elements of the rule of law in a democratic society and enunciate a pan-European understanding of the rule of law. In its case law, the ECtHR has repeatedly emphasized that 'the rule of law, one of the fundamental principles of a democratic society, is inherent to all the articles of the ECHR'.[20] The ECtHR recognizes the following elements of the rule of law principle: a prohibition of arbitrariness,[21] the lawfulness of human rights restrictions and requirements for the quality of the law,[22] equality and non-discrimination,[23] proportionality,[24] legal certainty, which requires predictability in the application of legal norms,[25] non-retroactivity of laws,[26] the principle of *res judicata,*[27] the uniformity of the case law,[28] access to court,[29] the independence and impartiality of the court,[30] a prohibition of the legislator's interference to the trial,[31] and the execution of court decisions[32] etc.

The conception of the rule of law applied by the ECtHR can be classified as a substantive one based on the priority of human rights. In this regard, the principle of legality, traditionally seen as an inherent principle of civil procedure, needs to be revisited. Legality should not be interpreted solely in the formal way (as a strict dogmatic observance of substantial and procedural legislation), but in addition it should include compliance with the quality requirements of the law. Thus, the case law of the ECtHR proves that all judgments rendered by national courts on the basis of existing law may, in their absolute majority, comply with the principle of legality, but this does not imply compliance with the rule of law.[33] In this regard, any law has to be available to the person interested in it, and the latter shall be able to foresee the consequences of the law application.[34] In other words, the law must meet

20 *The Former King of Greece v Greece* App No 26701/94 (ECtHR, 23 November 2000) para 79; *Amuur v France* App No 19766/92 (ECtHR, 25 June 1996).

21 *Malone v United Kingdom* App No 8691/79 (ECtHR, 02 September 1984) para 68.

22 *The Sunday Times v the United Kingdom* App No 6538/74 (ECtHR, 26 April 1979); *Kruslin v France* App No 11801/85 (ECtHR, 24 April 1990).

23 '*Relating to certain aspects of the laws on the use of languages in education in Belgium*' *v Belgium* (merits) App No 1474/62 (ECtHR, 23 July 1968); *Thlimmenos v Geece* App No 34369/97 (ECtHR, 06 April 2000).

24 *Ocalan v Turkey* App No 46221/99 (ECtHR, 12 May 2005).

25 *Kravchenko v Ukraine* App No 46673/06 (ECtHR, 30 June 2016) para 47.

26 *Melnik v Ukraine* App No 72286/01 (ECtHR, 28 March 2006).

27 *Brumărescu v Romania* App No 28342/95 (ECtHR, 28 October 1999); *Ryabykh v Russia* App No 52854/99 (ECtHR, 24 July 2003); *Driza v Albania* App No 33771/02 (ECtHR, 13 November 2007).

28 *Nejdet Sahin and Perihan Sahin v Turkey* App No 13279/05 (ECtHR, 20 October 2011) para 51, 58.

29 *Golder v United Kingdom* App No 4451/70 (ECtHR, 21 February 1975) para 34.

30 *Pullar v United Kingdom* App No 22399/93 (ECtHR, 21 September 1994) para 65.

31 *Stran Greek Refineries and Stratis Andreadis v Greece* App No 13427/87 (ECtHR, 09 December 1994) para 49.

32 *Immobiliare Saffi v Italy* App No 22774/93 (ECtHR, 28 July 1999).

33 *Kushoglu v Bulgaria* App No 48191/99 (ECtHR, 03 July 2008).

34 *Kruslin v France* App No 11801/85 (ECtHR, 24 April 1990).

such requirements as accessibility and foreseeability of the law, as well as its application in a manner not contrary to the rule of law and human rights.

Incorrect application of the ECHR or the case law of the ECtHR should serve as grounds for overturning or amending a lower court's judgment by a higher court. However, if there is a controversy between national law, on the one hand, and the ECHR or the case law of the ECtHR, on the other, the latter shall prevail due to its international nature, which is decisive for the hierarchy of sources. The case law of the ECtHR can also be employed to strengthen the national court's reasoning even when national law is applied, as well as to fill the gaps that may exist at the level of national legislation.

Some difficulties may arise in national practice in cases where the parties refer to the case law of the ECtHR against other countries, or when the court has to apply such decisions on its own initiative, because there is no obligation to translate all judgments of the ECtHR into Ukrainian, except for judgments delivered against Ukraine. For example, Art. 6 of the Law of Ukraine 'On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights' provides that in order to implement general measures the state provides a translation and the publication of full texts of decisions in Ukrainian. According to this Law, in the absence of an official translation of the decisions of the ECtHR, the court must use the original text. In practice, the official translation is made for decisions of the ECtHR against Ukraine. The lack of access to case law for judges and the public in general in native languages makes it difficult for national courts to apply the full range of the case law of the ECtHR, in particular decisions against other states. However, the refusal of the national court to consider the arguments of the parties, in particular, when they are based on the case law of the ECtHR against other states may lead to a violation of para. 1 of Art. 6 of the ECHR.[35]

Another negative tendency is the misapplication of the case law of the ECtHR, in particular when some case is applied to facts to which it was not supposed to apply, or when the point of the ECtHR is treated incorrectly. Notable in this context is the Judgement of the Grand Chamber of the Supreme Court of 4 September 2019, in which the Supreme Court quotes, as the position of the ECtHR para. 70, of the decision in the case *Ayder and Others v. Turkey*, which fundamentally contains an interpretation of Turkish constitutional legislation, and not the position of the ECtHR in this case. So the Ukrainian Supreme Court referred to the clarification of Turkish national law, instead of the position of the ECtHR, on the dispute.[36] The misapplication of the case law of the ECtHR reduces the efficacy of civil procedure and hinders the embodiment of the rule of law.

A characteristic feature of modern judicial practice is that the Supreme Court also interprets and applies the principle of the rule of law when evaluating the procedural actions of lower courts from the point of view of compliance with procedural norms. For example, in the Judgment of the Supreme Court of 12 September 2018 in case № 752/1016/17, considering the issue of the right to appeal the decisions of the court of first instance separately from the final judgment of the court on the merits of the case, the Civil Cassation Court noted that 'the provision of subpara. 8, para. 3, Art. 129 of the Constitution of Ukraine enshrines one of the main principles of judicial procedure – ensuring the appeal of court decisions and judgments, except for special cases provided by law, and thus establishes guarantees of appellate review of court decisions.' The Civil Cassation Court emphasized that such provisions:

35 *Hiro Balani v Spain* App No 18064/91 (ECtHR, 09 November 1994).

36 Case No 265/6582/16-ц (Supreme Court of Ukraine, 04 September 2019) < https://reyestr.court.gov.ua/Review/86310215> accessed 01 December 2020.

> should be applied with reference to Art. 8 of the Constitution of Ukraine proclaiming that the principle of the rule of law and the position of the ECtHR, according to which if the appellate courts exist in the national legal system, the state is obliged to ensure fundamental guarantees of para. 1 Art. 6 of the ECHR to participants of the appeal proceedings, taking into account the peculiarities of such proceedings and the procedural unity of the proceedings in the national legal order and the role of the appellate court in it.[37]

With reference to its previous case law, the Civil Cassation Court noted that 'in spite of the fact that para. 1 Art. 353 of the CPC enlists the interim decisions of the court of first instance that can be appealed separately from the judgment on the merits of the case, the issue of the admissibility of such an appeal in a particular case should be resolved taking into account whether some other remedies could possibly restore the rights of the person lodging the appeal. As a result, the Civil Cassation Court warns appellate courts from a 'formalistic approach to applying para. 1 Art. 353 of the CPC' and concludes that 'the court decision refusing the substitution of the creditor in the enforcement procedure and the renewal of the deadline for presenting the writ of execution can be subject to appeal, in spite of the fact that such a decision is not mentioned in para. 1 Art. 353 of CPC.'[38]

In terms of the constitutional reform one can note the obvious trends in approaches to the application and the interpretation of the principles of civil procedural law. Firstly, the new CPC of Ukraine proclaims some general principles of law as principles of civil procedure, which indicates the predominance of a natural law approach to understanding the principles of civil procedure, in contrast to purely dogmatic and formalistic positivist jurisprudence. Secondly, national jurisprudence reveals tight interconnection between the rule of law and the guarantees of the right to a fair trial, as well as the potential impact of the case law of the ECtHR on the practice of national courts and its harmonization with international standards of civil procedure. Thirdly, as far as the theory of civil procedure is concerned, one can notice some positive developments since the principles of civil procedure, for a long time, have been dictated by a positivist approach. The catalogue of principles of civil procedure should now be revised, taking into account the impact of general principles of law in the area of civil justice, as well as their interpretation in the case law of the ECtHR, in particular, the application and interpretation of para. 1 Art. 6 of the ECHR, which establishes guarantees of fairness and the accessibility of justice.

## 4 RIGHT TO A FAIR TRIAL: THE UKRAINIAN CONTEXT

Of particular importance for the theory and practice of civil procedure is par. 1 of Art. 6 of the ECHR. This article is of paramount importance for the civil procedure of all the Member States of the ECHR, as it allows for the enunciation of basic international standards for a fair trial in civil cases. The right to a fair trial has repeatedly been the subject of close attention by many scholars.[39] It is almost generally accepted in the literature to distinguish the structure of this right into two groups of guarantees: institutional (organizational) and procedural (functional). Institutional guarantees, established by law, of the right to a fair trial

37 Case No 752/1016/17 (Judgment of the Supreme Court, 12 September 2018) <http://reyestr.court.gov.ua/Review/77607397> accessed 01 December 2020.

38 ibid.

39 P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International 1998); D Vitkauskas, G Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights: a Handbook for Legal Practitioners*, 2nd ed. (Council of Europe 2017); DJ Harris, M O'Boyle, *Law of the European Convention on Human Rights*, 3d ed. (Oxford University Press 2014).

traditionally include access to a court, and its independence and impartiality. Procedural guarantees include public trial reasonable time of a trial, fair hearing, execution of court decisions etc.[40]

The above-mentioned guarantees of the right to a fair trial are generally reflected in civil procedural law. In accordance with Art. 2 of the CPC, the task of civil procedure is a fair, impartial trial and a resolution of civil cases within reasonable time aiming at effective protection of violated, unrecognized or disputed rights, freedoms or interests of individuals, rights and interests of legal entities or state interests.

Notwithstanding that the main guarantees of the right to a fair trial are enshrined in Ukrainian legislation, in the case law of the ECtHR against Ukraine, as well as in the practice of the Supreme Court, they reveal practical issues connected with the application of certain provisions of para. 1 Art. 6 of the ECHR. To be concise, we will focus on the one element of the right to a fair trial that the Supreme Court has often referred to in its recent practice, namely access to justice.

Access to justice problems often arise in Ukraine and are analysed by national courts in terms of the approaches developed by the ECtHR. The ECtHR notes that 'the right of access to the court is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and individuals.'[41] However, 'the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of that right is impaired. Furthermore, a limitation will not be compatible with Article 6, para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[42] These criteria for assessing the legitimacy of the restriction are called the test of proportionality in the practice of the ECtHR.

One illustrative example of the assessment of access to court in cases against Ukraine is the decision *Nataliya Mikhaylenko v. Ukraine* in which the ECtHR held illegal the provision of Ukrainian law depriving a legally incapable person of the right to raise before the court the issue of restoring legal capacity (para. 4 Art. 241 of the CPC) since there were no mandatory periodic review of whether the grounds for incapacitation still exist. In the ECtHR's view, the provision violated the applicant's right of access to a court, due to a disproportional limitation of the right, enshrined in para. 1 Art. 6 of the ECHR.[43] As a result, the rules of national law were subsequently changed under the influence of the relevant practice of the ECtHR, and, according to current legislation, incapacitated persons can apply for a renewal of their legal capacity.

Later on in a different case, heard by the Supreme Court, a person, who had previously been declared incapable by a court decision and who lived in a special hospital, applied to the court for the reinstatement of her civil capacity and expressed readiness to undergo a forensic psychiatric examination, noting, in particular, that her passport was not at her disposal and she could not give a power of attorney to represent her interests. As a result, she asked to allow her attorney to participate in the case with a power of attorney being certified by the court decision. The District Court left her application without consideration with reference

40 See: C Grabenwarter 'Fundamental Judicial and Procedural Rights' in D Eglers (ed), *European Fundamental Rights and Freedoms* (Germany 2007) 162–164.

41 *Ashingdane v the United Kingdom* App No 8225/78 (ECtHR, 28 May 1985).

42 *Stanev v Bulgaria* [GC] App No 36760/06 (ECtHR, 17 January 2012).

43 *Nataliya Mikhaylenko v Ukraine* App No 49069/11 (ECtHR, 30 May 2013).

to the fact that her attorney may not be a proper representative of the incapable person. The Court of Appeal agreed, holding that the application for the renewal of civil capacity had been submitted on behalf of the applicant by a person who did not have the authority to conduct the case. The Supreme Court in this case concluded that lower courts had restricted the applicant's right of access to court, even despite the fact that she had the opportunity to apply to the court for the restoration of her civil capacity on her own motion. In particular, the Supreme Court stated that in the case *Nataliya Mikhaylenko v. Ukraine*, the ECtHR noted that the applicant's inability to directly seek the restoration of her legal capacity resulted in that matter not being examined by the courts. The absence of judicial review of that issue, which seriously affected many aspects of the applicant's life, could not be justified by the legitimate aims underpinning limitations on access to a court by incapacitated persons (para. 40). Therefore, the Supreme Court concluded that such a situation caused a denial of justice for the applicant so there had been a violation of para.1 Art. 6 of the ECHR. In view of the above, the cassation appeal was satisfied, the decisions of the courts of first and appellate instances were overturned, and the case was transferred to the court of first instance for new consideration.[44]

Another example of the ECtHR decision against Ukraine is the decision *Tsezar and others v. Ukraine*, which concerned the restriction of the right of access to court due to the fact that applicants were not able to bring any claims before the courts in the city of Donetsk whose territory is not controlled by the government of Ukraine. After the beginning of the 'anti-terrorist operation' legislation was amended, and the jurisdiction of courts situated in uncontrolled territories was transferred to other courts in territory controlled by Ukraine. After some time, all social benefits for people living in the Donetsk and Luhansk regions (not controlled by Ukraine) were ceased. The applicants in the present case complained of a violation of their right of access to a court under para. 1 Art. 6 of the ECHR, as they could not bring any claims against the decision of the Government to cease their social benefits, since the courts had been relocated from the territory of the armed conflict. Refusing to satisfy the application in this case, the ECtHR emphasized that the inability of the courts located in the city where the applicants reside to hear their cases was the result of an armed conflict in the region not controlled by the government. In view of the above, the issue is not that the respondent government deliberately restricted the exercise of the applicants' right of access to a court. First of all, the question arises as to whether the respondent state has used all available means to organize its judicial system in such a way as to make the rights guaranteed by Art. 6 of the ECHR effective in practice in the light of the established principle that the ECHR is designed to guarantee practical and effective rather than theoretical and illusory rights. Taking into account 'the objective obstacles that the Ukrainian authorities had to face', the ECtHR held that 'domestic authorities took the steps reasonably expected of them to ensure the proper functioning of the judicial system making it accessible to the residents of the territories currently outside the control of the Government'. Furthermore, 'in the absence of any evidence that the applicants' personal situation precluded them from making use of that system, the ECtHR concluded that in the circumstances of the present case the applicants' inability to bring their claims before the courts in their city of residence did not impair the very essence of their right of access to court'.[45] As we can see, in this case the ECtHR supported the actions of the national authorities restricting the right of access to national courts and found them proportionate.

44 Case No 756/552/17 (Judgment of the Supreme Court, 20 June 2018) <http://www.reyestr.court.gov.ua/Review/74963689> accessed 01 December 2020.

45 *Tsezar and others v Ukraine* App No 73590/14 (ECtHR, 13 February 2018).

## 5 PILOT JUDGMENTS OF THE ECtHR AND CIVIL PROCEDURE PRACTICE

According to the Rule 61 of the Rules of Court, the ECtHR may adopt a pilot judgment where the facts of an application reveal, in the Contracting Party concerned, the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications. The ECtHR shall, in its pilot judgment, identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.

There are several purposes of the pilot-judgment procedure. On the one hand, its aim is to indicate 'structural or systemic problem or other dysfunction' which exists at a national level and helps the state to take effective measures within a certain time limit in order to resolve the problem. On the other hand, an important aim of pilot judgment is 'to induce the respondent state to resolve large numbers of individual cases arising from the same structural problem, thus implementing the principle of subsidiarity which underpins the ECHR system',[46] since the ECtHR can decide not to examine cases awaiting their resolution at a national level according to the pilot judgment.

In the case *Yuriy Nikolaevich Ivanov v. Ukraine*[47] in 2009, the ECtHR recognized that the non-enforcement of court decisions, where the state is the debtor, is a systemic problem in the national legal order, however, this problem still remains unresolved.

Unfortunately, enforcement procedure should be recognized as the 'Achilles heel'[48] of domestic civil procedure. According to statistics, the situation in the field of the enforcement of court decisions in Ukraine is disappointing, which has been repeatedly emphasized by both domestic researchers and the ECtHR. Thus, according to a survey conducted by the Razumkov Center in 2019, only 7.8 % of Ukrainians surveyed believe that the situation with the execution of court decisions is satisfactory, while 54.3 % hold the opposite view.[49]

In the context of the convention guarantees, the non-execution or the delayed execution of court decisions is a part of the wider problem of the violation of reasonable time for a trial requirement. According to the ECtHR's statistics for the entire period of its operation, of all violations found, 38.28 % concerned para. 1 Art. 6 of the ECHR, in particular the fairness (16.86 %) and the reasonable time (21.41 %) of the trial.[50] As of 2017, at least 29,000 complaints concerned violations relating to reasonable time for the execution of court decisions.[51]

The ECtHR has delivered several pilot judgments dealing with the non-execution of domestic court decisions against three states, namely, Ukraine (*Yuriy Nikolaevich Ivanov v. Ukraine*[52]), Moldova (*Olaru and Others v. Moldova*[53]) and Russia (*Burdov v. Russia* №2,[54] *Gerasimov and*

46 *Gerasimov and Others v Russia* App No 29920/05 (ECtHR, 01 July 2014) para 210.

47 *Yuriy Nikolaevich Ivanov v Ukraine* (n 8) paras 84–88, 94.

48 Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts [2006] <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:52006DC0618> accessed 01 December 2020.

49 'Judiciary in the evaluation of citizens of Ukraine' (2019) 3–4 National security and defense 79.

50 European Court on Human Rights (n 7) p 6.

51 *Burmych v Ukraine* (n 9) para 44.

52 *Yuriy Nikolaevich Ivanov v Ukraine* (n 8).

53 *Olaru and Others v Moldova* App No 476/07 (ECtHR, 28 July 2009).

54 *Burdov v Russia (No 2)* App No 33509/04 (ECtHR, 15 January 2009).

*Others v. Russia*[55]). These judgements concerned two repetitive problems in the national legal systems: firstly, undue delay in the enforcement of final court decisions where the debtor is the state or a public enterprise; secondly, an absence of an effective remedy for the protection of the right to a fair trial and the enforcement of court decisions within a reasonable time. As a result, in the judgments where the ECtHR found the violation of para. 1 Art. 6 and Art. 13 of the ECHR it obliged the states to provide an effective remedy to protect the right to a fair trial and the enforcement of domestic court decisions within a reasonable time at a national level and to secure sufficient redress for the non-enforcement of such decisions. Though circumstances of these cases were alike, the reaction of the abovementioned states to the judgments was different and the execution thereof at a national level was not successful in some cases, in the sense that remedies proposed were not recognized as being effective by the ECtHR.

The problem of the non-enforcement of court decisions in Ukraine was recognized as a systemic one by the ECtHR in its pilot judgment *Yuriy Nikolaevich Ivanov v. Ukraine*[56] (hereinafter – Ivanov pilot judgment) in 2009. In this case the applicant retired from the Ukrainian Army and was entitled to a lump sum retirement payment and compensation for his uniform, but the payments were not made to him on his retirement which made him seek recovery of the debt in court. The court satisfied his claim in full, but the decision remained partially unenforced: at first, due to the lack of funds in the debtor's bank accounts and later, due to insufficient budgetary allocations for such payments and also the fact that the forced sale of assets belonging to military units was prohibited by the law. Despite this decision of the ECtHR and the long time that has elapsed since its adoption, Ukraine still does not have appropriate mechanisms in place to remedy the violation of the right to a fair trial within a reasonable time.

The ECtHR recognized that lengthy delays in the execution of the final national court's decisions were 'caused by a variety of dysfunctions in the national legal system' within the state's control, in particular, 'the lack of budgetary allocations', 'the bailiffs' omissions and the shortcomings in the national legislation', 'authorities' failure to take specific budgetary measures', and 'the introduction of bans on the attachment and sale of property belonging to state-owned or controlled companies'.[57] Given these circumstances, the ECtHR pointed out the complexity of the structural problem in this case, which '*prima facie* requires the implementation of comprehensive and complex measures, possibly of a legislative and administrative character, involving various domestic authorities'.[58] In this decision the ECtHR gave Ukraine one year to establish an effective remedy or set of remedies capable of providing adequate and sufficient redress for the non-enforcement of the court's decision or delay in their enforcement in accordance with the principles established by the case law of the ECtHR.[59]

In response to the pilot judgment, Ukraine adopted the Law of Ukraine 'On State Guarantees of the Enforcement of Court Decisions'[60] of 05 June 2012 which set specific state guarantees in this respect. Under the Law plaintiff is entitled to compensation for the delay in the enforcement of court decision awarding payment or obliging the debtor to take certain actions relating to property as long as the debtor is a state body, state enterprise, institution, organization, or a legal entity, whose property cannot be sold in accordance with the law. Due to this law, the State Treasury of Ukraine is responsible for the enforcement of court decisions

55 *Gerasimov and Others v Russia* App No 29920/05 (ECtHR, 01 July 2014) para 210.

56 ibid.

57 ibid, para 84.

58 ibid, para 89.

59 ibid, paras 84–88, 94.

60 The Law of Ukraine 'On State Guarantees of the Enforcement of Court Decisions' No 4901-VI [2013] Vidomosti of the Verkhovna Rada 17/158 <https://zakon.rada.gov.ua/laws/show/4901-17#Text> accessed 01 December 2020.

delivered by national courts against state bodies and state enterprises. If the decision remains unenforced for a period exceeding three months, the state shall compensate three per cent of the outstanding debt per year. However, these guarantees are limited by the amount of funds allocated for the purpose according to the budget for each year.

However, the law seems not to be able to solve the problem because the state has taken responsibility for ensuring the enforcement of only a limited category of court decisions and the remedy provided is not a judicial one and therefore it does not allow all the relevant circumstances of each particular case to be taken into account. Attention should also be drawn to the amount of compensation. In its case law the ECtHR consistently notes that 'the level of compensation must not be unreasonable in comparison with the awards made by the ECtHR in similar cases',[61] and this is one of the criteria by which the ECtHR reviews the effectiveness of compensatory remedies in cases concerned with excessive lengths of proceedings. The Law of Ukraine 'On State Guarantees of the Enforcement of Court Decisions', however, sets up a fixed amount of compensation which is unjustified and disproportionate in comparison with the compensation awarded by the ECtHR. In view of the above, the proposed compensation mechanism cannot be considered as an effective remedy for the protection of the right to execution of a court decision within a reasonable time under para. 1 Art. 6 and Art. 13 of the ECHR and the case law of the ECtHR.

Nevertheless, the state turned out to be unable to fulfil its obligations even under the law mentioned above which resulted in substantial debt. According to Art. 19 of the Law of Ukraine 'On the State Budget of 2019,[62] the Cabinet of Ministers of Ukraine is entitled to restructure actual debts amounting to 7,544,562,370 UAH under court decisions, the execution of which is guaranteed by the state, and under the decisions of the ECtHR against Ukraine. The debts can be restructured through issuing financial treasury bills with up to a seven-year maturity, with one year of deferred payments and a 9.3 % yield per annum. This mechanism was proposed as an alternative remedy for the protection of the right to the execution of court decisions within a reasonable time. However, according to the information of the Government of Ukraine, no interested persons have yet applied for the mentioned mechanism.[63] Furthermore, the issue of enforcing judgments ordering performance of obligations in kind (rather than payment of a sum of money due), which has been highlighted in the case law of the ECtHR against other states, remains unresolved.[64]

The Committee of Ministers of the Council of Europe has repeatedly had to address the mentioned remedies, and as a result has worked out a set of measures to be taken by Ukraine in order to overcome the crisis under consideration. In particular, 'the three-step strategy' was proposed, including:

(1) the 'calculation of the amount of debt arising from unenforced decisions';

(2) the 'introduction of a payment scheme with certain conditions, or containing alternative solutions, to ensure the enforcement of still unenforced decisions';

(3) the 'introduction of the necessary adjustments to the state budget so that sufficient funds are made available for the effective functioning of the above-mentioned payment scheme, as well as necessary procedures to ensure that budgetary constraints are duly considered when

61 *Burdov v Russia (No2)* (n 51) para 99.

62 The Law of Ukraine 'On the State Budget of 2019' No 2629-VIII [2018] Vidomosti of the Verkhovna Rada 50/400 <https://zakon.rada.gov.ua/laws/show/2629-19#Text> accessed 01 December 2020.

63 *Burmych v Ukraine* (n 9) para 126.

64 *Ilyushkin and Others v Russia* App No 5734/08 (ECtHR, 14 April 2012) paras 74–75; *Gerasimov and Others v Russia* (n 52) para 210; *Olaru and Others v Moldova* (n 53).

passing legislation to prevent situations of the non-enforcement of domestic court decisions rendered against the state or state enterprises'.[65]

However, subsequent practice of the ECtHR against Ukraine evidences that this strategy was never put into life and for this reason the ECtHR had to renew the examination of applications in such cases due to a failure to provide effective domestic remedies. Estimates provided by the ECtHR reveal that a total of about 29,000 *Ivanov*-type applications have been submitted to the ECtHR since the first application in 1999. Since the beginning of 2016, the ECtHR has continued to receive a large number of such applications – over 200 per month.[66]

Crucial in this regard for both Ukraine and the practice of the ECtHR was the judgment in the case of *Burmych and Others v. Ukraine* of 12 October 2017 (hereinafter – *Burmych*) where the ECtHR took a fresh look at the problem of the non-enforcement of pilot judgments delivered against the states. The ECtHR revised its role in cases where the respondent state has not introduced the measures recommended by the ECtHR to solve the systemic problem. In this case, the ECtHR joined five applications in one proceeding with 12,143 *Ivanov*-type cases in which the applicants complained about a violation of para. 1 Art. of the ECHR regarding the non-enforcement of domestic court decisions against the state. In this judgment the ECtHR observes that 'it runs the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities in directing appropriate and sufficient redress for the non-enforcement of domestic decisions',[67] which is not compatible with the principle of subsidiarity and the aim of the pilot judgment procedure.

Pointing out the importance of distributing tasks between the ECtHR and the Committee of Ministers of the Council of Europe in the pilot judgment procedure, the ECtHR distinguishes between its own task – assistance to

> the State in fulfilling its obligations under Art. 46 by seeking to indicate the type of measure that might be taken by the State in order to put an end to a systemic problem identified by the ECtHR',[68] and the task of the Committee of Ministers – supervising the execution of judgments and ensuring 'that the State has discharged its legal obligation, including the taking of such general remedial measures as may be required by the pilot judgment in relation to affording relief to all the other victims, existing or potential, of the systemic defect found.[69]

In this respect the ECtHR notes that the question of the non-enforcement of domestic court decisions in Ukraine has been resolved by the ECtHR in the *Ivanov* pilot judgment, so the ECtHR has accomplished its task. The issue in the *Burmych* case relates to the non-enforcement of the *Ivanov* pilot judgment by Ukraine, therefore all the applications joined in the *Burmych* case 'should be dealt with in compliance with the obligation deriving from the pilot judgment' and transmitted to the Committee of Ministers 'in order for them to be dealt with in the framework of the general measures of execution of the above-mentioned *Ivanov* pilot judgment'. Moreover, the ECtHR held that it may strike any future *Ivanov*-type applications that may be lodged after the delivery of this judgment out of the list of its cases and transmit them directly to the Committee of Ministers, except for those applications which are found to be inadmissible under Art. 35 of the ECHR.[70] The ECtHR employed such a drastic measure, for the first time, in the *Burmych* case when a number of criticisms were elicited from the ECtHR judges

65 *Burmych v Ukraine* (n 9) para 128.
66 ibid, para 44.
67 ibid, para 155.
68 ibid, para 194.
69 ibid, para 194.
70 ibid, paras197–198, 221.

themselves. Thus, in their joint dissenting opinion, the judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc argue that:

> the present judgment has nothing to do with the legal interpretation of human rights. It concerns a matter of judicial policy only, and as such completely changes the well-established paradigm of the ECHR system […]. The ECtHR cannot, on account of a heavy caseload, just cease to perform its judicial tasks, leave the applicants in an unpredictable position and transfer the judicial responsibility on to a political body which unfortunately has so far had little impact on helping the respondent Government to properly execute the pilot judgment and to enact general measures.[71]

Among other arguments the following are given. Firstly, the judges insist on the fact that the circumstances of those joined 12,134 applications have not been examined so their similarity cannot be established with certainty. Secondly, this judgment, in fact, denies the right of future applicants to access to the ECtHR and justifies the ECtHR's reluctance to consider the cases by reference to its previous position regarding the functions of the pilot judgment procedure. In such a context, the ECtHR 'appears to become a filtering body for the Committee of Ministers'[72] regarding future *Ivanov*-type applications that can be struck out of the list of cases and transmitted to the Committee of Ministers. 'It would mean transferring the determination of human rights claims from a judicial authority, as the Convention system requires, to a political body, albeit a collective one'.[73] However, it is contrary to the Protocol № 11 which 'explicitly abolished any competence on the part of the Committee of Ministers to decide on violations of the ECHR, and retained only the Committee's competence as to the execution of the judgments of the ECtHR'.[74] Thirdly, bureaucratic reasons for 'reducing the burden on the ECtHR' underlie the judgment under consideration and leave the applicants in a state of legal uncertainty as instead of obtaining the ECtHR judgment in their cases they, in fact, 'will have to wait *sine die* for a political monitoring mechanism of the domestic reforms'.[75]

In our opinion, arguments can be found both for and against such a judgment of the ECtHR, and it can hardly be unambiguously assessed, but it is obvious in this context that the ECtHR, as has been emphasized by the *Burmych* case, indicates that all states which ratified the ECHR must abide by their obligations and ultimately fulfil the requirements of the ECtHR's pilot judgments, particularly with regard to the introduction of effective remedies for the right to a fair trial and the enforcement of judgments within a reasonable time, as well as for the elimination of the drawbacks existing in the national system that guarantee the right to a fair trial. Otherwise, states put themselves at risk of having an infinite series of payments of fair satisfaction with an endless series of applications.

This raises the question of the root causes leading to the non-enforcement of domestic court decisions in Ukraine and the need for further action to be taken at the national level to meet the requirements of the *Ivanov* pilot judgment and improve the situation in this area. In response to the ECtHR requirements, the Budgetary Programme № КПКВ 350–404017 ('Programme 4040') on guaranteeing the enforcement of the national courts' decisions was introduced, which is aimed at the systematization and further liquidation of debts in this category of cases. With the support of the Office of the Council of Europe, a study entitled 'The root causes to the non-enforcement of domestic judicial decisions in Ukraine' was conducted with our participation.[76]

71 ibid, Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc, para 1.

72 ibid, para 6.

73 ibid, para 13.

74 ibid, para 15.

75 ibid, para 14.

76 M Musiyaka, A Zayets, T Tsuvina, V Sushchenko, 'The root causes to the non-enforcement of domestic judicial decisions in Ukraine' 3–4 National security and defense 2.

In order to identify the root causes leading to the non-enforcement and late enforcement of court decisions where the debtor is the state and to make recommendations for their elimination, 305,554 court decisions (the total number of decisions in 'Program 4040' as of February 2019) were divided into several categories: a) decisions in social security cases, b) decisions in labour disputes, c) decisions against legal entities for which the state is responsible. We personally studied the largest category, namely the decisions in social security cases (the total number in the 'Programme 4040' was 27,600 cases, and one per cent of this total number – 2,760 cases – was selected for the analysis).

The analysis allowed identification of the following root causes leading to the non-enforcement of court decisions in this category of cases: a) a lack of sufficient budget funding; b) defects in writs due to the established court practice, according to which the courts in such cases do not determine the exact amount of money to be collected and instead just order the relevant public authority to recalculate the allowance; c) inconsistent legislation on providing social benefits to broad groups of citizens in the absence of proper financial justification: first, laws are passed to increase social guarantees for certain groups of citizens, and then the state tries to limit such payments due to lack of budget funding by passing new laws, which afterwards are declared unconstitutional,[77] leading to lawsuits for the recovery of unreceived payments; d) the complexity of the legal regulation of this area.[78] Among other reasons for the total non-compliance with the guarantees of the execution of court decisions, in which the debtor is the state, members of the working group identified: shortcomings of organizational and legal regulation of enforcement procedure, the violation of legislation governing an enforcement procedure by bailiffs, various moratoriums for enforcement against certain types of companies, the lack of a culture of respecting court decisions and their enforcement , the lack of an effective legal system of interaction between bodies on which the enforcement of court decisions depends, excessive formalism in the regulation of the enforcement procedure, the lack of effective mechanisms to prevent abuse in the enforcement procedure, etc.[79]

The need to overcome these problems calls for changes in the regulation of the enforcement procedure. The first steps to improve it were taken as a part of constitutional reform. According to Art. 129[1] of the Constitution of Ukraine, a court decision is recognized as binding. The state ensures the execution of a court decision in the manner prescribed by law. The court controls the execution of the court decision. These constitutional provisions are specified at the level of civil procedure legislation. According to Art. 18 of the CPC, court decisions that have entered into force are binding for all public authorities, enterprises, institutions, organizations, officials and citizens and should be enforced in Ukraine and abroad in cases established by the international treaties of Ukraine. Failure to execute a court decision is the basis for liability established by law. Finally, simultaneously with the adoption

77 See: Judgment of the Constitutional Court of Ukraine in case on the Constitutional Petition of 46 Deputies of Ukraine on the Compliance of the Provisions of Art 29, 36, Part 2 of Art 56, Part 2 of Art 62, Part 1 of Art 66, items 7, 9, 12, 13, 14, 23, 29, 30, 39, 41, 43, 44, 45, 46 of Art 71, Art 98, 101, 103, 111 of the Law of Ukraine 'On the State Budget of Ukraine on 2007' with the Constitution of Ukraine (constitutionality) (case about social guaranties of the citizens) of 09 July 2007, no 6-рп/2007 <https://zakon.rada.gov.ua/laws/show/v0a6p710-07> accessed 01 December 2020; Judgment of the Constitutional Court of Ukraine in case on the Constitutional Petitions of the Supreme Court of Ukraine on the Compliance of the Certain Provisions of Art 65 of Sec I, paras 61, 62, 63, 66 of Sec II, para 3 of Sec III of the Law of Ukraine 'On the State Budget of Ukraine on 2008 and Amendments to Certain Legislative Acts of Ukraine' and on the Constitutional Petition of 101 Deputies of Ukraine on the Compliance of the Provisions of Art 67 of Sec I, items 1–4, 6-22, 24–100 of Sec II of the Law of Ukraine 'On the State Budget of Ukraine on 2008 and on Amendments to Certain Legislative Acts of Ukraine' with the Constitution of Ukraine (constitutionality) (case about the subject and content of the Law 'On the State Budget of Ukraine') of 22 May 2008, No 10-рп/2008 <https://zakon.rada.gov.ua/laws/show/v010p710-08> accessed 01 December 2020.

78 M Musiyaka (n 75) 33–36.

79 ibid, 38-40.

of the amendments to the Constitution of Ukraine, two laws that directly relate to this area were adopted: the Law of Ukraine 'On bodies and persons carrying out enforcement of court decisions and decisions of other bodies'[80] and the Law of Ukraine 'On Enforcement Procedure'.[81] These laws enshrined new organizational and procedural principles governing the enforcement procedure. In this context, the transition to a mixed system of the enforcement of court decisions with the introduction of private bailiffs, the digitalization of enforcement proceedings, a simplified procedure for recovering debts in certain cases, etc., aimed at accelerating enforcement proceedings and increasing efficiency, requires special attention.[82] It may seem that a continuous improvement of legislation aimed at bringing national rules of procedural law in line with international standards of fair trial should significantly increase the efficiency of enforcement procedure, but so far it does not completely solve the problem of the non-enforcement of court decisions in Ukraine. The systemic problem of ensuring the enforcement of court decisions where the debtor is the state and state-owned enterprises remains unsolved, even after having been repeatedly addressed by the ECtHR in its judgments against Ukraine. Therefore, at present, the priority task, in this respect, is to introduce complex effective remedies at the national level for the enforcement of court decisions within a reasonable time, which would combine both preventive and compensatory elements according to para. 1, Art. 6 and Art. 13 of the ECHR.

## 6 THE REVIEW OF A CASE ON EXCEPTIONAL CIRCUMSTANCES AFTER THE JUDGEMENT OF THE ECtHR

The convention system provides for the possibility of interplay between national courts and the ECtHR, which may take the form of a review of a domestic court's decision on exceptional circumstances at a national level after an international judicial institution, whose jurisdiction is recognized by Ukraine, having found a violation of international obligations by Ukraine (subpara. 2, para. 3, Art. 423 of the CPC).

The legal cause for a review of the decision on exceptional circumstances after the ECtHR recognized Ukraine's breach of its obligations is contained in Art. 10 of the Law of Ukraine 'On Enforcement of Decisions and Application of the Case Law of the European Court of Human Rights', according to which a retrial by a court is recognized as one of the additional, individual measures, along with compensation, that can restore a previous legal status the applicant had before the violation of the ECHR (*restitutio in integrum*). However, this type of review has a subsidiary nature since it is not necessary for all the cases where the ECtHR found a violation.

This is confirmed by the Recommendation № R (2000) 2 of the Committee of Ministers to member states on the re-examination or the reopening of certain cases at a domestic level following judgments of the ECtHR according to which:

> Contracting Parties, in particular, have to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a

80 The Law of Ukraine 'On bodies and persons carrying out enforcement of court decisions and decisions of other bodies' No 1403-VIII [2016] Vidomosti of the Verkhovna Rada 29/535 <https://zakon.rada.gov.ua/laws/show/1403-19#Text> accessed 01 December 2020.

81 The Law of Ukraine 'On Enforcement Procedure' No 1404-VIII [2016] Vidomosti of the Verkhovna Rada 30/542 <https://zakon.rada.gov.ua/laws/show/1404-19#Text> accessed 01 December 2020.

82 See: V Turkanova, 'Open Enforcement: New Approach of Ukraine in Access to Justice' (2020) 1 Access to justice in Eastern Europe 58.

> violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.[83]

In *Bochan v. Ukraine (№ 2)* the ECtHR analysed the effectiveness of this type of review in the previous wording of the CPC.[84] In this case, the applicant received a decision of the ECtHR in case *Bochan v. Ukraine*,[85] in which the ECtHR found the violation of para. 1 Art. 6 of the ECHR with regard to the right to an independent and impartial court and the principle of legal certainty because the Supreme Court of Ukraine unjustifiably changed the territorial jurisdiction of the applicant's case. After this judgment, the applicant contested the proceedings on the grounds of so called 'exceptional circumstances' in the Supreme Court of Ukraine. The applicant was refused a review of her case because the grounds on which the ECtHR had found a violation of para. 1 Art. 6 of the ECHR in *Bochan v. Ukraine* do not indicate the need to review the case at the level of national law. Such a situation encouraged the applicant to file a new application to the ECtHR. In its judgment *Bochan v. Ukraine (No 2)*, the ECtHR noted that the Supreme Court of Ukraine, conducting the trial in the applicant's case, had 'grossly misrepresented' the findings contained in the ECtHR judgment, in particular, 'the Supreme Court recounted that the ECtHR had found that the domestic courts' decisions in the applicant's case had been lawful and well founded and that she had been awarded just satisfaction for the violation of the "reasonable time" guarantee'. But these allegations are clearly incorrect and do not correspond to the content of the ECtHR decision, so the ECtHR considers the Supreme Court's interpretation of the decision to constitute 'gross arbitrariness' and 'denial of justice', which led to 'the effect of defeating the applicant's attempt to have her property claim examined in the light of the Court's judgment in her previous case in the framework of the cassation-type procedure provided for under domestic law'. Consequently, the ECtHR found a violation of para. 1 Art. 6 of the ECHR in this case.[86]

Currently such a type of review is conducted by the Grand Chamber of the Supreme Court. In 2019, according to the statistics of the Supreme Court, 88 % of applications for a review on exceptional circumstances were due to the ECtHR finding a violation of the ECHR by Ukraine . These include 11 applications lodged in administrative proceedings, 3 applications in commercial proceedings, 15 applications in civil proceedings, 46 applications in criminal proceedings, 3 applications in cases of administrative offenses. In 2019 only one application in civil case was considered on merit and sustained, while in a significant number of cases the applications were returned, or the case was quashed.[87]

Interpreting subpara. 2, para. 3 Art. 423 of the CPC, the Supreme Court in one of its judgements pointed out that the review of judgments in exceptional circumstances as an individual measure to enforce the ECtHR decision cannot be used in cases where violations

83 Recommendation No R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights [2000] <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06> accessed 01 December 2020.

84 *Bochan v Ukraine (No 2)* (n 83).

85 *Bochan v Ukraine* App No 7577/02 (ECtHR, 03 May 2007).

86 *Bochan v Ukraine (No 2)* (n 83).

87 Analysis of the Administering of Justice by the Grand Chamber of the Supreme Court in 2019 [2020] 14–15 <https://supreme.court.gov.ua/userfiles/media/Analiz_zdijsn_VPVS_2019.pdf> accessed 01 December 2020.

of international law obligations: 1) must be eliminated only by taking measures of a general nature; 2) have nothing to do with a person who has filed an application for a review of court decisions; 3) have nothing to do with the case under review of the court decision in which the application was filed; 4) concern only the duration of the trial or the duration of the enforcement procedure.[88]

Thus, it can be concluded that in a large number of cases it is the award of fair satisfaction by the ECtHR that ensures the restoration of the violated rights, and, therefore, a new trial at the national level is unnecessary. For example, after the ECtHR recognizes a violation of a reasonable time for the trial or the publicity of the trial, the resumption of proceedings at the national level is not required. At the same time, the case law of the ECtHR against Ukraine and subsequent decisions of the Supreme Court show that in case of violations of such guarantees as the right to a fair trial as equality of arms,[89] the independence and the impartiality of a court,[90] access to court,[91] or such substantive rights as the right for private and family life (Art. 8 of the ECHR)[92] or the right to peaceful enjoyment of possessions (Art. 1 of the First Protocol of the ECHR)[93] the review on exceptional circumstances may be necessary to provide the *restitutio in integrum*. For example, in the case of *Lazarenko v. Ukraine*, the ECtHR found a violation of the equality of arms due to the failure to notify the applicant about appellate proceedings in his case and, as a result, his inability to file his objections.[94] In this case, after the review of the judgment due to exceptional circumstances, the Supreme Court remanded the case to the appellate court for further trial.[95]

## 7 CONCLUSIONS

The study of the impact of the ECHR and the case law of the ECtHR on civil procedure in Ukraine leads to the conclusion that the harmonization of Ukrainian civil procedure legislation with fair trial standards has become a defining trend of constitutional reform in the area of justice and civil procedure reform in 2017 in Ukraine. This can be seen not only at the level of the modernization of the provisions of the CPC, but also at the level of judicial practice, especially the practice of the new Supreme Court. At the same time, the changes in the civil procedure legislation had objective reasons and, despite different views and discussions on the expected consequences of judicial reform, became a response to the existing challenges aiming at improving the efficiency of civil procedure. These changes were inspired by the influence of the ECHR and the case law of the ECtHR, as well as the conclusions and recommendations of the Council of Europe, and generally reflected European trends in civil procedure.

The direct impact of the ECHR and the case law of the ECtHR on the field of civil justice manifests itself in the updated catalogue of civil justice principles and new trends in approaches to the interpretation of the principles of civil procedural law. The inclusion of

88 Case No 2-428/11 (Judgment of the Grand Chamber of the Supreme Court, 28 March 2018) <http://reyestr.court.gov.ua/Review/73304966> accessed 01 December 2020.

89 *Lazarenko v Ukraine* App No 70329/12 (ECtHR, 27 June 2017).

90 *Denisov v Ukraine* App No 76639/11 (ECtHR, 25 September 2018).

91 *Shestopalova v Ukraine* App No 55339/07 (ECtHR, 21 December 2017).

92 *Lazoriva v Ukraine* App No 6878/14 (ECtHR, 17 April 2018).

93 *Batkivska Turbota Foundation v Ukraine* App No 5876/15 (ECtHR, 09 October 2018).

94 *Lazarenko v Ukraine* (n 88).

95 Case No 2a-2573/11 (Judgment of the Grand Chamber of the Supreme Court, 07 February 2018) <http://reyestr.court.gov.ua/Review/72243661> accessed 01 December 2020.

the general principles of law (in particular the rule of law principle) into the list of civil procedure principles is indicative of a natural law approach overcoming purely dogmatic positivist jurisprudence in the domain of civil procedure.

There is a tight interconnection between the rule of law and the guarantees of the right to a fair trial. That is why the catalogue of principles of civil justice calls for revision considering the impact of general principles of law on civil justice, as well as a need for their interpretation in terms of the case law of the ECtHR, in particular, with regard to the application and the interpretation of para. 1 Art. 6 of the ECHR, which establishes guarantees of fairness and the accessibility of justice.

Of key importance, in terms of compliance of civil procedure with international standards, is the implementation of the guarantees of the right to a fair trial, enshrined in para. 1 Art. 6 of the ECHR at national level. Despite the enshrinement of certain elements of this right in civil procedure legislation of Ukraine, its implementation remains impeded due to problems with access to the practice of the ECtHR for judges and participants of a trial, which results in a misapplication of the case law of ECtHR by national courts.

As a result of the reform, the Supreme Court's jurisprudence was propelled to a new level where the court's main task is to ensure the unity of national case law. The practice of the Supreme Court has reached a brand-new level of quality in terms of implementing the requirements of the rule of law and the right to a fair trial, having abandoned a purely dogmatic interpretation of law and an excessive formalism which used to be inherent to Ukrainian judicial practice for a long time.

The influence of the ECHR and the case law of the ECtHR on the sphere of civil procedure is also manifested through the adoption of a pilot judgment of the ECtHR against Ukraine. In order to enforce the decisions *Yuriy Nikolaevich Ivanov v. Ukraine* and *Burmych v. Ukraine*, preventive and compensatory remedies vindicating the right to a trial and the enforcement of court decisions within a reasonable time should be implemented according to para. 1, Art. 6 and Art. 13 of the ECHR.

Of crucial importance for the implementation of human rights obligations is the re-examination of the case by national courts after the ECtHR has found a violation whenever it is necessary to restore the applicant's rights at the domestic level. This is done through the review of court decisions on exceptional circumstances (subpara. 2, para. 3, Art. 423 of the CPC) which in general meets the requirements for this type of review, though there were some negative cases (*Bochan v. Ukraine № 2*).

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# ECtHR DECISIONS THAT INFLUENCED THE CRIMINAL PROCEDURE OF UKRAINE

*Oksana Kaplina and Anush Tumanyants*

**Summary:** 1. Introduction. – 2. The Significance of the Convention as an Instrument of the European Public Order. – 3. ECHR and the Practice of the ECtHR as a Guide for the Reformation of Criminal Justice in Ukraine. – *3.1. The Principles of Criminal Proceedings: Freedom from Self-disclosure and the Right not to Testify against Close Relatives and Family Members; Immediacy of Testimonies, Objects and Documents Examination; Presumption of Innocence, Ensuring the Right to Defence and Their Implementation in the New CrPC of Ukraine 2012. – 3.2. Obligations of Ukraine Regarding the Creation of a System of Free Legal Aid. – 3.3. Positive Legislative Reaction of Ukraine to the Recommendations Made by the ECtHR Regarding the Standardisation of Measures to Ensure Criminal Proceedings and Precautionary Measures*. – 3.*4. Problems of Admissibility of Evidence and Ensuring the Rights of Individuals to Review the Materials of the Pre-trial Investigation.* – 4. ECHR as a Living Instrument and Act of Direct Action. – 5. Reserves for the Improvement of National Legislation in the Context of Protection of Human Rights and Freedoms in Accordance with the Legal Positions of the ECtHR. – 6. Conclusions.

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The authors have declared that no conflict of interest or competing interests exist. Prof. Oksana Kaplina serves as a Member of the Scientific Advisory Board of the Supreme Court, but despite this, she does not represent any views of this body in this particular research, nor is she bound by their views.

## CONTRIBUTORS

All the co-authors read and approved the final version and agreed to be accountable for all aspects of this article.

# ECTHR DECISIONS THAT INFLUENCED THE CRIMINAL PROCEDURE OF UKRAINE

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***Abstract*** *As of 2020, 70 years have passed since the day of the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which Ukraine ratified in September 1997. It was from this date that the countdown to significant democratic transformations in Ukraine and the establishment of human and civil rights and freedoms began. In this article, the authors raise relevant issues of reforming the criminal process of Ukraine in the context of European standards. The old Code of Criminal Procedure of Ukraine was adopted in 1960 and was in force for almost half a century. During this time, it became obsolete and bore a significant imprint of the Soviet past, which was manifest in both the bodies that conducted the trial and had primarily repressive powers and the public interests that dominated the rights and legitimate interests of those involved in criminal justice.*

*The conditions under which the first steps aimed at realising the importance of the Convention and the value of human rights enshrined in it took place were not easy. The path of reform processes in criminal proceedings was associated with the confrontation of the Soviet past with modern transformation. It was difficult to realise the need to harmonise national legislation with European standards of human rights and freedoms and consolidate their perception as one of the necessary conditions for Ukraine's integration into the European legal space, as well as the need for a conceptually new worldview for both the people of Ukraine and law enforcement bodies – officers, judges, and prosecutors.*

*The authors summarise the most important decisions of the ECtHR made on complaints against Ukraine during the period of the reform of criminal procedure legislation, analyse the problems identified by the ECtHR, and illustrate how the legislator implemented the ECtHR standards in national criminal procedure legislation. They note that on the basis of the Convention and the case-law of the ECtHR in criminal procedure legislation, important principles of criminal proceedings, such as adversarial proceedings, direct examination of evidence, the right to defence, the right not to testify against oneself and close relatives, and reasonable time are legitimised. For the first time, the legislation of Ukraine has enshrined a rule on the inadmissibility of evidence obtained as a result of a significant violation of human rights and freedoms. A separate segment of the article is devoted to the consideration of amendments to the criminal procedure legislation regarding the protection of the rights and legitimate interests of a person in respect of whom a measure of restraint in the form of custody is chosen. In order to ensure the right of a person to liberty and security, the position of an investigating judge and the institute of free legal aid have been introduced. In addition, the authors focus on the aspects of direct application of the Convention and ECtHR decisions in law enforcement practice without amending the legislation, as well as analyse the legislative perspectives arising from non-implemented ECtHR decisions.*

***Keywords:*** *European convention; human rights; criminal procedure; principles of criminal procedure; Ukraine; freedom from self-disclosure; the right not to testify against close relatives and family members; the right to defence.*

## 1 INTRODUCTION

The urgent need to reform the current criminal procedure legislation of Ukraine in the late 20th- early 21st century was due to the fact that the then-current Code of Criminal Procedure of Ukraine was adopted in 1960 and was in force for almost half a century. It was outdated and had an imprint of the Soviet past. The bodies that conducted the trial had mainly repressive powers, the public interest dominated the rights and legitimate interests of persons involved in criminal justice, there was an inequality of rights of the parties, the defence counsel was allowed to participate in criminal proceedings only at the final stage of the criminal process and had no access to the materials of the criminal case before the end of the proceedings, there was a custom of cases being returned by the court of first instance for additional investigation, etc. This code did not comply with the Constitution of Ukraine adopted on 28 June 1996.

Recognising the need to update the regulatory framework for criminal justice, numerous working groups have proposed amendments to the Criminal Procedure Code (CrPC) of Ukraine. In particular, the changes concerned the expansion of adversarial proceedings, the rights of the victim, the elimination of accusatory bias in court activities, the expansion of judicial control over the restriction of constitutional human rights and freedoms at the pre-trial stage in criminal cases, and appeals against decisions of investigators and prosecutors. Drafts of the new criminal procedure codes were also developed and presented. However, all these changes were patchwork, random, and situational. They could not fully transform the Soviet criminal process into modern criminal proceedings of a democratic state governed by the rule of law in Ukraine, where the priority is the rights, freedoms, and legitimate interests of a person and international standards for the construction of separate stages, proceedings, and procedures are taken into account. In addition, law enforcement practice and the science of criminal procedure were not ready for revolutionary change. Given the patriarchal mentality, many considered it necessary to gradually renovate criminal procedural law, which was based on national traditions, and called for caution in drawing on international experience because the new European standards, in their opinion, were so unusual that they could not be instilled at a national level and would lead to the loss of national identity. Further, the transplanting of models uncharacteristic of the Ukrainian legal system could lead to legislative divergence.

A significant number of problems existed in the structure of the criminal justice bodies called upon to carry out criminal proceedings. The system of these bodies was somewhat cumbersome, internally contradictory, not always scientifically sound, and overly complicated. The activities of its subjects were characterised by duplication of powers, lack of clear definition, and delimitation of their competence. The criminal justice authorities had an imperfect functional capacity, which did not allow them to ensure compliance with the rule of law in their activities. The numerous changes in the structure of criminal justice bodies were not systemic. They were mainly aimed at satisfying departmental interests and did not ensure the creation of an optimal system of crime prevention, detection, investigation, and punishment of perpetrators. The system of bodies traditionally called 'law enforcement' (police, Security Service of Ukraine, State Border Guard Service of Ukraine, tax police and other bodies authorised to conduct inquiries, investigations, apply administrative sanctions, etc.) were established as bodies of criminal prosecution and repression and did not aspire to the duty to protect and restore the violated rights of persons involved in the field of criminal justice. Further, the state did not introduce measures aimed at reducing the level of corruption in the field of criminal justice and state power in general. Public trust in the bodies conducting the criminal proceedings was declining every year.

It was in such conditions that the first steps of the Ukrainian legislator to reform not only the criminal process but also the entire legal system of the state began. It was obvious that

in society, there was an urgent need for revolutionary changes in the criminal justice system and the creation of criminal procedure legislation based on national achievements and traditions. However, at the same time, these changes had to take into account European values to protect human and civil rights and fundamental freedoms and international treaties consented to by the Verkhovna Rada of Ukraine.

Such reform processes were facilitated by radical changes in the socio-political conditions of society and the state, the adoption of the Constitution of Ukraine, and the path chosen by Ukraine aimed at further democratisation, humanisation, international integration, and strengthening protection of human rights and freedoms in accordance with international law and commitment to the European and world communities.

## 2 THE SIGNIFICANCE OF THE CONVENTION AS AN INSTRUMENT OF THE EUROPEAN PUBLIC ORDER

The preamble of the Constitution of Ukraine enshrined the desire of the state to transform itself in a democratic, social, and legal direction, confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine. After Ukraine gained independence in 1991, it became the 37th member of the Council of Europe in 1995, and on 17 July 1997, it ratified the Convention for the Protection of Human Rights and Fundamental Freedoms,[1] reaffirming its readiness to commit to the Council of Europe and, in particular, to implement the decisions of the European Court of Human Rights (hereafter: the ECtHR) and harmonise national legislation with the Convention on the Protection of Human Rights and Fundamental Freedoms[2] (hereafter: the ECHR, the Convention).

In order to move towards reforming the entire legal system, the criminal justice system and, in particular, criminal procedural law, it was necessary to synthesise European values, conduct comparative research, understand the conceptual vectors of reform, and identify guidelines, the generalisation of which would guide the reform process. The ECHR and the case-law of the ECtHR played a leading role in this reform process. Without diving into a detailed analysis of the significance of the Convention for the legal system, as the scholarship of Ukraine and the world[3] already has many fundamental works on this phenomenon, we will note only that its axiological significance for the criminal process in terms of legislative initiatives was difficult to overestimate. This is because of the nature of the criminal process, in

1 The Law of Ukraine on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, First Protocol and Protocols No 2, 4, 7 and 11 to the Convention of the Verkhovna Rada of Ukraine (VVR) 1997 No 40, 263.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 12 February 2021.

3 See: C Grabenwarter, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights' in A von Bogdandy, P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area, Theory, Law and Politics in Hungary and Romania* (2015) 257–275; <https://eltelawjournal.hu/wp-content/uploads/2014/10/7_Christoph_Grabenwarter.pdf> accessed 12 February 2021. H Keller, A Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 677–712. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1087&context=fss_papers> accessed 12 February 2021; W Luzius, 'Rethinking the European Court of Human Rights' in *The European Court of Human Rights between Law and Politics* (2011) 204–230; EA Alkema, 'The European Convention as a Constitution and Its Court as a Constitutional Court' in P Mahoney et al (eds), *Protection des droits de l'homme: la perspective européenne: mélanges à la mémoire de Rolv Ryssdal* (Cologne 2000) 41–65; M De Salvia, 'Compendium de la CEDH: les Principes Directeurs de la Jurisprudence Relative à la Convention Européenne des Droits de l'Homme' in *Jurisprudence 1960 à 2002* (2003) 865.

which the risks of human rights and freedoms and the risk of abuse of coercion are extremely high. Ensuring a fair trial and access to justice is the key to restoring public confidence in the judiciary, as well as maintaining the authority of the state as a whole.

On 23 February 2006, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On Enforcement of Decisions and Application of the Case Law of the European Court of Human Rights'.[4] This Law regulates the relations arising in connection with the obligation of the state to comply with the decisions of the ECtHR in cases against Ukraine; with the need to eliminate the reasons for Ukraine's violation of the Labour Code and its protocols; with the introduction of European human rights standards into Ukrainian justice and administrative practice; creating the preconditions for reducing the number of applications to the ECtHR against Ukraine.

The provisions of this Law of Ukraine largely relate to the final decisions of the ECtHR in cases against Ukraine, which recognised violations of the ECHR. This is understandable because based on the Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950', Ukraine fully recognises the binding jurisdiction of the European Court on all matters concerning the interpretation and application of the ECHR. Thus, the judgments of the European Court that may be given in respect to Ukraine are given the same legal status as the ECHRitself.

However, as is well known, the ECHR is a living instrument, which is continually developed in the ECtHR case law and must be interpreted in the light of present-day conditions.[5]

Christoph Grabenwarter highlighted that

> through manifold influences on the legal orders and the process of implementation into the constitutions of European states […] it seems appropriate to describe the Convention, by reference to the ECtHR, as a 'constitutional instrument of European public order' and, by reference to literature, as part of the *ordre public européen*, as a 'European constitution of human rights', a 'substantive common European constitution', a 'constitution of human rights' or as a 'process of constitutionalization' […] the Convention may be described as a European constitutional instrument of human rights and thus as a partial constitution in the field of human rights; the ECtHR may be referred to as a 'European constitutional court' for human rights.[6]

Rights and freedoms guaranteed by the ECHR are not theoretical or illusory but practical and effective, hereby obligating the contracting states to provide effective protection of human rights on a national level.[7]

The ECtHR itself reiterates that

> the Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[8]

4 The Law of Ukraine 'On the implementation of decisions and application of the case law of the European Court of Human Rights' [2006] Vidomosti of the Verkhovna Rada 18/123 <https://zakon.rada.gov.ua/laws/show/3477-15#Text> accessed 12 February 2021.

5 *Tyrer v UK* App no 5856/72 (ECtHR, 25 April 1978) para 31 <http://hudoc.echr.coe.int/eng?i=001-57587> accessed 12 February 2021. See also European Court of Human Rights, 'The ECHR in 50 questions' <https://www.echr.coe.int/Documents/50Questions_ENG.pdf> accessed 12 February 2021.

6 Grabenwarter (n 3) 103.

7 *Dvorski v Croatia* App no 25703/11 (ECtHR, 20 October 2015) para 82 <http://hudoc.echr.coe.int/eng?i=001-158266> accessed 12 February 2021.

8 *Ireland v UK* App no 5310/71 (ECtHR, 20 March 2018) para 12 <http://hudoc.echr.coe.int/eng?i=001-181585> accessed 12 February 2021.

## 3 ECHR AND THE PRACTICE OF THE ECtHR AS A GUIDE FOR THE REFORMATION OF CRIMINAL JUSTICE IN UKRAINE

### *3.1 The principles of criminal proceedings: freedom from self-disclosure and the right not to testify against close relatives and family members; immediacy of testimonies, objects and documents examination; presumption of innocence, ensuring the right to defence and their implementation in the new CrPC of Ukraine 2012*

One of the directions of the ECtHR practice's influence on national normative-legal guarantees of human rights and freedoms is the positive law-making reaction of the competent state body to the ECtHR's recommendations and instructions on improving the mechanisms for ensuring human rights and freedoms. It should be noted that of all the ECtHR's violations in the cases against Ukraine during 2008-2013, at least a fifth were caused by shortcomings in the national human rights legislation, which indicated the need to change the legislation without undue delay. It is determined by the fact that in the CrPC of 1960, the system of principles of criminal proceedings was significantly limited, and some of them, such as the presumption of innocence, were not mentioned at all.

A number of ECtHR decisions contributed to the formation of the new CrPC system of general principles of criminal proceedings as fundamental, general provisions that contain the essential features of criminal proceedings, determine the level of protection of human rights and freedoms, build its system (stages and separate proceedings), and guide the activities of participants in criminal proceedings.

Such decisions include *Lutsenko v Ukraine*, in which Lutsenko was convicted of murder.[9] The Supreme Court upheld the verdict, and Lutsenko consequently appealed to the ECtHR, arguing that he had not received a fair trial; he was convicted on the basis of the testimony of another accused. However, the latter was not questioned during the trial, and the court used his written testimony, which he had given during the pre-trial investigation as a witness, to convict Lutsenko. The ECtHR stated in its decision that Lutsenko's accomplice, who was also suspected of committing the same crime, testified as a witness and was therefore subject to criminal liability for refusing to testify, which violated his right to remain silent. Because of these violations, Lutsenko's conviction was the result of an unfair trial: 'The credibility of evidence is undermined if it is obtained in violation of the right to "silence" and the privilege against self-incrimination'. The right not to testify against oneself requires, in particular, that the prosecution in a criminal case does not allow the use of evidence obtained by means of pressure or coercion against the will of the accused in trying to prove its version of events (§ 49).[10] At the same time, the Court stated that the domestic courts violated the applicant's right to cross-examine the person who had testified against him.

In pursuance of *Lutsenko v Ukraine*, the new CrPC of Ukraine reflects a number of norms, including Art. 18 'Freedom from self-disclosure and the right not to testify against close relatives and family members'. The CrPC enshrined a rule that provided that no person could be forced to admit their guilt in committing a criminal offence or forced to give explanations or a testimony that could be grounds for suspicion or an accusation of committing a criminal offence. Everyone has the right not to say anything about the suspicion or accusation against them, to refuse to answer questions at any time and to be immediately informed of these rights. No person may be compelled to give explanations or testimonies that might give

9 *Lutsenko v Ukraine* App no 6492/11 (ECtHR, 2 July 2011).

10 In December 2011, the Supreme Court of Ukraine canceled all court decisions in Lutsenko's case and remanded the case to the court of first instance.

rise to suspicion or accusation of committing a criminal offence by their close relatives or members of their family.

In addition, for the first time in the CrPC of Ukraine, there was a rule-principle that provided for the immediacy of the court's examination of testimony, objects, and documents.[11] The law forbade the admission of evidence contained in testimony, objects, and documents that were not the subject of direct investigation by the court. As an exception, the court could accept as evidence the testimony of persons who did not depose directly at the hearing only in cases provided by the Code (Art. 23). In addition, for the first time in the history of the criminal process in Ukraine, there was the requirement to recognise a violation of the right to cross-examination as a significant violation of the right of a person, which entails the inadmissibility of evidence (para. 5 of Part 2 of Art. 87 of the CrPC).

A similar position was taken by the ECtHR in the case of *Leonid Lazarenko v Ukraine*, *Yaremenko v Ukraine*, and *Shabelnyk v Ukraine,*[12] where it stated, *inter alia*, that

> the principles of the right to defense and the right not to testify against oneself meet universally recognized international human rights standards, which are the main components of the concept of a fair trial and the rational essence of which is related, in particular, to the protection of the accused from arbitrary pressure from the authorities. They also help to prevent errors in the administration of justice and the objectives of Article 6, in particular the observance of the principle of equality between the investigating and prosecuting authorities and the accused. The right not to testify provides, inter alia, that the prosecution must prove its case against the accused without resorting to evidence obtained by means of coercion or pressure against the will of the accused (para. 51).[13]
>
> As regards the use of evidence obtained in violation of the detainee's right to remain silent and the right not to testify against himself, the Court reiterates that the existence of such rights is a universally recognized international standard - the core of the concept of a fair trial under Article 6. The establishment of such standards is explained, in particular, by the need to protect the accused from unlawful coercion by the authorities, which should help to avoid errors in the administration of justice and promote the objectives of Article 6. The right not to testify requires, in particular, to substantiate their arguments against the accused without resorting to evidence obtained by means of coercion or pressure, against the will of the accused (para. 77).[14]

Despite enshrining the provisions that constitute the meaning of presumption of innocence in the Constitution of Ukraine (Art. 62), the demand for its provisions in law enforcement practice, and its development at the doctrinal level, the CrPC of Ukraine of 1960 did not contain the phrase 'presumption of innocence'. However, the need for Ukraine to fulfil its international obligations and the decisions of the ECtHR in the cases of *Grabchuk v Ukraine*, *Panteleenko v Ukraine*, *Shagin v Ukraine*, and *Dovzhenko v Ukraine*[15] contributed to the emergence of a new

11 *Nechiporuk and Yonkalo v Ukraine* App no 42310/04 (ECtHR, 21 April 2011) <http://hudoc.echr.coe.int/eng?i=001-104613> accessed 12 February 2021.

12 *Lazarenko v Ukraine* App no 26855/05 (ECtHR, 19 November 2009) <http://hudoc.echr.coe.int/eng?i=001-95732> accessed 12 February 2021; *Yaremenko v Ukraine* App no 32092/02 (ECtHR, 12 June 2008) <http://hudoc.echr.coe.int/eng?i=001-86885> accessed 12 February 2021; *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009) <http://hudoc.echr.coe.int/eng?i=001-91401> accessed 12 February 2021.

13 *Lazarenko v Ukraine* App no 26855/05 (ECtHR, 19 November 2009) <http://hudoc.echr.coe.int/eng?i=001-95732> accessed 12 February 2021.

14 *Yaremenko v Ukraine* (n 12).

15 *Grabchuk v Ukraine* App no (ECtHR, 21 September 2006) <http://hudoc.echr.coe.int/eng?i=001-76950> accessed 12 February 2021; *Panteleyenko v Ukraine* App no 11901/02 (ECtHR, 29 June 2006) <http://hudoc.echr.coe.int/eng?i=001-76114> accessed 12 February 2021; *Shagin v Ukraine* App no 20437/05 (ECtHR, 10 December 2009) <http://hudoc.echr.coe.int/eng?i=001-96112> accessed 12 February 2021; *Dovzhenko v Ukraine* App no 36650/0312 (ECtHR, January 2012) <http://hudoc.echr.coe.int/eng?i=001-108549> accessed 12 February 2021.

Art. 17 'Presumption of innocence and proof of guilt' in the CrPC, which provided a general rule that a person is presumed innocent of committing a criminal offence and cannot be prosecuted until proven guilty in the procedure provided by the CrPC and established by the conviction of the court, which entered into force. It also enshrined the important provisions that must be reflected in the evidence: no one is obliged to prove his innocence in a criminal offence and must be acquitted if the prosecution does not prove the guilt of a person beyond a reasonable doubt; suspicion and accusations cannot be based on evidence obtained illegally; all doubts as to the guilt of a person shall be construed in favour of such person; treatment of a person whose guilt in committing a criminal offence has not been established by a conviction of a court that has entered into force must correspond to the treatment of an innocent person.

In pursuance of the decision of *Shabelnyk v Ukraine* and in order to prevent systemic violations taking place during the interrogation of persons forced to testify against themselves, the new CrPC of Ukraine also has a rule according to which evidence obtained from a witness who was further recognised as a suspect or accused in criminal proceedings are inadmissible (para. 1 of Part 3 of Art. 87 of the CrPC).

For the first time at the legislative level, the CrPC of Ukraine enshrined the principle of reasonable time for case examination. In *Izzetov v Ukraine* (2011), the ECtHR, emphasising that the reasonableness of the length of proceedings should be assessed in light of the circumstances of the case, proposed criteria such as the complexity of the case, the conduct of the applicant and the relevant authorities during the trial, and the importance of the subject matter for the applicant (para. 68).[16] Relying on the decisions in the cases of *Antonenkov and Others v Ukraine*,[17] *Ivanov v Ukraine*,[18] *Boldyrev v Ukraine*,[19] *NV v Ukraine*,[20] *Bugaev v Ukraine*,[21] *Aibabin v Ukraine*,[22] *Baglay v Ukraine*,[23] and others, Ukrainian legislators introduced Art. 28 of the CrPC, which implemented the ECtHR's definition of reasonable time limits for criminal proceedings and their criteria. This position is also confirmed in other decisions of the ECtHR. Moreover, the legislator reproduced the provisions developed by the practice of the ECtHR almost word-for-word. According to Art. 28 of the CrPC, reasonable time limits are considered to be objectively necessary for the performance of procedural actions and the adoption of procedural decisions. Criteria for reasonable time are: 1) the complexity of criminal proceedings; 2) behaviour of participants in criminal proceedings; 3) the manner in which the prosecutor and the court exercise their powers. In addition, it should be noted that although the fourth criterion is not enshrined in the rules of criminal procedure, it is applied by judges directly, based on the provisions of the ECHR. This criterion is based on factors such as the importance of resolving the case for the applicant (*Bugaev v Ukraine*).

### *3.2. Obligations of Ukraine regarding the creation of a system of free legal aid*

As is well known, under para. 3 (c) of Art. 6 of the ECHR,

> Everyone charged with a criminal offense has the following minimum rights: … (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

16 *Izzetov v Ukraine* App no 23136/04 (ECtHR, 15 September 2011) <http://hudoc.echr.coe.int/eng?i=001-106165> accessed 12 February 2021.

17 *Antonenkov and Others v Ukraine* App no 14183/02 (ECtHR, 22 November 2005).

18 *Ivanov v Ukraine* App no 1500/02 (ECtHR, 7 December 2006).

19 *Boldyrev v Ukraine* App no 27889/03 (ECtHR, 20 January 2011).

20 *NV v Ukraine* App no 17945/02 (ECtHR, 3 April 2008).

21 *Bugaev v Ukraine* App no 7516/03 (ECtHR, 8 July 2010).

22 *Aibabin v Ukraine* App no 23194/02 (ECtHR, 18 March 2009).

23 *Baglay v Ukraine* App no 22431/02 (ECtHR, 8 November 2005).

A number of complaints to the ECtHR from Ukrainian citizens concerned the non-provision of free legal aid during criminal proceedings, including in the Supreme Court of Ukraine. In this regard, in the case of *Maksimenko v Ukraine*,[24] the ECtHR stated that

> The right of those charged with criminal offences to free legal assistance, which is one of those guarantees, is subject to two conditions: the person concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that he or she be granted such assistance (para 25).

The interests of justice, in principle, require securing legal representation in the case of deprivation of liberty, especially when it comes to the possibility of sentencing to life imprisonment. The Court criticised the CrPC of Ukraine of 1960, noting that the violation of the right enshrined in para. 3 (c) of Art. 6 of the ECHR was due to the absence of any procedures for appointing free legal representation at that stage of the proceedings where it was no longer deemed mandatory under the CrPC.[25]

The need to comply with the provisions of the ECHR contained in para. 3 (c) of Art. 6 of the ECHR and the systemic violations found in the cases of *Maksymenko v Ukraine*, *Iglin v Ukraine*, *Nikolaenko v Ukraine*,[26] led to the development and adoption on 2 June 2011 of the Law of Ukraine 'On Free Legal Aid';[27] as well as a significant expansion of the rights of the defence. In particular, in accordance with Art. 20 of the CrPC 2012, in cases provided by the CrPC and/or the law governing the provision of free legal aid, the suspect is entitled to legal aid free of charge at the expense of the state.

Based on the ECtHR's consideration of a number of cases, in particular, *Balytsky v Ukraine*, *Yaremenko v Ukraine*, *Lutsenko v Ukraine*, *Shabelnyk v Ukraine*, *Leonid Lazarenko v Ukraine*; *Borotyuk v Ukraine*; *Bortnik v Ukraine*, *Todorov v Ukraine*; *Khairov v Ukraine*; *Serhiy Afanasyev v Ukraine*; *Yerokhina v Ukraine,* during the drafting of the CrPC of Ukraine, the legislator developed rules regarding: 1) the right of the suspect or the accused to have a lawyer and visit him or her before the first interrogation in compliance with the conditions ensuring confidentiality of communication, and after the first interrogation, without limiting their number and duration (para. 3, Part 3 of Art. 42 of the CrPC of Ukraine of 2012); 2) the obligation of the investigator, prosecutor, investigating judge, or court to engage a defence counsel, if his/her participation is mandatory but the suspect or the accused has not engaged a defence counsel; the suspect or the accused has filed a motion to engage a defence counsel, but due to lack of funds or for other objective reasons, he/she cannot engage him or her independently; the investigator, prosecutor, investigating judge, or court decides that the circumstances of the criminal proceedings require the participation of a defence counsel, and the suspect or the accused did not engage him or her (Part 1 of Art. 49 of the CrPC of Ukraine of 2012); the expansion of cases of mandatory involvement of a defence counsel (Part 1 of Art. 52 of the CrPC of Ukraine 2012); abolition of the institute of the guilty plea, as the law did not provide for the right to a lawyer in such cases, which was repeatedly criticised by the ECtHR.

In addition, these cases contributed to the formation of new regulations on the admissibility of evidence, which are reflected in Art. 87 of the CrPC of Ukraine 2012.[28]

24 *Maksimenko v Ukraine* App no 39488/07 (ECtHR, 20 December 2011) <http://hudoc.echr.coe.int/eng?i=001-108239> accessed 12 February 2021.

25 ibid, paras 28–32.

26 *Maksimenko v Ukraine* (n 24), *Iglin v Ukraine* App no 39908/05 (ECtHR,12 January 2012) <http://hudoc.echr.coe.int/eng?i=001-108506> accessed 12 February 2021; *Nikolayenko v Ukraine* App no 39994/06 (ECtHR, 15 November 2012) <http://hudoc.echr.coe.int/eng?i=001-114457> accessed 12 February 2021.

27 The Law of Ukraine No 3460-VI of 2 June 2011 'On Free Legal Aid' [2011] Vidomosti Verkhovnoi Rady 51:577.

28 Department for the Execution of the Judgments of the ECHR Case of *Balitskiy v Ukraine* (leading case) <http://hudoc.exec.coe.int/eng?i=004-31116> accessed 12 February 2021.

The decision of the ECtHR in the case *Zagorodny v Ukraine* (24.11.11) determined the inclusion in the CrPC of Ukraine of 2012 of a rule according to which a lawyer in criminal proceedings must be a lawyer listed in the Unified Register of Lawyers of Ukraine (Art. 45). Subsequently, relevant amendments were also made to the Constitution of Ukraine, which provided that 'everyone has the right to professional legal assistance. In cases provided by law, this assistance is provided free of charge. Everyone is free to choose a defender of their rights' (Art. 59).

### *3.3 Positive legislative reaction of Ukraine to the recommendations made by the ECtHR regarding the standardisation of measures to ensure criminal proceedings and precautionary measures*

The impact of the ECtHR's practice on Ukraine's criminal procedure legislation has caused a paradigm shift in criminal procedure. This shift included expanding court jurisdiction to ensure a system of guarantees for the protection of individual rights and adversarial proceedings at the pre-trial stage. Art. 5 of the ECHR states that

> Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. […] Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

These provisions can be considered one of the determinants that influenced the introduction of almost revolutionary changes for the criminal process of the post-Soviet state institution of investigating judge in the criminal process of Ukraine, which performs the function of judicial control over the rights, freedoms, and interests of persons in criminal proceedings. In addition, a number of ECtHR decisions on Ukraine have accelerated changes in legislation. In particular, the ECtHR judgment in the case of *Merit v Ukraine* of 30 March 2004 (para 63)[29] stated that

> prosecutors perform investigative and prosecuting functions and, therefore, their position in the criminal proceedings as provided for by the law at the material time, in particular by the provisions of Law on Prosecution (Chapters I-II) and the Code of Criminal Procedure of Ukraine (Articles 22, 25 and 32 of the Code), must be seen as that of a party to these proceedings.

The ECtHR thus concludes that: a) recourse to a prosecutor with complaints is not an effective remedy, as the status of a prosecutor in national law and his or her participation in criminal proceedings do not provide adequate guarantees for the independent and impartial consideration of complaints; b) the attribution to the prosecutor of the right to choose a measure of restraint in the form of detention does not comply with para. 3 of Art. 5 of the ECHR, as he or she is a party to the proceedings and it cannot be expected from a person who plays such a role to be impartial in the exercise of judicial power in the same case.

Thus, the introduction of the institution of an investigative judge with a fairly broad subject of jurisdiction, a 'neutral arbitrator' who performs neither the function of prosecution nor the function of defence and is the bearer of judicial power, helped to ensure prompt, urgent judicial protection in case of restriction of constitutional rights during pre-trial investigation. It also secured the implementation of the principles of the rule of law and adversarial proceedings at this stage of criminal proceedings, which increased the level of legal protection of its participants.

In contrast to the periodic judicial control provided for by the CrPC of Ukraine of 1960, the activity of an investigating judge under the new CrPC is cross-cutting, which has a

29 *Merit v Ukraine* App no 66561/01 (ECtHR, 30 March 2004) <http://hudoc.echr.coe.int/eng?i=001-61685> accessed 12 February 2021.

positive effect on the level of guarantee of constitutional human rights and freedoms in criminal proceedings. Given the tasks facing the investigating judge, this subject of criminal proceedings is capable of preventing and protecting against violations or unjustified restrictions of constitutional human rights and freedoms that are likely to be allowed by actions or decisions of the coroner, investigator, or prosecutor.

The investigating judge exercising the powers within the given competence, including in the application of measures to ensure criminal proceedings, granting permission to conduct certain investigative (searching), and covert investigative (searching) actions, uses a three-part test to assess the justification of interference with human rights, which was developed by the case-law of the ECtHR, in particular, in the judgments in *Panteleenko v Ukraine* of 29 June 2006[30] and *Ratushna v Ukraine* of 2 December 2010.[31] The test includes such constituents as: 1) the interference was carried out 'in accordance with the law'; 2) it meets a legal, legitimate purpose; 3) it is 'necessary in a democratic society'.

In exercising his/her powers, the investigating judge (at the stage of the pre-trial investigation) or the court (during the trial) shall verify the existence of the conditions guaranteed by the ECHR for the restriction of the rights and freedoms of the person in criminal proceedings. Thus, in particular, in para. 42 of the judgment in the case of *Kryvitska and Kryvitsky v Ukraine* of 2 December 2010, the ECtHR stated

> A State interference constitutes a violation of Article 8 of the Convention, unless it pursues one of the legitimate aims enumerated in Article 8 § 2, is "in accordance with the law", and can be regarded as "necessary in a democratic society".[32]

The ECtHR takes a similar position in other cases, for example, in para. 47 of the judgment of *Savina v Ukraine*[33] of 18 December 2008; para. 51 of the decision *Verentsov v Ukraine*[34] of 11 April 2013; para. 81 of the judgment *Serhiy Volosyuk v Ukraine*[35] of 12 March 2009, etc.

The case-law of the ECtHR has given a new impetus to the understanding of the institution of precautionary measures in the new CrPC of Ukraine of 2012, the essence of which is deduced through the prism of measures to ensure criminal proceedings, which are used to achieve its effectiveness. One of the pilot decisions in this respect is the decision of the ECtHR in the case of *Kharchenko v Ukraine*, which emphasised that considering the systemic nature of the problem identified in this case (systemic human rights violations in detention), specific reforms in Ukrainian law and administrative practice should be implemented immediately to bring them into line with the Court's findings in this judgment in order to ensure that such legislation and practice comply with Art. 5 of the ECHR (para. 101).[36] As a starting point, we note that the main purpose of Art. 5 of the ECHRis the prevention of arbitrary or unjustified deprivation of liberty.[37]

30 *Panteleyenko v Ukraine* App no 11901/02 (ECtHR, 29 June 2006) <http://hudoc.echr.coe.int/eng?i=001-76114> accessed 12 February 2021.

31 *Ratushna v Ukraine* App no 17318/06 (ECtHR, 2 February 2010) <http://hudoc.echr.coe.int/eng?i=001-102023> accessed 12 February 2021.

32 *Kryvitska and Kryvitskyy v Ukraine* App no 30856/03 (ECtHR, 2 December 2010) <http://hudoc.echr.coe.int/eng?i=001-101978> accessed 12 February 2021.

33 *Saviny v Ukraine* App no 39948/06 (ECtHR, 18 December 2008) <http://hudoc.echr.coe.int/eng?i=001-90360> accessed 12 February 2021.

34 *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013) <http://hudoc.echr.coe.int/eng?i=001-118393> accessed 12 February 2021.

35 *Volosyuk v Ukraine* App no 28403/05 (ECtHR, 12 March 2009) <http://hudoc.echr.coe.int/eng?i=001-76092> accessed 12 February 2021.

36 *Borotyuk v Ukraine* App no 33579/04 (ECtHR, 16 March 2011) <http://hudoc.echr.coe.int/eng?i=001-102288> accessed 12 February 2021.

37 *McKay v United Kingdom* App no 543/03 (ECtHR, 3 October 2006) <http://hudoc.echr.coe.int/eng?i=001-77177> accessed 12 February 2021.

The key role for the law enforcement practice of Ukraine was played by the decisions of the ECtHR in the cases of *Letelle v France*[38] of 26 June 1991, *Tomazi v France*[39] of 27 August 1992, *White v Ukraine*[40] of 21 January 2011, and *Borotyuk v Ukraine*[41] of 16 March 2011, as the legal conclusions formulated in these cases have changed the approaches to the application by national courts of a measure of restraint in the form of detention, which could previously have been chosen based only on the gravity of the crime. Founded on the case-law of the ECtHR and the new criminal procedure legislation, investigating judges in Ukraine take into account all the circumstances of criminal proceedings, avoiding standard lists of risks, and the prosecution must substantiate each of them separately with evidence. As stated in the ECtHR judgment in *Kharchenko v Ukraine*[42] of 10 February 2011, a continued detention can be justified only in the presence of a specific public interest which, despite the presumption of innocence, prevails over the principle of respect for individual liberty; national judicial authorities must examine all the factors for or against the existence of a genuine requirement of public interest, justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing the applications for release (para. 60 of the decision in the case *Borotyuk v Ukraine*).[43]

According to the logic of the ECtHR, the use of detention as a precautionary measure is possible only if there are sufficient grounds to restrict the right to liberty and security of person. In particular, para. 61 of the judgment in *Ruslan Yakovenko v Ukraine* states that in order for detention not to be arbitrary, it is necessary to observe the proportionality between the stated grounds for detention and the actual detention (including the possible punishment that threatens the person).[44] The requirement of detention was taken into account only by the domestic legislator and reflected in Arts. 177, 183, and 194 of the CrPC of Ukraine, according to the normative content of which the prosecutor must prove the need to apply appropriate precautionary measures, and the investigating judge and the court, based on 'the presumption of the release of the accused' (see *Kalashnikov v Russia*, 15 July 2002),[45] must establish appropriate and sufficient grounds for its application.

The ECHR case-law has developed four basic acceptable reasons for refusing bail, which are defined in para. 59 of the judgment in *Smirnova v Russia* of 24 July 2003, namely: a) the risk that the accused will fail to appear for trial, b) the risk that the accused, if released, would take action to prejudice the administration of justice, c) commit further offences or d) cause public disorder.[46] These provisions are fully reproduced in Art. 177 of the CrPC of Ukraine. An essential element of the Convention's guarantee of non-arbitrary detention is the following requirement: in the absence of reasonable suspicion, a person may under no circumstances be detained in order to force him/her to confess to a crime, testify against

38 *Letellier v France* App no 12369/86 (ECtHR, 26 June 1991) <http://hudoc.echr.coe.int/eng?i=001-57678> accessed 12 February 2021.

39 *Tomasi v France* App no 12850/87 (ECtHR, 27 September 1992) <http://hudoc.echr.coe.int/eng?i=001-57796 accessed 12 February 2021> accessed 12 February 2021.

40 *Bilyy v Ukraine* App no 14475/03 (ECtHR, 21 January 2011 <http://hudoc.echr.coe.int/eng?i=001-101175> accessed 12 February 2021.

41 *Borotyuk v Ukraine* (n 36).

42 ibid.

43 *Borotyuk v Ukraine* (n 36).

44 *Ruslan Yakovenko v Ukraine* App no 5425/11 (ECtHR, 4 June 2015) <http://hudoc.echr.coe.int/eng?i=001-154978> accessed 12 February 2021.

45 *Kalashnikov v Russia* App no 47095/99 (ECtHR, 15 July 2002) <http://hudoc.echr.coe.int/eng?i=001-60606> accessed 12 February 2021.

46 *Smirnova v Russia* App nos 46133/99 and 48183/99 (ECtHR, 24 July 2003) <http://hudoc.echr.coe.int/eng?i=001-61262> accessed 12 February 2021.

others or to obtain facts or information that may give rise to reasonable suspicion.[47] At the same time, 'reasonable suspicion' means that there are facts or information that can convince an objective observer that the person in question may have committed an offence (see *Nechyporuk and Yonkalo v Ukraine*).[48]

Implementing this requirement, the domestic legislator in Part 2 of Art. 177 of the CrPC of Ukraine laid down an important guarantee against the arbitrary application of a precautionary measure: 'The basis for the application of a precautionary measure is the existence of reasonable suspicion that a person has committed a criminal offense…'. The above legislative structure radically changed the vicious practice that existed before the adoption of the CrPC of Ukraine in 2012, when even the highest court recommended that when considering a request for detention, a judge may not examine evidence, evaluate it, or otherwise verify the guilt of a suspect or accused to consider and resolve those issues that must be resolved by the court during the consideration of the criminal case on the merits (see the decision of the Plenum of the Supreme Court of 25 April 2003 No 4, p. 10).[49]

Based on the content of the ECtHR judgment in *Mironenko and Martenko v Ukraine* of 10 December 2009[50]

> the competent court has to examine not only compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest, and the legitimacy of the purpose pursued by the arrest and the ensuing detention.[51]

Therefore, the CrPC of Ukraine stipulates that the request of the investigator or prosecutor to apply a measure of restraint must contain specific circumstances that give grounds to suspect a person of committing a criminal offense and references to materials confirming these circumstances (para. 3, Part 1 Art. 184 of the CrPC).

Reasonable suspicion is an important guarantee against the arbitrary application of precautionary measures, but the proof of its existence at the time of choosing a specific precautionary measure does not lead to further indictment or sentence. This guides the practice of the ECtHR. Thus, in the judgment in the case of *Chebotari v Moldova* of 13 November 2007, it was stated that

> in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c) it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody. […] Neither is it necessary that the person detained should ultimately have been charged or brought before a court.[52]

Another illustrative example is the case-law of the ECtHR (*Rashad Khasanov and Others v Azerbaijan*, 7 June 2018),[53] which found a violation of the ECHR on grounds of suspicion.

47 *Nechiporuk and Yonkalo v Ukraine* App no 42310/04 (ECtHR, 21 April 2011) <http://hudoc.echr.coe.int/eng?i=001-104613> accessed 12 February 2021.

48 ibid.

49 On the practice of application by courts of a measure of restraint in the form of custody and extension of terms of custody at the stages of inquiry and pre-trial investigation: resolution of the Plenum of the Supreme Court of Ukraine of 25 April 2003 No 4 in Legislation of Ukraine: normative rights base, Supreme Council of Ukraine <http://zakon5.rada.gov.ua/laws/show/v0004700-03> accessed 12 February 2021.

50 *Mironenko and Martenko v Ukraine* App No 4785/02 (ECtHR, 10 December 2009) <http://hudoc.echr.coe.int/eng?i=001-96195> accessed 12 February 2021.

51 A similar legal position is contained in *Yeloyev v Ukraine*. See: *Yeloyev v Ukraine* App no 17283/02 (ECtHR, 6 November 2008) <http://hudoc.echr.coe.int/eng?i=001-89452> accessed 12 February 2021.

52 *Chebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007) <http://hudoc.echr.coe.int/eng?i=001-83247> accessed 12 February 2021.

53 *Rashad Hasanov and Others v Azerbaijan* App nos 48653/13, 52464/13, 65597/13, 70019/13 (ECtHR, 7 June 2018) <http://hudoc.echr.coe.int/eng?i=001-183372> accessed 12 February 2021.

Thus, there has been a violation of Arts. 5 and 18 of the CrPC on the ground that the applicants' freedom was restricted for other purposes under the ECHR. In particular, their arrest and detention were intended to punish these individuals for their political and social activities as members of the NIDA board, as well as to end protests against the deaths of soldiers and destroy the active youth movement in the country. The Court noted that these objectives differed from bringing them before the statutory competent authority on the basis of a reasonable suspicion of having committed a crime. The Court considered this to be a sufficient ground for finding a violation of these articles of the ECHR.[54]

To continue the analysis of the grounds for the use of detention, we note that the basic risks provided for in Art. 5 of the ECHR are fully implemented in the national legislation of Ukraine. In particular, in accordance with Art. 177 of the CrPC of Ukraine, the purpose of the precautionary measure is to ensure the fulfilment of procedural obligations of the suspect or the accused, as well as to prevent attempts to: 1) hide from the pre-trial investigation and/or court; 2) destroy, hide or distort any of the things or documents that are essential for establishing the circumstances of a criminal offence; 3) illegally influence a victim, witness, another suspect, accused, expert, or specialist in the same criminal proceedings; 4) obstruct criminal proceedings in any other way; 5) commit another criminal offence or continue a criminal offence in which he/she is suspected or accused.[55]

Another convention contained in para. 4 of Art. 5 of the ECHR that has been implemented in the CrPC of Ukraine concerns the provision of equal opportunities for the parties to criminal proceedings to independently defend their legal positions before the court. That is, it is necessary to ensure the mandatory presence of the suspect or the accused in deciding on the application of precautionary measures. In particular, in para. 277 of the judgment in *Tymoshenko v Ukraine*, the ECtHR stated that one of the purposes of a reasonable decision on this issue was to demonstrate to the parties that their positions had been taken into account. The new CrPC of Ukraine guarantees the right of the suspect to be present during the consideration of the request for the application of a precautionary measure, except for the cases provided for in Part 6 of Art. 193 of the CrPC of Ukraine. But, as can be seen from the content of Art. 199 of the CrPC of Ukraine, the issue of the suspect's participation in the consideration of the petition for an extension of the detention term remains unresolved.

Judicial review of the lawfulness of a preventive measure in the form of detention is linked to another standard – detention for a reasonable period of time. It is noteworthy that the CrPC does not directly mention this international standard, but the ECtHR, verifying compliance by Member States with paras. 1 and 3 of Art. 5 of the ECHR, examines the period during which it is legitimate to restrict a person's right to liberty and personal security. At the same time, the case-law of the ECtHR does not specify which period of detention should be defined as reasonable but only emphasises that it should be justified. Thus, in para. 266 of the judgment in the case of *Tymoshenko v Ukraine*, the Court stated: 'the justification of any period of imprisonment, regardless of how short it is, must be convincingly proved by the state authorities'.[56] Para. 45 of the judgment in *Tkachev v Ukraine* states that

> it falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time.

54 ibid.

55 In this context, it should be noted that the ECtHR also considers the risk to the person under investigation as a ground for the application of such a preventive measure as custody, while the stated risk is not provided for in the current CrPC of Ukraine. *Korban v Ukraine* App no 26744/16 (ECtHR, 04 July 2019) <http://hudoc.echr.coe.int/eng?i=001-194188> accessed 12 February 2021.

56 *Tymoshenko v Ukraine* App no 49872/11 (ECtHR, 30 April 2013) <http://hudoc.echr.coe.int/eng?i=001-119382> accessed 12 February 2021.

> To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions ordering continued detention.[57]

Similar positions have been formulated in other decisions of the ECtHR.[58]

In the context of the study of the use of detention in court proceedings, it should be noted that the ECtHR drew attention to the lack of proper justification for the need to continue the preventive measure in the form of detention in numerous decisions of Ukraine while the CrPC of 1960 was in power (*Todorov v Ukraine,*[59] *Yeloyev v Ukraine,*[60] *Vitruk v Ukraine,*[61] *Yurtaev v Ukraine*[62]). Despite the fact that the current CrPC of Ukraine has set a maximum period of detention only during the pre-trial investigation, the domestic approach to determining the length of detention of the accused during the trial is acceptable in international practice and meets international standards of freedom and personal integrity requiring the procedure for reviewing the legality of long-term application of this preventive measure, guaranteed by Part 3 of Art. 331 of the CrPC of Ukraine, which the court undertakes to periodically exercise ongoing judicial review of the appropriateness of further extension of the detention of the accused. In addition, the correlation with international standards is provided by the provisions of Part 2 of Art. 331 and Part 1 of Art. 196 of the CrPC of Ukraine, which establishes mandatory requirements for the validity of the court decision on the election or continuation of detention of the accused during the trial. It states the need to indicate the circumstances that note the existence of risks under Art. 177 of the CrPC of Ukraine – circumstances that indicate the inadequacy of the application of more lenient measures to prevent the risks provided for in Art. 177 of the CrPC of Ukraine and provide evidence to substantiate these circumstances.

In conclusion, we can state that the current CrPC of Ukraine practically considers the legal conclusions of the ECtHR regarding the inconsistency of the procedure of application of a preventive measure in the form of detention that took place when the CrPC of Ukraine of 1960 was in power and are formulated in decisions against Ukraine, among others, in *Kharchenko v Ukraine*, *Feldman v Ukraine*, *Hudz v Ukraine*, *Temchenko v Ukraine*, and *Baryshevsky v Ukraine*.[63]

57 *Tkachev v Ukraine* App no 39458/02 (ECtHR, 13 December 2007) <http://hudoc.echr.coe.int/eng?i=001-83977> accessed 12 February 2021.

58 See, *inter alia*: *Volosyuk v Ukraine* App no 1291/03 (ECtHR, 12 March 2009) <http://hudoc.echr.coe.int/eng?i=001-76092> accessed 12 February 2021; *Smirnova v Russia* App nos 46133/99 and 48183/99 (ECtHR, 24 July 2003) <http://hudoc.echr.coe.int/eng?i=001-61262> accessed 12 February 2021.

59 *Todorov v Ukraine* App no 16717/05 (ECtHR, 12 January 2012) <http://hudoc.echr.coe.int/eng?i=001-108578> accessed 12 February 2021.

60 *Yeloyev v Ukraine* App no 17283/02 (ECtHR, 6 November 2008) <http://hudoc.echr.coe.int/eng?i=001-89452> accessed 12 February 2021.

61 *Vitruk v Ukraine* App no 26127/03 (ECtHR, 16 September 2010) <http://hudoc.echr.coe.int/eng?i=001-100385> accessed 12 February 2021.

62 *Yurtayev v Ukraine* App no 11336/02 (ECtHR, 31 January 2006) <http://hudoc.echr.coe.int/eng?i=001-72211> accessed 12 February 2021.

63 *Feldman v Ukraine* App nos 76556/01 and 38779/04 (ECrHR, 8 April 2010) <http://hudoc.echr.coe.int/eng?i=001-98112> accessed 12 February 2021; *Kharchenko v Ukraine* App no 40107/02 (ECtHR, 10 February 2011) <http://hudoc.echr.coe.int/eng?i=001-103260> accessed 12 February 2021; *Gudz v Ukraine* App no 25032/11 (ECtHR, 22 October 2015) <https://www.bailii.org/eu/cases/ECHR/2015/929.html> accessed 12 February 2021; *Temchenko v Ukraine* App no 30579/10 (ECtHR, 16 July 2015) <http://hudoc.echr.coe.int/eng?i=001-156073> accessed 12 February 2021; *Baryshevskyy v Ukraine* App no 71660/11 (ECtHR, 26 February 2015) <https://www.bailii.org/eu/cases/ECHR/2015/235.html> accessed 12 February 2021.

### *3.4. Problems of admissibility of evidence and ensuring the rights of individuals to review the materials of the pre-trial investigation*

The introduction of European standards for the protection of human rights and the expansion of the scope of such principles of criminal justice as adversarial proceedings and immediacy have led to significant changes of approaches to the standardisation of evidence and proof in the CrPC of Ukraine of 2012. Judgments of the ECtHR in *Nechyporuk and Yonkalo v Ukraine* of 21 April 2011, *Grigoriev v Ukraine* of 15 May 2012, *Yaremenko v Ukraine* of 12 July 2008, *Shabelnyk v Ukraine* of 19 February 2009, *Kaverzin v Ukraine* of 15 May 2012, and others declared the violations of Art. 6 of the ECHR due to the use of evidence obtained in violation of Art. 3 of the ECHR. These decisions contributed to the fact that, for the first time in the legislation of Ukraine, the institution of admissibility of evidence, as well as provisions concerning the grounds and procedure for declaring factual data inadmissible for use in evidence, were enshrined in Chapter 4 'Evidence and Proof' and created the content of a separate legal institute. The CrPC established that evidence obtained as a result of a significant violation of human rights and freedoms guaranteed by the Constitution and laws of Ukraine, international treaties approved by the Verkhovna Rada of Ukraine, and any other evidence obtained as a result of a significant violation of human rights and freedoms are inadmissible (Art. 87 of the CrPC). It should be noted that the provisions of this article are quite popular in practice.

In *Oleksiy Mykhaylovych Zakharkin v Ukraine* (2010) [64], the ECtHR stated that the CrPC victim did not duly address the issue of access to the case file by the victim or other interested persons at the pre-trial stages (para. 71). Due to this decision, a new article was added to the CrPC of Ukraine – Art. 221 'Familiarization with the materials of the pre-trial investigation before its completion', according to which the investigator, coroner, or prosecutor is obliged at the request of the defence, the victim, or a representative of the legal entity, to provide them with materials of the pre-trial investigation for review, except for materials on the application of security measures against persons involved in criminal proceedings, as well as those materials which at this stage of criminal proceedings could prejudice the pre-trial investigation. Moreover, the law forbade refusing to provide a publicly available document, the original of which is in the materials of the pre-trial investigation.

In addition, the CrPC established a system of guarantees for the opening of criminal proceedings for the side of the defence. In particular, in accordance with Art. 290 of the CrPC, recognising the evidence gathered during the pre-trial investigation as sufficient to draw up an indictment, the prosecutor or investigator is obliged to notify the suspect and his/her defence counsel of the completion of the pre-trial investigation and provide access to pre-trial investigation materials. Moreover, the prosecutor or investigator is obliged to provide access to the materials of the pre-trial investigation and material evidence and the opportunity to copy or display any documents or copies thereof. Of course, the documents provided for review may lack information that will not be disclosed during the trial. The obligation to open the materials of the criminal proceedings will also be imposed on the defence, but only at the request of the prosecutor. Moreover, the defence party has the right not to provide the prosecutor with access to any materials that may be used by the prosecutor to confirm the guilt of the accused in committing a criminal offence. In such a model, the well-known principle of *favor defensionis* is implemented. In addition, the law provides for a procedural sanction in the form of inadmissibility of evidence for non-disclosure of materials by the parties to criminal proceedings (Part 12 of Art. 290 of the CrPC of Ukraine).

64 *Oleksiy Mykhaylovych Zakharkin v Ukraine* App no 1727/04 (ECtHR, 24 June 2010) para 71. <http://hudoc.echr.coe.int/eng?i=001-99626> accessed 21 February 2021.

## 4 ECHR AS A LIVING INSTRUMENT AND ACT OF DIRECT ACTION

We would also like to note the cases of direct application in the law enforcement practice of Ukraine of the decisions of the ECtHR, even when the legislator did not regulate certain provisions at the level of the CrPC. In particular, in *Kulyk v Ukraine* of 2 February 2017 and *Titarenko v Ukraine* of 20 December 2012,[65] the ECtHR criticised the detention of defendants in a metal 'cage' without reasonable justification, considering it a violation of Art. 3 of ECHR. In particular, the Court emphasised that the detention of a person in a metal 'cage' during a trial offends human dignity, as such treatment is objectively degrading and incompatible with standards of civilised conduct, which is a hallmark of a democratic society. The Court held that there was a violation of Art. 3 of the ECHR in respect to the conditions of the applicant's detention, including his placement in a metal cage in the courtroom. Based on the precedents of the ECtHR, the courts of Ukraine refused to equip the premises with metal cages and, at the request of the defence, clarified the issue of a real or specific security threat, which would require the suspect to be near the defence counsel glass cage.

Also, the approach of the ECtHR, which was formulated in the judgments of the ECtHR on *Gorodnichev v Russia*, *Klyakhin v Russia,*[66] and *Iglin v Ukraine*[67] on the use of handcuffs during the trial is taken into account in Ukrainian courts to prevent violations connected with humiliation under Art. 3 ECHR. In particular, in these rights, the court pointed out the expediency of using handcuffs as special means in cases due to justified, reasonable requirements of public safety or the proper administration of justice.

## 5 RESERVES FOR THE IMPROVEMENT OF NATIONAL LEGISLATION IN THE CONTEXT OF PROTECTION OF HUMAN RIGHTS AND FREEDOMS IN ACCORDANCE WITH THE LEGAL POSITIONS OF THE ECtHR

Considering the impact of the case-law of the ECtHR on criminal procedure legislation, it should be noted that there are many cases of non-enforcement of ECtHR decisions or delays in enforcement. The following problems can be addressed in criminal procedural law. In particular, in the judgments of the ECtHR in *Soldatenko v Ukraine* and *Korneikova v Ukraine*, the ECtHR stated

> The Court first ascertains whether the Convention itself complies with the national law and, in particular, whether the general principles set out in it or derived from it, in particular the general principle of legal certainty, which includes the "quality of the law", requiring the law to comply with the principle of the rule of law, this idea permeates all articles of the Convention. In this case, the "quality of the law" means that where a national law provides for the possibility of deprivation of liberty, such a law must be sufficiently accessible, clearly articulated and predictable in its application in order to eliminate any risk of arbitrariness.[68]

65 *Kulyk v Ukraine*, App no 30760/06 (ECtHR, 23 June 2016) <http://hudoc.echr.coe.int/eng?i=001-163911> accessed 12 February 2021; *Titarenko v Ukraine* App no 31720/02 (ECtHR, 20 September 2012) <http://hudoc.echr.coe.int/eng?i=001-113273> accessed 12 February 2021.

66 *Gorodnitchev v Russia,* App no 52058/99 (ECtHR, 24 May 2007) <http://hudoc.echr.coe.int/eng?i=001-80611> accessed 12 February 2021; *Klyakhin v Russia* App no 46082/99 (ECtHR, 30 November 2004) <http://hudoc.echr.coe.int/eng?i=001-67584> accessed 12 February 2021.

67 *Iglin v Ukraine* App no 39908/05 (ECtHR, 12 January 2012) para 70–72 <http://hudoc.echr.coe.int/eng?i=001-108506> accessed 12 February 2021.

68 See, *inter alia*: *Soldatenko v Ukraine* App no 2440/07 (ECtHR, 23 October 2008) <http://hudoc.echr.coe.int/eng?i=001-89161> accessed 12 February 2021; *Korneykova v Ukraine* App no 39884/05 (ECtHR, 19 January 2012) <http://hudoc.echr.coe.int/eng?i=001-108654> accessed 12 February 2021.

The current CrPC does not regulate the application of a precautionary measure during the pronouncement of a court decision. It concerns the detention of the accused on the basis of a sentence that has not entered into force. The current domestic practice when the court of first instance in the same document on its own initiative without discussion with the parties decides on the choice of a measure of restraint in the form of detention or its continuation with the wording 'until the sentence enters into force' contradicts the case-law of the ECtHR and confronts the principles of competition and dispositiveness.

Further, there is legal uncertainty regarding the victim's participation in the court proceedings to decide on the application of a precautionary measure. The ECtHR's position in *Batsanina v Russia* concludes that the principles of equality and adversarial proceedings require a 'fair balance between the parties' and that each of them should be given a reasonable opportunity to present his/her position in conditions that do not put him/her in a less favourable position compared to his/her opponent.[69] The normalisation of the victim's right to participate in deciding on the application of a precautionary measure will ensure the balance of interests of the parties and his/her right to judicial protection of his/her own interests, which should also be reflected in the CrPC of Ukraine.

There is also regulatory uncertainty regarding the duration of a preventive measure in the form of placement in a psychiatric institution in conditions that exclude its dangerous behaviour (given the fact that by its legal nature, this preventive measure is, in fact, equivalent to detention), and the lack of appeal of this decision. Thus, in particular, in the decision of the ECtHR in the case *M v Ukraine* from 19 April 2012, it states that the decision on involuntary hospitalisation of a person in a psychiatric hospital must specify the maximum period after which these decisions are subject to official review in accordance with the law.[70] With regard to the procedure for appealing a court decision on the placement of a person in a psychiatric institution, it should be noted that it is a standard recognised by the international community as a necessary guarantee to protect the rights of patients forcibly hospitalised in a psychiatric institution.[71]

## 6 CONCLUSIONS

Ukraine has proclaimed common European democratic values as a priority of its socio-political development and embarked on the path of deepening the influence of international law on national law and legal practice. This trend has necessitated the introduction of common European human rights standards, based on the ECHR and the case-law of the European Court of Human Rights as a living tool for its implementation. However, Ukraine's criminal procedure law did not meet international human rights standards, was outdated, and reflected the Soviet past, leading to numerous human rights violations due to the lack of effective judicial control mechanisms and proper human-centred legal procedures capable of securing the rights of both the suspect or the accused and the victim of the crime.

Based on Ukraine's ratification of the ECHR and the ECtHR's extensive case-law on Ukraine, the international legal nature of the Convention determined the need to comply with the

69 *Batsanina v Russia* App No 8927/02 (ECtHR, 26 May 2009) <http://hudoc.echr.coe.int/eng?i=001-92667> accessed 12 February 2021.

70 *M v Ukraine* App no 2452/04 (ECtHR, 19 April 2012) <http://hudoc.echr.coe.int/eng?i=001-110515> accessed 12 February 2021.

71 Recommendation Rec (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder (Adopted by the Committee of Ministers on 22 September 2004 at the 896th meeting of the Ministers' Deputies) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dc0c1> accessed 12 February 2021.

Court's decisions in cases against it and subsequently accelerated the process of new criminal procedure. The adoption of the new CrPC of Ukraine (from 13 April 2012) was an important event for the state. The path to its preparation, which lasted several years, was not easy. It absorbed the most progressive international human rights standards, eliminated the shortcomings of outdated legislation identified by the ECtHR, and built on the ideology of the rule of law, the unconditional priority of universal values, such as freedom, personal integrity, and respect for human dignity. The general principles of criminal proceedings proclaim the rule of law, reasonable time, presumption of innocence, ensuring the right to defence, access to justice, adversarial proceedings, and others. The new Code significantly improves the legal regulation in the field of criminal justice, brings to it European values and principles, increases the efficiency and effectiveness of criminal proceedings, deformalises it, allows a fair balance between the interests of the state and the person prosecuted, and creates equal opportunities for parties to the prosecution and defence. The key role in the formation of a system of effective protection of individual rights in criminal proceedings, as shown by a systematic and meaningful analysis of ECtHR decisions, belongs to the Convention and the case-law of the ECtHR.

However, the practice of applying the new criminal procedure legislation, as well as the case-law of the ECtHR in Ukraine, demonstrates the impeccability of internal regulations, understanding of the main institutions of the criminal process by law enforcement, and, unfortunately, systemic problems. This provides the state with the task of improving the legislation without undue delay, eliminating the problems, and improving the mechanisms aimed at the immediate implementation of the decisions of the ECtHR issued against Ukraine.

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# JUDICIAL REFORMS IN EASTERN EUROPE: ENSURING THE RIGHT TO A FAIR TRIAL OR AN ATTACK ON THE INDEPENDENCE OF THE JUDICIARY?

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**Summary:** 1. Introduction. The Right to a Fair Trial and Independence of the Judiciary. – 2. Elements of Judicial Independence. – 3. Judicial Reforms in Eastern Europe: General Overview. – *3.1 Serbia*. – *3.2 Northern Macedonia*. – *3.3 Poland.* – *3.4 Hungary*. – *3.5 Romania*. – *3.6 Moldova*. – *3.7 Ukraine*. – 4. Common Features of the Analysed Judicial Reforms in the Countries of Eastern Europe. – 5. Conclusions.

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## CONTRIBUTOR

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# JUDICIAL REFORMS IN EASTERN EUROPE: ENSURING THE RIGHT TO A FAIR TRIAL OR AN ATTACK ON THE INDEPENDENCE OF THE JUDICIARY?

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***Abstract*** *The right to a fair trial is one of the essential elements of the rule of law – a fundamental value of the modern constitutional state. Among the systems of institutional, organisational, and substantive guarantees for ensuring this right, which stem from the European Court of Human Rights case law, there is 'a fair and public hearing by an independent and impartial tribunal established by law'. This requirement is organically linked to the principle of the separation of powers, which is a central tenet of constitutionalism and provides for the functioning of the judiciary as a separate, independent branch of power. Therefore, any changes in the judicial systems of modern constitutional states, or, moreover, judicial reforms, should not only avoid contradicting these principles but, on the contrary, should be aimed at ensuring the right to a fair trial. However, the experience of such reforms in a number of Eastern European countries, despite the declaration of their perfectly legitimate and positive goals, raises questions about their true direction. As a result, not only does the institutional mechanism for the protection of human rights (which is the immediate goal of proclaiming the right to a fair trial) suffer, but also the constitutional systems of the countries concerned become unbalanced and unable to respond adequately to political challenges. This paper examines the essence of judicial reforms in a number of Eastern European countries (Serbia, Northern Macedonia, Poland, Hungary, Romania, Moldova, and Ukraine) and analyses them in terms of their impact on ensuring the right to a fair trial and the functioning of constitutional systems.*

***Keywords:*** *judicial reform, the right to a fair trial, independence of the judiciary, separation of powers.*

## 1 INTRODUCTION. THE RIGHT TO A FAIR TRIAL AND INDEPENDENCE OF THE JUDICIARY

The right to a fair trial reflected in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is one of the elements of the rule of law – a fundamental value of the modern constitutional state.[1] It is inseparably connected

1 The term *constitutional state* has entered the scientific community of Ukraine relatively recently (various aspects of the constitutional state's functioning were analysed by P Stetsiuk, S Shevchuk, M Savchyn, S Riznyk, and others). However, it has been established in Western constitutional and legal doctrine for several centuries since the end of the 19th century, when the famous British scholar Albert Dicey, in his 'Introduction to the Study of the Law of the Constitution', not only distinguished states with constitutional and unconstitutional regimes, but also clarified the differences between certain types of constitutionalism, which later became the basis for singling out some models of constitutionalism.

with human rights and democracy, which together constitute the threefold basis of the constitutional state and, at the same time, the value basis for European integration.[2] It is no coincidence that the European Court of Human Rights (ECtHR) highlights the 'hearing of a case by an independent and impartial tribunal established by law' within the developed system of institutional, organisational and substantive guarantees of the right to a fair trial.[3]

The role of the judiciary in constitutional states varies, but within the European (continental) model of constitutionalism[4] (which is present in the countries examined in this study), the purpose of the judiciary is: first, guaranteeing and protecting fundamental rights; second, the abolition of illegal acts of executive bodies; third, protection against possible arbitrariness of investigative bodies (not all of them are part of the executive branch); fourth, recognition of laws as unconstitutional (if the constitutional jurisdiction is part of the judiciary), ensuring the inviolability of constitutional norms on guaranteeing human rights, the separation of powers, and other constitutional values and principles.

Undoubtedly, the most important mission of the judiciary is to protect the fundamental rights and freedoms of the individual. And in European countries, this role is special because it is associated with the operation of international human rights treaties,[5] which are binding for the national legal systems of European states and impose appropriate responsibilities on public authorities (legislative, executive, and judicial). Along with the established international human rights protection mechanism, the role of the national judiciary is crucial in the protection of fundamental rights, as courts review the compliance of the national public authorities' activities with conventional norms, applying them directly. Herewith, national courts exercise the so-called 'diffuse convention control', protecting fundamental rights from violations by national governments on the basis of their own interpretation

The concept of a constitutional state is developed in various modern studies, such as: J Habermas, 'Civil disobedience: Litmus test for the democratic constitutional state' (1985) 30 Berkeley Journal of Sociology, 95–116 <http://www.jstor.org/stable/41035345> accessed 14 February 2021; A Sajo, 'Corruption, clientelism, and the future of the constitutional state in Eastern Europe' (1998) 37 E. Eur. Const. Rev., 37; R Myerson, 'The autocrat's credibility problem and foundations of the constitutional state' (2008) 102 (1) The American Political Science Review, 125–139 DOI:10.2307/27644502; Christian Joppke, *Is multiculturalism dead?: Crisis and persistence in the constitutional state* (Cambridge 2017); N Barber, *The constitutional state* (Oxford Scholarship Online: January 2011) DOI:10.1093/acprof:oso/9780199585014.001.0001; J Weinrib, 'The modern constitutional state' in *Dimensions of dignity: The theory and practice of modern constitutional law*, Cambridge Studies in Constitutional Law (Cambridge University Press 2016) DOI:10.1017/CBO9781316026663.005; D Gosewinkel, 'The constitutional state' in H Pihlajamäki, MD Dubber and M Godfrey (eds), *The Oxford handbook of european legal history* (Oxford University Press 2018) DOI: 10.1093/oxfordhb/9780198785521.013.42.
In this article, by *constitutional state*, we mean a non-arbitrary state with public authorities that is limited by constitutional means (including a written constitution) in order to ensure fundamental human rights.

2 Statute of the Council of Europe, London, 5.V.1949, preamble and articles 1, 3 <https://rm.coe.int/1680306052>; Consolidated Version of the Treaty on European Union, Official Journal of the European Union, 9 May 2008, C 115/15.

3 *Campbell and Fell v The United Kingdom* App no 7878/77 (ECtHR, 28 June 1984) para 78.

4 The issue of models of constitutionalism has been studied, in particular by J Couso, 'Models of democracy and models of constitutionalism: The case of Chile's constitutional court 1970–2010' (2011) Texas Law Review, 1517-1536; Luc B Tremblay, 'Two models of constitutionalism and the legitimacy of law: Dicey or Marshall?' (2006) 6 (1) Oxford University Commonwealth Law Journal, 77–101 DOI: 10.1080/14729342.2006.11421466); Stefan Gardbaum, 'Introduction' in *The new commonwealth model of constitutionalism: Theory and practice*, Cambridge Studies in Constitutional Law (Cambridge University Press 2013) DOI:10.1017/CBO9780511920806.001.
For more details on the nature and features of the European model of constitutionalism, as well as the role of the independence of the judiciary in it, see: O Boryslavska, *Yevropeiska model konstytutsionalizmu: Systemno-aksiolohichnyi analiz* (Kharkiv 2018) 244–260 [European Model of Constitutionalism: System and axiological analysis].

5 These include, in particular, the European Convention on Human Rights and the relevant case-law of the ECtHR, as well as EU legal acts and relevant case-law within the jurisdiction of the Court of Justice.

of conventional norms, based on the conditions and peculiarities of a particular national legal order.[6] International judicial bodies monitor the correctness of the application of the provisions of the Convention by national courts in cases of appeal to them by interested parties who believe that their fundamental rights are not protected by the state.

Thus, ensuring the right to a fair trial is a necessary condition for the reality (not the illusion) of fundamental rights (both constitutional and conventional), as well as for protection from state arbitrariness. Only an independent tribunal can carry out this mission, so the ECtHR has repeatedly emphasised the importance of judicial independence in its case-law on Art. 6 of the Convention, highlighting such aspects as independence from the executive and from case parties. Independence from the executive, according to the ECtHR, is determined by such factors as the procedure for appointing judges, the duration of their term of office, and guarantees against external pressure, as well as whether the court gives the impression of its independence.[7]

Judicial independence is interpreted by the Court in connection with the principle of separation of powers, which 'has assumed growing importance in the case-law of the Court',[8] but the appointment of judges by the executive or the legislature is considered 'permissible, provided the appointees are free from influence or pressure when carrying out their adjudicatory role'.[9] Equally important for guaranteeing the independence of the judiciary in the context of Art. 6, from the ECtHR's point of view, is the immutability of judges while performing their duties, which is seen as a prerequisite for their independence and a guarantee of the right to a fair trial.[10]

The importance of the right to a fair trial for human rights and the rule of law creates a number of requirements for states to ensure the independence of the judiciary. It is logical that these requirements should be taken into account in cases of judicial reforms. Moreover, it seems that the guarantee of the right to a fair trial should serve as a kind of guide for such reforms. However, the experience of a number of European countries shows that this is not always the case.

This paper presents analyses of the judicial reforms that have taken place over the last two decades in Eastern Europe in terms of their relationship to the institutional elements of the right to a fair trial and guarantees of judicial independence and seeks answers to the question posed in the title of the article.

## 2 ELEMENTS OF JUDICIAL INDEPENDENCE

Independence of the judiciary is considered a universal principle, recognised at the UN level and reflected in numerous international legal acts establishing relevant international standards. The most important among them are the Basic Principles on the Independence of The Judiciary, adopted by the United Nations General Assembly (1985),[11] the Montreal Universal Declaration on the Independence of Justice, adopted at the final plenary session of the First

6 CDL-AD(2014)036, Report on the Implementation of International Human RIGHTS Treaties in Domestic Law and the Role of Courts, adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014), Strasbourg, 8 December 2014 (pp. 4–5).

7 See, for example, cases *Campbell and Fell v The United Kingdom* (n 4); *Brudnicka and others v Poland* App no № 54723/00 (ECtHR,10 April 2018).

8 *Stafford v The United Kingdom [ВП]* App no 46295/99 (ECtHR, 28 May 2002) para 78.

9 *Flux v Moldova* App no 31001/03 (ECtHR, 3 July 2007) para 27.

10 *Campbell and Fell v The United Kingdom* (n 4) para 80.

11 Basic Principles on the Independence of The Judiciary (General Assembly Resolutions 40/32 And 40/146).

World Conference on the Independence of Justice (1983),[12] and the Bangalore Principles of Judicial Conduct, adopted by the Economic and Social Council of the UN (2006).[13]

In addition, the Council of Europe has developed standards for the independence of the judiciary that must be ensured in the Member States. The Council of Europe's documents interpret the independence of the judiciary as 'the basic principle of the rule of law', and the aim of its implementation is to guarantee for every person the fundamental right to a fair trial only on a lawful basis and without any outside influence in accordance with Art. 6 of the ECHR.[14]

From the standpoint of the Council of Europe bodies, the independence of the judiciary is interrelated and interdependent with the independence of judges. Therefore, the Committee of the Council of Ministers recommended the governments of the Member States to take all necessary measures for enhancing the role of each individual judge and the judiciary as a whole and strengthening their independence and effectiveness. In particular, such responsibilities are vested in the executive and the legislature.[15] It should be noted that the independence of judges is not considered as their 'prerogative or privilege granted in their own interests', but as a necessary tool to ensure the rule of law, which is introduced in the interests of those who rely on justice. At the same time, it is emphasised that independence must be guaranteed both from society as a whole and from specific parties in a case in which judges must make their judgments.[16]

The documents of the Council of Europe distinguish between the internal and external independence of judges. Internal independence means that each individual judge should be independent and impartial in the exercise of adjudicating functions and able to act without any restriction, improper influence, pressure, threat, or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Additionally, the hierarchical judicial organisation should not undermine individual independence.[17] The external independence of judges stems from the relationship within the system of state power, as well as the relationship between the judiciary and the society. Relations with the legislative and executive branches are important in ensuring the external independence of the judiciary. In addition to the fact that the legislative and executive branches are prohibited from reviewing court decisions (except for amnesty, pardon, or similar measures), the Council of Europe has developed standards for statutes that determine the status of judges. Such statutes should ensure the competence, independence, and impartiality of a judge that every person when applying to a court relies on and cannot make changes aimed at reducing the level of guarantees already achieved in the respective states.[18] This provision is crucial from the point of view of this study because the law is usually the primary tool for judicial reform.

Important means of ensuring the internal (personal) independence of judges are the procedure for replacing judicial positions, the term of office, and prosecution of judges.

12 Montreal Universal Declaration on the Independence of Justice, adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on 10 June 1983.

13 The Bangalore Principles of Judicial Conduct, adopted by the Economic and Social Council of the UN, ECOSOC 2006/23.

14 Recommendation CM/Rec (2010)12 On judges: Independence, efficiency and responsibilities and explanatory memorandum (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

15 Recommendation no R (94)12 Of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies).

16 Opinion no 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.

17 Recommendation CM/Rec(2010)12 (n 15).

18 European Charter on the statute for judges, Council of Europe, DAJ/DOC (98) 23, 10 July 1998.

The defining standard for obtaining the position of a judge is that all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability, and efficiency.[19] Moreover, merit means not only legal knowledge, analytical skills, or academic achievements of candidates, but also certain character traits, communication skills, efficiency in making judgments, a sense of justice, etc.[20]

An important question in view of the above-mentioned criteria is the procedure for assessing the qualities of candidates in practice. The only requirement in the Council of Europe recommendations in this regard is the use of 'transparent procedures and good practice' in dealing with the appointment of judges. At the same time, their importance is emphasised in view of the creation of preconditions for public trust and perception of the judiciary, which is an important condition for the functioning of the judiciary in a constitutional state.[21] As for the subjects and procedures for the appointment of judges, European standards in this area are based on the requirement of independence of the subjects from political bodies: parliament and government. Thus, the Council of Europe bodies prefer judicial councils (with the majority of judges or retired judges) as independent entities forming the staff of the judiciary but do not preclude the application of other systems of appointment. If constitutional provisions or traditions allow governments to appoint judges, transparent and independent procedures must be provided to ensure that judges are selected on the basis of the objective criteria above. At the same time, the parliament is not considered a proper subject for the appointment of judges, as there is a danger that political expediency may outweigh the objective preferences of the candidate.[22] For example, in its Opinion on the draft Constitution of Serbia, the Venice Commission criticised the parliamentary method of electing judges, noting that involving parliament in judicial appointments leads to the unjustified politicisation of the process because the nature of such appointments is too discretionary and political expediency will naturally outweigh effective assessment of the qualities of candidates.[23]

An important means of ensuring a judge's personal independence is the term of his or her tenure. According to European standards, regardless of the method of appointment (election), judges must have a guaranteed term of office until the established retirement age or the expiration of a fixed term of office.[24] Moreover, preference is given to a lifelong appointment until a judge reaches retirement age, as it is considered that such an approach is the least problematic in terms of ensuring the independence of judges. The Venice Commission, for example, has repeatedly criticised the appointment of judges for a limited period (probationary period) as contrary to the principle of immutability of judges and adversely affecting their independence and impartiality, as they may make judgments based on their future appointments.[25]

19 Recommendation no R(94)12 (n 16).

20 CDL-AD (2010)004, Report on the Independence of the Judicial System, Part I: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010). <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e> accessed 12 February 2021.

21 CDL-AD (2010)004, Report on the Independence of the Judicial System, Part I (n 21).

22 CDL (2015)004, Preliminary Opinion on the Draft Law on Amending the Law on the Judicial System and the Status of Judges of Ukraine, Strasbourg, 11 February 2015. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2015)004-e> accessed 12 February 2021.

23 CDL-AD(2007)004, Opinion on the Constitution of Serbia, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), Strasbourg, 19 March 2007. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e> accessed 12 February 2021.

24 Recommendation no R (94) 12 (n 16).

25 CDL-AD (2007)003, Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), par. 26. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)003-e> accessed 12 February 2021.; CDL(2015)004, Preliminary Opinion on the Draft Law on Amending the Law on the Judicial System and the Status of Judges of Ukraine (n 23).

No less important for ensuring the independence of the judiciary is the procedure for bringing judges to justice: both criminal and disciplinary. It should be mentioned that judicial immunity also includes protection against civil suits for 'actions done in good faith in the course of their functions'.[26] Protection from illegal prosecution, as well as prosecution that aims to pressure the court, is provided by the institute of judicial immunity. Judicial immunity provides for a special procedure for prosecuting judges, which requires the consent of certain authorised entities for a judge's prosecution. In this regard, there are two key requirements: the first concerns the very existence of judicial immunity; the second stipulates that the consent to prosecute judges must be given by entities independent of politics (either courts or so-called judicial councils, in which judges constitute at least a majority). For example, the Venice Commission has repeatedly stressed the need to delegate the power of consenting to the prosecution of judges in Ukraine from parliament to the court[27] or the High Council of Justice, which should be 'truly independent' and have a majority of judges.[28]

The question of the extent of judicial immunity is important. The bodies of the Council of Europe assume that judges should enjoy a certain degree of immunity, but that this should not be general immunity (as provided, for example, by the 1991 Bulgarian Constitution, which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts).[29] Undoubtedly, judges must be protected from outside influence. To this end, they should enjoy functional immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, eg, taking bribes.[30]

In general, the requirements outlined here are designed to ensure the functioning of an effective and independent judiciary capable of impartially resolving conflicts that arise in the state and protecting human rights. However, factors that do not allow the judiciary to effectively perform its functions on these principles are corruption and, consequently, a low level of public confidence. The latter is the most common excuse used in the reasoning for providing judicial reforms. Such confrontation in practice influences the independence of the judiciary and, sometimes, outright attempts of political pressure on it while solving the problems of corruption, integrity, and public distrust, as a rule, also fails.

## 3 JUDICIAL REFORMS IN EASTERN EUROPE: GENERAL OVERVIEW

The significant number of standards and documents developed by the Council of Europe to guarantee the independence of the judiciary is not accidental. While in states with established traditions of democracy, the independence of the judiciary is generally guaranteed, in countries where these traditions are still being formed or restored after interruption by

26 CDL-AD (2003)12, Memorandum Reform of the Judicial System in Bulgaria, Conclusions, adopted by the Venice Commission at its 55th plenary session (Venice, 13-14 June 2003), par. 15.a. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)012-e> accessed 12 February 2021.

27 CDL-AD (2007)003, Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine (n 26).

28 CDL-AD (2011)033, Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine, adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), par. 79. <http://www.venice.coe.int/webforms/documents/CDL-AD(2011)033-e.aspx> accessed 12 February 2021. CDL-D(2013)034, Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine, Adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), par. 25 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)034-e> accessed 12 February 2021.

29 CDL-AD (2003)12, Memorandum Reform of the Judicial System in Bulgaria, Conclusions (n 27).

30 CDL-AD (2010)004, Report On The Independence Of The Judicial System Part I (n 24) par. 61.

socialist regimes, attempts to exert political influence on the judiciary are quite frequent and sometimes harsh and systematic.[31] It is in the countries with young democracies, whose constitutional systems are in the process of constant transformation, that judicial reforms are quite often carried out. As we identified at the beginning of this study, these reforms should be primarily aimed at ensuring the right to a fair trial, improving access to justice, and, generally, ensuring more effective protection of human rights. It is this approach that corresponds to the common European constitutional values that have become the basis of European integration.[32] The real situation in a number of countries is different. Yet, before drawing any general conclusions, a few practical examples of the judicial reform and their correlation with the principle of the independence of the judiciary should be analysed.

### *3.1 Serbia*

Judicial reform in Serbia began with the adoption of the 2006 Constitution.[33] The same year, parliament[34] approved the National Strategy for Judicial Reform, whose main objective was 'to restore public confidence in the judicial system of the Republic of Serbia by establishing the rule of law and legal certainty'.[35] The Strategy stated that it was based on 'four key principles: independence, transparency, accountability, and efficiency'.[36] Besides this, the document emphasises that 'the Government of the Republic of Serbia undertakes to implement the reform program to achieve a more effective, adequate and modern judiciary recognizing the right of Serbian citizens to access to justice and fair trial within reasonable time1 by an impartial tribunal',[37] namely, there is a reference to the right to a fair trial. In addition to the Constitution, Serbia adopted a Law on its implementation, which contained a number of controversial issues, including the reappointment of all judges who held office as of the entry into force of the new Constitution. Powers of reappointment of judges were vested in the High Council of Justice, which, although it was supposed to include six judges out of 11 members (ie, the majority), was nevertheless politically dependent on parliament, by which it was to be appointed.

The law was based on the principle of a discontinuity between the constitutional order under the previous Constitution and the one provided for in the 2006 Constitution, which ran counter to the constitutional process itself and took place in accordance with the procedure provided for in the previous Constitution. When analysing the content of the Law, the Venice Commission noted that the reasons, guided by the legislator, for anticipating the need for reappointment of judges were not obvious. If the desire was to 'get rid of judges who compromised themselves by cooperating with the previous regime or corruption', then reappointment was not the means to solve these problems, as it would not guarantee the appointment of the best judges. Therefore, such a decision would not seem 'wise'.[38]

31 Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: selected examples, PACE // http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en> accessed 12 February 2021.

32 O Mader, 'Enforcement of EU values as a political endeavour: Constitutional pluralism and value homogeneity in times of persistent challenges to the rule of law' (2019) 11 Hague J Rule Law, 133–170 DOI:10.1007/s40803-018-00083-x.

33 The Constitution replaced the previous 1990 Constitution following the break-up of the Union State of Serbia and Montenegro in 2006.

34 Serbian National Assembly.

35 Official website of the Ministry of Justice of Republic of Serbia, <https: arhiva.mpravde.gov.rs/en/articles/judiciary/national-judicial-reform-strategy/> accessed 12 February 2021.

36 National Judicial Reform Strategy, Republic of Serbia Ministry of Justice p. 4, par. B, Key principles. <https: arhiva.mpravde.gov.rs/uploads/en/judiciary/national-judicial-reform-strategy/national-judicial-reform-strategy/Strategy.pdf> accessed 12 February 2021.

37 Там само, pp. 3–4, par. A. Introduction.

38 CDL-AD(2007)004, Opinion on the Constitution of Serbia (n 24) par. 71–72.

The reappointment of judges by the politically dependent High Council of Justice can be considered an attempt of the parliamentary majority to exert political influence on the judiciary.

During 2008–2010, about 500 judges were reappointed (out of a total of 2,300 judges), about a third of the judges were not reappointed, and the remaining positions were taken by 'judicial elections' in 2011 and later. All this led to the blocking of the judicial system, which was unable to perform its functions.[39] In addition, two decisions of the Constitutional Court of Serbia were issued in 2010, recognising the violation of the right to a fair trial in respect of judges who were not reappointed. About 100 applications were submitted to the ECtHR. As a result of these events in 2008–2009, Serbia dropped from 128th to 142nd place in the Judicial Independence Rating.[40]

In January 2012, the Parliamentary Assembly of the Council of Europe assessed the state of the Serbian judicial system negatively, noting the political influence of the parliament and the President on the judiciary.[41] A 2014 World Bank analysis of Serbia's judiciary confirmed those inferences, noting that 'the judiciary remains plagued by corruption and is under the influence', and although some progress has been made, Serbia is generally lagging behind not only EU Member States but also its neighbours.[42] As of January 2021, the official website of the Council of Europe contains information on the project 'Strengthening the Judicial Reform Process in Serbia',[43] which was ongoing until 31 December 2020.

### *3.2 Northern Macedonia*

Judicial reform in the Republic of Northern Macedonia has been ongoing since 2005 and has changed substantially under political and social influence. The constitutional amendments of 2005 provided for the creation of a new body – the Council of Justice – as an independent body of judicial self-government that was to deal with personnel and disciplinary issues in the judiciary. However, its functioning has shown a number of problems associated with cases of external influence on this body and the questionable effectiveness of its activities.[44]

Following the victory of the centre-right VMRO-DPMNE[45] party in the 2006 parliamentary elections, the coalition declared the beginning of a radical judicial reform aimed at tackling corruption in the judiciary. The Laws on Courts and the Council of Justice adopted for this purpose became the basis for the mass dismissal of judges who had held office (from 2007 to 2014, the Council of Justice initiated 63 such procedures for judges, which is a significant number, taking into account the population of the country, and significantly exceeds the European statistics).[46] After the 2014 parliamentary elections, the centrist-

39 V Beširević, '"Governing *without* judges": The politics of the Constitutional Court in Serbia' (2014) 12 (4) *International Journal of Constitutional Law*, 954–979 DOI:10.1093/icon/mou065.

40 Snapshot of the reappointment of judges in Serbia, Belgrade, Judges Association of Serbia, 2015 <http://www.sudije.rs/files/Snapshot_of_the_reappointment_of_judges_in_Serbia.pdf> accessed 12 February 2021.

41 The honouring of obligations and commitments by Serbia, Resolution 1858 (2012) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18065&lang=en> accessed 12 February 2021.

42 Serbia Judicial Functional Review Executive Summary with Recommendations, Multi-Donor Trust Fund for Justice Sector Support in Serbia. October 2014, p. 4 <http://www.mdtfjss.org.rs/archive//file/Serbia%20JFR%20-%20Main%20Findings%20and%20Recommendations.pdf> accessed 12 February 2021.

43 Council of Europe, European Committee's on Legal Cooperation website <https: www.coe.int/en/web/cdcj/serbia-strengthening-the-judiciary-reform-process-in-serbia> accessed 12 February 2021.

44 D Preshova, I Damjanovski and Z Nechev, 'The Effectiveness of the European model of judicial independence in the Western Balkans: Judicial councils as a solution or a new cause of concern for judicial reforms' Center for the Law of EU External Relations, CLEER Papers 2017/1.

45 Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity.

46 CDL-AD (2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of 'The Former Yugoslav Republic of Macedonia', adopted by the Venice Commission at its 105th Plenary

right coalition, which won a qualified majority, began constitutional reform, part of which was aimed at changing the composition of the Council of Justice. However, given the impossibility of completing the process of amending the Constitution (opposition parties challenged the election results and boycotted the work of parliament), the parliament passed the Law 'On the Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge' (February 2015). This newly created body was given the right to initiate disciplinary proceedings against judges, ie, powers that, under the Constitution, belonged to the Council of Justice. Such steps were negatively assessed by the Venice Commission, as the newly created body actually duplicated the Council of Justice in its competence.[47] Nevertheless, the Council was established, and a bill to eliminate it was only developed in 2017.[48]

In fact, in 2017, the government developed a Strategy for Reform of the Judicial Sector for the Period 2017–2022 with an Action Plan. In particular, it was stated that despite all the new legal projects and new institutions in the judicial sector and the incorporation of international standards and norms into the legal system, many problems remained. The results achieved in the field of judiciary efficiency 'remain overshadowed by its impaired independence, resulting in a low degree of quality and distrust of citizens in the institutions of the justice system'.[49] The Strategy is designed for the period up to 2022, but its key provisions are on the verge of establishing European standards of judicial independence.

### *3.3 Poland*

Serious problems with guaranteeing the independence of the judiciary have recently arisen in Poland. The ruling party, which has a majority in parliament and is represented by the President of the Republic, has attempted to establish political control over the judiciary (at the same time it blocked the activity of the Constitutional Tribunal, a body of constitutional jurisdiction). For this reason, the Law on the Organization of Ordinary Courts of 12 July 2017 was adopted, along with draft laws amending the Laws on the National Council of Justice and the Supreme Court establishing a new procedure for appointing judges – members of the Council. In its resolution, the Parliamentary Assembly of the Council of Europe called on the Polish authorities to refrain from carrying out this reform, as it poses a serious threat to the 'respect for the rule of law, in particular the independence of the judiciary' (para. 9.1).[50] Despite this, the bills were submitted to the Sejm by the President of the Republic of Poland, which caused a wave of outrage and protests in Polish society, as well as a negative reaction from the European Union and the Council of Europe.

During the judicial reform started in January 2017, a number of laws were passed by the Polish parliament. The most important of them were the acts on the General Courts (signed by the President and entered into force), the National Council of Justice, and the Supreme Court. The last two of these laws were vetoed by the President, who later introduced his

Session (Venice, 18-19 December 2015), Strasbourg, 21 December 2015, par. 6 <http: www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)042-e> accessed 12 February 2021.

47 CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of 'The Former Yugoslav Republic of Macedonia' (n 48).

48 CDL-AD (2017)033, Opinion on the Draft Law on the Termination of the Validity of the Law on the Council for Establishment of Facts and Initiation of Proceedings for Determination of Accountability for Judges… <http: www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)033-e> accessed12 February 2021.

49 Strategy for Reform of the Judicial Sector for the Period 2017–2022 with an Action Plan, Republic of Macedonia Ministry of Justice, p. 2 <https://rm.coe.int/strategy-for-reform-of-the-judicial-sector-for-the-period-2017-2022-wi/16808c4384> accessed 12 February 2021.

50 Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: Selected examples, PACE <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en> accessed 12 February 2021.

version of the bills to the parliament. The key innovations of these legislative acts were the following: the right to appoint and dismiss chairmen of courts of general jurisdiction was given to the Minister of Justice; chairmen of the courts were given discretionary powers to distribute cases among judges;[51] the Minister of Justice was given the right to dismiss judges of the Supreme Court, and the President was given discretionary powers to extend the powers of a judge after he has reached the age limit; the right to appoint 15 members of the judiciary to the National Council of Justice passed to the Sejm, where at least three-fifths of its members must vote for such a decision (the total membership of the Council is 25 members, 15 of whom must be elected from among judges, six are elected by the parliament, one is appointed by the President, and three more are the members of this body *ex officio*).[52] One of the measures of the judicial reform was reducing the age limit for judges from 70 to 65 years (this was done by the adoption of Laws on general courts and the Supreme Court).[53] However, the European Court of Justice ordered Poland to remove this provision from the law and reinstate judges dismissed on its basis.[54]

It should be added that in 2016, the status of the Prosecutor General was also reformed, which resulted in the merger of the offices of the Prosecutor General and the Minister of Justice and a significant increase in the powers of the latter in the management of the prosecutorial system.[55] Considering these new powers, the acquisition of the right to appoint staff in the judiciary indicates the excessive influence of the executive on the judiciary and the attempt to place it under control of the government and the parliamentary majority.

The purpose of the judicial reform, as it was announced in a public speech by the Minister of Justice, was 'to increase the efficiency of the judiciary, reduce delays in cases, strengthening the responsibility of judges, increase their professionalism, combat corporatism and restore public confidence in the judiciary'.[56] However, the analysis of the content of laws and drafts on judicial reform gives grounds to conclude that they were in their entirety aimed at establishing control of the executive branch (and through it, the parliamentary majority) over the courts. As the UN Special Rapporteur noted, taken together, these legislative acts pose a major threat to the independence of the Polish judiciary and the separation of powers.[57] Serious reservations about the content of judicial reform have also arisen in European structures, which have emphasised the threats to the separation of powers, democracy, and the rule of law.[58]

51 As a rule, the distribution of cases is done via electronic lot, yet the system is run by the Ministry of Justice, and the matrix is not known to public.

52 CDL-AD(2017)031 Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, Strasbourg, 11 December 2017, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e> accessed 12 February 2021.

53 Act on the Supreme Court of 8 December 2017 with amendments of 20 December 2019, Poland <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)005-e> accessed 12 February 2021.

54 Judgment of the ECJ in ECLI:EU:C:2019:924 <http://curia.europa.eu/juris/document/document.jsf?docid=219725&doclang=EN> accessed 12 February 2021; Judgment in Case C-619/18 <http://curia.europa.eu/juris/d ocument/document.jsf?text=&docid=207961&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2881539> accessed 12 February 2021.

55 CDL-AD(2017)028, Opinion on the Act on the Public Prosecutor's Office, as amended, para 20, Strasbourg, 11 December 2017 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e> accessed 12 February 2021.

56 CDL-AD(2017)031, Opinion on the Draft Act Amending the Act on the National Council of the Judiciary (n 54).

57 Poland must safeguard judicial independence, UN Special Rapporteur <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21912&LangID=E> accessed 12 February 2021.

58 European Parliament resolution of 13 April 2016 on the situation in Poland <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0123&language=EN> accessed 12 February 2021.; European Parliament resolution of 14 September 2016 on the recent developments in

### *3.4 Hungary*

Hungary also faced serious problems in reforming the judiciary. After receiving an absolute majority in the 2010 parliamentary elections, Fidesz and its leader, Victor Orban, embarked on a comprehensive constitutional reform that affected the judiciary. Following the entry into force of the Basic Law, its transitional provisions, and the law on the legal status of judges, the mandatory retirement age for judges was reduced from 70 to 62, which, according to the plan of the coalition, was to ensure a significant renewal of the judiciary. The Venice Commission stated in this regard that this measure was questionable in light of the fundamental principles and rules concerning the independence, status, and immutability of judges. According to various sources, this provision would cause approximately 300 of the most experienced judges to be obliged to resign within a year. Accordingly, about 300 vacancies would have to be filled. This could undermine the functioning of the courts and negatively affect the continuity and legal certainty, as well as open opportunities for undesirable influence on the composition of the judiciary.[59]

It is worth noting that on 6 November 2012, the European Court of Justice ruled that such a radical reduction in the retirement age for Hungarian judges, as well as prosecutors and notaries, from 70 to 62 years of age was discriminatory on the grounds of age. In March 2013, the Hungarian Parliament passed a law amending the age limits in order to partially implement the judgments of the Constitutional Court of Hungary of 16 July 2012 and the judgment of the European Court of 6 November 2012.[60]

Another means of influencing the judiciary was giving the President of the National Judicial Administration the power to transfer cases from one court to another in order to ensure that cases are heard within a reasonable period of time. In addition, the law does not establish objective regulatory criteria for the selection of cases to be transferred to another court. In such circumstances, the said discretion appears to be directed against the independence of the judiciary.

### *3.5 Romania*

Overcoming corruption and restoring confidence in the judiciary were the main tasks of the reform of justice, which took place in several stages. The first was related to the European integration process and covered the period 2005–2009 (from the time of signing the Association Agreement with the EU). The main requirement that the country had to fulfil was to ensure the rule of law and overcome widespread corruption,[61] which extended not only to the entire system of state power but also to the political system in general. Describing the outcome of this reform as of 2009, Martin Mendelski noted that there was 'considerable

Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0344&language=EN> accessed 12 February 2021; European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland <www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0442> accessed 12 February 2021.

59 CDL-AD(2012)001-e, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012) <https://www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx> accessed 12 February 2021.

60 European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012). П. ВС. <http://www.europarl.europa.eu/sides/getDoc. do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN> accessed 12 February 2021.

61 Elena Botezatu,, *Regional cooperation in Central and Southeastern Europe: the Romanian experience in fighting corruption,* European Institute of Romania, October 2006 <https://mpra.ub.uni-muenchen.de/3163/> accessed 12 February 2021.

change in the efficiency-related dimension (judicial capacity), leading to enhanced modernization of Romania's central judicial system. By contrast, there was persistence in the power-related dimension (judicial impartiality), undermining implementation and the achievement of *de facto* rule of law'.[62] It is worth noting that at this stage, the reform was based on the agreed position of the Ministry of Justice and the High Council of Magistracy (the highest body of judicial self-government) and was supported by the EU institutions. To implement the anti-corruption direction, a separate body with strong powers was established – the National Anti-Corruption Directorate – which has been successful for some years and has had some important results[63] supported by Romanian society. As for the reform of the judiciary, it was primarily aimed at reducing the judicial workload, improving the organisational structure, increasing the budget, and so on.

The second phase of the reform came after 2017 when parliament passed laws reforming the justice system, which the European institutions criticised as threatening the independence of the judiciary. The adoption of these laws seems to have been considered in a broader context, given the general constitutional and political situation in the country since the 2012 constitutional crisis, the attempted constitutional reform of 2013, and the ongoing political turbulence. As stated in the yearly assessment report (under the EU Mechanism of Cooperation and Verification, established upon Romania's accession to the EU), 'within a nine months period since the January 2017 report, Romania has seen two governments, while growing tensions between State powers (Parliament, Government, and Judiciary) made the cooperation between them increasingly difficult'.[64]

The aim of the reform, as it was defined by the government, was to provide answers to existing problems and needs of the judicial system and to adapt it to new social realities. For this purpose, three laws have been developed and adopted on the status of judges and prosecutors, on judicial organisation, and on the Superior Council of Magistracy. These laws were aimed at strengthening the independence of judges by separating judges' and prosecutors' careers but also at increasing the efficiency and accountability of the judiciary. Instead, they had the opposite effect, undermining the independence of Romanian judges and prosecutors and the public confidence in the judiciary.[65] In particular, the laws provided for changing the procedure for appointing prosecutors, transferring a decisive influence on this process to the Minister of Justice, the limitation of freedom of expression of magistrates, and creating the new Section for investigating offences of magistrates, as well as the arrangements weakening the role of the Superior Council of Magistracy as the guarantor of the independence of the judiciary.[66]

The adoption of these laws by the parliament has provoked mass public protests for anti-corruption measures that have been ongoing for a long time. The adoption, in January 2017, of a Government Emergency Ordinance to decriminalise certain corruption offences caused

62 Martin Mendelski, *Romanian rule of law reform: A two dimensional approach* (Romania under Basescu 2011) 155–179.

63 European Commission, EU Anti-Corruption Report, Report from the Commission to the Council and the European Parliament, Brussels, 3 February 2014 COM(2014) 38 final <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf> accessed 12 February 2021.

64 Report from the Commission to the European parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism, Brussels, 15 November 2017 COM(2017) 751 final.

65 CDL-PI(2018)007, Opinion on draft amendments to Law No. 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organization, and Law No. 317/2004 on the Superior Council for Magistracy, par. 161 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)017-e> accessed 12 February 2021.

66 CDL-AD(2018)017, Opinion on draft amendments to Law No 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organization, and Law No 317/2004 on the Superior Council for Magistracy, par. 162 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)017-e> accessed 12 February 2021.

widespread protests throughout Romania. In June-July 2018, the Romanian Parliament adopted amendments to the Criminal Code and the Criminal Procedure Code,[67] which, according to the Venice Commission, will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime, including corruption-related offences.[68] This again caused a wave of protests. The amendments to the above-mentioned laws in February 2019 only strengthened their negative aspects in terms of violating the independence of judges.[69]

### *3.6 Moldova*

Judicial reform in Moldova was launched in 2018 as an implementation measure of the National Action Plan for the Republic of Moldova – European Union Association Agreement for the period of 2017–2019. Relevant constitutional amendments were drafted in the same year but were not approved by the parliament in time (according to the Constitution of Moldova, if the parliament does not pass a bill amending the Constitution within a year, it is considered cancelled).[70] Therefore, the government has developed legislative amendments to the law on the Superior Council of Magistracy (SCM), which, according to the Constitution, consists of judges and university lecturers elected for a tenure of four years and three *ex officio* members – the President of the Supreme Court of Justice, the Minister of Justice, and the Prosecutor general. The proposed changes provide for increasing the number of members of the Council from 12 to 15. The additional three members will include one judicial member and two lay members. Therefore, the SCM will be composed of seven judicial members (and seven substitutes) elected by the General Assembly of Judges and five lay members (who are tenured law professors) appointed by parliament, in addition to three *ex officio* members. The bill was passed by parliament in December 2019.

In addition, the process of drafting amendments to the Constitution, which have already been the subject of analysis by the Venice Commission, continues. In particular, it welcomed several positive features of the draft amendments: the removal of the probationary periods for judges, the limitations on the possibility for the President to reject proposals by the SCM in judicial appointments, the provision of only functional immunity for judges, the provision that at least half of the members of the SCM must be judges elected by their peers from among all court levels, the consultative role of the SCM in the preparation of the budget of the judiciary, and the statement at the constitutional level that the SCM is the guarantor of the independence of judicial authority, etc.[71]

Despite the generally positive direction and the corresponding positive assessment of these changes, their actual implementation in practice has raised a number of questions. In February 2020, the procedure of election of four lay members started (two positions remained vacant, and two new positions were created by the legislative amendments).

67 In total, about 300 changes were made.

68 CDL-AD(2018)021, Opinion on Amendments to the Criminal Code and the Criminal Procedure Code, adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)021-e> accessed 12 February 2021.

69 CDL-AD(2019)014, Opinion on Government Emergency Ordinance 7/2019 of 20 February 2019 on amendments to the three laws of justice in Romania (CDL-REF(2019)013 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)014-e> accessed 12 February 2021.

70 Constitution of the Republic of Moldova, art. 143(2) <https://www.presedinte.md/eng/constitution> accessed 12 February 2021.

71 CDL-AD(2020)015, Urgent Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate Generale of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amending the Law No 947/1996 on the Superior Council of Magistracy <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)015> accessed 12 February 2021.

It is worth noting that in March, the composition of the parliament's standing committees, including the Legal Committee on appointments and immunities, was modified, and the parliamentary opposition left the Committee and boycotted the interview phase of the election of the lay members. Despite this, the parliament appointed four new members of the SCM from among law professors for a period of four years, without the votes of the MPs from the opposition. Moreover, in May, the law was amended again, introducing the possibility of filling vacancies for judicial members of the SCM with already-elected substitute members pending the convocation of the General Assembly of Judges.[72] Such events questioned the absence of political influence, or at least its minimal character, on the formation of the SCM, which is clearly not conducive to restoring confidence in justice, the declared the goal of reform.

### *3.7 Ukraine*

Changes in the judiciary took place during the entire period of Ukraine's independence. Initially, in 1990–1996, they were aimed at the introduction of universally recognised principles of justice and, after the adoption of the Constitution of Ukraine, the implementation of its provisions. However, full-scale judicial reform only began after 2014 as a result of the Revolution of Dignity.

The most important problem in the functioning of the judiciary in Ukraine so far has been the presence of political influence, which is incompatible with the principle of judicial independence. Thus, the Venice Commission recommended that Ukraine eliminate the role of political bodies in the appointment and dismissal of judges, the formation of courts, the composition of the High Council of Justice, the procedure for deprivation of judicial immunity, etc. (paragraph 14).[73] In general, these requirements were taken into account in the reform of justice, which began in 2016 by amending the Constitution. As a result, the procedure for appointing judges was changed, as well as the composition of the High Council of Justice (created instead of the 'Vyscha Rada Justitciyi', which in English has the same translation – High Council of Justice), the majority of which, according to European standards, are judges, which received key personnel powers in the judiciary.

For their part, the public made serious allegations of corruption in the judiciary and insisted on its purification. Thus, in April 2014, the Law on Restoring Confidence in the Judiciary was adopted, which aimed to increase the authority of the judiciary by dismissing judges involved in court decisions that violated the constitutional rights and freedoms of citizens between 30 November 2013 and 23 February 2014.[74] The law provided for three main things: 1) dismissal of court chairmen from administrative positions; 2) the termination of powers of members of the High Council of Justice (HCJ) and the High Qualification Commission of Judges (HQCJ); 3) the creation of a Temporary Special Commission for the Inspection of Judges, composed of 15 members (appointed by the plenum of the Supreme Court of Ukraine, the Government Commissioner for Anti-Corruption Policy, and the Verkhovna Rada of Ukraine – five members each). The inspection was carried out at the request of citizens, but the effectiveness of the Commission was very low.[75]

72 CDL-AD(2020)007, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Revised Draft Provisions on Amending and Supplementing the Constitution with Respect to the Superior Council of Magistracy <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)007-e> accessed 12 February 2021.

73 CDL(2015)004, Preliminary Opinion on the Draft Law on Amending the Law on the Judicial System and the Status of Judges of Ukraine (n 23).

74 Law of Ukraine 'On Restoration of Confidence in the Judiciary in Ukraine' of 8 April 2014 <https://zakon.rada.gov.ua/laws/show/1188-18#Text> accessed 12 February 2021.

75 Reports of the temporary commission <http://www.vru.gov.ua/add_text/30> accessed 12 February 2021.

Almost simultaneously, the Law 'On Purification of Power' was adopted, which applied to all government officials, including judges. The subject of the judges' inspection under this law was the accuracy of the information on their property and its compliance with income received from legal sources during their tenure. Regarding the results of the procedures provided by law, it should be noted that in official sources, there is no complete information on the number of persons prosecuted, and the effectiveness of these procedures is questionable.

Significant changes in the justice system began with the introduction of amendments to the Constitution of Ukraine in 2016 and the adoption of a number of laws aimed at implementing constitutional reform. As a result, a new Supreme Court and the High Anti-Corruption Court were established (with the appointment of new judges on a competitive basis), a new composition of the High Council of Justice was formed, and a qualification assessment of judges was conducted. Along with the positive aspects of the reform, a number of problems arose of various levels of seriousness, including those related to the independence of the judiciary. Thus, the reform was aimed at replacing the staff of the judiciary (not open reappointment of judges). In the opinion of representatives of public organisations, this should lead to the purification of the judiciary from corruption and other negative phenomena. However, achieving this goal was accompanied by difficulties on the path of reform.

First of all, mass dismissals, which began in response to the established qualification assessment system, led to a critically insufficient number of current judges (in some courts, there were no judges at all for a long time). At the same time, the lack of a full HCJ and HQCJ for some time, as well as organisational difficulties in their work, did not allow this problem to be solved quickly. Regarding the activities of the HCJ and HQCJ, it also was not possible to eliminate the political influence on the formation and activity of these bodies. The HCJ enjoys a low level of trust from both society and the legal community, which accuses it of making politically motivated decisions.

These problems remain unresolved, which, on the one hand, does not contribute to the proper functioning of the judiciary and tangible progress towards guaranteeing the rule of law, and, on the other, is the reason each subsequent political power launches new 'judicial reforms'.[76]

## 4 COMMON FEATURES OF THE ANALYSED JUDICIAL REFORMS IN THE COUNTRIES OF EASTERN EUROPE

This analysis of a number of judicial reforms in Eastern Europe provides grounds for distinguishing some of their common features. First of all, it should be emphasised that in almost all countries, judicial reforms have been the subject of sharp political battles, the content and course of which raises questions about their true purpose: is it really to guarantee the right to a fair trial, rather than establishing control (less or more) over the judiciary? In almost all the analysed countries, the objectives of the reform were to ensure the rule of law, the right to justice, to combat corruption, and to restore confidence in the judiciary. In addition, all the countries have declared that one of the key principles of reform is to respect (or ensure) the independence of the judiciary. However, practice has shown that the independence of the judiciary is the most vulnerable point in reform.

Ensuring the independence of the judiciary is of particular importance in new democracies. According to the Venice Commission, in old democracies, the decisive influence of the

76 In particular, in an interview with tThe New York Times on 19 December 2020, the President of Ukraine, V Zelensky, announced the 'beginning of a global reform of the judiciary' in 2021 ('With Trump Fading, Ukraine's President Looks to a Reset With the U.S. ', *The New York Times*, 19 December 2020).

executive on the appointment of judges generally satisfies the requirement to guarantee the independence of the judiciary, as these powers are constrained by 'a long-established legal culture and traditions'. However, in new democracies (which have not yet developed traditions that could prevent the abuse of power), clear constitutional and legislative provisions are needed to prevent political abuse in the appointment of judges.[77]

The most problematic factors in terms of compatibility with the principle of independence of the judiciary were the means used in the reform, such as: the anticipatory dismissal of judges appointed for life; the reduction of the retirement age for judges, which led to a significant reduction in the number of current judges in the judiciary; the resolution of personnel issues and issues of disciplinary responsibility of judges by the executive body; the formation of bodies of personnel and disciplinary support of the judiciary by a political body (parliament, government) or under their significant or decisive influence.

In a number of countries, there have been attempts to make judicial reforms radical. However, such radical reforms involving the dismissal or reappointment of all or most judges (due to loss of 'public trust', suspicions of corruption, etc.) have not been successful and have clearly had no chance of success because they were in sharp opposition to established constitutional principles.

When conducting judicial reform, it should be taken into account that the judiciary is one of the branches of government that functions as a triad and is an integral part of the constitutional system. In addition, a single branch of government should not be demonised by accusing it of corruption, as this is a deliberate omission of or disregard for the general problem of the constitutional and political system. Therefore, anti-corruption reform is not identical to judicial reform and requires a systematic approach.

## 5 Conclusions

Both corruption and violations of the independence of the judiciary are equally threatening to the rule of law and the protection of human rights. Therefore, attempts to sacrifice at least one of these aspects in the course of judicial reform ultimately lead to negative consequences. The independence of the judiciary is an obligatory feature in the conditions of the constitutional state. It is impossible for the state to perform its functions to protect human rights and freedoms and the rights and interests of legal entities, control the legality and constitutionality of public authorities' activities, and guarantee the system of separation of state powers in general in cases of political or other pressure on judges. It is clear that political influence on the judiciary seriously upsets the balance in constitutional systems of government because, in this case, there is a kind of skew towards the legislature, executive, or excessive concentration of power by a political party that has a majority in parliament and controls the government. On the other hand, corruption is not only the cause of the ineffectiveness of the human rights protection system but also a factor that significantly distances a country from the rule of law and poses a threat to national security.

However, radical actions (in the form of a complete reset of the judiciary, reappointment or dismissal of all judges, early retirement, etc.), which look tempting in terms of opportunities to achieve results quickly, do not have a positive long-term result in practice, which is confirmed by the experience of a number of countries. Conversely, the lack of decisive action

77 CDL-AD(2007)028, Judicial Appointments Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), Venice, 22 June 2007 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e> accessed 12 February 2021.

by governments to find a compromise with corrupt institutions also fails. Therefore, the solution seems to be based on a balanced approach – a well-thought-out, systematic set of measures aimed at improving the justice system and resolutely overcoming corruption risks based on respect for basic constitutional principles.

The importance of the judiciary for the functioning of constitutional democracy can be described as existential. A corrupt judiciary, deprived of public trust, is one of the greatest threats to constitutional democracy and the biggest obstacle in developing countries. However, radical, unreasoned, unconstitutional measures aimed at carrying out judicial reforms not only do not bring the necessary and desired results but also move the state even further from constitutional democracy.

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# REFERRING A CASE TO THE HIGHEST DIVISION OF THE SUPREME COURT IN THE CRIMINAL PROCEDURE LEGISLATION OF UKRAINE AND EUROPEAN COUNTRIES

*Nazar Bobechko, Alona Voinarovych and Volodymyr Fihurskyi*

**Summary:** 1. Introduction – 2. Grounds for referring the criminal proceedings for consideration by the higher-level structural division of the Supreme Court – 3. An exclusive legal problem and necessity for the development of law and the uniformity of law enforcement practice as grounds for the referral. – 4. The fault of the grounds and the procedure for referring the case for consideration by a higher-level structural division of the Supreme Court in the Ukrainian Criminal Procedure Code. – 5. The reasonableness of judgements on the referral of criminal proceeding for consideration by the joint chamber and the Grand Chamber of the Supreme Court – 6. Consistency of court practice of the structural divisions of the Supreme Court – 7. Conclusions

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## CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist. Prof. Nazar Bobechko serves as Member of the Scientific Advisory Board of the Supreme Court, despite this, he does not represent any views of this body in this particular research or bound by that.

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# REFERRING A CASE TO THE HIGHEST DIVISION OF THE SUPREME COURT IN THE CRIMINAL PROCEDURE LEGISLATION OF UKRAINE AND EUROPEAN COUNTRIES

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***Abstract*** *The article aims to examine one of the elements of the formal mechanism of maintaining court practice unity in criminal proceedings of Ukraine and European countries – referring a case to the highest division of the Supreme Court. Similar to the Ukrainian criminal procedure legislation, the grounds for referring a criminal case and the procedure of its application are provided in the legislation of Estonia, Italy and Lithuania. At the same time, the Ukrainian legislator has established a number of special features, however, the wording of the relevant articles of the Criminal Procedure Code of Ukraine is not perfect. The article provides answers to such questions as how forceful the provisions of criminal procedure legislation of Ukraine are, to what extent of effectiveness the Supreme Court exercises its legal authority regarding the unity of court practice in criminal proceedings, and whether the controversies in legal positions of the structural divisions of the Supreme Court have been successfully avoided.*

*In order to achieve the stated aims, parts 2 and 3 are devoted to the examination of the grounds for referring a case in criminal proceedings of Ukraine and European countries. Part 4 outlines the shortcomings of the content of some articles of the Criminal Procedure Code of Ukraine concerning the procedure of the referral of a criminal case to the highest division of the Supreme Court. Part 5 provides the analysis of the validity of decisions made by the boards of judges at the Supreme Court on the referral of criminal proceedings to its higher judicial divisions – the joint chamber of the Criminal Cassation Court and the Grand Chamber of the Supreme Court. On the basis of the study of the judgements of boards, the judicial chambers of the Criminal Cassation Court and the Grand Chamber of the Supreme Court, in part 6 the question is answered on whether the Supreme Court of Ukraine managed to perform its duty on the assurance of court practice unity in such an area as criminal proceedings.*

***Keywords:*** *exclusive legal problem, development of law, formation of uniform law enforcement practice, the Supreme Court, criminal proceedings, Ukraine.*

## 1 INTRODUCTION

In 2016, another judicial reform occurred in Ukraine.[1] As a result, a number of provisions of Ukrainian legislation, including the criminal-procedural one, were redefined. Thus, the Supreme Court of Ukraine was liquidated, and the Supreme Court was established instead.[2] In lieu of three higher specialized courts (for civil and criminal cases, commercial cases and administrative cases), four cassation courts were established (administrative, commercial, criminal and civil) which obtained the status of structural divisions of the Supreme Court. Joint chambers of these courts are supposed to develop common legal positions of boards of judges and judicial chambers. The Grand Chamber took the highest position in the hierarchical structure of the newly created Supreme Court.

The Ukrainian legislator moved away from the approach established by Roman law to the understanding of judicial power only as an interpreter and enforcer of the law ('Praxis judicum est interpres legum') by recognizing judicial precedent as the source of law. In such a manner, the judicial power, in person of the highest body in the judicial system of Ukraine, the Supreme Court, was granted authorities to formulate rules of conduct, along with the legislative and executive branches of power. Its activity is significantly important for the formation of a political regime of the state, and its decisions become a guideline for the equal application and the correct enforcement of rules of law as well as for the establishment of legal facts.

Deficiencies in criminal procedure legislation (gaps, conflicts, inconsistencies in legal regulation, erroneous use of blanket and reference norms, defects of the conceptual and categorical apparatus, ambiguity of language structures, etc.) and excessive use of evaluative concepts in regulations create judicial discretion. In turn, such discretion leads or may lead to different approaches to understanding the content and application of legal norms.

From the standpoint of the Consultative Council of European Judges (CCJE), permanence of conflicting judgments can create a state of legal uncertainty, thus reducing public confidence in the judiciary, which is one of the most important components of a state based on the rule of law. In such circumstances, the Supreme Court plays an important role in resolving inconsistencies in case law.[3]

By the way, in the items 37 and 63 of the judgment *Beian v. Romania № 1*, the European Court of Human Rights (ECtHR) noted that the role of the Supreme Court is, *inter alia*, to resolve inconsistencies in case law.[4]

1 M Zhernakov, 'Judicial Reform in Ukraine: Mission Possible?' (2016) 1: 6–7 <http://en.dejure.foundation/library/judicial-reform-in-ukraine-mission-possible> accessed 23 December 2020; C Giardullo, 'Four Years After: The 'Long March' of Justice-Sector Reforms in Ukraine' (2018) 1 (18) Istituto Affari Internazionali Papers 1: 9–11 <https://www.iai.it/sites/default/files/iaip1801.pdf> accessed 23 December 2020; S Nitsova, G Pop-Eleches, G Robertson, 'Revolution and Reform in Ukraine. Evaluating Four Years of Reform', Institute for European, Russian and Eurasian Studies at the George Washington University's Elliott School of International Affairs (2018) 1: 34–38 <https://www.ponarseurasia.org/perspectives/revolution-and-reform-ukraine-evaluating-four-years-reform> accessed 23 December 2020.

2 It should be recalled that on 15 December 2017 the new Supreme Court as the highest authority in the judicial system of Ukraine began its activities with freshly appointed judges (as of 23 December 2020, it had 183 judges from the maximum number of 200, specified by law), and the Supreme Court of Ukraine ceased its operation. The rebooting of the Supreme Court of Ukraine as a key part of judicial reform intended to purify the judiciary and establish fair justice in Ukraine.

3 Opinion No 20 (2017) of Consultative Council of European Judges (CCJE) 'The Role of Court with the Respect to the Uniform Aplication of the Law', items 6, 20 < https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3> accessed 23 December 2020.

4 Judgment of the European Court of Human Rights in Beian v Romania, No 1, 6 December 2007 <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Beian%20v.%20Romania%20%E2%84%96%201%22],%22documentcollectionid2%22:[%22GRANDCHAMBER% 22,%22CHAMBER%22],%22itemid%22:[%22001-83822%22]}> accessed 23 December 2020.

The legal literature mainly covers issues related to the role of the Supreme Court in ensuring the unity and sustainability of judicial practice, the characteristics of judicial precedent in national legal systems. At the same time, such a formal mechanism – of ensuring judicial practice unity by referring a criminal case to a higher division of the Supreme Court – has not yet been covered in the comparative legal aspect.

The aim of this article is an examination of the grounds and the procedure of referring a case to the highest division of the Supreme Court in the criminal procedure legislation of Ukraine and European countries. In order to achieve the stated aim, the following tasks are set: to characterize the content of the grounds of a case referring to the highest division of the Supreme Court in the criminal procedure legislation of Ukraine and European countries, to disclose its procedure; to find out the motivation of the court decisions for referring a case to the highest division of the Supreme Court in the criminal procedure legislation of Ukraine; to identify the shortcomings in regulating of these issues in the criminal procedure legislation of Ukraine; and to clarify the consistency of a case law of the Supreme Court.

## 2 GROUNDS FOR REFERRING THE CRIMINAL PROCEEDINGS TO THE HIGHER-LEVEL STRUCTURAL DIVISION OF THE SUPREME COURT

For maintaining the unity of court practice, two grounds for referring criminal proceedings, for consideration, to the higher-level structural division of the Supreme Court are provided by the Criminal Procedure Code (CrPC) of Ukraine: 1) the necessity to deviate from the conclusion on the application of rule of law in similar relations, which was set out in an earlier decision of the higher-level structural division of the Supreme Court (parts 1–4 of Art. 434[1]); 2) the case contains an exclusive legal problem and such a referral is necessary for the assurance of development of law and formation of uniform law enforcement practice (part 5 of Art. 434[1]).[5] These grounds have been formulated with the help of evaluative concepts – 'similar legal relationships' and 'an exclusive legal problem'.

It should be noted that the introduction of these grounds is not a Ukrainian invention. The CCJE takes the view that numerous countries with Supreme Courts in civil law are now empowered to select cases with the intention of setting standards that should be applicable in future cases. Therefore, in these cases, a judgment of a Supreme Court, when it was reached with the intention to set a precedent, can already count as an authoritative case law.[6]

The legislation of some states does not establish the grounds for referring a criminal case but defines the conditions for accepting an appeal for consideration by the Supreme Court of these states.

Thus, according to section 323 of the Criminal Procedure Act of Norway *(Straffeprosessloven),* an appeal to the Supreme Court may not proceed without the consent of the Appeals Committee of the Supreme Court. Such consent shall only be given when the appeal is concerned with issues whose significance extends beyond the current case, or when other particularly important reasons indicate that the case should be tried in the Supreme Court.[7]

5 Code of Ukraine of 13 April 2012 No 4651-VI 'Criminal Procedure Code of Ukraine' (as amended of 21 July 2020) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 23 December 2020.

6 Opinion No 20 (2017), (n) 2, item 14.

7 Law of Norway of 22 May 1988 No 25 'Criminal Procedure Act of Norway' (as amended of 30 June 2006, No 53) <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf> accessed 23 December 2020.

In turn, item 1 of section 10 and section 11 of chapter 54 of the Swedish Code of Judicial Procedure *(Rättegångsbalken)* found that the Supreme Court, upon consideration of an appeal, should grant leave to appeal only if it is of importance for the guidance of the application of law.[8]

As a final point, the Code of Judicial Procedure of Finland *(Oikeudenkäymiskaari)* in section 2 of chapter 30a specifies that the Supreme Court may grant leave for an appeal for a precedent only if, in view of the application of the law in other similar cases or of the uniformity of legal *praxis*, it is important to submit the matter for a decision by the Supreme Court.[9]

In these countries a filtering system is established for cases before the Supreme Court. A criterion for filtering is whether a decision in this case would contribute to the development of the law. Given this, the Supreme Court is not obliged to deal with cases which do not warrant a decision by the highest court from a legal point of view. The purpose of this order is to enable the Supreme Court, given its limited resources, to shift its focus further onto the unity of law and the development of law. The use of these means will therefore have favourable consequences for these tasks of the Supreme Court. As a result, this court is in a position to focus its attention, above all, on those themes and problems which occur regularly in practice, and in respect of which there is a need for clear guidelines from the highest court.[10]

The existence of instruments for ensuring uniformity within the same court is particularly relevant for Supreme Courts. It is especially problematic if the Supreme Court itself becomes a source of uncertainty and of conflicting case law, instead of ensuring its uniformity. It is thus of paramount importance that within the Supreme Court mechanisms exist which can remedy inconsistencies within this court. Such instruments may include e.g. referrals to grand chambers or convening larger panels where the case law of the Supreme Court is divergent or where the reconsideration and possible overruling of an established precedent is considered. At least an 'exchange of opinions' with the chamber, from which case law another chamber intends to depart, might be necessary.[11]

Similar to Ukrainian criminal procedure, legislation grounds for referring a criminal case and the procedure of their application are provided in the legislation of Estonia, Italy and Lithuania.

For example, in item 1 of § 356 of the Code of Criminal Procedure of Estonia *(Kriminaalmenetluse seadustik)* this ground is formulated as:

> the majority of the full panel of the Criminal Chamber reaches a different opinion than the legal principle or position hitherto held by the Supreme Court *en banc* on the application of law.[12]

Scholars note that cases may also be heard by special (*ad hoc*) panels composed of the members of different chambers or by the Supreme Court *en banc.*[13]

8 Law of Swedish of 18 June 1942 'The Swedish Code of Judicial Procedure' (as amended of 12 January 2017) <https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf> accessed 23 December 2020.

9 Law of Finland of 4/1734 'Code of Judicial Procedure of Finland' (as amended of 10 April 2015) <https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf> accessed 23 December 2020.

10 M Feteris, 'Development of the Law by Supreme Courts in Europe' (2017) 13(1) Utrecht Law Review 155: 156, 158, 159.

11 Opinion No 20 (2017) (n 2) item 24.

12 Law of the Republic of Estonia of 12 February 2003 'Code of Criminal Procedure of the Republic of Estonia' (as amended of 26 September 2013) <https://www.riigiteataja.ee/en/eli/530102013093/consolide> accessed 23 December 2020.

13 J Laffranque, 'The Judicial System of Estonia and European Union Law' (2005) 33(2) International Journal of Legal Information 224: 228.

Similarly, this ground is defined in part 2 of Art. 378 of the CrPC of Lithuania *(Lietuvos Respublikos baudžiamojo proceso kodekso)* whereby a cassation case heard by a panel of three judges may be referred to the plenary session of the Criminal Cases Division of the Supreme Court of Lithuania if the application of the Criminal or Criminal Procedure Law in the case would create grounds to deviate from the practice of the Supreme Court of Lithuania.[14]

The Supreme Court of Lithuania has noted that upon deciding the interpretation and application of law it is important to consider the factor of time i.e. it is essential to take into consideration that after the formulation of a certain rule both the interpreted rule and the court practice may change. Thus, any interpretation of the Supreme Court of Lithuania must be applied in the context of factual circumstances of the case, changes in law and the developments of court practice. In addition, in the case of conflict of precedents (when there are several different court decisions concerning analogous cases) the precedent of a higher instance should also be followed with consideration to the time of adoption and other significant factors (such as whether a precedent reflects the existing court practice or whether it is only a sporadic occurrence); the persuasion of the reasoning; the structure of the court (whether the decision has been made by a single judge or a chamber sitting in an extended composition or full court); whether the judges expressed separate opinions regarding a prior decision; important changes (social, economic and other) resulting from the decision of the court considered as precedent.[15]

Also, according to parts 1, 2 of Art. 618 of the Code of Criminal Procedure of Italy *(Codici di procedura penale)* should a chamber realize that the question of law under its examination has caused or may cause judicial conflict, it may, upon request of the parties or of its own motion, refer the appeal to the Joint Chambers of the Court of Cassation, by issuing an order. Should a chamber not share the principle of law affirmed by the Joint Chambers, it shall refer the decision on the appeal to the Joint Chambers of the Court of Cassation, by issuing an order.[16] Researchers call this procedure a 'horizontal' precedent.[17]

In the deliberative moment, when the case is dealt with by a (simple) section, the problem of jurisprudential contrast may arise, in the sense that the question of law to be resolved has found different solutions in some simple sections or finds the judge deliberating on an interpretative position that is not in agreement with that of another simple section or of the same Joint Sections (criminal). In such cases the appeal is remitted by the same section to the United Sections for the decision in order to achieve a uniform interpretation of the law and to ensure the court practice.[18]

In the criminal procedure legislation of Ukraine, this is about the case when the board of judges, the chamber or joint chamber of the Cassation Court see different solutions to a typical legal situation in the criminal proceeding which came for a cassation hearing, compared to the one that has already formed a basis of a decision of the same instance,

14 Criminal Procedure Code of the Republic of Lithuania of 14 March 2002 No IX-785 'Lietuvos Respublikos baudžiamojo proceso kodekso' <https://e-seimas.lrs.lt/portal/legalAct/en/TAD/TAIS.163482> accessed 23 December 2020.

15 D Ambrasienė and S Cirtautienė, 'The Role of Judicial Precedent in the Court Practice of Lithuania' (2009) 2(116) Jurisprudencija 61: 65.

16 Code of Criminal Procedure of Italy of 22 September 1988 No 477 'Codici di procedura penale' (as amended of 25 June 2020) <https://www.brocardi.it/codice-di-procedura-penale/libro-nono/titolo-iii/capo-iii/art618.html> accessed 23 December 2020.

17 L Baccaglini, G di Paolo, F Cortese, 'Judicial Precedent in the Italian Legal System: A Shift Toward a Stare Decisis Model?', (2017) Stanford Law School Chine Guiding Cases Project 1: 7 <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2017/04/CGCP-English-Commentary-19-Baccaglini-Di-Paolo-Cortese.pdf> accessed 23 December 2020.

18 *Esplicato Codice Di Procedura Penale*. XVIII edizione (Edizioni Giuridiche Simone 2013) 816.

adopted in another board of judges, by this or another chamber, a joint chamber or the Grand Chamber of the Supreme Court (hereinafter – the SC Chamber).

The Ukrainian legislator is talking about the conclusion which is set out in a judgment made by the Supreme Court. However, the conclusion is neither a structural part of the ruling of the court of cassation instance nor a form of expression of court practice. From the semantic point of view, the term 'conclusion' means something that was decided by someone after a consideration of all information available.[19] Such a final opinion, on the application of legal rules, is set out in the operative part of the ruling of the court of cassation instance. However, not only a logical outcome but also its argumentation which is given in the motivating part of the resolution, is important for law enforcement activity. Therefore, in parts 1–4 of Art. 434[1] of the CrPC of Ukraine it is more appropriate to speak not about the conclusion, but the legal position of the court of cassation instance. The legal position of the Supreme Court in criminal proceedings is a point of view set out in a court ruling of the highest body in the judicial system of Ukraine on the basis of the results of review of justness of judgment. This position is mandatory when resolving similar cases regarding the interpretation of criminal and criminal procedural legal rules applicable to established circumstances of the case. It contains theoretically reasoned models of methods of legal conflicts resolution, overcoming of gaps in legal regulation, as well as established judicial rules, due to which the unity and stability of court practice is maintained.

An important question is the nature of the conclusions of the Supreme Court, or more precisely, the legal positions (*pravovi pozytsii*).

According to part 6 of Art. 13 of the Law of Ukraine 'On the Judiciary and the Status of Judges', conclusions about the application of rules of law outlined in court rulings of the Supreme Court are taken into consideration by other courts when applying such rules of law.[20] The provision of such content is established in part 6 of Art. 368 of the CrPC of Ukraine: by choosing and applying the rule of law of Ukraine on criminal liability for socially dangerous acts when passing a sentence, the court shall take into account conclusions on the application of relevant rules of law set out in the court rulings of the Supreme Court.[21]

Shall the following provisions be understood as clarification of the binding power of legal positions of the highest authority in the judicial system of Ukraine?

In linguistics, the word 'consider' is interpreted as 'think about something very carefully, especially before making a decision; to think of someone or something in a special way or to have a special opinion'.[22] This means that legal positions of the Supreme Court are not binding for lower-level courts; the latter should only take them into account when hearing and deciding on criminal proceedings.

Moreover, the obligation of taking into consideration applies only to legal positions of the Supreme Court regarding rule of law of Ukraine on criminal liability which is planned to be applied by the court of lower instance. Instead of this, legal positions of the highest court in the judicial system of Ukraine concerning the interpretation and application of criminal procedural rules may not be taken into account based on a lexical and grammatical interpretation of part 6 of Art. 368 of the CrPC of Ukraine.

In other words, adhering to legal positions of the Supreme Court is based on its authority which shall be formed.

19 *Longman Dictionary of American English*, spec. ed. (Pearson Education Limited 2009) 205.

20 Law of Ukraine of 13 April 2012 No 1402-VIII 'About the Court System and the Status of Judges' (as amended of 21 July 2020) <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 23 December 2020.

21 Code of Ukraine (n) 4.

22 *Longman Dictionary* (n) 18, 213.

This also concerns adherence to explanations of the Plenum of the Supreme Court on the application of legislation while deciding on court cases, which have recommendatory nature (item 10 of pt. 2 of Art. 46 of the Law of Ukraine 'On the Judiciary and the Status of Judges'.)[23]

However, classical case law is formed as a result of consideration by the court of higher instance of the particular case and is not established as a result of abstract generalizations of court cases in certain categories of cases. This specific nature 'from concrete to general' is affiliated with the professional duty of judges to administer justice which foresees obligatory sufficiency of court decisions.

From the perspective of the European Commission for Democracy through Law (Venice Commission), the procedure of formulating the provisions of court rulings of the Supreme Court of the Ukraine Plenum constitutes an extra-judicial measure that goes outside judicial proceedings and has the nature of an administrative ruling regarding the judgements of courts of a lower level. In such a manner, the principle of the independence of judges is violated, so this measure should not be used by the state in which that rule of law applies. The Commission considers that court rulings of the Plenum of the Supreme Court of Ukraine carry great risk as a ground for the cancelling of judgements under the procedure of supervision, grossly violating the principle of *res judicata*.[24]

Besides that, carrying out such kind of an abstract activity does not preclude mistakes being made in explanations that may be flawed, contradictory or nonconforming to law.

Despite the arguments mentioned, the Ukrainian legislator has saved relevant provisions in the new legislation about the court system but has refused to recognize explanations of the Plenum of the Supreme Court as binding.

The analysed provisions of the criminal procedure law of Ukraine use the evaluative term 'similar legal relations,' which is not disclosed by the Ukrainian legislator.

Such a question remains topical: by what features shall the term 'similarity' of legal relations be recognized – by the subject matter of legal regulation (criminal and criminal procedure), by the function in legal regulation (regulatory and protective), by nature (material and procedural), depending on the distribution of rights and obligations between subjects (unilateral and bilateral), by the correlation of rights and obligations of subjects (simple and complex), by the level of individualization of rights and obligations of subjects (absolute and relative), by the nature of responsibilities of subjects (active and passive), by composition (subject, object, content), by legal facts which form the basis for their occurrence, change or termination, etc.?

According to the established practice of the Supreme Court of Ukraine, similarity of legal relations means, in particular, the identity of the subjective composition of participants in relations, the object and subject matter of legal regulation, as well as conditions of application of legal rules (specifically, time, place, grounds of occurrence, termination and change of the corresponding legal relations). The content of legal relations is determined by the circumstances of each particular case in order to find out their similarity in different judgements of the court (courts) of cassation instance.[25]

23 Law of Ukraine (n) 19.

24 Opinion of European Commission for Democracy through Law on Draft Law of Ukraine on the 'Judicial System' (CDL (2001) 46) <http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL(2001)055-e&lang=RU#> accessed 23 December 2020.

25 Judgment in case No 21-41a14 (The Supreme Court of Ukraine, 20.05.2014); Judgment in case No 444/2909/15 (The Supreme Court of Ukraine, 29 March 2017); Judgment in case No 910/3040/16 (The Supreme Court of Ukraine, 06 September 2017).

However, such an interpretation is contrary to the semantic meaning of the words 'identical' and 'similar.' Thus, in linguistics 'identical' is interpreted as 'the same'.[26] Instead, 'similar' is defined as 'being almost identical, but not quite the same'.[27]

The chance that the same legal situation exists with a different composition of criminal procedure relations is quite possible (for example, the denial to open an appeal proceeding on the appeal of an accused or another interested person who does not have a procedural status of participant in the criminal proceeding). Such cases require an individual approach.

Specific understanding of the sense of conditions of the application of legal rules is observed from the content of the foregoing legal position of the Supreme Court of Ukraine. The highest authority in the system of courts of general jurisdiction, in fact, has mixed different legal categories: requirements (conditions) for the application of legal rules, a first stage of the application of rules of law (making the base of findings for deciding the case – time, place and other circumstances) and the development of legal relations in particular cases (their occurrence, change or termination). For the law enforcement, it is too early to speak about the object of legal regulation.

The aforesaid position of the Supreme Court of Ukraine provides authentication between the concepts of the 'content of legal relations' and the 'essence of legal relations.' In the theory of law, most scholars relate the object, subject and essence to the content of legal relations. In such a manner the assessment of similarity of legal relationships is limited only to such an element as essence, neglecting other components of this category.

Considering the above, in our opinion, any legal relations with at least one common feature (for example, branch affiliation, character or function in legal regulation, legal fact underlying in their development, the rights and obligations of their subjects) are similar.

Therefore, the concept of 'similar relations' is extremely broad. The board of judges, chamber or joint chamber may well consider some relations to be similar while the others may not. How can this approach assure the unity of court practice?

It should be pointed out that in the context of parts 1–4 of Art. 434[1] of the CrPC of Ukraine for the referral of criminal proceedings for consideration of the Chamber, the Joint Chamber of Cassation Court and the Grand Chamber of the Supreme Court and hearing by them of this case, to establish similarity of legal relations is not enough. It is also necessary to 1) find out whether legal conclusion already formulated is relevant to legal relations which are the subject matter of the cassation hearing; 2) acknowledge wording of this conclusion by the corresponding supreme judicial division of the Supreme Court or the Supreme Court of Ukraine; 3) substantiate the necessity of change of the legal conclusion given the loss of validity or amendment of the legal rule which was applied while reaching such conclusion, inconformity with development of social relations, or noncompliance with public requirements.[28]

26 *Longman Dictionary* (n) 18, 507.

27 Ibid 18, 946.

28 Code of Ukraine (n 4).

## 3 AN EXCLUSIVE LEGAL PROBLEM AND THE NECCESSITY FOR THE DEVELOPMENT OF LAW AND THE UNIFORMITY OF LAW ENFORCEMENT PRACTICE AS GROUNDS FOR THE REFERRAL

The criminal procedure legislation of other states defines some other ground for referring a criminal case to a higher division of the superior court.

Thus, in item 2 § 356 of the Code of Criminal Procedure of the Republic of Estonia, it is stated that a criminal matter is referred to the Supreme Court *en banc* if the majority of the full panel of the Criminal Chamber considers the adjudication of the criminal matter by the Supreme Court *en banc* to be essential for the uniform application of the law.[29]

In accordance with part 2 of Art. 610 of the Code of Criminal Procedure of the Italian Republic, the President of the Court of Cassation, either upon request of the Prosecutor General or the lawyers, or of his or her own motion, shall assign the appeal to the Court of Cassation to the Joint Chambers when the issues raised are particularly relevant or when conflicts among the decisions of individual chambers need to be solved.[30] It is intended to encourage an adequate technical study of the legal problem. The aim of that order is to ensure the uniformity of the interpretation of the law, in line with the preventive function of the Court of Cassation. The sentences of the Joint Chambers are of particular importance within the legal system, precisely because they settle differences between Chambers once and for all, or because they take a position on a matter of particular importance.[31]

In turn, part 1 of Art. 378 of the CrPC of the Republic of Lithuania determines that a cassation case heard by a panel of three judges may be referred to an extended panel of seven judges if the proper application of the law of criminal or criminal procedure in the case would mean a new interpretation of a legal norm in case law.[32]

It seems that the Ukrainian legislator specified the above grounds for referring a criminal case, using the categories 'an exclusive legal problem', 'the development of law', 'formation of uniform law enforcement practice'.

Exclusive legal problem is about complex theoretical and legal issue in criminal proceedings, deciding on which, in the opinion of a board of judges or a chamber of the court of cassation (but not a joint chamber), is advisable to implement at the highest level in the hierarchical structural division of the Supreme Court, given the necessity of assurance of court practice unity.

The existence of exclusive legal problems is caused by defects of legislation (gaps, collisions, inconsistencies in legal regulation, the misuse of blanket and referral rules, defects of conceptual and categorical framework, the indistinctness of linguistic structures, etc.) and the excessive use of estimated terms in legal acts. Outlined and other defects cause legal uncertainty. In order to overcome this, courts have to appeal for discretion in law enforcement. In its turn, such a judicial review leads to or may lead to differences in approaches to the understanding of essence and the application of legal rules. In such circumstances, it is possible to maintain unity and subsequently, the stability of court practice regarding typical legal situations only at the level of the highest body in the judicial system of Ukraine – the Supreme Court.

29 Law of the Republic of Estonia (n 11).

30 Code of Criminal Procedure of Italy (n 15).

31 T Paolo, *Manuale di procedura penale*. Quindicesima edizione (Giuffrè Editore 2014) 950.

32 Criminal Procedure Code of the Republic of Lithuania (n 13).

Accordingly, an exclusive legal problem is a complex theoretical and applicative issue which is derived from the defects of legislation that creates legal uncertainty and for the assurance of uniform approaches to understanding and the correct application of rules of law in typical legal situations needs to be resolved at the level of the Supreme Court.

Upon that, according to pt. 5 of Art. 434[1] of the CrPC of Ukraine, only one division of the Supreme Court – the Grand Chamber[33] – has authorities to resolve an exclusive legal problem. However, in our view, the necessity to involve the Grand Chamber of the Supreme Court in resolving an exclusive legal problem should be linked solely to legal situations common to various kinds of jurisdictions – administrative, commercial, criminal and civil. For example, problems of the implementation of basic principles in relevant branches of law, general provisions of litigation, the recording of litigation, or appeals and review of judgements in appeal and cassation. At the same time, when an exclusive legal problem is limited to only one type of jurisdiction, it is appropriate to refer it for consideration to the joint chamber of the corresponding cassation court within the structure of the Supreme Court. It is advisable to make corresponding amendments in the legislation of Ukraine.

The highest national courts can develop the law in their judgments in a number of different ways:

a) by providing a more detailed explanation of the legal reasoning. A Supreme Court can develop the law by providing a more detailed explanation of its legal reasoning. By doing so, a Supreme Court in its judgment not only outlines its final legal conclusion ('that is how it is') but also includes the arguments that reveal how it arrived at that conclusion. Such a form of reasoning increases clarity and predictability as to how the Supreme Court will decide in other comparable cases;

b) by providing a broader than necessary formulation. A Supreme Court may also formulate a legal rule in its judgment which is more extensive and more broadly applicable than strictly necessary to decide the case in question. Such a 'broader than necessary formulation' is often valuable for legal practice. It generally has a clear law-making effect, because a broadly formulated rule of this kind clarifies how decisions should be taken in a whole range of other – including future – cases;

c) by adding preceding paragraphs to describe general principles. The formulation of one or more broad legal rules in a judgment can be expanded by adding a description of general principles followed by the Supreme Court when deciding cases in this category. Such a formulation of general principles usually occurs in one or more preceding paragraphs in the judgment, before the court applies these principles to the present case. In such paragraphs, the court describes in general terms the legal framework which it adopts when judging cases of this kind;

d) by adding superfluous statements to their rulings. Some Supreme Courts from time to time add superfluous statements to their rulings. These are statements that do not influence the decision in the case at hand, and which, as a consequence, need not be included in the judgment. With this technique, the court calls for additional 'broadcasting time', as it were. It can be used when the court knows or foresees, from its contact with society and legal practice, that the issue is leading or will lead to controversy. If this technique is used, it is limited to matters which to some extent are related to the subject of the case in which the judgment is made. Otherwise, it would result in regulation with no genuine link to adjudication.[34]

By figuring out and overcoming defects of legal regulation, while assuring the unity of court practice, the Supreme Court influences the development of law by incorporating uniform

33 Code of Ukraine (n 4).

34 Feteris (n 9) 159–161.

rules into law enforcement. It follows that the concept of 'an exclusive legal problem' is closely related to adjoining categories, referred to part 5 of Art. 434[1] of the CrPC of Ukraine – the 'development of law' and the 'formation of uniform law enforcement practice'.[35]

In our opinion, the development of law is a process of qualitative and quantitative changes in the legal system aimed at improving the latter. Instead, the formation of uniform law enforcement practice should be understood as an activity of creating predictability and consistency in the order of the hearing of similar categories of court cases and their results, which entails the similarity (sameness) of interpretation, a specification of legal norms, the overcoming of gaps in legal regulation by applying of analogy, and which is based on principles of substantive and procedural law.

The definition of the uniform application of the law is not formulated in Ukrainian legislation. However, according to CCJE, by common understanding, the concept appears as a compliance of regulations issued by governmental bodies, enterprises, institutions, organizations and officials with the Constitution of Ukraine and existing laws.[36]

The Supreme Court is responsible for ensuring uniform application of laws by the courts. The main instruments for implementing this competence are the principal standings and the principal legal opinions, which the Supreme Court considers and approves at a general session. Namely, it determines principal standings and principal legal opinions on issues of importance to ensure consistency in the application of the laws by the courts, on its own initiative or on the initiative by the meetings of judges or court departments.[37]

In items 5, 6, 20 and 28 of the Opinion № 20 (2017) of CCJE it is stated that the uniform application of the law is essential for the principle of equality before the law. Uniform application of the law contributes to public confidence in the courts and enhances the public perception of fairness and justice. The Supreme Court must ensure the uniformity of case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system. In the CCJE's view, the public role of a Supreme Court, which consists of providing guidance *pro futuro* thus ensuring the uniformity of case law and the development of law, should be achieved through a proper filtering system of appeals. While admitting that such instruments can have a positive impact on the uniformity of case law and legal certainty, the CCJE is of the opinion that they raise concerns from the viewpoint of the proper role of the judiciary in the system of separation of state powers.[38]

The Grand Chamber of the Supreme Court, by reference to its task to assure the same (more precisely, the correct) application of rules of law by cassation courts (para 1, pt. 2 of Art. 45 of the Law of Ukraine 'On the Judiciary and the Status of Judges'[39]) is intended in its judgements to guide in one direction not only court practice of local and appellate courts, but also of cassation courts (including their divisions – joint chambers, chambers and boards) on controversial law enforcement issues. Therefore, legal positions of the Grand Chamber of the Supreme Court have certain peculiarities. First of all, they are aimed at the coordination of legal approaches of boards of judicial chambers, as well as the judicial chambers of the Cassation Criminal Court themselves, that is they aim to overcome differences in understanding of certain issues of criminal and criminal procedural law which arise in

35 Code of Ukraine (n 4).

36 Questionnaire for the preparation of the Consultative Council of European Judges Opinion No 20 (2017): 'The role of courts with respect to uniform application of the law' <https://rm.coe.int/16806f1e5b> accessed 23 December 2020.

37 J Ristik, 'The Role of the Supreme Court in Ensuring Uniformity of Court Practice in The Republic of Macedonia'. (2017) XLI (2) Annual of Institute for Sociological, Political and Juridical Research 57: 61.

38 Opinion No 20 (2017) (n 2).

39 Law of Ukraine (n 19).

the course of law enforcement activity. Secondly, they appear as a compromise solution to a problematic legal situation, a result of an analytical reflection of opinions of judges of different structural divisions of the highest authority in the judicial system of Ukraine.

At the same time the phrase of pt. 5 of Art. 434[1] of the CrPC of Ukraine 'formation of uniform law enforcement practice' extends to both cases of referral of criminal proceeding for consideration by a higher structural division of the Supreme Court, since the main task of this judicial authority in accordance with pt. 1 of Art. 36 of the Law of Ukraine 'On the Judiciary and the Status of Judges' is to assure stability and unity of court practice.[40] In terms of legal technique rules, the above mentioned provision does not appear to carry a meaningful burden and is therefore unnecessary.

Upon that, in the first instance, it is the responsibility of corresponding structural divisions of the Supreme Court to refer criminal proceedings (in parts 1, 2, 3 and 4 of Art. 434[1] of the CrPC of Ukraine the word 'refers' is used),[41] in the second instance, the reasonability of such a referral is left to discretion of the corresponding structural division of the Supreme Court – board of judges or chamber (in part 5 of Art. 434[1] of the CrPC of Ukraine the phrase 'is entitled' is used). Taking into account the importance of the legal problem which is to be resolved and the consequences of such a resolution for law enforcement and law-making, establishing discretion, regarding the referral of criminal proceedings, is inappropriate.

## 4 THE FAULT OF THE GROUNDS AND THE PROCEDURE FOR REFERRING THE CASE FOR CONSIDERATION TO A HIGHER-LEVEL STRUCTURAL DIVISION OF THE SUPREME COURT IN THE UKRAINIAN CRIMINAL PROCEDURE CODE

Amendments to the CrPC of Ukraine made by articles 434[1], 434[2] deserve critical appraisal.

First of all, they are capable of generating run-around – even before the start or during a cassation hearing as the criminal proceeding may be referred to another division of the Cassation Criminal Court of the Supreme Court. This, in its turn, is contrary to the principle of procedural economy because an irrational method of realization of criminal proceeding is chosen, which is characterized by long duration and a more costly achievement of tasks in a particular proceeding. This also shows subjectivity in deciding which judicial unit of cassation instance shall administer judicial control over justice of appealed judgment. The legal situation is further complicated by the authority of the Grand Chamber to return criminal proceedings referred to it to the lower structural division of the Cassation Criminal Court of the Supreme Court.

Secondly, the analysed novelties do not correlate with the principle of reasonableness of terms of a criminal proceeding. After the criminal proceeding has been referred for consideration to the chamber, joint chamber or the Grand Chamber of the Supreme Court, the cassation hearing becomes prolonged for an indefinite period. In addition, making such a decision after the beginning of a cassation hearing is related to its postponement. However, the postponement of a cassation hearing in such a case undermines, to the essence, such a criminal procedural institute because it is not related to an existence of obstacles which cannot be eliminated in this court hearing.

Thirdly, the criteria for the referral of criminal proceedings to consideration of the higher division of the Cassation Criminal Court of the Supreme Court and criteria for denial of its

40 Law of Ukraine (n 19).

41 Code of Ukraine (n 3).

acceptance are of a subjective nature, since they focus on feasibility and consideration, rather than on the needs of legal regulation and law enforcement activity.

The procedure for referring a criminal case is much more effectively regulated in the criminal procedure legislation of Italy. Thus, according to part 2 of Art. 610 of the Code of Criminal Procedure of Italy the president of the Court of Cassation, either upon request of the Prosecutor General or the lawyers, or of his own motion, shall assign the appeal to the Court of Cassation to the Joint Chambers when the issues raised are particularly relevant or when conflicts among the decisions of individual chambers need to be solved.[42] In addition, in part 1 of the Art. 618 of the Code of Criminal Procedure of Italy is stated that should a chamber realize that the question of law under its examination has caused or may cause judicial conflict, it may, upon request of the parties or of its own motion, refer the appeal to the Joint Chambers of the Court of Cassation, by issuing an order.[43] In this way, it is possible not only to prevent but also to eliminate the existing judicial conflict between the decisions of the chambers.

Fourthly, the provisions of Art. $434^1$ of the CrPC of Ukraine have established conditions for both the abuse by parties of their procedural rights and self-withdrawal of the board, judicial chamber or joint chamber from performance of the duties assigned to them. The Ukrainian legislator practically encourages the inactivity of the relevant division of cassation instance in the form of transfer of criminal proceedings for consideration to its higher structural division. A voluntary waiver of these divisions of court of cassation instance from their obligations helps to avoid liability for possible negative consequences of their judgements. This approach obviously does not correlate with the principle of publicity in criminal proceedings.

Fifthly, the method of maintaining the unity of court practice set out in articles $434^1$, $434^2$ of the CrPC of Ukraine is 'manual' and peculiar for the unstable regime of functioning of the judicial system. It may help to achieve positive results in a short-term perspective but for the long term forecast it will be smoothed down by negative occurrences in court practice. This method involves several subjects that produce legally significant decisions, creates a practice of administration of judicial control by structures of the Supreme Court higher by hierarchy, thereby unbalancing criminal procedural relations between interested persons and lower divisions of the highest body in the judicial system – the board of judges of cassation instance.

In our opinion, the coordination of the unified position of structural divisions of the Supreme Court in criminal proceedings should not be an element of the procedural form of the cassation proceeding but should be subject to the organizational and functional activity of this judicial body, regulated at the level of its internal acts.

## 5 THE REASONABLENESS OF THE CRIMINAL PROCEEDING REFERRAL FOR CONSIDERATION TO THE JOINT CHAMBER AND THE GRAND CHAMBER OF THE SUPREME COURT

The reasonableness of the referral and the consideration of criminal proceedings by the aforementioned judicial divisions of the Supreme Court raise substantial interest, taking into account the fact that the normative meanings of the categories 'similar legal relations' and 'an exclusive legal problem' are not defined.

As of today, about thirty judgments in the sphere of criminal procedure law have been

42 Code of Criminal Procedure of Italy (n 14).

43 Code of Criminal Procedure of Italy (n 14).

made by the joint chamber of the Cassation Criminal Court and the Grand Chamber of the Supreme Court upon the results of cassation hearings.

Such judgments were studied from the perspective of such a requirement as reasonableness. In particular, the reasonableness of chosen judgements of the Supreme Court was evaluated on a three-level scale – complete, partial and insufficient. Special attention was paid to arguments used for the referral of criminal proceedings for the consideration of higher judicial divisions of the Supreme Court and to their relevance (propriety). Relevance of arguments was evaluated by three indicators – fully relevant, partly relevant and also irrelevant.

First of all, it should be pointed out that there is no unity in judicial divisions of the Supreme Court on an understanding of the meaning of the term 'similar relations' which, without doubt, significantly complicates its fulfilment of the task of maintaining the consistency and unity of court practice.

The partial reasonableness of decisions of boards of judges of judicial chambers of the Cassation Criminal Court on referral of criminal proceeding to the Grand Chamber of the Supreme Court was demonstrated by the fact that they did not always contain sufficiently convincing arguments for motivation of existence of a reason for making this decision.

For example, the decision of the judges as of 2 April 2018 contains internal contradictions since the board of judges while dismissing the opening of the cassation proceeding simultaneously decided to refer the criminal proceeding for the consideration of the Grand Chamber of the Supreme Court.[44]

Besides that, partial motivation of decisions of boards of Cassation Criminal Court judicial chambers to refer a case to the Grand Chamber of the Supreme Court was also shown in the fact that these court decisions do not always take into account the specificity of the circumstances of criminal proceedings which may influence the motives that explain the necessity of the consideration of criminal proceedings by the Grand Chamber of the Supreme Court.

For example, the judges acknowledged the necessity of the referral of criminal proceedings on both grounds. With respect to one of them, the decision specified that the absence of explanation by the court to the accused of the right of a jury during a preparatory hearing cannot be an absolute ground for a cancellation of judgements. Instead, the Supreme Court of Ukraine states that non-compliance of the court with the requirements of Art. 384 of the CrPC of Ukraine is an absolute ground for a cancellation of judgements by higher courts. It is important to notice the difference between the legal situation considered by the Supreme Court of Ukraine and the one which was received for consideration of the board of judges of the Cassation Criminal Court of the Supreme Court. In the first case, the prosecutor did not explain to the accused the possibility and the peculiarities of the hearing of the criminal proceedings against him by jury and did not attach a corresponding written explanation to the indictment act and the register of pre-trial investigation materials. During the proceeding, the court of the first instance not only failed to correct these defects but also violated pts. 1 and 2 of Art. 384 of the CrPC of Ukraine as long as it did not explain to the accused his right to hear the case by the jury and the specificity of such a proceeding. This means that the right to have the criminal case by jury was not explained to the accused at all. Instead of this, in the criminal proceedings which was the subject of consideration of the board of judges of the Cassation Criminal Court of the Supreme Court during a preparatory hearing the court, in the first instance, did not explain to the defendant this right and did not clarify his opinion in this regard. However later, when the prosecution was changed during the trial and the accused were charged with the crime under pt. 2 of Art. 115 of the

44 The decision in case No 51-3680ск18 (Cassation Criminal Court as a part of the Supreme Court, 02 April 2018).

Criminal Code of Ukraine, the court of the first instance explained to them both the right to hear their case by jury. Therefore, in such a manner, a previously made substantial breach of requirements of criminal procedure law was corrected. In this situation not explaining the right to have the jury trial to the accused at the stage of the preparatory proceeding is a conditional reason for the cancellation of the sentence.[45]

There are no identified examples of insufficient motivation of the decisions of boards of judicial chambers of Cassation Criminal Court on referral of case for consideration by the Grand Chamber of the Supreme Court on the analysed ground.

The partial relevance of arguments in decisions of boards of the judicial chambers of the Cassation Criminal Court on the referral of criminal proceeding for consideration by the Grand Chamber of the Supreme Court appeared in fact that in motivating part of some of these court decisions along with the proper means of argumentation there were used theses which were non-relevant to legal situation that were considered by the court of cassation instance.

Thus, in the decision of the board of judges of the second judicial chamber of the Cassation Criminal Court as of 5 July 2018 the following means of argumentation were used: 1) rules of the CrPC of Ukraine; 2) Art. 6 of the European Convention on Human Rights (hereinafter – ECHR); 3) provisions of the Instruction on organization of investigative (searching) actions conduction and the use of their results in criminal proceedings, approved by the Order of the General Prosecutor of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, the Administration of the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice as of 16 November 2012; 4) the court ruling of the Supreme Court of Ukraine as of 16 March 2017 in case № 5-364кс16 which states that non-disclosure by parties of materials under procedure established in this article is a separate basis for recognition of such materials as inadmissible evidence; 5) the judgment of the Constitutional Court of Ukraine № 12рп/2011 as of 20 October 2011 which states that only actual data obtained in accordance with requirements of criminal procedure legislation may be legitimated and used as evidence in criminal cases; 6) the judgment of ECtHR as of 24 November 2000 in the case of *Daktaras vs. Lithuania* which states that admissibility of evidence is a matter for national courts and judgment of the ECtHR as of 26 March 1996 in the case *Doorson vs. Netherlands* which states that the right to open corresponding evidence is not an absolute right. From the means mentioned above, the rules of the CrPC of Ukraine and the provisions of instruction on the organization of investigative (searching) actions conduction and the use of their results in criminal proceedings are completely relevant to the legal situation that was the subject matter of cassation revision. Instead of this, decisions of the Supreme Court of Ukraine, the Constitutional Court of Ukraine and the ECtHR are partly relevant because they formulate legal positions on issues that are only indirectly related to the case under consideration. In turn, the reference to Art. 6 of the ECHR shall be admitted as an irrelevant means of motivation as there are no rules which have at least some connection to the analysed legal situation.[46]

The partial reasonableness of court rulings of the Grand Chamber of the Supreme Court lies in fact that while recognizing the very fact of existence of complex theoretical and applicative issues which need to be resolved at the level of the highest structural division of the Supreme Court a judgment on the consequences of a cassation hearing formulates a legal position on resolving only one of such issues. Instead of this, another issue is not resolved.

For example, in a court ruling as of 12 September 2018, the Grand Chamber of the Supreme Court, along with the necessity to partially deviate from the conclusion of the Supreme Court

45 The decision in case No 523/6472/14-к (Cassation Criminal Court as a part of the Supreme Court, 05 June 2018).

46 The decision in case No 751/7557/15-к (Cassation Criminal Court as a part of the Supreme Court, 05 July 2018).

of Ukraine, recognized the existence of an exclusive legal problem regarding the application of a preventive measure at the stage of the cassation proceeding, not in general, but in the context of a specific case referred for its consideration. At the same time, this court ruling contains information neither about the essence of such a problem, nor about its reasons. Moreover, the Grand Chamber of the Supreme Court did not investigate ways of resolving such an exclusive legal problem since, under the consequences of cassation proceedings, the sentence was not cancelled, and the criminal proceeding was not submitted for a new trial in a court of lower instance. On the other hand, with regard to the existence of procedural authorities of the cassation court to examine evidence which was not submitted by the parties to courts of the lower instance, the Grand Chamber of the Supreme Court did not recognize it as an exclusive legal problem. However, this did not prevent it from formulating conclusions on the application of rules of law in this situation.[47]

According to the results of the conducted research there were no revealed cases of partial or insufficient reasonability of court rulings of the Grand Chamber of the Supreme Court on grounds of necessity to deviate from the conclusion on the application of the rule of law in similar legal relations set out in previously adopted judicial decisions of the Supreme Court of Ukraine or the Supreme Court, as well as the partial relevance or irrelevance of arguments used in court rulings. Similarly, the examples of partial or insufficient argumentation in the decision of the Supreme Court on the return of criminal proceedings for reconsideration as well as the partial relevance and irrelevance of arguments used therein were not found.

Most decisions on the referral of the criminal proceeding to be considered by the Grand Chamber of the Supreme Court and court rulings of the Grand Chamber of the Supreme Court on the results of cassation hearing contain a partial motivation of the existence of an exclusive legal problem.

Such a statement derives from the fact that judgments of the Supreme Court do not formulate features and meaning of an exclusive legal problem and do not analyse reasons for its occurrence. In addition, judgments which were examined do not provide an interpretation of the term 'an exclusive legal problem,' as well as categories related with it – the 'development of law' and the 'formation of uniform law enforcement practice' which complicates the understanding and the application of corresponding rules of criminal procedure law (articles $434^1$, $434^2$ of the CrPC of Ukraine).[48]

It is fair to say that in the decision of the Grand Chamber of the Supreme Court on taking a cassation proceeding to consideration, the semantic meaning of term 'problem' has been disclosed and an approach has been outlined to the formulation of the definition of 'a legal problem' – 'contradictory situations characterized by opposite approaches to understanding of certain events, statuses, processes, occurrences or objects and which require formulation of recommendation or proposal that will allow to solve the corresponding problem.'[49]

The partial reasonableness of decisions of boards of judges of the judicial chambers of the Cassation Criminal Court on referral of cases for consideration by the Grand Chamber of the Supreme Court, in our opinion, has been manifested in the fact that some of them lack clear, evident and convincing arguments for the necessity of making such a decision.

For example, in the decision of the judges as of 6 March 2018 there is no formulation of the meaning of an exclusive legal problem. It is unclear whether it should be considered as a failure by investigating judges to comply with requirements of criminal procedural law by an overreaching of their authorities, or whether such a problem consists in contradiction

47 The decision in case No 523/6472/14-к (n 44).

48 Code of Ukraine, (n 4).

49 Decision in case No 243/6674/17-к (Grand Chamber of the Supreme Court, 12 April 2018).

to appellate and cassation practice, or for both reasons. Moreover, the board of judges did not express itself clearly concerning any support or disapproval of the legal position of the Supreme Court of Ukraine set out in the court ruling as of 12 October 2017.[50]

An insufficient argumentation of decisions of boards of judges of judicial chambers of the Cassation Criminal Court on referral of case for consideration by the Grand Chamber of the Supreme Court was expressed in an abstractive summary of the legal situation which was the subject matter of a cassation hearing without formulation of its own legal position and therefore the grounds for the hearing of criminal proceedings by the Grand Chamber of the Supreme Court.

For example, the judges in the decision as of 6 March 2018 retold how the Supreme Court of Ukraine in its court ruling as of 12 October 2017 mentioned that in a case of making by an investigating judge a decision which is not provided by criminal procedural rules to which refer provisions of part 3 of Art. 309 of the CrPC of Ukraine, the court of appeal is not entitled to refuse checking its legality, appealing to provisions of part 4 of Art. 399 of the CrPC of Ukraine. The right to appeal such judgment is subject to securing it on the basis of item 17 of part 1 of Art. 7 and part 1 of Art. 24 of the CrPC of Ukraine, which guarantee it.

But then the judges of the Supreme Court have drawn another conclusion, that the decision of the investigating judge, on appointment of unscheduled documentary inspection on compliance with requirements of tax, currency and other legislation, is not subject to appeal because such kind of a decision is not included in the list provided by part 1 of Art. 309 of the CrPC of Ukraine. From the abovementioned legal positions, it is evident that the judges, in fact, deviated from the previously formulated conclusion of the Supreme Court of Ukraine. However, the judges took a neutral position – neither supporting nor disapproving the above conclusions. Moreover, it is not clear from this decision where exactly an exceptional legal problem is, the existence of which is stated by the board of judges, what its reasons are and why there is no unity of cassation practice.[51]

The partial relevance of various types of arguments in decisions of the judges of the Cassation Criminal Court on referral of a case to the Grand Chamber of the Supreme Court was manifested in the use of arguments which both concern and do not concern complicated theoretical and applicative issues which are subject matter of the cassation hearing.

Thus, in the decision of the judges the following grounds of motivation were used: 1) the rules of criminal procedural law of Ukraine which do not provide for the right of the investigating judge to make a decision about the authorization of unscheduled inspections; 2) an analysis of court practice which gave a possibility to state the wide extent of cases where investigative judges made decisions about permitting unscheduled inspections; 3) the study of the practice of courts of appeal instance when some reporting judges opened appeal proceedings on a complaint and others refused to do so on the grounds of which its contradiction is established; 4) investigation of cassation court practice which implies that cassation instance both leaves decision on the refusal to open appeal proceedings unchanged and annuls it with a return to the previous stage of criminal proceedings which does not contribute to a unity of court practice; 5) the provisions of Art. 8 of the ECHR content of which provides that unscheduled inspections could potentially lead to a breach of Art. 8 of the ECHR; 6) the legal position of the ECtHR from which it follows that by granting permission for an unscheduled inspection, an investigating judge acts not as judicial authority which prevents possible violations from the side of the investigating authorities, but in fact, initiates such an inspection giving an investigator or prosecutor powers which the law does not empower

50 Ibid (n 48).

51 The decision in case No 237/1459/17 (Cassation Criminal Court as a part of the Supreme Court, 06 March 2018).

them with; 7) provisions of the Constitution of Ukraine which outline the limits of state interference in the rights and freedoms of an individual; 8) Art. 36 of the Law of Ukraine 'On the Judiciary and Status of Judges' which determines powers of the Supreme Court in the court system of Ukraine; 9) the decisions of the ECtHR which express legal positions regarding the right of the supreme judicial authority to interpret legal rules and to make decisions which are not expressly provided by law. The last three grounds are not relevant as they do not concern the legal situation that was the subject matter of the cassation hearing.[52]

The irrelevance of different kinds of arguments in the decisions of the boards of judges of judicial chambers of the Cassation Criminal Court within the Supreme Court on referral of cases for consideration by the Grand Chamber on the aforementioned grounds was not established.

In our opinion, the partial reasonableness of court rulings of the Grand Chamber of the Supreme Court was expressed by the fact that they do not always formulate an independent legal position nor use their own arguments to confirm it.

In the court decision it is mentioned that in the case of making by the investigating judge a decision which was not provided by criminal procedural rules, and which refers to provisions of part 3 of Art. 309 of the CrPC of Ukraine, the court of appeal instance is not entitled to refuse to check its legality on the grounds of provisions of part 4 of Art. 399 of the CrPC of Ukraine. The right to appeal such a judgment shall be secured on the basis of item 17, pt. 1 of Art. 7 and part 1 of Art. 24 of the CrPC of Ukraine which guarantee it. However, it does not further interpret the wording of item 8 of Art. 129 of the Constitution of Ukraine which guarantees the right of appeal review and also the provisions of Art. 24 of the CrPC of Ukraine, which, in particular, guarantees the right to review by a court of a higher level a sentence, a court decision concerning rights, freedoms or interests of a person regardless of whether such person participated in the court hearing.[53]

The partial relevance of different kinds of arguments in court rulings of the Grand Chamber of the Supreme Court is expressed in the fact that inappropriate reference to provisions of the ECHR occurs sometimes.

Namely, the means provided by the decision of the Supreme Court with reference to the provisions of Art. 8 of the ECHR do not appear to be relevant since this article guarantees the right to respect private and family life but the context of this criminal proceeding refers to public activity of the Limited liability company. Legal positions of the Constitutional Court of Ukraine, the ECtHR and the Supreme Court of Ukraine in relevant cases which were used in a court ruling of the Grand Chamber are partly relevant as they do not directly concern the legal situation which was the subject matter of the cassation review but outlines the general approach to limitations of rights on appeal.[54]

As a result of an analysis of decisions on the referral of criminal proceedings for consideration by the Grand Chamber of the Supreme Court and the decisions of the Grand Chamber of the Supreme Court under the consequences of a cassation hearing a situation was revealed in which two criminal proceedings with the same problematics – the lawfulness of decisions of investigating judges on the holding of unscheduled inspections and the possibility of appealing against these decisions – had reasoning for the existence of an exclusive legal problem, the necessity for its resolution at the level of the Grand Chamber of the Supreme Court, as well as the reasoning of the conclusion of the Grand Chamber itself which substantially differed in completeness.[55]

52 The decision in case No 243/6674/17-к, (n 48).

53 The decision in case No 237/1459/17 (n 50).

54 The decision in case No 243/6674/17-к (n 48).

55 The decision in case No 243/6674/17-к (n 47); The decision in case No 237/1459/17 (n 50).

In conclusion, let us focus on the analysis of the reasonableness of decisions of boards of judges of judicial chambers of the Cassation Criminal Court on referral of criminal proceeding for consideration by the joint chamber of this structural division of the Supreme Court, as well as judgments of the joint chamber upon results of hearing.

For example, in the decision of the judges on case referral for consideration by the joint chamber of the Cassation Criminal Court, conclusions provided by the decision of the Grand Chamber of the Supreme Court as of 23 January 2019 were not taken into account. Although this judgment concerns the possibility of appeal in the cassation of amnesty judgments, it does set out conclusions on appeal in the cassation of judgments on a stage of the enforcement of judgments in general. Thus, item. 43 of this decision points out that, based on the provisions of item 8 of Art. 129 of the Constitution of Ukraine in wording as of 2 June 2016, the right of a person to appeal in cassation against a judgment in criminal proceedings has a limited nature and may be realized only in cases provided by the CrPC of Ukraine. In item 40 of the same judgment, it is emphasized that Art. 539 of the CrPC of Ukraine does not provide the possibility of the cassation review of judgments made at the stage of the enforcement of a court sentence. Taking into account these legal rules, the board of judges of the second judicial chamber of the Cassation Criminal Court could quite independently and without the referral of the criminal proceeding for consideration by the joint chamber of the Cassation Criminal Court make a decision on the possibility of appeal in the cassation of decision about the cancellation of the release of those convicted from the service of the sentence with probation.[56]

## 6 CONSISTENCY OF COURT PRACTICE OF THE STRUCTURAL DIVISIONS OF THE SUPREME COURT

Legal positions established by the Supreme Court in the sphere of criminal proceedings do not have a stable nature and are sometimes contradictory. We will provide some examples of cases in which the Supreme Court decided on criminal cases in contradiction to its own legal position formulated in a similar case.

Thus, in the decision it is mentioned that carrying out the inspection of housing does not require the decision of an investigating judge.[57]

An opposite legal opinion on this issue was expressed by the judges – if an event which is the reason for an inspection, happened in housing or in another possession of a person, the requirements provided by Art. 30 of the Constitution of Ukraine and the relevant provisions of articles 13, 233, 234 and 237 of the CrPC of Ukraine shall be applied to the carrying out of such an inspection.[58]

Apparently, at the level of the Criminal Cassation Court within the Supreme Court there is no unity regarding the question of whether the decision by an investigative judge is required for an inspection of the scene in housing or another possession of a person. In this case, the Supreme Court did not assure the stability and unity of court practice as is required by part 1 of Art. 36 of the Law of Ukraine 'On the Judiciary and the Status of Judges'.[59]

56 The decision in case No 756/9514/15-к (Cassation Criminal Court as a part of the Supreme Court, 14 February 2019).

57 The decision in case No 752/17016/16-к (Cassation Criminal Court as a part of the Supreme Court, 01 February 2018).

58 The decision in case No 159/451/16-к (Cassation Criminal Court as a part of the Supreme Court, 12 February 2019).

59 Law of Ukraine (n 19).

Following the legal positions which contain differences with the previously formulated conclusions on the application of rules of law – the decision of an investigating judge on the full or partial cancellation of an arrest of the property made under the rules of Art. 174 of the CrPC of Ukraine is not subject to appeal,[60] an appeal against the decision of an investigating judge on the complaint submitted in an order established by Art. 206 of the CrPC of Ukraine is not provided by the law.[61] The motivation of such legal positions is based on the fact of an absence of these decisions of investigating judges in the list of court decisions that may be appealed (Art. 309 of the CrPC of Ukraine).

While formulating these legal positions the joint chamber of the Criminal Cassation Court should have taken into consideration the legal position of the Grand Chamber of the Supreme Court set out in the decision[62] and in the decision[63] which state that the decisions of investigating judges concerning the authorization of unscheduled inspections can be appealed regardless of the fact that such decisions are not mentioned in Art. 309 of the CrPC of Ukraine. In this case, according to the authors, the joint chamber of the Cassation Criminal Court has neglected the already formulated court practice of the Grand Chamber of the Supreme Court.

In our opinion, the position of the Grand Chamber of the Supreme Court expressed in the decision as of 16 October 2019 is also contradictory – if the prosecution, during the pre-trial investigation, took time with all the necessary and possible measures aimed at the disclosure of procedural documents which became the grounds for conducting unspoken investigative (search) actions but such documents were not disclosed for the reasons which did not depend on the will and procedural behaviour of the prosecutor, the court may not automatically recognize the reports of unspoken investigative (search) actions as inadmissible evidence on the motives of the non-disclosure of procedural documents which sanctioned their conduct.

In fact, by this legal position, the Grand Chamber of the Supreme Court stepped back from the position previously formulated by it in its court ruling as of 16 January 2019 – the procedural documents which became the grounds for conducting unspoken investigative (search) actions and which were not disclosed to the defence party in accordance with the procedure laid down by Art. 290 of the CrPC of Ukraine may be open to another party since they were not in the possession of prosecution at that time, but the court shall not admit the information contained in these materials of criminal proceedings as evidence.

As indicated in p. 31 of Opinion 20 (2017) of the CCJE 'On the Role of Courts with Respect to Uniform Application of the Law', the deviation from produced court practice should only be made if there is an urgent need.[64] However, such a need has not been explained by the aforementioned structural divisions of the Supreme Court.

## 7 CONCLUSIONS

One of the ways in which the highest national courts can ensure the unity and sustainability of judicial practice is by referring a criminal case to the highest division of the Supreme Court. Structural divisions of the Supreme Court play a crucial role in the equal application of the court practice, a provision of its stability.

60 The decision in case No 569/17036/118 (Cassation Criminal Court as a part of the Supreme Court, 19 February 2019).

61 The decision in case No 766/22242/17 (Cassation Criminal Court as a part of the Supreme Court, 27 May 2019).

62 The decision in case No 243/6674/17-к (n 48).

63 The decision in case No 237/1459/17 (n 50).

64 Opinion No 20 (2017), (n 2) items 6, 20.

Some European countries have fixed the grounds and procedure for such a referral in their criminal procedure legislation. The Ukrainian legislator has borrowed legal regulation of this issue, while establishing a number of national features.

The wording of articles 434[1], 434[2] of the CrPC of Ukraine which establishes grounds and a procedure of referral of criminal proceedings for consideration by the corresponding structural divisions of the Supreme Court is not only not free from defects associated with compliance to requirements of legislative technique and doctrinal justification but also represents the introduction of a 'manual' method of maintaining the unity of court practice which is peculiar for an unstable regime of functioning of the judicial system.

In general, the level of reasonableness of judgments by the Supreme Court on the referral of criminal proceeding for consideration by the higher judicial division is quite high but, in some respects, it still requires improvements. Firstly, the Grand Chamber of the Supreme Court has to clarify the meaning of categories 'similar legal relations' and 'an exclusive legal problem'. Secondly, in the decisions of the boards of judges of the judicial chambers of the Criminal Cassation Court on the referral of criminal proceedings for consideration by the Grand Chamber of the Supreme Court, it is reasonable to bring forward more convincing arguments for the justification of the existence of the grounds for reaching this decision and to use only a relevant means of argumentation in their motivating p Thirdly, the boards of judges of the judicial chambers of the Criminal Cassation Court should check whether the Grand Chamber of the Supreme Court has already formulated the conclusion regarding similar legal situations before deciding to refer the criminal proceeding for consideration by the joint chamber of this court. Fourthly, the Grand Chamber of the Supreme Court in court rulings on the consequences of the cassation review should provide legal positions on all complex theoretical and applicative issues which need to be resolved at the level of the highest judicial division of the Supreme Court using its own evidence for its substantiation.

The provisions of the criminal procedural legislation of Ukraine and the activity of the Supreme Court have not assured the absence of differences and contradictions in law enforcement. It is not uncommon in the activity of the Supreme Court that one of its structural divisions becomes a source of uncertainty and of contradiction in court practice instead of the assurance of its unity. Therefore, the implementation of the principle of legal certainty (*res judicata*) and the doctrine of the stability of justice (*jurisprudence constante*) in Ukraine is far from optimal.

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All the coauthors read, approved the final version and agreed to be accountable for all aspects of this article.

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# THE PROTECTION OF THE WORKER`S RIGHT TO FREEDOM OF ASSOCIATION: THE ECTHR CASE-LAW

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**Summary:** 1. Introduction. – 2. Positive and Negative Obligations of the State in Protecting the Right to Freedom of Association. – 3. The Legal Nature and Content of the Right to Freedom of Association. – 4. Restrictions on the Freedom of Trade Unions. – 5. Conclusions.

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## CONTRIBUTOR

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## DISCLAIMER

The author declares that she was not involved in the analysed activities and has no relations with these bodies.

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# THE PROTECTION OF THE WORKER`S RIGHT TO FREEDOM OF ASSOCIATION: THE ECTHR CASE-LAW

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***Abstract*** *The article is devoted to the study of the freedom of association of workers as an important element of the mechanism of the protection of labour rights, and also as a tool for effective social dialogue aimed at improving working conditions and ensuring the socio-economic well-being of workers. It is established that although the right to form and join trade unions under the ECHR is part of the right to freedom of association, its content is quite broad, as it is determined by the purpose of such association, which is to protect the interests of workers. Therefore, a wide range of collective redress, including the right to collective bargaining and the right to strike, are now an integral part of the right of workers to form or join trade unions. The study pays special attention to the analysis of the case-law of the ECtHR, which allowed the author to identify key elements of the content of the right of employees to association and determine the positive and negative obligations of the state that are necessary to ensure its effectiveness and protection. Taking this analysis into account and examining the national case-law, gaps in the legal regulation of freedom of association of workers in Ukraine have been identified, and proposals for their elimination have been made.*

***Keywords****: freedom of association; trade union; protection against discrimination; strike; collective bargaining; case-law of the ECtHR*

## 1 INTRODUCTION

The right of workers to form and join associations in order to protect their socio-economic interests is an integral part of a democratic society and modern legal regulation of labour. This right is of particular importance for the protection of labour rights because the employee, despite the declared equality, is a weaker party in the employment relationship compared to the employer. Accordingly, the association of workers, especially the creation of trade unions, gives them additional opportunities to 'be on an equal footing' with the employer. A trade union, as a separate subject of labour law, is endowed with significant powers and rights to represent and protect the interests of its members, which strengthen and supplement the catalogue of individual labour rights of employees.

The right to freedom of association of workers in the domestic legal doctrine is most often considered through the prism of trade union activity. Thus, O.O. Pifko studied the constitutional and legal status of trade unions in Ukraine and several EU countries in detail, determining the content of the right to association and its place in the system of constitutional human rights.[1] A thorough analysis of the labour and legal status of trade

1 O Pifko, 'Constitutional and legal principles of the formation and activities of trade unions in Ukraine and in the EU member countries: A comparative study' (Dr of Law thesis, Uzhhorod National University 2019).

unions was conducted by Yu.M. Shchotova. The author particularly defined the principles of trade unions in the transformation of labour relations and made proposals on how to improve the regulation of their activities, including the need to specify the responsibilities of trade unions as an important means of protecting the interests of their members.[2] The realisation of the right of employees to unite through the creation of trade unions, its restrictions, and areas of improvement was studied by O.G. Sereda,[3] J.W. Simutina,[4] N.A. Tsyganchuk,[5] and others.

The works of Yu.V. Kyrychenko,[6] O.Yu. Pogrebniak,[7] and O.A. Triukhan[8] are devoted to the analysis of the normative regulation of the right to freedom of association in trade unions at the international and national levels. It is also worth noting the theoretical and legal study of V.V. Solominchuk,[9] who not only analysed the peculiarities of trade union participation in the process of interaction between civil society and the state and the limits of the latter's interference in trade union activities but also identified the role and forms of trade union participation in human rights. Some aspects of trade union participation in the protection of workers' rights are covered in a study by T. Semigina[10] (on the right to professional development), R.Ya. Butynska (on the exercise of the right to collective bargaining and resolution of collective disputes),[11] and O.V. Zhadan (on the protection of workers from informal employment).[12]

The right to freedom of association of workers is also studied in the context of trade union activity by many foreign researchers. Thus, M. Seeliger, I. Wagner,[13] and B. Larsson[14] emphasise the importance of the right to unite in trade unions at the supranational level, especially for the formation of EU policy. Regarding the analysis of the role of the principle of freedom of association in the protection of labour rights, we should also mention the works of M.

2 Yu Shchotova, 'Legal mechanism for implementing the functions of trade unions as subjects of labour law' (Dr of Law thesis abstract, Taras Shevchenko National University of Kyiv 2013).

3 O Sereda, 'Powers of trade unions in the mechanism of legal protection of workers' rights' (2015) 15 (1) Scientific Bulletin of the International Humanities University. Series: Jurisprudence 123–125.

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12 O Zhadan, 'Prospects for the development of trade unions in the transformation of the system of regulation of social and labour relations']2020) 4 (71) Theory and Practice of Public Administration 155–162.

13 M Seeliger, I Wagner, 'A socialization paradox: Trade union policy cooperation in the case of the enforcement directive of the posting of workers directive' (2018) Socio-Economic Review <https://doi.org/10.1093/ser/mwy037> accessed 10 December 2020.

14 B Larsson, 'Trade union channels for influencing European Union policies' (2015) 5 Nordic Journal of Working Life Studies 101–121.

Wilhelm, A. Kadfakb,[15] N. Egels-Zandéna H. Lindholm,[16] and L. Goerke, M. Pannenberg.[17] Many researchers emphasise the importance of intensifying trade union activities to ensure employment (Y. Wang, K. Ouattarab[18]), the protection of platform workers (M. Grahama, J. Woodcock, R. Heeksb,[19] U. Brand, M. Niedermoser[20]), the implementation of the concept of decent work (Sh. Rai, B. Brown, K. Ruwanpurac[21]), and maintaining the mental health of workers (J. Wels[22]).

The purpose of this article is to analyse the current content of the right to freedom of association according to the case-law of the ECtHR, to study the peculiarities of its application by national courts, and to establish the role of trade unions to protect labour rights and interests.

The right to freedom of association is an important tool for achieving social justice through social dialogue between workers and employers (*Sindicatul Păstorul cel Bun v Romania,*[23] para. 130). On the other hand, according to the International Labour Organization (ILO), the preconditions for a sound social dialogue include strong, independent organisations of workers and employers with the technical capacity to access to relevant information, as well as respect for the fundamental rights of freedom of association and collective bargaining.[24] When social dialogue functions properly, it promotes justice and legality and allows long-term solutions to be found to the most difficult problems in the field of labour, which are then applied by those who participated in their development.[25]

Employees participate in social dialogue through the creation of associations, as social dialogue relations are collective. Thus, according to the Law of Ukraine 'On Social Dialogue in Ukraine', the parties to the social dialogue at the national, sectoral, and territorial levels include the trade union side, and only at the production level can there be a trade union or

15 M Wilhelm et al, 'Private governance of human and labour rights in seafood supply chains – The case of the modern slavery crisis in Thailand' (2020) 115 Marine Policy <https://doi.org/10.1016/j.marpol.2020.103833> accessed 10 December 2020.

16 N Egels-Zandéna, H Lindholm, 'Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation' (2015) 107 Journal of Cleaner Production 31–40 <https://doi.org/10.1016/j.jclepro.2014.08.096> accessed 10 December 2020.

17 L Goerke, M Pannenberg, 'Trade union membership and sickness absence: Evidence from a sick pay reform' (2015) 33 Labour Economics 13–25 <https://doi.org/10.1016/j.labeco.2015.02.004> accessed 10 December 2020.

18 Y Wang, K Ouattarab, 'Employment double dividend hypothesis with the presence of a trade union' (2020) 193 Economics Letters <https://doi.org/10.1016/j.econlet.2020.109273> accessed 10 December 2020.

19 M Grahama, J Woodcock et al, 'The Fairwork Foundation: Strategies for improving platform work in a global context' (2020) 112 Geoforum 100–103 <https://doi.org/10.1016/j.geoforum.2020.01.023> accessed 10 December 2020.

20 U Brand, M Niedermoser, 'The role of trade unions in social-ecological transformation: Overcoming the impasse of the current growth model and the imperial mode of living' (2019) 225 Journal of Cleaner Production 173–180 <https://doi.org/10.1016/j.jclepro.2019.03.284> accessed 10 December 2020.

21 Sh Rai, B Brown, K Ruwanpurac, 'SDG 8: Decent work and economic growth – A gendered analysis' (2019) 113 World Development 368–380 <https://doi.org/10.1016/j.worlddev.2018.09.006> accessed 10 December 2020.

22 J Wels, 'The role of labour unions in explaining workers' mental and physical health in Great Britain. A longitudinal approach' (2020) 247 Social Science & Medicine <https://doi.org/10.1016/j.socscimed.2020.112796> accessed 10 December 2020.

23 *Sindicatul 'Păstorul cel Bun' v Romania* App no 2330/09 (ECtHR, 9 July 2013) <http://hudoc.echr.coe.int/eng?i=001-122763> accessed 10 December 2020.

24 International Labour Organization, 'Tripartism and social dialogue' <https://www.ilo.org/global/topics/workers-and-employers-organizations-tripartism-and-social-dialogue/lang--en/index.htm> accessed 10 December 2020.

25 International Labour Organization, 'Work for a Brighter Future: report of the Global Commission on the Future of Work' (2019) 23 <https://www.ilo.org/infostories/en-GB/Campaigns/future-work/global-commission> accessed 10 December 2020.

freely elected collective bargaining representatives (Art. 4).[26] Therefore, the right of workers to freedom of association is important not only to protect their socio-economic interests but also to improve the legal regulation of labour, improve working conditions, and ensure social justice in labour relations through social dialogue. At the same time, without the proper regulation of guarantees for the freedom of association of employees, social dialogue cannot be realised. This is because regulation provides for bilateral or tripartite consultations and negotiations of the subjects, which must be independent and free in their activities. Otherwise, social dialogue is formal, legitimising the decisions of public authorities through collective bargaining and collective agreements.

Freedom of trade union activity is recognised as a prerequisite for continued progress under the 1944 ILO Declaration on the Goals and Objectives.[27] The content of the right of employees to association is currently most thoroughly reflected in the case-law of the ECtHR. Thus, Art. 11 of the 1950 ECHR,[28] which defines the jurisdiction of the ECtHR, enshrines 'the right to freedom of association with others, including the right to form and join trade unions for the protection of one's interests'.

In this case, the provisions of the ECHR are not applied separately but together with the system of standards enshrined in international law in the relevant field. For example, the decision of the *National Union of Rail, Maritime and Transport Workers v the United Kingdom*[29] (para. 76) states that the ECHR cannot be applied 'in a vacuum' but should be interpreted in light of the general principles of international law. A similar provision is reflected in the decisions of *Manole and 'Romanian Farmers Direct' v Romania*[30] (paras. 61, 67) and *Demir and Baykara v Turkey*[31] (paras. 85, 230), which further emphasise that in defining the meaning of terms and notions in the text of the ECHR, the Court can and must take into account elements of international law, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. In all these cases, the ECtHR emphasises the need to interpret the scope of trade union freedom to the extent that is generally accepted in international law.

Therefore, in addition to the ECHR and the case-law of the ECtHR, the European Social Charter (revised) of 1996[32] and a number of ILO conventions, including two fundamental conventions (Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948[33] and Right to Organise and Collective Bargaining Convention No. 98 of 1949) are important in determining the content and specifics of the protection of workers' rights to freedom of association:[34]

26 The Law of Ukraine 'On Social Dialogue in Ukraine' 2862-VI [2010] Vidomosti of the Verkhovna Rada 28/255.

27 International Labour Organization, *Declaration concerning the aims and purposes of the ILO* (Declaration of Philadelphia, 1944) <https://zakon.rada.gov.ua/laws/show/993_328> accessed 10 December 2020.

28 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] <https://zakon.rada.gov.ua/laws/show/995_004#Text> accessed 10 December 2020.

29 *National Union of Rail, Maritime and Transport Workers v the United Kingdom* App no 31045/10 (ECtHR, 8 April 2014) <http://hudoc.echr.coe.int/eng?i=001-142192> accessed 10 December 2020.

30 *Manole and 'Romanian Farmers Direct' v Romania* App no 46551/06 (ECtHR, 16 June 2015) <http://hudoc.echr.coe.int/eng?i=001-155631> accessed 10 December 2020.

31 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) <http://hudoc.echr.coe.int/eng?i=001-89558> accessed 10 December 2020.

32 Council of Europe, *European Social Charter* (revised) [2006] Official Gazette of Ukraine 40/2660.

33 International Labour Organization, *C87 Freedom of Association and Protection of the Right to Organise Convention* [1948] <https://zakon.rada.gov.ua/laws/show/993_125#Text> accessed 10 December 2020.

34 International Labour Organization, *C98 Right to Organise and Collective Bargaining Convention* [1949] <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/righttoorganiseandcollectivebargainingconventionno98.pdf > accessed 10 December 2020.

Thus, Convention No. 87 stipulates:
- the right of employees to create an organisation of their choice without prior permission, as well as the right to join such organisations (Art. 2), with a single restriction – the relevant organisations must act in accordance with the law (Art. 8);
- the obligation of public authorities to refrain from interfering in the activities of the relevant organisations of employees (Art. 3), including their dissolution or temporary prohibition in the administrative order (Art. 4).

Convention No. 98 guarantees workers' protection against discrimination on the grounds of trade union membership (Art. 1) and elaborates the guarantees of the prohibition of state interference in the activities of workers' organisations (Art. 2). At the same time, the Convention lays down the legal basis for social dialogue to regulate social and labour relations. Thus, according to Art. 4, states should take measures to encourage and promote the use of collective bargaining between workers' and employers' organisations in order to regulate working conditions.

The principle of freedom of association and the effective recognition of the right to collective bargaining is one of the four fundamental principles and rights at work (ILO Declaration on Fundamental Principles and Rights at Work, 1998).[35] That is, the International Labour Organization assumes that freedom of association (freedom of association in the context of Art. 11 of the ECHR) and the right to collective bargaining are interrelated. This connection is also emphasised in the current case-law of the ECtHR, although for a long time, collective bargaining was not defined by the ECtHR as an element of the right to freedom of association.

Thus, without a proper guarantee of the freedom of association of workers, the exercise of the right to collective bargaining is either limited or impossible, as the workers' union itself participates in negotiations with employers (trade unions or other bodies authorised by workers, but usually trade unions). Conversely, it is through effective collective bargaining that a union can gain additional recognition from employees, ensure that more people join it, and, through representativeness, have more leverage with the employer.

The European Social Charter (revised) of 1996 also enshrines the right of workers to form or join organisations for the protection of their economic and social interests (Art. 5). The right of association in the Charter is quite general in comparison with the ECHR. At the same time, defining the content of the right to collective bargaining, the Charter enshrines the positive obligations of states to facilitate joint consultations and negotiation mechanisms between workers and employers, as well as the need to regulate the right of workers and employers to collective action, including the right to strike (Art. 6). Therefore, in its practice, the ECtHR refers to the provisions of the Charter when interpreting certain elements of the right to freedom of association of workers and defining the limits of state intervention in the restriction of this right. The extension of the content of the right to freedom of association into trade unions by identifying opportunities for collective bargaining and strikes in the case-law of the ECtHR has taken place, *inter alia*, under the influence of the provisions of the revised Charter.

35 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work* [1998] <https://www.ilo.org/declaration/thedeclaration/textdeclaration/WCMS_716633/lang--en/index.htm> accessed 10 December 2020.

## 2 POSITIVE AND NEGATIVE OBLIGATIONS OF THE STATE IN PROTECTING THE RIGHT TO FREEDOM OF ASSOCIATIONS

One of the most important objectives of Art. 11 of the ECHR, according to the case-law of the ECtHR, is to protect people from arbitrary interference by public authorities in the exercise of the right to freedom of association (*Manole and Romanian Farmers Direct v Romania,*[36] *Sindicatul 'Păstorul cel Bun' v Romania*,[37] etc.). The key focus of the article is to define the negative obligations of the state, which are to limit its state intervention in the realisation of the human right to form or join trade unions. At the same time, many decisions of the ECtHR emphasise the positive commitment to the effective exercise of this right.

For example, in *Wilson, National Union of Journalists and Others v the United Kingdom*[38] (paras. 41, 43, 47–48), a violation of Art. 11 of the ECHR was found on account of the state's failure to fulfil its positive obligations. Thus, the offer to employees who agreed not to be represented by trade unions of more favourable employment conditions (in particular, wage increases) by the employer did not provide for direct state intervention. However, the United Kingdom's liability arose because it had failed to provide applicants with the right to freedom of association in accordance with the law. In particular, the law did not provide for remedies by which applicants could prevent the employer from establishing less favourable conditions for workers who were not prepared to renounce their trade union rights. The court found that there were regulations in the United Kingdom that allowed employers to hinder the union's ability to protect the interests of its members. By allowing financial incentives to be waived in the face of trade union rights, the state had violated its positive obligation to ensure the exercise of the right to freedom of association.

Another example of the ECtHR's recognition of a breach by a state of its positive obligation in the context of Art. 11 of the ECHR is *Demir and Baykara v Turkey*. The Court found[39] that Turkey had not provided an opportunity for municipal officials to exercise their right to form a trade union. Interestingly, in the analysed case, there are violations by the state both in the form of actions (non-recognition of the legal personality of the trade union Tüm Bel Sen) and inaction (lack of legislative changes to implement the right to form a trade union for civil servants). In view of this combination, the Court emphasised the possibility of examining the complaint in terms of a breach of Turkey's negative obligations (both state interference in Art. 11) and positive obligations. As a result of the Court's examination of all the circumstances of the case, the priority for the legal consequences for the applicants was the failure to fulfil a positive obligation. The state did not provide legislative opportunities to exercise trade union rights due to the non-recognition of the right of municipal employees to form a trade union (although it ratified the relevant ILO Convention No. 87, which enshrines such a right).

In view of the present case, as well as on the basis of other case-law of the ECtHR, it should be noted that there are no clear boundaries between the positive and negative obligations of the state in the context of Art. 11 of the ECHR. Therefore, in finding a violation of Art. 11, the Court often proceeds from the particular circumstances of the case in order to determine the factors that have had a greater effect on the applicants: direct state interference or inaction.

36 *Manole and Romanian Farmers Direct v Romania* (n 30) para 57.

37 *Sindicatul 'Păstorul cel Bun' v Romania* (n 23) para 131.

38 *Wilson, National Union of Journalists and Others v the United Kingdom* App nos 30668/96, 30671/96 and 30678/96 (ECtHR, 2 July 2002) <http://hudoc.echr.coe.int/eng?i=001-60554> accessed 10 December 2020.

39 *Demir and Baykara v Turkey* (n 31) paras 116, 125–127.

At the same time, the Court emphasises in its judgments the need to apply uniform principles for resolving a case, regardless of whether it is analysed in terms of the state's call for appropriate measures to implement Art. 11 or in terms of interference by public authorities that must be justified under Art. 11 para. 2. The Court considers the key criterion for determining the effectiveness of such obligations in both cases to be a fair balance between the interests of the individual worker and society as a whole (for example, *Sindicatul 'Păstorul cel Bun' v Romania*, *Demir and Baykara v Turkey*, etc.).

In the context of ensuring such a balance, a special place in the practice of the ECtHR is occupied by the ***state ensuring the balance between the interests of the trade union*** as a collective entity ***and the interests of a particular employee***, a member of the trade union. Thus, within the limits of its positive obligations, the state must create opportunities to protect the worker from the abuse of trade unions by its dominant position. For example, in *Associated Society of Locomotive Engineers & Firemen (ASLEF) v the United Kingdom*[40] (para. 43), it is stated that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. Therefore, for an individual's right to join a union to be effective, the state must provide mechanisms to protect the worker from abuse by the unions, which are often the dominant subjects in the context of the implementation of Art. 11 of the ECHR.

Conversely, the appropriate balance provides for the need for proper protection of the rights of the union, taking into account its interests and the interests of a particular employee as a member of the union. Thus, in the same case, *Associated Society of Locomotive Engineers & Firemen (ASLEF) v the United Kingdom*, a British railway workers' union argued that the right to freedom of association had been violated by interfering with the union's ability to freely elect its members. The national courts ordered the union to renew the membership of one of its employees (Mr Lee), who had been expelled for promoting political views that contradicted the union's values. The ECtHR found a violation of Art. 11 of the ECHR, stating that the state's interference in the activities of the trade union in order to protect its member from the organisation itself was unjustified. Noting that there was no abuse or unreasonable treatment by the applicant trade union against Mr Lee, the Court emphasised the right of the trade union to elect its members as an integral part of the right to freedom of association (para. 38). This conclusion of the Court is conditioned by the provision of Art. 3 of the ILO Convention No. 87, which:

- guarantees workers' organisations the right to regulate the principles and program of their activities through statutes and administrative regulations, to freely elect representatives;
- prohibits the state from interfering in the freedom of formulation and implementation of program activities of workers' organisations.

The approach to non-interference of the state in the internal activities of trade unions is reflected in the judicial practice of Ukraine. Thus, the Resolution of the Grand Chamber of the Supreme Court of 26 February 2020 (case No. 210/5659/18)[41] states that the issue of membership belongs to the exclusive competence of trade unions and their internal organisational activities, so it is not subject to judicial review. At the same time, the Supreme Court found arguments of the plaintiffs about the violation of their labour rights due to termination of powers of the chairman and deputy chairman of the union unfounded because the relationship was not of labour nature; the dispute was related to membership in the organisation and therefore should have been resolved according to trade union legislation. A similar approach is set out in the decision of the Civil Court of Cassation of

40 *Associated Society of Locomotive Engineers & Firemen (ASLEF) v the United Kingdom* App no 11002/05 (ECtHR, 27 February 2007) <http://hudoc.echr.coe.int/eng?i=001-79604> accessed 10 December 2020.

41 Resolution of the Grand Chamber of the Supreme Court (No 10/5659/18) 26 February 2020 <https://reyestr.court.gov.ua/Review/88138146> accessed 10 December 2020.

the Supreme Court of 28 March 2018 (case No. 341/1490/17[42]) and the decision of the Lviv Court of Appeal of 24 January 2019 (case No. 461/4538/17[43]).

Just as a trade union has the right to determine the conditions for membership in it, so too does the employee have the right to join or not join the trade union. Accordingly, Art. 11 of the ECHR also includes ***a person's negative right to join***, ie, the right not to join or leave a trade union and not to be compelled to join a trade union. Thus, in *Sigurður A Sigurjónsson v Iceland*,[44] a violation of Art. 11 was found, as obtaining a license to drive a taxi was made conditional on joining the Frami Automobile Association. Despite the state's arguments concerning the public law nature of the organisation's activities, the ECtHR recognised it as an association within the meaning of Art. 11 of the ECHR and found unjustified state interference (by adopting relevant legislation) in the right to freedom of association. The ECtHR also noted that most states that have ratified the ECHR guarantee the negative aspect of freedom of association, ie, the freedom not to join or leave the association.

If in the analysed case, it was a question of non-fulfilment of negative obligations by the state, then in *Sørensen and Rasmussen v Denmark*[45] (paras. 59, 61, 76), the court found a breach of positive obligations. The state was unable to protect the applicants' negative right to freedom of association, as they had to become members of a particular trade union in order to be employed. Despite the applicants' acceptance of trade union membership as a mandatory condition of employment, the Court emphasised that this did not alter the fact that they had joined the trade union against their will. First, refusing to join a union automatically meant not getting a job. Second, one of the applicants was dismissed without notice after leaving the union, although the membership requirement did not relate to his ability to perform a particular job. In this judgment, the ECtHR further emphasises (para. 56) that both the positive and negative aspects of the right to freedom of association must have the same level of protection by states.

Another positive obligation of states in the context of Art. 11 of the ECHR is ***the need to establish effective protection against discrimination***. There are two separate aspects to this issue. First, Art. 14 of the ECHR enshrines the need to ensure the right to freedom of association without discrimination on a number of grounds that are not exhaustive (sex, race, colour, language, religion, political or other opinion, national or social origin, belonging to national minorities, property status, birth, or other characteristics). Secondly, one of the anti-discrimination features is trade union membership, so it is necessary to ensure the right to non-discrimination, regardless of the exercise of the positive right to freedom of association.

Yes, in *Danilenkov and Others v Russia*[46] (paras. 123, 136), it is emphasised that the wording of Art. 11 explicitly states the right of 'everyone', which means the possibility of not being discriminated against for choosing to exercise the right to trade union protection. The ECtHR also emphasises that discrimination on the basis of trade union membership is one of the most significant violations of freedom of association, which threatens the very existence of a trade union (discrimination for membership in a certain trade union may lead to the withdrawal of employees from it, restrict the entry of other persons at risk of being subjected

42 Resolution of the Supreme Court (No 341/1490/17) 28 March 2018 <https://reyestr.court.gov.ua/Review/73157069> accessed 10 December 2020.

43 Resolution of the Lviv Court of Appeal (No 461/4538/17) 24 January 2019 <https://reyestr.court.gov.ua/Review/79744471> accessed 10 December 2020.

44 *Sigurður A Sigurjónsson v Iceland* App no 16130/90 (ECtHR, 30 June 1993) <http://hudoc.echr.coe.int/eng?i=001-57844> accessed 10 December 2020.

45 *Sørensen and Rasmussen v Denmark* App nos 52562/99 and 52620/99 (ECtHR, 11 January 2006) <http://hudoc.echr.coe.int/eng?i=001-72015> accessed 10 December 2020.

46 *Danilenkov and Others v Russia* App no 67336/01 (ECtHR, 10 December 2009) <http://hudoc.echr.coe.int/eng?i=001-93854> accessed 10 December 2020.

to such discrimination). The analysed decision found a violation of Art. 14 of the ECHR in conjunction with Art. 11, as the state had not established a mechanism for effective judicial protection against discrimination on the grounds of trade union membership.

Instead, in *National Union of Belgian Police v Belgium*,[47] the ECtHR did not find discrimination in the joint application of Art. 11 and 14 of the ECHR. The applicant emphasised discriminatory treatment, which was the application's removal from the process of collective consultation on municipal police in contrast to a number of other trade unions. However, the ECtHR established the legality of the restriction, emphasising that not all differences are discriminatory, but only those that are not reasonable and objectively justified or that the means of achieving the aim are not proportionate to the aim (paras. 47, 49).

Ukrainian law contains some contradictory provisions on guaranteeing the right to freedom of association in trade unions without discrimination. Thus, part 3 of Art. 36 of the Constitution of Ukraine guarantees the right to participate in trade unions in order to protect their labour and socio-economic rights and interests only to citizens of the state.[48] According to Art. 6 of the Law of Ukraine 'On Trade Unions, Their Rights and Guarantees of Activity',[49] the right to form trade unions is granted only to citizens of Ukraine, while foreigners and stateless persons may only join trade unions if the statutes of the latter provide such an opportunity. In addition, part 1 of Art. 7 of the Law provides for the right to freely choose a trade union to join only for citizens of Ukraine. Accordingly, foreigners and stateless persons working legally in Ukraine do not have the right to form trade unions or to freely choose a trade union to join. Such a choice is limited, in particular, by whether the trade union statute envisages the right of foreigners and stateless persons to join a union. Therefore, if there is no trade union in the enterprise, institution, or organisation where foreigners work, they may be restricted in their right to form an association to protect their own interests. We consider such a restriction discriminatory on the grounds of nationality and contrary to the ILO Convention No. 97, which guarantees the right of all workers to create an organisation of their choice without distinction (Art. 2), and the ILO Convention No. 98, which regulates the right of all workers to adequate protection from discriminatory actions to restrict freedom of association. However, the purpose of restricting the rights of foreigners and stateless persons is not defined in national legislation, so the relevant provisions, in our opinion, need to be brought into line with international standards.

An important guarantee of trade union activity, which follows from the case-law of the ECtHR, is the need for state regulation of opportunities not only to create relevant associations but also ***to ensure activities throughout its existence***. The case of *United Communist Party of Turkey and Others v Turkey*[50] (para. 33) emphasised that if the guarantees of Art. 11 of the ECHR extended only to the formation of associations, the right would be declarative, as it would not preclude the dissolution of the associations immediately after their creation. That is why the protection of the ECHR in this case extends to the entire period of trade union existence.

A significant limitation to the effective exercise of trade union rights may be the existence of ***liability for trade union activists***. In the decision of *Trade Union of the Police in the Slovak Republic and Others v Slovakia*[51] (para. 55), the ECtHR emphasised the need for the

47 *National Union of Belgian Police v Belgium* App no 4464/70 (ECtHR, 27 October 1975) <http://hudoc.echr.coe.int/eng?i=001-57435> accessed 10 December 2020

48 Konstytucija Ukrai'ny [Constitution of Ukraine] [1996] Vidomosti of the Verkhovna Rada 30/141.

49 The Law of Ukraine 'On trade unions, their rights and guarantees of activity' 1045-XIV [1999, revised 2019] Vidomosti of the Verkhovna Rada 45/397.

50 *United Communist Party of Turkey and Others v Turkey* App no 133/1996/752/951 (ECtHR, 30 January 1998) <http://hudoc.echr.coe.int/eng?i=001-58128> accessed 10 December 2020.

51 *Trade Union of the Police in the Slovak Republic and Others v Slovakia* App no 11828/08 (ECtHR, 11 February 2013) <http://hudoc.echr.coe.int/eng?i=001-113335> accessed 10 December 2020.

state to ensure that there are no disproportionate penalties that would prevent trade union representatives from representing and defending the interests of their members. According to the decision in *Urcan and Others v Turkey*[52] (para. 34), criminal or disciplinary sanctions for trade union activities may be an obstacle to the lawful participation in strikes and other active actions to protect the professional interests of workers.

However, the causal link between the employee's trade union activity and the application of liability is important. For example, in *Trofimchuk v Ukraine*[53] (para. 37), the applicant emphasised her dismissal for absenteeism as a restriction on her right to association. The ECtHR did not establish a link between the disciplinary action in the form of dismissal and the applicant's establishment of a trade union, as she had not proved either her participation in its establishment or the obstruction by the employer of her participation in the activity; that is, the trade union. Therefore, no violation of Art. 11 of the ECHR was established.

## 3 THE LEGAL NATURE AND CONTENT OF THE RIGHT TO FREEDOM OF ASSOCIATION

In the case-law of the ECtHR, it has been repeatedly emphasised that freedom of unions (the right to form or join trade unions to protect one's interests) is not a separate, independent right, but only a form or special aspect of freedom of association. (eg, *National Union of Belgian Police v Belgium* (para. 38), *Manole and 'Romanian Farmers Direct' v Romania* (para. 57), *Associated Society of Locomotive Engineers and Firemen (ASLEF) v the United Kingdom* (para. 37), *Wilson, National Union of Journalists and Others v the United Kingdom*, (para. 42), *Sigurður A Sigurjónsson v Iceland* (para. 32), etc.).

The following conclusions follow from this:

- the peculiarities of the application and interpretation of the ECtHR of Art. 11 in the context of non-union freedom of association may also be applied to the right to join trade unions in so far as this is appropriate having regard to the nature of the employment relationship. In particular, this concerns the application of Art. 11 part 2 of the ECHR concerning restrictions on the exercise of the right of association;
- The ECHR does not provide for special treatment by the state of trade unions or their members (*Sindicatul 'Păstorul cel Bun' v Romania*[54]) compared to other types of associations. However, special regulation of the content of freedom of association in relation to trade unions should be noted. The right to freedom of association is defined in general, without regulating the goals or purpose of such an association. In *National Union of Belgian Police v Belgium*,[55] the ECtHR emphasises that in this way, the ECHR guarantees the protection of the interests of trade union members through trade union actions, the list of which may differ from one state to another. It is this broad goal that determines the constant development of the case-law of the ECtHR concerning determining the means to achieve it (to which, to date, the ECtHR includes, among others, collective bargaining and strikes).

The wide range of means to protect the interests of trade union members in the laws of different countries is due, *inter alia*, to the delicate nature of social and political issues related

52 *Urcan and Others v Turkey* App nos 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04 (ECtHR, 17 October 2008) <http://hudoc.echr.coe.int/eng?i=001-87634> accessed 10 December 2020.

53 *Trofimchuk v Ukraine* App no 4241/03 (ECtHR, 28 January 2011) <https://zakon.rada.gov.ua/laws/show/974_846#Text> accessed 10 December 2020.

54 *Sindicatul 'Păstorul cel Bun' v Romania* (n 23) para 133.

55 *National Union of Belgian Police v Belgium* (n 47) para 39.

to ensuring an appropriate balance between the interests of workers and employers (*Manole and 'Romanian Farmers Direct' v Romania,*[56] *Sørensen and Rasmussen v Denmark, Sindicatul 'Păstorul cel Bun' v Romania*,[57] etc.) Therefore, the freedom of states to ensure positive obligations in this area is practically not limited.

The essence of the right to freedom of association in accordance with the case-law of the ECtHR is determined by two interrelated principles:

1) maximum freedom of discretion of the state in determining measures to ensure positive obligations;

2) minimum freedom of discretion during the intervention of states in the exercise of the right to freedom of association and in the regulation of those aspects of the content of freedom of association, without which the relevant right cannot be properly exercised.

Accordingly, when regulating measures to promote the effective exercise of the right to freedom of association, determining restrictions on its exercise at the legislative level, the state must take into account those elements of the content of this right that the ECtHR considers essential. Therefore, we will examine such elements further according to the case-law of the Court.

Thus, in the decision in *Demir and Baykara v Turkey*,[58] the broadest list of elements of the right to form and join trade unions was identified. It includes the right to form and join trade unions, the prohibition on concluding employment agreements exclusively with members of a particular trade union, and the right to demand that the employer hear a position on behalf of its members, the right to collective bargaining with the employer. However, this list is not exhaustive and varies depending on the development of labour relations and international labour regulation.

For example, prior to this judgment, the ECtHR has repeatedly stated in its case-law that the establishment of a legislative mechanism for collective bargaining should not be considered a mandatory component of the mechanism for exercising the right to freedom of association (eg, *National Union of Belgian Police v Belgium*,[59] *Wilson, National Union of Journalists and Others v the United Kingdom*[60]). In support of this position, the ECtHR noted that while the European Social Charter regulates the obligation to facilitate joint consultations between workers and employers, it allows states not to make such an obligation when ratifying the Charter. Accordingly, it cannot be assumed that the right to collective bargaining implicitly follows from Art. 11 part 1 of the ECHR and the ECtHR therefore emphasised that collective bargaining may be one way of protecting the interests of its members by trade unions but is not necessary for effective freedom of association.

Interestingly, in the decision of *Wilson, National Union of Journalists and Others v the United Kingdom* (2002), it is stated that the Court is not yet ready to recognise that the freedom of trade union to express its vote presupposes the employer's obligation to recognise the trade union. However, in 2008, in *Demir and Baykara v Turkey*, the ECtHR has reviewed its case-law in this regard. In particular, the ECtHR now holds that the right to collective bargaining with employers has become one of the main elements of the right to form trade unions (para. 154) and that a collective agreement is an essential means of promoting and protecting trade union interests (para. 157). The change in approaches is linked both to the development of

56 *Manole and 'Romanian Farmers Direct' v Romania* (n 30) para 60.

57 *Sørensen and Rasmussen v Denmark, Sindicatul 'Păstorul cel Bun' v Romania* (n 45) para 133.

58 *Demir and Baykara v Turkey* (n 31) para 229.

59 *National Union of Belgian Police v Belgium* (n 47) para 38.

60 *Wilson, National Union of Journalists and Others v the United Kingdom* (n 38) para 44.

international labour standards and to the ECtHR's analysis of the practice of contracting states in this area.

Along with collective bargaining, an important component of the right to freedom of association is ***the right to strike*** (*Wilson, National Union of Journalists and Others v the United Kingdom*,[61] *Schmidt and Dahlström v Sweden*[62] (para. 36), etc.) In *National Union of Rail, Maritime and Transport Workers v the United Kingdom*,[63] citing a number of other judgments, the ECtHR emphasised that restricting the right to organise and conduct a strike restricts the right to freedom of association, so the right to strike is protected by Art. 11 of the ECHR. In its decisions, the ECtHR recognised the restrictions on strikes set by law as unreasonable and disproportionate to the purpose of the restrictions (for example, *Hrvatski liječnički sindikat v Croatia*,[64] *Enerji Yapı-Yol Sen v Turkey*,[65] *Veniamin Tymoshenko and others v Ukraine*[66]).

Thus, in *Veniamin Tymoshenko and Others v Ukraine*, the ECtHR found a violation of the applicants' right to strike as a result of state intervention – the establishment of unjustified restrictions on strikes for transport workers. Instead, in the judgment in *Trofimchuk v Ukraine*,[67] a conclusion can be drawn that the Court clearly distinguishes between the right to freedom of peaceful gathering and the right to strike as an element of the right to freedom of association. Thus, the applicant took part in a picket against her employer, which is the exercise of her right to freedom of peaceful assembly but does not provide guarantees of absence from work, unlike a legal strike, which ensures immunity from disciplinary action.

National courts are guided by the ECtHR's view that the right to strike is protected by Art. 11 of the ECHR. Thus, referring to the decision of the *National Union of Rail, Maritime and Transport Workers v the United Kingdom* and *Trofimchuk v Ukraine*, the Popasnyansky District Court of Luhansk Oblast, in its judgment from 2 November 2016 (case No. 423/3238/16-c)[68] stated that interference with the right to strike was possible only if it was 'established by law', pursued one or more legitimate goals and is 'necessary in a democratic society' to achieve these goals. A similar position is supported by the decision of the Stryj City District Court of the Lviv Oblast of 17 August 2017 (case No. 456/2397/17).[69] At the same time, these decisions established the illegality of the strike due to the violation of the procedure of its holding. At the same time, the courts referred to the arguments of the ECtHR, including those cited above in *Trofimchuk v Ukraine*. The courts restricted the right to strike by defining a clear procedure for complying with the requirements of Art. 11 part 2 of the ECHR, as it pursued a legitimate aim: to enable the employer to take measures to avoid or minimise the negative effects of the strike. Similar arguments with reference to the case-law of the ECtHR were used by the courts to declare the strikes illegal in the decisions of the Svitlovodsk City District Court of Kirovohrad

61 ibid, para 45.

62 *Schmidt and Dahlström v Sweden* App no 5589/72 (ECtHR, 6 February 1976) <http://hudoc.echr.coe.int/eng?i=001-57574> accessed 10 December 2020.

63 *National Union of Rail, Maritime and Transport Workers v the United Kingdom* (n 29) para 84.

64 *Hrvatski liječnički sindikat v Croatia* App no 36701/09 (ECtHR, 27 November 2014) <http://hudoc.echr.coe.int/eng?i=001-148181> accessed 10 December 2020.

65 *Enerji Yapı-Yol Sen v Turkey* App no 68959/01 (ECtHR, 06 November 2009) <http://hudoc.echr.coe.int/eng?i=001-92267> accessed 10 December 2020.

66 *Veniamin Tymoshenko and others v Ukraine* App no 48408/12 (ECtHR, 02 January 2015) <https://zakon.rada.gov.ua/laws/show/974_a44#Text> accessed 10 December 2020.

67 *Trofimchuk v Ukraine* (n 53) paras 38–45.

68 Decision of the Popasna District Court of Luhansk Region No 423/3238/16-ц (2 November 2016). <https://reyestr.court.gov.ua/Review/62396610> accessed 10 December 2020.

69 Decision of the Stryi City District Court of the Lviv Region No 456/2397/17] (17 August 2017). <https://reyestr.court.gov.ua/Review/68357601> accessed 10 December 2020.

Oblast from 19 September 2017 (case No. 401/2326/17)[70] and the Kivertsiv District Court of Volyn Oblast from 20 December 2016 (case No. 158/2007/16-c),[71] etc.

The existence of a significant number of court decisions declaring strikes illegal in Ukraine is evidence of a complex legislative procedure for organising and conducting strikes. Thus, according to the Law of Ukraine 'On the Procedure for Resolving Collective Labour Disputes (Conflicts)',[72] the minimum duration of the period from the formation of employees' demands to the beginning of a strike in case of non-compliance with labour legislation or collective agreement is 20 days, while the maximum is 50 days, not including the time for organising the events: the collection of signatures, decision-making by the general meeting (conference) of the labour collective on the requirements for the employee, and then on the announcement of a strike, the formation of labour arbitration, etc. In the case of, for example, non-payment of wages by the employer (and, consequently, the inability of the employee to provide for himself and his family members), this period is too long. In addition, the procedure of organising a strike is quite complex and requires an understanding of a significant number of legal nuances. We believe that ensuring the effectiveness of the right to strike requires simplification of the procedure for its organisation, taking into account, *inter alia*, the results of the generalisation of national case-law in this area.

The experience of individual European countries should be used to improve the legislation that determines the mechanism for exercising the right to strike in Ukraine. In many European countries, the norm provides for other collective actions, in addition to traditional strikes: picketing, solidarity actions, work according to the rules, slowing down the work, pre-emptive strike, etc.[73] They are often limited in time but have a fairly simple organisation procedure and allow the employer to see the real intentions of employees to assert their rights.

The right to strike does not in itself imply the right to win (*National Union of Rail, Maritime and Transport Workers v the United Kingdom*),[74] but it provides unions with additional means to protect the rights of their members and, in many cases, is an effective way of leverage on the employer. By analogy, the right to collective bargaining is not equal to the right to collective agreement. For example, the parties may disagree or decide on the inexpediency of concluding a collective bargaining agreement, and the collective bargaining mechanism itself is important because it provides an opportunity for trade unions to convey to the employer the interests of its members.

## 4 RESTRICTIONS ON THE FREEDOM OF TRADE UNIONS

An important guarantee of the exercise of the right to freedom of association is protection against unrestricted state interference in its exercise. However, para. 2 of Art. 2 of the ECHR lays down a number of legal restrictions on the exercise of this right. Appropriate restrictions must be met in order to be justified:

70 Decision of the Svitlovodsk City District Court of the Kirovohrad Region No 401/2326/17 (19 September 2017) <https://reyestr.court.gov.ua/Review/69071089> accessed 10 December 2020.

71 Decision of the Kivertsy District Court of the Volyn Region No 158/2007/16-ц (20 December 2016) <https://reyestr.court.gov.ua/Review/63549884> accessed 10 December 2020.

72 The Law of Ukraine 'On the Procedure for Resolving Collective Labour Disputes (Conflicts)' 5458-VI [Revised 2012] Vidomosti of the Verkhovna Rada 34/227.

73 Federation of Trade Unions of Ukraine, 'The Right to Strike in EU Countries: Comparative Characteristics. The state of Ukrainian legislation on the right to strike and bring it into line with international norms' <https://pon.org.ua/novyny/4222-pravo-na-strajk-ukrayina-yes.html> accessed 10 December 2020.

74 *National Union of Rail, Maritime and Transport Workers v the United Kingdom* (n 29) para 85.

1) be established by law;

2) have a legitimate goal, be proportionate to this goal.

The criterion of 'establishment by law' is interpreted by the ECtHR quite broadly. Even if restrictions on the right to freedom of association are established by state law, they will not always be justified. According to the ECtHR case-law, both the existence of a relevant restriction in national law and the quality of the law are assessed – its accessibility, accuracy, and predictability of consequences.

Thus, in the case of *NF v Italy*,[75] reaffirming previous case-law, the ECtHR emphasised that the expression 'established by law' in Art. 11 of the ECHR not only implies that the impugned restriction is enshrined in the law of the respondent state but also requires the relevant legislation to be available to interested parties and its consequences (para. 26). With regard to the requirement of predictability, the ECtHR clarifies that it means the accuracy of the wording which allows a person (independently or by consultation) to regulate his conduct (*NF v Italy*,[76] *Veniamin Tymoshenko and Others v Ukraine*,[77] *Verentsov v Ukraine*[78] (para. 52), *Shmushkovich v Ukraine*[79] (para. 37), etc.). In addition, the quality of the law presupposes that it must clearly define the scope of the restrictions and the manner in which they are applied (*Maestri v Italy*[80] (para. 30), *NF v Italy* (para. 29)).

Thus, in *Veniamin Tymoshenko and Others v Ukraine*,[81] the ECtHR found that the interference with the applicants' rights under Art. 11 of the ECHR was not based on sufficiently precise and predictable legislation. The ban on strikes by transport workers was based on the norm established by the Law of Ukraine 'On Transport', but the relevant provision contradicted the Law of Ukraine 'On the Procedure for Resolving Collective Labour Disputes (Conflicts)'. At the same time, the ECtHR emphasised that the restrictive norm of the Law 'On Transport' was applied for 16 years after the state enshrined in the transitional provisions of the Law of Ukraine 'On Procedure for Resolving Collective Labour Disputes (Conflicts)' the norms on the application of provisions of other laws only in the part that did not contradict it. Accordingly, the criterion of predictability of the restriction was not met, and the ECtHR found a violation of Art. 11 of the ECHR.

In *Koretsky and Others v Ukraine*[82] (para. 48), the ECtHR also found a violation of the criterion of predictability with regard to the provisions of Ukrainian law in the field of registration of associations of citizens. The ECtHR found such regulations to be too vague, which gives the authorities too wide discretion and limits of discretion when deciding whether to register or refuse to register a public organisation. In such a case, even the judicial protection procedure available to the applicants could not prevent the arbitrary refusal to register. On that basis, the ECtHR found, *inter alia*, a violation of Art. 11 of the ECHR.

75 *NF v Italy* App no 37119/97 (ECtHR, 12 December 2001) <http://hudoc.echr.coe.int/eng?i=001-59622> accessed 10 December 2020.

76 *NF v Italy* (n 75) para 29.

77 *Veniamin Tymoshenko and others v Ukraine* (n 66) 80.

78 *Verentsov v Ukraine* App no 20372/11 (ECtHR, 11 July 2013) <https://zakon.rada.gov.ua/laws/show/974_945#Text> accessed 10 December 2020.

79 *Shmushkovych v Ukraine* App no 3276/10 (ECtHR, 14 February 2014) <https://zakon.rada.gov.ua/laws/show/974_990#Text> accessed 10 December 2020.

80 *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) <http://hudoc.echr.coe.int/eng?i=001-61638> accessed 10 December 2020.

81 *Veniamin Tymoshenko and others v Ukraine* (n 66) 81–86.

82 *Koretsky and others v Ukraine* App no 40269/02 (ECtHR, 3 April 2008) <https://zakon.rada.gov.ua/laws/show/974_446#Text> accessed 10 December 2020

In a similar case concerning the refusal to register an association, *Jafarov and Others v Azerbaijan*[83] (paras. 70, 81), the ECtHR also emphasised that in assessing the lawfulness of an interference and determining the predictability of the law, it is necessary to take into account, in addition to the text of the law itself, the manner of its application and the available official interpretations (para. 70). At the same time, judicial interpretation is especially important, as it provides for the application of the rule in accordance with the specific situation and circumstances. Therefore, the presence of several possible interpretations of one rule does not automatically make the law unpredictable. On the contrary, interpretation in a particular situation is one of the key tasks of the trial.

In addition to legality, restrictions on the freedom of association must have a legitimate aim, which is linked in the ECHR primarily to national or public interests and the protection of human rights and freedoms. Thus, under Art. 11 para. 2, the exercise of the right of association may be established if it is 'necessary in a democratic society in the interests of national or public security, to prevent riots or crimes, to protect health or morals or to protect the rights of and the freedoms of others'. Since the provisions of the article are quite general, the ECtHR, in determining the validity of specific restrictions, proceeds from an analysis of their purpose, the proportionality of the interference, and its validity to achieve the relevant purpose. At the same time, it is determined that the objective is consistent with the general principles for establishing the limits set out in Art. 11 para. 2 of the ECHR.

For example, the Constitution of Ukraine prohibits the formation and operation of public organisations (including trade unions) whose program goals or actions are aimed at eliminating Ukraine's independence, forcibly changing the constitutional order, violating the sovereignty and territorial integrity of the state, and undermining its security, illegal seizure of state power, propaganda of war, violence, incitement of interethnic, racial, religious hatred, encroachment on human rights and freedoms, and public health (Art. 37). It is clear that such restrictions comply with the general principles of restrictions on freedom of association under Art. 11 para. 2 of the ECHR. At the same time, a certain guarantee for minimising interference in trade union activities is the provisions of the Basic Law, according to which the prohibition of associations of citizens is carried out only in court (Art. 37 para. 4), and the principles of their formation and operation are determined exclusively by Ukrainian law (Art. 92). The restriction of the right of foreigners and stateless persons legally working in Ukraine to freely choose trade unions to join does not comply with the general principles of the restrictions set out in the ECHR.

The right to freedom of association, including the constitutional right to form a trade union, may not be restricted by such requirements that may not be objectively fulfilled. This position of the Constitutional Court of Ukraine led to the recognition of certain provisions of the Law of Ukraine 'On Trade Unions, Their Rights and Guarantees of Activity' as unconstitutional (decision of 18 October 2000 No. 11-rp/2000[84]). Thus, the restriction on a number of quantitative criteria for joining a trade union at a certain level was lifted, as well as on the condition of legalisation of trade unions related to the moment of registration, which the Constitutional Court recognised as equivalent to the requirement of prior permission to form a trade union. The right to association may be limited to certain categories of employees. Thus, Art. 11 para. 2 of the ECHR allows for the imposition of legal restrictions

83 *Jafarov and Others v Azerbaijan* App no 27309/14 (ECtHR, 25 July 2019) <http://hudoc.echr.coe.int/eng?i=001-194613> accessed 10 December 2020.

84 Decision of the Constitutional Court of Ukraine in the case on constitutional petitions of People's Deputies of Ukraine and the Commissioner of the Verkhovna Rada of Ukraine for Human Rights on compliance with the Constitution of Ukraine (constitutionality) of Art 8, 11, 16 of the Law of Ukraine 'On Trade Unions, Their Rights and Guarantees' formation of trade unions) No 11-рп/2000 (18 October 2000) <https://zakon.rada.gov.ua/laws/show/v011p710-00#Text> accessed 10 December 2020.

on persons who are members of the armed forces, police, or administrative authorities of a state. At the same time, it is a question of establishing certain restrictions on the exercise of the right to freedom of association and not its abolition in general for these categories. This is emphasised, in particular, in the decision of *Demir and Baykara v Turkey*.[85]

In certain decisions, the ECtHR also emphasises the requirement of proportionality to impose restrictions on these categories of persons for the purpose for which they are imposed. Thus, in *Trade Union of the Police in the Slovak Republic and Others v Slovakia*,[86] it is stated that such interference would be lawful only if it pursued one or more legitimate aims and was necessary for a democratic society to achieve them. A similar position is expressed in the decision of *Adefdromil v France*.[87]

## 5 CONCLUSIONS

The right of workers to form and join trade unions, enshrined in the ECHR, is part of the universal human right to freedom of association. Accordingly, all the peculiarities concerning the content of freedom of association and its restriction, according to the case-law of the ECtHR, apply to the freedom of association in trade unions, taking into account the specifics of labour relations.

Despite defining the right of workers to freedom of association as an element of the right to freedom of association, the ECHR and the relevant case-law of the ECtHR define a number of its specific features. First and foremost, for workers, freedom of association has a clear purpose – to protect their own interests (while in general, freedom of association can be exercised for different purposes). Accordingly, the right to form or join trade unions is not merely an example of freedom of association in the context of Art. 11 of the ECHR. Given the purpose of creating associations, certain types of trade union activities aimed at achieving them are an integral part of the right to association. First of all, this should include the right to bargain collectively and the right to strike.

Art. 11 of the ECHR creates both positive and negative obligations for the state, although there are no clear boundaries between them. At the same time, there is maximum discretion of the state in determining measures to ensure positive obligations. The most common violations of the ECtHR are violations of the following positive obligations:

- ensuring a balance between the interests of the union as a collective entity and the interests of a particular employee;
- the need to create opportunities to protect the employee from the abuse by trade unions of their dominant position;
- regulation of opportunities both for the creation of associations of workers and for maintenance of their activity during all period of existence;
- the need to create effective protection against discrimination on the grounds of trade union membership.

With regard to negative obligations, the effective exercise of the right to freedom of association by workers is possible only with limited state intervention in its implementation. Restrictions on the right to association are justified only if they meet the following criteria: 1) established by law (which the ECtHR interprets not only as the existence of regulations on

85 *Demir and Baykara v Turkey* (n 31) 119.

86 *Trade Union of the Police in the Slovak Republic and Others v Slovakia* (n 51) 62.

87 *Adefdromil v France* App no 32191/09 (ECtHR, 02 October 2014) para 45 <http://hudoc.echr.coe.int/eng?i=001-147058> accessed 10 December 2020.

relevant restrictions, but also their availability, accuracy, and predictability of consequences in the relevant rules); 2) have a legitimate purpose, are proportional to this goal. Therefore, the analysis of the case-law of the ECtHR allows us to conclude about the minimum discretion in the intervention of states in the exercise of the right to freedom of association and in regulating those aspects of the content of freedom of association without which the right cannot be properly exercised.

The right of workers to freedom of association is important both for the protection of other labour rights and for the satisfaction of socio-economic interests in labour relations. Thus, associations of workers (primarily trade unions) are endowed with vast powers to protect their rights, including through public control over the employer's compliance with labour laws, the ability to obtain any information about working conditions, consent to dismiss members of the union or the right to demand the dismissal of the manager, etc. Individual employees do not have such opportunities. In addition, collective labour rights, such as the right to bargain collectively, the right to strike, etc., can only be exercised by workers by exercising their right to association.

The content of the right to freedom of association is dynamic, changing with the development of labour relations, improvement of international labour standards, and practices of individual states. At the same time, the case-law of the ECtHR contributes to improving the legal regulation of the right of workers to form and join trade unions. When the ECtHR finds a violation of Art. 11 of the ECHR, states bring their legislation and practice into line with the requirements of the international community.

In Ukraine, the case-law on the protection of employees' right to association is rather limited. At the same time, in a number of cases, including the Supreme Court, a ban on interference in the internal organisational activities of trade unions has been established, which is in line with the case-law of the ECtHR. At the same time, a large number of court decisions declaring strikes illegal allow us to conclude that it is important to simplify the procedure for organising a strike, to introduce other types of collective action (for example, pre-emptive strikes) to ensure greater effectiveness of workers' right to association. The case-law of the ECtHR on Art. 11 of the ECHR should also be used in the reform of labour legislation to maximise the state's positive obligations, which can also be an impetus for the intensification of trade union activities.

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# THE RIGHT OF ACCESS TO A COURT IN UKRAINE IN THE LIGHT OF THE REQUIREMENTS OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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**Summary:** 1. Introduction. – 2. The Right to a Fair Trial and the Inconsistency of the System of Local General Courts with the New Administrative-Territorial Structure of the District Level. – 3. Lack of Clear and Understandable Criteria for Delimiting the Subject-Matter Jurisdiction of Cases in Terms of the Right to a Fair Trial. – 4. The Insignificance of the Case and the Court Fee as Procedural Restrictions on the Right of Access to Court. – 5. Staffing of the Judiciary and the Level of Public Confidence in the Judiciary as Elements of Ensuring the Right of Access to Justice. – 6. Introduction of a Lawyer's Monopoly on the Representation of Another Person in Court in Terms of the Right to a Fair Trial. – 7. Motivation of Court Decisions in the Aspect of the Right to a Fair Trial. – 8. Conclusions.

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## CONFLICTS OF INTEREST

The authors declare no conflict of interest of relevance to this topic.

## DISCLAIMER

The authors declare that they were not involved in the analysed law drafts within their collaboration with the legislative body.

# THE RIGHT OF ACCESS TO A COURT IN UKRAINE IN THE LIGHT OF THE REQUIREMENTS OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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***Abstract*** *This note considers the national legal provisions that regulate the procedure and features of a person's appeal to the court to protect their rights. Taking into account the provisions of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) regarding the right to a fair trial and the case-law of the European Court of Human Rights (ECtHR) on its interpretation, key threats to the effective exercise of access to justice in Ukraine have been identified. The problem of the inconsistency of the system of local general courts with the new administrative-territorial structure at the district level is highlighted. It is demonstrated how the lack of clear and understandable criteria for distinguishing the subject matter jurisdiction of cases affects the ensuring of the human right to an effective court. Particular attention is paid to the staffing of the judiciary and the low level of public confidence in the judiciary. The authors have analysed the validity of the application of such procedural restrictions as the court fee for filing a lawsuit and the classification of 'insignificant cases', which are impossible to appeal. On this basis, it is concluded that the existence of such restrictions on access to court cannot be considered a violation of the right to a fair trial if such restrictions are justified and proportionate to the lawful purpose of their establishment and do not violate the essence of this right. The features of the introduction in Ukraine of a lawyer's monopoly on the representation of another person in court, as well as the practice of the ECtHR regarding the possibility of recognising such restrictions as a violation of the right to a fair trial, are analysed. Legislative initiatives to improve the motivation of decisions by the courts are highlighted. It was concluded that the provisions aimed at forming a more responsible attitude of judges to the consideration of cases and making reasoned decisions, as well as solving the problem of excessive load on judges, are a prerequisite for ensuring the right to a fair trial.*

***Keywords:*** *human rights and responsibilities, fair trial, access to justice, case-law of the European Court of Human Rights, procedural restrictions, court jurisdiction, proportionality, legal purpose, court fees, lawyer monopoly.*

## 1 INTRODUCTION

According to Art. 6 of the ECHR, everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide on his/her civil rights and obligations or establish the reasonableness of any criminal charges against him/her.

The right of access to a court and trial as an element of the broader right to a fair trial is one of the fundamental guarantees of the exercise of natural human rights and freedoms. After all, the inaccessibility of judicial control over the proper and conscientious realisation of their rights and responsibilities by all participants in public relations would result in anomie in the state. According to the provisions of Art. 55 of the Constitution of Ukraine, human and civil rights and freedoms are protected by the court. Access to justice for every person is ensured in accordance with the Constitution of Ukraine and in the manner prescribed by the laws of Ukraine.

A textbook example of the European Court of Human Rights' interpretation of the right of access to a court is the decision in *Golder v the United Kingdom*

> It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[1]

It is worth noting that the right of access to a court has never been considered an absolute one. Its implementation is possible depending on compliance with certain restrictions, which, in turn, must be legal, reasonable, and serve a legitimate purpose. As noted by the ECtHR in *Guérin v France*

> these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.[2]

At the same time, the provisions of the national legislation of Ukraine, which regulate the procedure and features of a person's appeal to the court to protect their rights, contain certain threats to the effective exercise of the right to access to court in Ukraine, taking into account the provisions of Art. 6 of the ECHR and case-law of the ECtHR on their interpretation. Among these threats, first of all, is the inconsistency of the system of local general courts with the new administrative-territorial structure of the district level; lack of clear and understandable criteria for distinguishing the subject matter jurisdiction of cases; features of the legal regulation of such procedural restrictions as the court fee for filing a claim and categorising the case as insignificant, which makes it impossible to appeal it; problems of staffing of the judiciary and low level of public confidence in the judiciary; the introduction of a lawyer's monopoly on the representation of another person in court. The reasons and preconditions for imposing such restrictions on access to justice and their relation to the right to a fair trial will be discussed later in this article.

1 *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 35 <http://hudoc.echr.coe.int/eng?i=001-57496> accessed 19 February 2021.

2 *Guérin v France* App no 25201/94 (ECtHR, 29 July 1998) para 37 <http://hudoc.echr.coe.int/eng?i=001-58204> accessed 19 February 2021.

## 2 THE RIGHT TO A FAIR TRIAL AND THE INCONSISTENCY OF THE SYSTEM OF LOCAL GENERAL COURTS WITH THE NEW ADMINISTRATIVE-TERRITORIAL STRUCTURE OF THE DISTRICT LEVEL

A key aspect of the practical implementation of the human right of access to justice is the proper organisation of the judiciary. When assessing the state's fulfilment of its obligations to ensure the right to a fair trial, the ECtHR assumes that the right of access 'by its very nature calls for regulation by the state, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'.[3] Art. 125 of the Constitution of Ukraine stipulates that the judicial system in Ukraine is based on the principles of territoriality and specialisation and is determined by law. Thus, the peculiarities of the administrative-territorial system have a significant impact on the organisation of the judiciary and the system of its bodies.

Art. 19 of the Law of Ukraine 'On the Judiciary and the Status of Judges' stipulates the grounds for the formation or liquidation of the court. These grounds include changes in the judicial system defined by this Law, the need to ensure access to justice, optimise state budget expenditures or change the administrative-territorial structure. The general principles of this system, including the division of the territory of Ukraine into such components as the Autonomous Republic of Crimea, regions, districts, cities, districts in cities, towns, and villages, are enshrined in Art. 133 of the Constitution of Ukraine. At the same time, the most acute problem for ordinary citizens remains access to local general courts, which are district courts formed in one or more districts or districts in cities, or in a city, or in a district (districts) and a city (cities). District, inter-district, district in cities, city, city-district courts continue to exercise their powers until the formation and commencement of the local district court, whose jurisdiction extends to the relevant territory.

The formation and liquidation of districts, the establishment, and change of boundaries of districts and cities, the classification of settlements as cities, the naming and renaming of settlements and districts belong to the powers of the parliament (Art. 85 of the Constitution of Ukraine). In mid-2020, the Verkhovna Rada of Ukraine, at the request of the Government, substantially revised the system of administrative-territorial organisation at the district level. Four hundred and ninety districts were liquidated, and 136 new districts were created. Therefore, the logical question is to bring the system of local courts in line with the new district division because currently, several district courts can function within one district, and the territorial jurisdiction of some district courts can cover the boundaries of several newly created districts.

The problem of renewal of district executive bodies was solved quite quickly in accordance with the order of the Cabinet of Ministers of Ukraine No. 1635-p on reorganisation and formation of district state administrations.[4] At the same time, national legislation establishes a special procedure for the formation and liquidation of courts: a court is formed, reorganised, and liquidated by a law, the draft of which is submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultations with the High Council of Justice. Thus, until the formation of a new system of district courts, which will correspond to the changed district administrative-territorial structure, the existing district courts continue to exercise their powers within the previous administrative-territorial structure. This legal

3 *Stanev v Bulgaria* App no 36760/06 (ECtHR, 17 January 2012) para 230 <http://hudoc.echr.coe.int/eng?i=001-108690> accessed 19 February 2021.

4 The order of the Cabinet of Ministers of Ukraine No 1635-p on reorganization and formation of district state administrations of 16 December 2020 <https://www.kmu.gov.ua/npas/pro-reorganizaciyu-ta-utvorennya-rajonnih-derzhavnih-administracij-1635-161220> accessed 19 February 2021.

position was also expressed by the Council of Judges of Ukraine in a corresponding letter.[5] However, until the *status quo* is legally secured in this area, the right of access to a local court cannot be considered adequately protected. Therefore, the relevant draft law on this issue was submitted by the Government to the Verkhovna Rada of Ukraine.[6]

However, a temporary (transitional) settlement of the territorial jurisdiction of district courts does not abolish the positive obligation of the state to create a clear and accessible system of these courts, which would correspond to the administrative-territorial structure of the state. Thus, the decision of the ECtHR in *Airey v Ireland* states that

> hindrance in fact can contravene the Convention just like a legal impediment (above-mentioned Golder judgment, p. 13, para. 26). Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions". The obligation to secure an effective right of access to the courts falls into this category of duty.[7]

It is also worth noting that the current legislation provides reliable guarantees of the right to a fair trial in the event of liquidation of a particular court. Thus, on the basis of Art. 147 of the Law of Ukraine 'On the Judiciary and the Status of Judges', the liquidated court, within one month from the date of its termination, transfers to the newly formed court materials and documents related to the exercise of its powers, in particular, archival cases, the storage term of which has not yet expired, documents not completed in the office, as well as personnel documents in paper and electronic form, library funds. Court cases and materials of proceedings in the possession of the liquidated court are to be transferred immediately, before the first day of work of the newly formed court.

## 3 LACK OF CLEAR AND UNDERSTANDABLE CRITERIA FOR DELIMITING THE SUBJECT-MATTER JURISDICTION OF CASES IN TERMS OF THE RIGHT TO A FAIR TRIAL

A common and acceptable restriction on the right of access to a court is the need to comply with the procedural rules established at the state level. The case-law of the ECtHR enshrines an approach whereby procedural rules concerning the subject matter of the dispute or the application of such rules should not prevent the parties from obtaining available judicial protection. For example, in *Shestopalova v Ukraine*, the ECtHR found a violation of Art. 6 para. 1 of the Convention concerning the applicant's right of access to a court. The Court stated that

> the applicant was able to institute proceedings before the domestic courts but that they finally failed to rule on the merits of her reinstatement claim, having found no jurisdiction in respect of the matter, notwithstanding the fact that the procedural admissibility requirements had been complied with.[8]

5 The Letter of the Head of the Council of Judges of Ukraine No 9pc-466/20-вих of 22 July 2020 <http://rsu.gov.ua/uploads/news/listrsuteritorialnapidsudnist-94cb75de58.pdf> accessed 19 February 2021.

6 Draft Law of Ukraine 'On Amending some Legislative Acts of Ukraine Concerning Settling Separate Questions of Activity and Organization of State Bodies, Local Self-Government in Connection with Establishing (Liquidation) of Districts' of 15 June 2020 No 3651 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69133> accessed 19 February 2021.

7 *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979) para 25 <http://hudoc.echr.coe.int/eng?i=001-57420> accessed 19 February 2021.

8 *Shestopalova v Ukraine* App no 55339/07 (ECtHR, 21 December 2017) para 18 <http://hudoc.echr.coe.int/eng?i=001-179558> 19 February 2021.

Obviously, the lack of clear and understandable criteria for delimiting the subject-matter jurisdiction of cases should be interpreted as a violation of the principle of legal certainty, which is part of the rule of law. After all, the consequence of a violation of jurisdictional rules is either grounds for refusing to initiate proceedings or grounds for closing the proceedings that had been opened, depending on the stage of the proceedings when such a violation was revealed. As a result, the person is deprived of the opportunity to apply to an authorised court to resolve a dispute regarding his/her rights and obligations. Insufficient legal certainty of subject-matter jurisdiction creates difficulties not only for persons applying to the court for protection but also for judges. In such circumstances, the provisions of national law on the court's obligation to explain to the plaintiff, to whose jurisdiction the case falls, if the proceedings are closed due to the non-jurisdiction of such a court, remain ineffective (Part 1 of Art. 239 of the Code of Administrative Procedure, Part 1 of Art. 256 of the Civil Procedure Code, Part 2 of Art. 231 of the Commercial Procedure Code).

The problem of determining judicial jurisdiction to hear cases is not new for Ukraine. Unfortunately, we can state that even a large-scale update of the procedural legislation at the end of 2017[9] did not lead to significant improvement of the situation. This is evidenced by the extensive practice of the Supreme Court, which by law has the function of ensuring the uniform application of legal provisions by courts of different specialisations in the manner prescribed by procedural law. The Grand Chamber of the Supreme Court has heard almost 3,000 jurisdictional disputes and formed more than 300 legal positions. In some cases, the Grand Chamber of the Supreme Court itself deviated from its conclusions on the application of the rule of law to determine the judicial jurisdiction of cases. At the same time, according to Judge O. Kibenko,

> in resolving these issues, the Supreme Court takes the position that the criterion for determining jurisdiction should be as simple and clear as possible, ie such that can be applied at the time of filing a lawsuit, and not after the court has already begun hearing the case. [10]

The ECtHR, in assessing the compliance of states with the requirements to ensure the right to a fair trial, also draws attention to the observance by national courts of the rules of judicial jurisdiction enshrined in law. In particular, in *Sokurenko and Strygun v Ukraine*, the Court has concluded that

> having overstepped the limits of its jurisdiction, which were clearly laid down in the Code of Commercial Procedure, the Supreme Court could not be considered the "tribunal established by law" within the meaning of Article 6 para. 1 of the Convention in respect of the impugned proceedings.[11]

In view of the above and in order to ensure the human right of access to court, we believe that domestic procedural law needs to be improved, in particular, by establishing presumed criteria for delimiting the subject-matter jurisdiction of cases, guaranteeing the mechanism of a case transfer to a court of another jurisdiction.

9 The Law of Ukraine No 2147-VIII of 3 October 2017 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts' <https://zakon.rada.gov.ua/rada/show/2147-19> accessed 19 February 2021.

10 'Jurisdiction of disputes, insignificant cases and application of the principle of the rule of law by judges of the Supreme Court' (*Verkhovnyi Sud,* 26 January 2021) <https://supreme.court.gov.ua/supreme/pres-centr/news/1062315> accessed 19 February 2021.

11 *Sokurenko and Strygun v Ukraine* App nos 29458/04 and 29465/04 (ECtHR, 11 December 2006) para 28 <http://hudoc.echr.coe.int/eng?i=001-76467> accessed 19 February 2021.

## 4 THE INSIGNIFICANCE OF THE CASE AND THE COURT FEE AS PROCEDURAL RESTRICTIONS ON THE RIGHT OF ACCESS TO COURT

Among the procedural restrictions on access to court proceedings, the impossibility of cassation appeal of court decisions in cases of insignificant complexity (insignificant cases) is often singled out. However, we believe that the restriction of the right to cassation should not be equated with the restriction of access to justice, as such an approach fully complies with the requirements of Art. 6 of the ECHR. First of all, it should be borne in mind that the Convention, in general, does not provide for a direct obligation of the state to establish appellate and cassation courts. However, in the case of such institutions, their activities usually have to meet the standards of the right to a fair trial. At the same time, the ECtHR has repeatedly stated that

> Given the special nature of the Court of Cassation's role, which is limited to reviewing whether the law has been correctly applied, the Court is able to accept that the procedure followed in the Court of Cassation may be more formal […]

For example, such a position was enshrined in *Levages Prestations Services v France*.[12]

One of the criteria for classifying cases as insignificant is the value of the claim, which cannot exceed one hundred times the subsistence minimum for able-bodied persons (UAH 227,000 in 2021). This should also not be considered as a violation of the right of access to court. For example, in *Brualla Gomez de la Torre v Spain*, the ECtHR stated

> The Court considers legitimate the aim pursued by this statutory amendment, namely increasing the financial threshold for appeals to the Supreme Court in this sphere, so as to avoid that court's becoming overloaded with cases of lesser importance.[13]

The relevant provisions of Ukrainian legislation on this issue have already been the subject of an assessment by the ECtHR, which has recognised them as not violating the essence of the right of access to a court. Thus, in *Azyukovska v Ukraine*, the Court found that

> the new admissibility requirement had been sufficiently foreseeable to the applicant at the time when she sought to avail herself of the right to appeal before a court of cassation […] The appeal on points of law to the Supreme Court had been made after the applicant's claims had been considered by the Novomoskovsk Court and the Dnipropetrovsk Regional Court of Appeal, each of which had full jurisdiction. Further, the Supreme Court noted that the applicant had not demonstrated the existence of grounds which would have justified granting a leave to appeal on an exceptional basis.[14]

For developing countries, including Ukraine, a serious challenge is to strike a balance between the private interest of individuals in applying to court to protect their rights and the financial capacity of the state to maintain the judiciary. A common procedural restriction on the right of access to a court is the obligation to reimburse court costs in advance by the party initiating the dispute. The Annex to Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe sets out a number of principles concerning court costs in the context of facilitating access to justice. In particular, the admission to the proceedings should not depend on the payment by a party to the state of a sum of money

12 *Levages Prestations Services v France* App no 21920/93 (ECtHR, 23 October 1996) para 48 <http://hudoc.echr.coe.int/eng?i=001-58065> accessed 19 February 2021.

13 *Brualla Gomez de la Torre v Spain* App no 26737/95 (ECtHR, 19 December 1997) para 36 <http://hudoc.echr.coe.int/eng?i=001-58127> accessed 19 February 2021.

14 *Azyukovska v Ukraine* App no 26293/18 paras 24–25 <http://hudoc.echr.coe.int/eng?i=001-187765> accessed 19 February 2021.

that is unreasonable in view of the issue in the case. To the extent that court costs are a clear obstacle to access to justice, they should, if possible, be reduced or eliminated.[15]

In the context of the right of access to court, a key element of court costs is the court fee charged for filing applications and complaints to the court. In Ukraine, the basic social standard, the size of which serves as a value for calculating the rate of court fees, is the subsistence minimum for able-bodied persons, established by law on 1 January of the calendar year in which the application or complaint is filed with the court. In the case-law of the ECtHR, the requirement to pay a court fee in connection with the filing of a lawsuit is not considered as a restriction of the right of access to court, which undermines the very essence of this right. However, the amount of the fee, calculated taking into account the specific circumstances of the case, including the applicant's ability to pay it, and the stage of the proceedings at which this restriction was imposed are factors in determining whether the person exercised his/her right of access to court (see, for example, *Kreuz v Poland*).[16] Therefore, the rules laid down in national law as to the amount of such costs must be proportionate to the objectives of Art.6 para. 1 of the ECHR.

According to the Law of Ukraine of 8 July 2011 No. 3674-VI 'On Court Fees', the maximum rate of court fees for filing a property claim to the local general court for individuals or entrepreneurs is a subsistence minimum of EUR 5 (in 2021 – UAH 11,350), and for legal entities, a subsistence minimum of EUR 350 for able-bodied persons (UAH 794,500). When filing an appeal and cassation appeal, the rate of court fees is increased by 50% and 100%, respectively. At the same time, the Law provides for cases in which the court fee is not collected, as well as the categories of persons who are exempt from paying the court fee during the consideration of the case in all courts. The provisions of the Law, on the basis of which it is possible to defer and pay an instalment payment of court fees, reduce its amount, or release from payment based on the property status of the party, are socially justified. This can happen, in particular, in cases where the court fee exceeds five per cent of the annual income of the plaintiff – an individual during the previous calendar year or if the plaintiffs are members of a low-income or large family. It is the proportionality of the court fee to income, financial and financial status, social status of the person that is a guarantee of permissible restriction of the right of access to court. Otherwise, it may be considered incompatible with the content of such a right. Thus, the court's unjustified refusal to reduce the amount of the appeal fee was found to be in breach of Art. 6 para. 1 of the ECHR in *Kniat v Poland*.[17] The Court stated that the domestic courts had failed to strike a proper balance between, on the one hand, the state's interest in collecting court fees and, on the other hand, the applicant's interest in continuing her appeal against the divorce decree.

## 5 STAFFING OF THE JUDICIARY AND THE LEVEL OF PUBLIC CONFIDENCE IN THE JUDICIARY AS ELEMENTS OF ENSURING THE RIGHT OF ACCESS TO JUSTICE

At the present stage of development of the domestic judicial system, one of the most acute problems is the quantitative and qualitative staffing of the judicial system, which has a significant impact on the implementation of the constitutionally guaranteed right of access to justice.

15 Reccomendation No R (81) 7 Of the Committee of Ministers of the Council of Europe on measures to facilitate access to justice of 14 May 1981 <https://court.gov.ua/userfiles/08.pdf> accessed 19 February 2021.

16 *Kreuz v Poland* App no 28249/95 (ECtHR, 19 June 2001) para 60 <http://hudoc.echr.coe.int/eng?i=001-59519> accessed 19 February 2021.

17 *Kniat v Poland* App no 71731/01 (ECtHR, 26 October 2005) paras 45–47 <http://hudoc.echr.coe.int/eng?i=001-69901> accessed 19 February 2021.

A long-term judicial reform in Ukraine has so far not yielded the desired results. The vast majority of courts remain understaffed, which significantly increases the burden on other judges and extends the timeframe of case consideration. According to the State Judicial Administration of Ukraine, as of 1 January 2020, 2,044 positions of judges were vacant. In the first half of 2020 alone, 119 judges expressed a desire to resign. Approximately 10 courts in Ukraine do not work at all due to the lack of judges with powers.

At the same time, the body authorised by the Law to select candidates for appointment to the position of a judge (High Qualification Commission of Judges of Ukraine) has not been operating for more than a year. The powers of the members of the commission were terminated on 7 November 2019. That is why the urgent task of the state is to form the composition of such a commission on the basis of a transparent and objective competition and to launch a full-fledged selection of judges as soon as possible. The Verkhovna Rada of Ukraine is already considering a draft law aimed at improving the procedures for the formation and operation of judicial authorities and resuming competitions for judges.[18] Therefore, the realisation of the right of citizens to access to court depends on how balanced the approach of the parliament to rebuilding the institutional foundations of the judiciary in Ukraine will be.

Effective access to justice is no less determined by the level of public confidence in the judiciary. Unfortunately, the results of sociological measurements indicate serious problems in this area. In the fall of 2020, the Razumkov Centre's sociological service conducted a specialised representative survey, 'Attitudes of Ukrainian citizens to the judiciary'.[19] Some of the conclusions of this study are the following.

Since most citizens do not have personal experience of communicating with the courts and determine their attitude to the judiciary on the basis of other people's experience or information in the media, the attitude of the population as a whole to the judiciary is negative while the level of trust is one of the lowest among state and social institutions. However, the level of trust of citizens who have had their own recent experience of communicating with the courts is much higher.

This situation clearly demonstrates the need to fill the judicial system as soon as possible with professional and honest judges, whose activity will promote the authority of the judiciary, respect for court decisions, and restore public confidence in the state in the face of the judiciary.

The ways to achieve a high level of public confidence in the judiciary in Ukraine vary: from a radical 'reset' to a position in which civil society's distrust of the courts in Ukraine is not a sufficient basis for their 'reset' due to the current crisis. It should be recalled that this crisis was provoked, in part, by the reform aimed to improve the activities of judicial authorities, which was enshrined in the provisions of Law No. 193-IX on changing the number and subjects of appointment of the High Qualifications Commission of Judges of Ukraine. The provisions of this reform have already received their legal assessment in the Decision of the Constitutional Court of Ukraine of 11 March 2020 No. 4-p/2020. In particular, the position that the change in the number and subjects of appointment of members of the High Qualifications Commission of Judges of Ukraine without the introduction of an appropriate transition period is recognised as creating significant obstacles to the functioning of effective

18 The Draft Law of Ukraine of 22 June 2020 No 3711 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some Laws of Ukraine on the Activities of the Supreme Court and Judicial Governance Bodies' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69228> accessed 19 February 2021.

19 Report on the results of the study 'Attitudes of Ukrainian citizens to the judiciary'. Ukrainian Center for Economic and Political Studies O Razumkova (Kyiv, 2020) <https://rm.coe.int/annex-1-representative-survey/1680a0c2af> accessed 19 February 2021.

justice and in some cases making it impossible to exercise everyone's right to access to justice as requirements of the principle of the rule of law.[20]

It should also be noted that such a position was previously set out in the Conclusions of the Venice Commission on amendments to the legislation of Ukraine governing the status of the Supreme Court and judicial authorities, adopted at its 121st plenary session (Venice, 6–7 December 2019). It was emphasised that trust in the judiciary could only grow within a stable system, as persistent institutional instability when reforms follow changes in political power can also be detrimental to public confidence in the judiciary as an independent and impartial institution (para. 13 of the Conclusion).[21]

In addition, the explanatory note to para. 10 of the Bordeaux Declaration 'Judges and Prosecutors in a Democratic Society' states that the precondition for public trust in judges and prosecutors and the basis of their legitimacy and authority is the highest level of professional competence of those holding such positions.[22] That is why the reform of the judiciary in Ukraine should be at the present stage mediated by personnel reset of its bodies, but in a progressive evolutionary way using the principle of individual responsibility while adhering to the right of everyone to respect for private life. Also, a systematic change in the special training of candidates for judges and the further training of incumbent judges in order to achieve a high level of their competence as a prerequisite for increasing civil society confidence and ensuring the institutional stability of the judiciary is important in this reform.

## 6 INTRODUCTION OF A LAWYER'S MONOPOLY ON THE REPRESENTATION OF ANOTHER PERSON IN COURT IN TERMS OF THE RIGHT TO A FAIR TRIAL

One of the novelties of the national legislation of Ukraine was the introduction of the so-called lawyer's monopoly on certain types of legal services, in particular on the representation of another person in court, as well as protection against criminal charges. And if the latter legal institution is not currently the subject of an active debate on its expediency and necessity, then the exclusive representation of another person in court by a lawyer raises a sharp discourse on the possible risks of restricting the right of access to court.

The foundations of this discourse were laid, in particular, in the Strategy for Reforming the Judiciary and Related Legal Institutions for 2015–2020, approved by the Decree of the President of Ukraine of 20 May 2015 No. 276/2015,[23] which addressed the need for short-term definition types of legal aid that can be provided only by a lawyer, in order to improve the quality of legal aid and the quality of justice in general, without restricting the participants in the trial in the right of access to justice.

20 The case No 1-304/2019(7155/19), Judgment of the Constitutional Court of Ukraine of 11 March 2020 No 4-r/2020 <https://zakon.rada.gov.ua/laws/show/v004p710-20> accessed 19 February 2021.

21 CDL-AD(2019)027-e Ukraine 'Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, adopted by the Venice Commission at its 121st Plenary Session' (Venice, 6–7 December 2019) <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e> accessed 19 February 2021.

22 Opinion No 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No 4 (2009) of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe 'On the relations between Judges and Prosecutors in a democratic society' <https://rm.coe.int/1680747391 https://rm.coe.int/opinion-no-12-2009-on-the-relations-between-judges-and-prosecutors-in-/16806a1fbd> accessed 19 February 2021.

23 The Decree of the President of Ukraine from 20 May 2015 No 276/2015 'On the Strategy for Reforming the Judiciary and Related Legal Institutions for 2015–2020' <https://zakon.rada.gov.ua/rada/show/276/2015> accessed 19 February 2021.

This perspective was reflected in the constitutional amendments of the Law of Ukraine of 2 June 2016 No. 1401-VIII 'On Amendments to the Constitution of Ukraine (concerning justice)',[24] according to which it is declared that everyone has the right to professional legal assistance (Art. 59 of the Constitution). At the same time, in Chapter VIII of the Constitution of Ukraine 'Justice', Art. 131[2] stipulates that for the provision of such professional legal assistance in Ukraine, there is a bar, the principles of organisation and activity of which are determined by law. In order to guarantee the provision of professional legal assistance, a constitutional rule enshrines that only a lawyer represents another person in court, as well as provides protection from criminal charges.

There is currently no clear legal certainty as to the relationship between the constitutional guarantees of the right of everyone to receive professional legal assistance, by enshrining only the right of a lawyer to represent another person in court and by restricting the right of access to court in such circumstances. This was reflected in the draft Law on Amendments to the Constitution of Ukraine (on the abolition of the lawyer's monopoly) No. 1013 of 29 August 2019.[25] Its provisions caused considerable resonance in the professional community concerning the introduction, restriction, and abolition of the lawyer's monopoly on representation of a person in court, as well as the capabilities of the state in the field of legal provision of the right of access to court.

In this context, it should be noted that in *Moldavska v Ukraine*, the ECtHR, analysing the constitutional restrictions on the representation of another person in court, restated, *inter alia*, that the right of access to court is not absolute. Even a broader restriction on the free choice of defence counsel, limiting it to a licensed advocate before all courts, may not in itself raise an issue under Art. 6 of the ECHR since specific legal qualifications can be required to ensure the efficient defence of a person. However, such a restriction on the applicant's right must have a sufficient basis in domestic law to avoid being arbitrary.[26]

Thus, the ECtHR, in fact, pointed out that enshrining in the national legislation of Ukraine the representation of another person in court exclusively by a lawyer does not in itself violate the right to a fair trial, and also pointed to the state's legal capacity to access to court, due to current needs and resources. Therefore, on this basis, it can be concluded that the existence of such restrictions on access to court cannot be unequivocally recognised as a violation of the right to a fair trial.

## 7 MOTIVATION OF COURT DECISIONS IN THE ASPECT OF THE RIGHT TO A FAIR TRIAL

One of the pressing issues of national law enforcement is the problem of proper motivation of court decisions. In this context, it should be noted that in accordance with Art. 6 para. 1 of the ECHR, judgments of courts and tribunals should adequately state the reasons on which they are based in order to show that the parties were heard and to ensure public scrutiny of the administration of justice. However, Art. 6 para.1 cannot be understood as requiring a detailed answer to every argument raised by the parties. Accordingly, the question of

24 The Law of Ukraine of 2 June 2016 No 1401-VIII 'On Amendments to the Constitution of Ukraine (Regarding Justice)' <https://zakon.rada.gov.ua/rada/show/1401-19> accessed 19 February 2021.

25 The Draft Law 'On Amendments to the Constitution of Ukraine (Concerning the Abolition of the Lawyer's Monopoly) of 29 August 2019 No 1013 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66242> accessed 19 February 2021.

26 *Moldavska v Ukraine* App no 43464/18 para 26 <http://hudoc.echr.coe.int/eng?i=001-193900> accessed 19 February 2021.

whether a court has failed to fulfil its obligation to state reasons can only be determined in the light of the circumstances of the particular case.[27]

The legal expert community is currently emphasising that the issue of the validity of a court decision is crucial in the justice system and argues that the state is obliged to resolve problematic issues in this area, which judges themselves cannot resolve on their own.

The draft Law of Ukraine of 25 January 2021 No. 4737 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Other Legal Acts of Ukraine on Motivation of the Decisions of Judges'[28] is an attempt to settle this problem at the current stage of reforming of the Ukrainian judiciary in the direction of ensuring the right to a fair trial. The draft law, in particular, states that if the court in its decision did not provide a legal assessment of all the arguments of the parties in respect of which the dispute arose, such a dispute is considered unresolved.[29]

The proposals outlined above are aimed at forming a more responsible attitude of judges to the consideration of cases and decision-making, and therefore at finding additional guarantees to ensure everyone's right to a fair trial. In such circumstances, they can be described as timely and promising.

At the same time, proposals to give the parties the right to independently prepare a draft text of a court decision in a specific case, which has an auxiliary (advisory) nature, and formally submit it to the case file are debatable. It is seen that the introduction of such a procedural possibility may threaten to violate the principles of fairness and impartiality of the court, as one of the important reasons for improper motivation of court decisions is the lack of time due to excessive workload on judges due to the lack of staffing of the judiciary. Addressing this issue should balance the burden on judges and create objective conditions for proper motivation of court decisions.

## 8 CONCLUSIONS

The key threats to the effective exercise of the right of access to court in Ukraine include the inconsistency of the system of local general courts with the new administrative-territorial structure on the district level, the lack of clear and unambiguous criteria for delimitation of subject-matter jurisdiction, the problem of quantitative and qualitative staffing and the resulting low level of public confidence in the judiciary. Establishment by Ukraine of statutory procedural restrictions, in particular, the obligation to pay court fees for filing a lawsuit, the introduction of criteria for the insignificance of the case, which makes it impossible to appeal, securing a lawyer's monopoly on representation of another person in court, cannot be considered a violation of the convention right to a fair trial if such restrictions are justified and proportionate to the lawful purpose of their establishment, do not violate the very essence of the right to go to court. In the search for additional guarantees to ensure everyone's right to a fair trial, legislative initiatives are introduced aimed at forming a more responsible attitude of judges to the consideration of cases and making reasoned decisions,

27 *Salov v Ukraine* App no 65518/01 para 89 <http://hudoc.echr.coe.int/eng?i=001-70096> accessed 19 February 2021.

28 The Draft Law 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and other Legislative Acts of Ukraine on the Motivation of Court Decisions' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70891> accessed 19 February 2021.

29 Explanatory note to the draft Law of Ukraine 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and other legislative acts of Ukraine on the motivation of court decisions' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70891> accessed 19 February 2021.

as well as solving the problem of the excessive workload of judges due to shortcomings in the judiciary as an objective prerequisite for proper motivation of court decisions.

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# THE APPLICABILITY OF THE RIGHT TO A FAIR TRIAL IN CIVIL PROCEEDINGS: THE EXPERIENCE IN UKRAINE

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**Summary:** 1. Introduction – 2. The Legal Nature of the Right to a Fair Trial – 3. The scope of the Applicability of the Right to a Fair Trial – *3.1. Legally Bound Subjects – 3.2. The dispute over the Right as the Measure of Applicability – 3.3. The diversification of Judicial Procedures – 3.4. The civil nature of the Rights and Duties as the Protection Objects.* – 4. Conclusions.

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The author has declared that no conflict of interest or competing interests exist, in particular, within her activities as a judge of the Supreme court. This study was solely a result of the author's academic research.

## CONTRIBUTOR

The author is solely responsible for the reading and the approval of the final version and has agreed to be accountable for all aspects of this note.

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# THE APPLICABILITY OF THE RIGHT TO A FAIR TRIAL IN CIVIL PROCEEDINGS: THE EXPERIENCE IN UKRAINE

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**Abstract** *In this note, the author attempts to prove that the right to a fair trial is essentially a substantive right; that is, a right that combines the manifestations of a fundamental right. At the same time, this right imposes some positive duties on the State to provide for it. It has national and supranational regulations, and at the same time reflects subjective law and axioms, as well as elements of procedural and substantive law. Attention is drawn to the fact that in Ukraine the legal nature of this right is implemented only partially, since neither legislation nor judicial practice recognize it as an independent object of protection.*

*Taking into account the provisions of Para 1, Art. 6 of the ECHRs and the case law of the ECtHR , the research proposes to define the scope of the applicability of the right to a fair trial proceeding from: (1) legally bound subjects, which may include not only courts within the judicial system of the country concerned on the basis of the law, but also other jurisdictional and quasi-judicial bodies; and (2) the procedures in which the guarantees of a fair trial must be observed. Depending on the existence or absence of a dispute over the rights in them the latter is divided into 'disputed', 'conditionally disputed' or 'indisputable'. It is proved that the requirements of Art. 6, Para 1 of the ECHR do not apply to them, but that they are mandatory under the first two procedures. An attempt to analyse the recent positions of the ECtHR on the possibility of including protection measures in the scope of the application is made. Also, the author determines which of those protection measures provided in national law falls within the scope of this regulation. Furthermore, the author draws attention to the fact that the rights and duties to protect a person who is invoked must be 'civil in nature' in order to be covered by the guarantees of a fair trial. On the basis of certain criteria the author identifies procedures in the national legal system within which the right to a fair trial must be guaranteed.*

***Keywords:*** *a right to a fair trial, substantive law, scope of applicability of the fair trial right, court, established by law, judicial procedures, legal dispute, diversification of judicial procedures, 'civilistic' rights and duties.*

## 1 INTRODUCTION

In 1950, during the regional institutionalization of human rights in Europe, the ECHR was adopted. Despite the fact that almost 70 years have elapsed, the interest in this international instrument grows year by year, primarily because it was with the adoption of the ECHR that fundamental human rights were recognized and codified not only at the constitutional level of individual countries but also at the international level. This has led to the imposition on ECHR member countries of a positive duty to ensure compliance with the European standards of human rights protection, the failure or improper enforcement of which also enables rights protection at the supranational level through the ECtHR. The ECtHR, in

turn, may establish not only that fundamental rights have been violated on the basis of the outcome of individual complaints, but also that the country concerned should be brought to material responsibility by collecting just compensation in favour of the applicant, with the obligation to eliminate errors at the national level leading to this. Thus, fundamental human rights have received the highest degree of recognition and protection since the adoption of the ECHR, i.e. their fundamental nature was established[1].

Among the rights enshrined in the ECHR which the member countries are obliged to guarantee, the right to a fair trial is one of the most important. Despite its fundamental nature, it is not always respected at the national level. The statistics for the period from 1959 to 2019 show that there was a violation of Art. 6, Para 1 of the ECHR in 11,543 cases. The greatest number of violations of the right to a fair trial were found in cases where the defendants were in: Turkey (1,605), Italy (1,501), the Russian Federation (1,237), Ukraine (1,038), Greece (693), Romania (651), France (565), etc.[2] In 2019 there were 334 such cases: in the Russian Federation (86), Ukraine (58), the Republic of Moldova (27), Hungary (27), etc.[3] The description given, in our view, can be explained, *inter alia*, by: (1) the imperfect nature of this right, which presupposes its legislative regulation at the national level; (2) a certain states' autonomy in the introduction of restrictions which reflect the national specificity of a particular legal system; and (3) the use by the ECtHR of an autonomous and evolutionary rights interpretation that allows for derogation from an already formulated position. As a result, the right to a fair trial is understood as a dynamic system of guarantees.

All things considered, and due to the gradual expansion of the content of a fair trial right under this note, we believe it necessary to address the scope of this right since the correct determination of the latter is a condition for its observance, taking into account the legal nature of the right to a fair trial and the ECtHR practice. However, given that Ukraine has gradually undertaken judicial reform thoughout 2016 to 2020, which has directly affected the sphere of civil procedure, it is advisable to analyse some of its innovations.

## 2 THE LEGAL NATURE OF THE RIGHT TO A FAIR TRIAL

There are many classifications of human rights according to different criteria in the literature but it is generally accepted that all rights are differentiated according to the content of the needs for which they provide. In some cases, the right to a fair trial falls under the political or civil rights cluster or under a separate set of procedural rights (rights-guarantees). Although, in most cases, it has no place in this classification.

However, as for determining the legal nature of the right to a fair trial, it should be based primarily on the fact that it is a treaty right, and the approach suggested by the ECtHR should be taken into account. For the latter, all the rights enshrined in the ECHR are divided into two groups: substantive and procedural.[4] In science, this distribution is based on the criterion of entitlement, and exists in parallel with the classification of human rights according to the content of needs. Traditionally, substantive rights are contrasted with procedural rights,[5]

1 NY Sakara, 'Impact of the human rights fundamentalization on the development of the fair trial right' Rule of law issues (2017) 13851.

2 ECtHR, 'Violations by Article and by State 1959-2019' <https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf > accessed 6 February 2021.

3 ibid.

4 G Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP 2013) 174;

5 WA Thurman, 'The Role of Substantive Law and Procedure in the Legal Process' (1932) XLV (4) Harward Law Review 639, 643-644.

although substantive and procedural law are recognized as being interrelated and mutually influential.[6] However, we believe that this approach requires some clarification.

Today there is no single point of view of what exactly is meant by the category 'substantive'. As already mentioned, in most cases, it is equated with 'material'. That is, substantive rights are used as a synonym for material rights.[7] However, different interpretations can be found. Thus, individual researchers emphasize the self-sufficiency of the right to a fair trial as evidenced by the fact that the ECtHR recognizes its violations, regardless of whether other substantive rights have been violated under the ECHR. It follows from the abovementioned that the substance of a right is linked to its autonomous status, that is its independence from other rights and the possibility of its protection. Other scientists also reveal the category substantive through the integrative character and the possibility of combining mutually exclusive properties,[8] the interaction of international and national law on a parity basis,[9] and the means of ensuring public order through private law methods.[10] In turn, the European Commission for Democracy through Law (Venice Commission) also uses the category substantive with several meanings. First, it emphasizes the fundamental nature of the rule of law that permeates all articles of the ECHR. Second, they are characterized by concepts whose content includes, among other things, namely: 'respect for fundamental rights', which rank alongside official (the rule of law) and European Union law-specific concepts (the fair application of the law, effective enjoyment of rights under European Union law, respect for the laws of expectation and even the fight against corruption) or axiomatic notions in other words. Third, there is a substantive interpretation of the term Rechtsstaat both in the Constitutional law doctrine of Germany and in the practice of the Constitutional Court; that is, it is autonomous. Fourth, this category is used as a synonym for the category 'material'.[11]

An analysis of the cited points of view makes it possible to conclude that the *substantive* category is most often used to emphasize the peculiarities of a legal phenomenon through the prism of its essence, if the latter cannot be unequivocally characterized using concepts without forming an antinomy. The latter is due to the existence of a concepts dichotomy that cannot be reconciled. It is appropriate to define the right to a fair trial as a substantive right.

The substance of the right to a fair trial is reflected in the following. First, this right refers to fundamental human rights,[12] that is, rights that belong to human beings by birth. They are derived from and linked to our nature and in this sense, this right is an inalienable part of human life. At the same time, this right is not absolute, i.e. the position of the ECtHR allows its legislation to be regulated at a national level and for the State to retain a certain autonomy in introducing any restrictions consequently, to reflect the national specificities of

6 MK Yukov, 'Civil Procedural Law. Issues of development and protection of citizens' rights' (RE Gukasian ed, Kaliningradskiy Gos. Universitet 1977) 66-75.

7 JR Temirbekov, 'Some features of understanding the rule of law in US constitutional theory' (2015) 1 (66) Law and State 53-54.

8 OM Sviridenko, 'Substantive legal relations as an integral part of the insolvency (bankruptcy) concept' (2010) 11 Modern law 76-77.

9 SA Savchenko, 'Interaction Process of norms and principles of international and national law' (2010) 3 Gazette of the Moscow University of the Ministry of Internal Affairs of Russia 154.

10 TV Sahnova, 'Right to Judicial Protection as a Substantive Procedural Law: The Effect of Globalization' (2014)3 The Bulletin of Civil Procedure 11-25.

11 European Commission For Democracy through Law (Venice Commission), Report on the Rule of Law. Venice, 25-26 March 2011 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-rus> accessed 6 February 2021.

12 NY Sakara, 'Impact of the human rights fundamentalization on the development of the fair trial right' (2017) 138 Problemy Zakonnosti 43-54.

a particular legal system. In other words, this right is not entirely a negative right[13] like all fundamental rights, because it imposes positive obligations on the State to create conditions for its realization, i.e. there is a symbiosis of positive and negative rights.

Second, the right to a fair trial emerged as a national right, that is, as a right recognized and guaranteed by individual countries. However, further international and regional institutionalization has resulted in it becoming a supranational European standard of human rights with obligations for its implementation, i.e. an upward and downward internationalization. This, in turn, resulted in the creation of a universal standard of human rights firmly established in the national legal order at both the constitutional and sectoral levels. At the same time, the provisions that are included in its content are relatively certain, since the ECtHR applies an autonomous and evolutionary interpretation of the ECHR in its activities. Despite the principle of subsidiarity, it is the ECtHR that determines the requirements, which must be respected by national judicial authorities when considering and deciding cases, i.e. the court derivatively formulates the content of procedural rights, regardless of their recognition in national legislation, or otherwise, in relation to the right to a fair trial.

Third, while the right to a fair trial is articulated as a subjective right, it should also be identified as an axiom of civil procedural law that is self-evident in truth and should be perceived as having a clear legal value. In its basis lie such truths as: 'Where there is a right, there is a remedy', 'hear the other side', 'the right to be listened and the right to be heard', 'justice must not only be done, but it must be seen to be done', 'the judge's operation, which does not fall within his competence, is useless', and 'the judge must be impartial'. These maxims have undergone modern processing, have been merged into a whole and reproduced in the corresponding legal construction.

Fourth, a fair trial right is clearly a procedural right. It provides that everyone has the opportunity to initiate legal proceedings in respect of his or her civil rights and freedoms, to obtain effective judicial protection, and the state is obliged to create the appropriate conditions for its realization. All substantive human rights are recognized as fundamental objects that can be protected in their own right by the international, civilized community. However, as has already been noted, this right is of a specific nature because it combines elements of both positive and negative order. In addition, the individual components of this right (for example, the right to have the case examined and the execution of the decision within a reasonable time) are now recognized in the national legal order as independent objects of judicial protection, which allows for a mention of its materialization which is an attribution of substantive rights under certain conditions.

It follows from the above that the right to a fair trial should be defined as a substantive right, thus emphasizing its essence as a combination of the manifestations of fundamental rights. At the same time it imposes positive obligations on the State to ensure it. It is characterized by national and supranational determination, including the involvement of the ECtHR in shaping the content of procedural rights associated with it, regardless of their recognition at the national level, subjective law and axioms, as well as procedural and substantive law.

It should be noted that the substantive nature of the right to a fair trial is now partly implemented in national legislation and law enforcement practice in Ukraine. So, on the one hand, at the constitutional (Constitution of Ukraine, Arts. 55, 124, 126, 129) and sectoral levels (Law of Ukraine 'On the Judicial System and the Status of Judges', Arts. 2, 4, 7–15, 17, 18, etc.), almost all the components of this right are enshrined and guaranteed accordingly. According to Art. 17 of the Law of Ukraine 'On the Execution of Decisions and the Application

13 OB Prokopenko, *The fair trial right: conceptual analysis and implementation practice* (Publishing House FINN 2011) 63.

of the Practice of the ECtHR ', the courts must apply the ECtHR case law as a source of law. However, the above-mentioned right does not yet enjoy the status of being an independent subject of judicial protection and consequently cannot be defended at the national level by means of an effective legal remedy, as has been repeatedly noted by the ECtHR with regard to Ukraine. Thus, the lodging of a complaint before a higher court about the inactivity of a lower court is not considered to be sufficiently effective to expedite proceedings, since, firstly, the instructions of the higher courts are non-binding recommendations only,[14] and secondly, the initiation of disciplinary proceedings against the judge, which may result from a separate decision and be from a higher court informing the qualification commission of delays in the proceedings, is subject to the discretion of the relevant authorities and is not directly accessible to those concerned.[15] In addition, since Ukrainian legislation does not provide for criminal liability for delays in the consideration of a case, the criminal proceedings initiation against a judge and the requirement to compensate for damage caused by a judge, in the course of a criminal case, may not be considered an effective remedy.[16]

Art. 1176, para. 5 of the CPC of Ukraine establishes that harm caused to a physical or legal person as a result of an unlawful decision by a court in a civil case is fully compensated by the State if the actions of a judge (judges), which influenced the resolution of the unlawful decision, contained the elements of a crime according to the conviction of the court that became enforceable. It follows from the above that, as a first condition, the State will make reparation for the damage caused, only if the latter is the consequence of an unlawful judgement in a civil case, that is, a court decision adopted in violation of procedural and substantive law. According to Art. 410, para. 2 of the CPC, a just and lawful decision cannot be overturned for purely formal reasons alone. This means that if non-compliance with the requirements of Art. 6, para. 1 of ECHR has not resulted in an unlawful court decision, the damage caused by the violation of a fair trial right is not subject to compensation. In other words, there is no basis for applying the compensation mechanism. Furthermore, as a second condition, the State will make reparation for the damage caused only if the legality of the court decision is established, if the judge is convicted, and the causal link between the crime and the violated right is recognized. However, the need to establish the guilt of judges by a court sentence that has become enforceable means that material damage is not compensated in practice. In turn, Art. 1176, Para 6 of the CPC establishes that if the damage caused to a physical or legal person is a result ofan unlawful action, an inaction or an unlawful decision of the body of inquiry, then the preliminary (pre-trial) investigative body, the procurator's office or the court shall be reimbursed in accordance with the general principles. With this, however, the current Ukrainian legislation does not answer the question of what is meant by such actions, inactions or decisions. Moreover, according to Art. 1166, 1167 of the CPC, which provide for general grounds of liability for damaged property and moral damage, such damage must be compensated by the person who caused the damage, that is, by the judge. However, it is impermissible in the context of the principle of the judges' independence and their subordination only to the law, as well as in the determination of the guilt of such a person, that is, a judge. However, both the ECtHR and the Supreme Court have repeatedly stressed in their rulings that appeals against the actions of judges (courts) concerning the examination and resolution of cases, as well as appeals against court decisions, outside the procedure prescribed by procedural law are not admissible. That is, there is no higher court. Courts and judges may not be defendants in cases of appeal against their acts or inaction in other court cases or against their decisions taken as a result of such cases, as well as against

14 *Karimov v Ukraine* App no 69435/01, para 74 (ECtHR, 31 January 2008).

15 *Efimenko v Ukraine* App no 55870/00, para 64 (ECtHR, 18 July 2006).

16 *Loshenko v Ukraine* App no 11470/04, para 30 (ECtHR, 11 December 2008).

the obligations of courts and judges to perform certain procedural actions.[17] In addition, para. 7, Art. 1176 of the CPC explicitly establishes that the procedure for compensation for damage caused by unlawful decisions, acts or inaction of the body conducting the search activity – the pre-trial investigation body, prosecutor's office or court – is established by law. Since such a law has not been adopted in the territory of Ukraine yet, it is impossible to rectify the damage caused by the violation of the right to a trial within a reasonable time.

As for the right to the execution of a court decision without undue delay, which is a constituent part of a fair trial right, in Ukraine an attempt to introduce a compensatory mechanism for its protection was made through the adoption of the Law of Ukraine 'On the State guarantees regarding the implementation of judicial decisions' no. 4901-VI of 05 June 2012. The law concerns the late execution of court decisions against State authorities and enterprises. However, the mechanism introduced was recognized by neither the Committee of Ministers of the Council of Europe nor the ECHR as an effective remedy, as indicated in the *Burmich and Others v. Ukraine* case.[18]

## 3 THE SCOPE OF THE APPLICABILITY OF THE RIGHT TO A FAIR TRIAL

According to Art. 6, Para 1 of ECHR, the right to a fair trial must be ensured by the court in resolving the dispute over rights and duties. It follows from this rule that the extent of its applicability is not universal despite the fundamental nature of this right. That is, it must be determined at the national level, allowing for the specificity of the respective legal system and national legal traditions. However, in view of the composition of the relevant rule, the criteria to be taken into account in determining its limits are: (1) legally bound entities which, according to Art. 6 para. 1 of the ECHR, are obliged to ensure respect for the above-mentioned right and the procedures which it guarantees. By the latter, it is useful to mean a set of formalized policies aimed at achieving an expected and determined legal result, which have their own rules, a legislatively defined beginning and ending, and their own object and subject.[19] The list of such procedures is determined according to their ability to resolving how a 'dispute over rights and duties' has a 'civil character'.

### *3.1 Legally Bound Subjects*

It follows from the content of Art. 6, para. 1 of the ECHR that the courts are legally bound subjects primarily. Thus, according to Art. 125 of the Constitution of Ukraine, Paras 1–3 of Art. 17 of the Law of Ukraine 'On the judicial system and the status of judges' the judicial system is based on the principles of territoriality, specialization and instance. The Supreme Court is the highest court in the judicial system. The judicial system consists of: local courts, courts of appeal, and the Supreme Court. In accordance with the principle of specialization, there are general, administrative courts, the High Court of Intellectual Property and the Supreme Anti-corruption Court.

In contrast to the current legislation of Ukraine, the ECtHR applies a slightly broader interpretation of the category 'tribunal', indicating that it does not always have to be a 'classical court' integrated into the 'state court' system. Such an authority could be established to deal

17 Case no. 757/43355/16-ц (Resolution of the Supreme Court, 21 November 2018).

18 *Burmych and Others v Ukraine* App no 46852/13 (ECtHR, 12 October 2017).

19 TV Sakhnova, 'Procedure of the Civilistic Process: Future Methodology' (2012) 1 Bulletin of the Civil Process 13-14.

with individual issues and regulated accordingly outside the ordinary judicial system.[20] However, their employees need not be lawyers or professional judges.[21] Moreover, the fact that it performs various functions (administrative, regulatory, advisory and disciplinary) does not indicate that it cannot be considered as a court in itself[22] provided that, in essence, it performs a judicial function, that is, the function of adjudicating matters within its competence on the basis of the rule of law within the framework of a duly conducted order.[23] This requires that such an authority should be vested with the legal authority to deal with all matters of both fact and law relevant to the case.[24] This means either granting it 'sufficient jurisdiction' or entrusting it with the function of 'judicial supervision'.[25] The scope of fact-finding may be limited, as such a body should evaluate the previous review rather than take actual decisions. The role of Art. 6, Para 1 of the ECHR is not limited to ensuring access to a court with the jurisdiction to substitute the decisions of administrative authorities with its own decisions. In this context, emphasis is placed on the respect to be provided by the decision of the administrative authorities proceeding from their 'feasibility' as they either relate to specific branches of the law (e.g. planning, environmental protection, gambling regulation, etc.),[26] or are adopted in cases in which the jurisdiction of the judicial review body is limited by the technical nature of the subject matter of the dispute.[27] In assessing whether the review has been carried out at a sufficient level, the ECtHR takes into account the powers granted to this 'court' or 'tribunal', as well as such circumstances as: the decision to be disputed, that is, whether it concerns a certain branch that requires special knowledge, or to what extent it allows discretion; the method used in its adoption, including the procedural guarantees that exist during the case consideration by the administrative authority; and the content of the dispute, including the means of appeal, both desirable and existing.[28]

In addition to the requirement on the scope of its powers, the ECtHR also considers that the decision of the body that can be regarded as a court should be of a general binding character and not of a recommendatory nature [29] and it cannot be set aside by non-judicial bodies.[30] As an example, the ECtHR regarded the Local Real Property Transactions Authority as a court,[31] the authority which decides on compensation for damage caused by the crime (the Criminal Damage Compensation Board),[32] the Arbitration Tribunal[33] etc. At the same time, the status of this 'court' was not extended to the body which, although being integrated into the classical judicial system, had discretionary powers limited by the decision of the executive branch.[34] In Ukraine, apart from the courts of the judicial system there is the International Commercial Arbitration Court at the Chamber of Commerce and the Industry

20 *Rolf Gustafson v Sweden* App no 23196/94 (ECtHR, 01 July 1997) para 45, Reports 1997-IV.

21 *Ettl and Others v Austria* App no 9273/81 (ECtHR, 23 April 1987) para 36-41, Series A no 117.

22 *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987) para 50, Series A no. 127-B.

23 *Sramek v Austria* App no 8790/79 (ECtHR, 22 October 1984) para 36, Series A no. 84.

24 *Terra Woningen BV v the Netherlands* App no 20641/92 1(ECtHR, 7 December 1996) para 52, Reports 1996-VI.

25 *Tsanova-Gecheva v Bulgaria* App no 43800/12, para 97 (ECtHR, 15 September 2015).

26 *Sigma Radio Television LTD v Cyprus* Apps no 32181/04, 35122/05, para153 (ECtHR, 21 July 2011).

27 *Al-Dulimi and Montana Management Inc v Switzerland* [GC] App no 5809/08 (ECtHR 2016) para 130.

28 *Sa Patronale Hypothécaire c Belgique* App no 14139/09, para 38 (ECtHR, 17 Juillet 2018).

29 *Benthem v Netherlands* App no 8848/80 (ECtHR, 23 October 1985) para 40, Series A no 97.

30 *Van De Hurk v Netherlands* App no 16034/90 (ECtHR 19 April 1994) para 45 Series A no 288.

31 *Sramek v Austria* App no 8790/79 (ECtHR, 22 October 1984) para 36 Series A no 84.

32 *Rolf Gustafson v. Sweden* App no 23196/94 (ECtHR 01 July 1997) para 48 Reports 1997-IV.

33 *Lithgow and Others v The United Kingdom* App nos 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81 (ECtHR, 08 July 1986) para 201 Series A no 102.

34 *Van De Hurk v Netherlands* App no 16034/90 (ECtHR, 19 April 1994) para 54 Series A no 288.

of Ukraine recognized by the ECtHR as a 'court, in the law',[35] the High Council of Justice, the Parliamentary Committee and the plenary meeting of Parliament,[36] although the Supreme Council of Justice now replaces the Supreme Council of Yustitsia[37].

For some cases, it should be noted that the observance of certain elements of the right to a fair trial is checked by the ECHR, that is, the requirements of Art. 6, Para 1 of the ECHR apply to constitutional proceedings. Thus, in the decision in the case of *Poliakh and others v. Ukraine*, the ECtHR verified the observance of the right to a trial within a reasonable time, taking into account the time frame for the decision on the constitutionality of the Law of Ukraine 'On Lustration' no. 1682-VII of 16 September 2014 before the Constitutional Court of Ukraine. An understanding of the ECtHR indicates that such proceedings form part of the ordinary judicial procedure, since without resolving this issue, administrative courts could not consider the merits of the applicants' cases.[38]

Under Art. 17 of the CPC, civil rights and interests may be protected by the President of Ukraine, State authorities, the authorities of the Autonomous Republic of Crimea or local self-government authorities. The administrative form of protection is reproduced in the jurisdictional activities of the above-mentioned authorities,[39] which is inherently subsidiary, since it can only occur in cases expressly provided by law, without depriving a person of the right to judicial protection. As an example, under Art. 19 of the Family Code of Ukraine, a person has the right to previous recourse to the guardianship agency for the protection of his or her family rights and interests. The decision of the guardianship agency is binding if within 10 days of its issuance the person concerned has not applied to the courts for the protection of rights or interests, except in cases provided for in Art. 170, Para 2, of the Code. An application for protection from a guardianship agency does not deprive a person of the right to apply to a court.

It follows from the above that if at the national level civil rights and interests can be protected administratively by the authority that performs quasi-judicial functions, provided that it satisfies other requirements for the 'court' formulated in the ECtHR practice, it can be defined as a legally binding authority. That is, it is advisable for the ECtHR, when considering and deciding a case, to adhere to the guarantees laid down in Art. 6, Para 1 of the ECHR. However, in most instances, for such authorities these requirements are optional rather than mandatory and may therefore be applied in a limited, selective manner,[40] since the administrative form cannot claim autonomy in civil relations[41] and is the exception rather than the general rule. In addition, under Art. 55, Para 2 of the Constitution of Ukraine everyone is guaranteed the right to appeal to the courts against decisions, actions or inactions of State authorities, local self-government authorities, officials and employees. Thus, after the use of an administrative form of protection, a person always has the right to go to court.

In addition to judicial and administrative forms of protection, current Ukrainian legislation provides for an alternative form of protection. As an example, in accordance with Art. 4, Para 4 of the CPC, Art. 1, Para 2 of the Law of Ukraine 'On Arbitration Tribunals', any dispute

35 *Regent Company v Ukraine* App no 773/03 (ECtHR, 03 April 2008) para 54.

36 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR 2013) para 90.

37 Editor's note. See more in S Prylutskyi, O Strieltsova 'The Ukrainian Judiciary under 21st-Century Challenges' (2020) 2/3(7) Access to Justice in Eastern Europe 78-99.

38 *Polyakh and Others v Ukraine* App no 58812/15 and 4 others (ECtHR 17 October 2019) para 186-192.

39 VV Komarov et al, *Civic Process Course: Textbook* [Kurs tsyvilnoho protsesu: pidruchnyk] (Law 2011) 17.

40 TA Tsuvina, 'Peculiarities of the calculation of the reasonable period of civil proceedings in the context of the jurisprudence of the European Court of Human Rights' (2015) 130 Problems of Legality 98.

41 TV Sakhnova, 'Civic Process Course: Theoretical Beginnings and Basic Institutions' (Wolters Kluwer 2008) 14.

arising from civil and economic legal relations may be submitted to arbitration by agreement between the parties, except in the cases provided for by law. An arbitration tribunal is a non-State independent body established by agreement or by decision of the natural and/or legal persons concerned in accordance with the procedure established by this Law for the settlement of disputes, arising from civil and economic legal relations (Art. 2, Para 2 of the Law of Ukraine 'On Arbitration Tribunals'). International commercial arbitration is a variant of an arbitration tribunal. According to Art. 1, Para 2 of the Law of Ukraine 'On International Commercial Arbitration', the International Commercial Arbitration can review, by agreement of the parties: (1) disputes from contractual and other civil law relations arising in the conduct of international trade and other types of international economic relations if the place of business of at least one of the parties is abroad; and (2) disputes between enterprises with foreign investments and international associations and organizations established in the territory of Ukraine among themselves, disputes between their participants, and disputes between these enterprises with other subjects of Ukrainian law.

In its decisions, the ECtHR has taken a separate position to extend the requirements of Art. 6, Para 1 of the ECHR to the arbitration activity. Thus, the ECtHR distinguishes between statutory arbitration, which must respect the guarantees of the right to a fair trial and voluntary arbitration, which must generally adhere to the requirements mentioned by the parties, although, usually, there is no violation of the ECHR if the arbitral tribunal is convened on a voluntary basis and both parties have the same opportunity to influence the composition of the arbitration tribunal.[42] In the latter case, by choosing this type of arbitration the parties relinquish some rights, expressly or implicitly, provided for in Art. 6, Para 1 of the ECHR. The main consideration is that the refusal is voluntary,[43] legal and unambiguous. In the case of procedural rights, an effective waiver should also comply with minimum guarantees in accordance with its meaning and should focus only on individual rights. However, a waiver does not mean that national courts should not have some control over the conduct of arbitration hearings leading to binding awards, nor does it mean that they are not responsible for such oversights. However, States have considerable discretion in regulating the reasons why an award should be set aside.[44]

The literature suggests that, given the importance of guarantees of a fair trial for the constitutional order of European countries, the latter should be fully applied by arbitration tribunals in the public interest.[45] However, we believe that as voluntary arbitration is a variant of alternative dispute resolution, its 'formalization' will lead to a distortion of its substance and a decrease in quantitative and qualitative efficiency. Nevertheless, the State should be able to monitor the activities of such authorities through the State courts at the request of one of the parties, although such control should be limited to the mere verification of the voluntariness of the arbitration agreement, the result is that the individual waives his or her right of access to the court and complies with the basic provisions of the agreement between the parties on the procedure for the settlement of the dispute. However, compliance with all the requirements set out in Art. 6, Para 1 of the ECHR by the arbitration tribunals (arbitration) depends, first and foremost, on the existence of prior agreement between the parties to that effect, as set out in the arbitration agreement. At the same time, in the event of non-compliance, it follows that the State is not responsible for this, as it cannot influence the activities of such legal persons in any way.

42 *Bramelid and Malmstrom v Sweden* App no 8588/79, 8589/79 (ECtHR, 12 December 1983) para 30 DR 29.

43 *Pastore v Italy* (dec) App no 46483/99 (ECtHR, 25 May 1999).

44 *Osmo Suovaniemi and Others v Finland* (dec) App no 31737/96 (ECtHR, 23 February 1999).

45 V Marmazov, P Pushkar, 'Is there a right to a fair arbitration guaranteed by the European Convention on Human Rights?' (2011) 1 Law of Ukraine 37-49.

It should be noted that the scope of the applicability of the right to a fair trial is not purely limited to the jurisdictional activities of 'courts'. The ECtHR formulated the concept of 'the right to a court', one aspect of which is the right of access, which would be illusory if the legal system of a Contracting State allowed a binding final judgement not to be enforced to the detriment of one of the parties. Consequently, for the purposes of Art. 6, Para 1 of the ECHR, the execution of a decision taken by any court should be considered as an integral part of the judicial proceedings.[46] Effective access to court includes the right to enforcement without undue delay,[47] and is adopted by both national and foreign courts.[48] Thus, State executive service authorities and private actors which, in accordance with the Law of Ukraine 'On authorities and persons enforcing court decisions and decisions of other bodies', enforce judicial decisions and decisions of other authorities in its activity and have to respect both reasonable time limits (that is, to avoid undue delay) and other guarantees that are the elements of the a trial right.[49] The State is responsible for the effectiveness of the enforcement system.[50]

### *3.2 Dispute over a right as a criterion of applicability*

In disclosing the meaning of the concept of 'dispute over a right', the ECHR proceeds from the fact that this category should not be interpreted too technically. That is, it should be dealt with on its substance, and not in the formal sense. The use of the French word *contestation* indicates that there is a disagreement[51] between two opposing parties, which can be made up of two individuals, as well as one individual and the State.[52] Such differences cannot be resolved through a non-conflict unilateral procedure available in the absence of a dispute about the right.[53] *Inter alia*, the existence of the latter may be evidenced by differing views expressed by the parties on the same issue.[54] At the same time, in ascertaining its reality, it is necessary to 'look beyond the limits of appearances and language', which is used in formulating a rule of law (i.e. to depart from its literal interpretation) and to focus on the real situation depending on the circumstances of each particular case.[55]

It follows that in order for a dispute over a right to arise, there must always be two opposing parties who, by their actions (or, indeed, inaction), demonstrate the existence of a difference between them over the disputed matter. If the latter is implicit or non-existent, the law should expressly caution against recourse to the courts to assert their rights. This will make it possible to overcome the 'actual' absence of a legal dispute, since we believe that the latter should be presumed because of the impossibility of exercising subjective rights.

The ECtHR has also formulated a number of requirements for a 'dispute over a right'. The first requirement is that the dispute must be genuine and serious[56] or, in other words, claims to the court must be motivated, unless otherwise provided for, to avoid giving the impression

46 *Hornsby v Greece* App no 18357/91 (ECtHR,19 March 1997) para 40, Reports 1997-II.

47 *Immobiliare Saffi v Italy* [GC] App no 22774/93 para 66, ECHR 1999-V.

48 *Saccoccia v Austria* App no 69917/01 (ECtHR, 18 December 2008) para 62.

49 V Turkanova, 'Open Enforcement: New Approach of Ukraine in Access to Justice' (2019) 2 *Access to Justice in Eastern Europe*.

50 *Nosal v Ukraine* App no 18378/03 (ECtHR, 29 November 2005) para 40.

51 *Le Compte, Van Leuven and De Meyere v Belgium* App nos 6878/75; 7238/75 (ECtHR, 23 June 1981) para 45, Series A no 43.

52 *Ringeisen v Austria* App no 2614/65 (ECtHR, 16 July 1971) para 94, Series A no 13.

53 *Alaverdyan v Armenia (dec)* App no 4523/04 (ECtHR, 24 August 2010) para 35.

54 *Procola v Luxembourg* App no 14570/89 (ECtHR, 28 September 1995) para 37, Series A no 326.

55 *Van Droogenbroeck v Belgium* App no 7906/77 (ECtHR, 24 June 1982) para 38, Series A no 50.

56 *Sporrong and Lönnroth v Sweden* App nos 7157/75, 7152/75 (ECtHR, 23 September 1982) para 81, Series A no 52.

that they are biased and unreasonable.[57] For example, the ECtHR considers that where it is contested that HIV-positive prisoners are held together with other prisoners,[58] or that films are not shown in prisons[59], then these would require non-compliance with this requirement, and consequently would be excluded from the scope of Art. 6, Para 1 of the ECHR cases as these, in no way, violate the rights of persons and do not cause harm and do not create grounds for awarding compensation accordingly. Among other things this means that the person applying to the court must have a legal interest i.e. that person must apply for a protection of rights, freedoms and interests.[60]

Second, the dispute may relate not only to the existence of the subjective right, but also to the scope, sphere or mode of its realization.[61] However, if the emergence of a subjective right depends on the commission of certain acts or the occurrence of circumstances provided for by law, the dispute may not arise until respective legal facts have taken place.[62] Issues of both fact and law can be contentious,[63] including the legal interpretation of a rule of law.[64] However, in cases concerning the right to pursue certain activities, the assessment of the candidate's qualities, experience, the duration of the performance of a certain job, diploma and qualification carried out by the body authorized to decide issues on 'admission to the profession' cannot be contested since the latter is more like a 'school or university examination and it is very far from the judicial function'.[65]

Third, the review outcome must be decisive for the disputed right or duty; a mere minor link or a remote effect is not sufficient for the application of Art. 6, Para 1 of the ECHR.[66] However, this cannot be equated only to the consequences of the proprietary character.[67] For example, the ECtHR recognized that legal proceedings challenging the lawfulness of an extension of a licence to operate a power plant are not subject to this rule, since the link between the decision to extend and the right to protection of life, the physical integrity and property was 'too minor and too remote' and the complainants could not prove that they were directly at risk, which would have been not only serious but also specific and unavoidable.[68] On the other hand, the ECtHR has approved the application of Art. 6, Para 1 of the ECHR, and the complainants' settlement, in the case of an appeal against the construction of a dam, as it could have caused flooding.[69] This criterion seems to suggest that the decision of the court should determine and/or affect the rights and obligations of the parties realistically (causation having been established), not possibly.

57 *Rolf Gustafson v Sweden* App no 23196/94 (ECtHR, 01 July 1997) para 39, Reports 1997-IV.

58 *Skorobogatykh v Russia* (dec) App no 37966/02 (ECtHR, 8 June 2006).

59 *Artyomov v Russia* App no 14146/02 (ECtHR, 27 May 2010) para 198.

60 *Ambruosi v Italy* (dec) App no 31227/96 (ECtHR, 3 February 2000).

61 *Zander v Sweden* App no 14282/88 (ECtHR, 25 November 1993) para 22, Series A no 279-B.

62 *Gavrielides v Cyprus* App no 15940/02 (ECtHR, 1 September 2006) para 38.

63 *Albert and Le Compte v Belgium* App no 7299/75; 7496/76 (1 September 2006, 10 February 1983) para 27, 29, Series A no 58; *Benthem v the Netherlands* App no 8848/80 (ECtHR, 23 October 1985) para 32, Series A no 97.

64 *Van Marle and Others v the Netherlands* App nos 8543/79; 8674/79; 8675/79; 8685/79 (ECtHR, 26 June 1986) para 36, Series A no101.

65 *Van Marle and Others v the Netherlands* (n 66); *San Juan v France* (dec) App no 43956/98 ECHR 2002-III.

66 *Fayed v the United Kingdom* App no 17101/90 (ECtHR, 21 September 1994) para 56, Series A no 294-B.

67 *Kurzac v Poland* (dec) App no 31382/96 ECHR 2000-VI; *Kuśmierek v Poland* App no 10675/02 (ECtHR, September 2004) para 49, 21; *Pieniążek v Poland,* App no 62179/00 (ECtHR, 28 December 2004) para 20.

68 *Balmer-Schafroth and Others v Switzerland* App no 22110/93 (ECtHR, 26 August 1997) para 40, Reports 1997-IV; *Balmer-Schafroth and Others v Switzerland* (dec) App no 50495/99 (ECtHR, 13 September 2001); *Athanassoglou and Others v Switzerland* [GC] App no 27644/95 para 46-55, ECHR 2000-IV.

69 *Gorraiz Lizarraga and Others v Spain* App no 62543/00 para 46, ECHR 2004-III.

Fourth, the subjective right in a dispute should be recognized in law, at least where there are controversial grounds,[70] i.e. neither Art. 6, Para 1 of the ECHR nor the ECtHR aims to create new subjective rights[71] or attribute new, uncharacteristic content to existing ones.[72] Legislative provisions and its interpretation by national courts should always remain determinative.[73] However, the discretionary power of the courts to decide whether to allow the right to a dispute to be exercised, provided that certain criteria are met, or to refuse to do so is decisive in the right 'recognition' assessment at the national level.[74] However, the mere existence of discretionary powers does not automatically preclude the existence of a right [75] if there are mechanisms and protection of that right.[76] However, so-called 'unofficial' methods can also be used for protection, i.e. those which are not expressly stipulated in the law but produced by judicial practice.[77]

Thus, taking into account the position of the ECtHR, as well as the existing development of civil procedure law, we consider it possible to provide a more detailed definition of the concept of 'dispute over a right', which is synonymous with the term 'legal dispute' which is used in Art. 124, Para 3 of the Constitution of Ukraine as a criterion for determining court jurisdiction. The latter should be understood as legal deviations arising from legal uncertainty in the subjective rights and obligations of several subjects. It has an internal shape which displays its structure and consists of a subject matter, grounds and content. The subject matter includes subjective rights, freedoms or interests that are recognized in national legislation and are in a state of legal uncertainty, the overcoming of which is decisive for understanding their content, restoration and exersise. The grounds for a dispute include circumstances which give rise to such a condition. In turn, the content of a dispute consists of a cognitive interpretation by a person (the initiator) of the existence of a violation, and the non-recognition or contestation of the opposing party's subjective rights, freedoms or interests, which gives rise to uncertainty and impedes its exercise. The external form of legal dispute expression is always the active action of the dispute initiator, manifested in the request to the opposing party or jurisdictional authority for the restoration of the violated, unrecognized or disputed right, freedom or interest. Legal disputes are always pre-trial and extra-judicial in nature. When it is referred to the court, it is transformed into a claim that is directly subject to the civil case it concerns.[78]

It should be noted that the criterion of a 'dispute over a right' is constantly applied by national courts when deciding whether a case can be tried. The Grand Chamber of the Supreme Court found that, because of this, some cases are not subject to review by the courts, namely: appeal of the Act on the Violation of the Rules on the Electrical Energy Usage does not impose any obligations on the consumer and it is a type of complaint[79]; outlawing actions/inactions of the court (judge or court officials) connected with a case review, as well as claims for the obligation of the court (judge) to perform certain procedural acts because it cannot be dealt

70 *Editions Périscope v France* App no 11760/85 (ECtHR, 26 March 1993) para 35, Series A no 234-B.

71 *W v the United Kingdom* App no 9749/82 (ECtHR, 08 July 1987) para 73, Series A no 121-A.

72 *Fayed v the United Kingdom* App no 17101/90 (ECtHR, 21 September 1994) para 65, Series A no 294-B.

73 *Roche v The United Kingdom* App no 32555/96, para 120, ECHR 2005-X; *Masson and Van Zon v the Netherlands* App nos 15346/89, 15379/89 (ECtHR, 28 September 1995) para 49, Series A no 327-A.

74 *Masson and Van Zon v the Netherlands* App no 15346/89, 15379/89 (ECtHR, 28 September 1995) para 50-51, Series A no 327-A; *Szücs v Austria* App no 20602/92 (ECtHR, 24 November 1997)para 33 Report 1997-VII.

75 *Elles and Others v Switzerland* App no 12573/06 (ECtHR 16 December 2010) para 16.

76 *Boulois v Luxembourg* App no 37575/04 para 98 ECHR 2012.

77 *Gorou v Greece (No 2)* App no 12686/03 (ECtHR, 20 March 2009) para 27.

78 NY Sakara, 'Content and Legal Nature of Legal Dispute' ['Zmist ta pravova pryroda yurydychnoho sporu'] (2017) 46 Uzhgorod National University Scientific journal. Series: Law 63-68.

79 Case no 522/12901/17-ц (Resolution of the Supreme Court of Ukraine, 6 February 2019)..

with under the rules of any proceedings[80]; the prohibition to issue future orders requiring military personnel to apply for a one-time cash assistance [81]; unlawful notarial action to issue a certificate of acquisition from a public tender [82]; finding a violation of Art. 13 of the ECHR and a fair satisfaction payment[83], etc.

### *3.3 Differentiation of Judicial Procedures*

All procedures, in understanding Art. 6, Para 1 of the ECHR and the practice of the ECtHR, are divided into disputed and undisputed procedures. The first are those that are directly violated in court for the primary resolution of the dispute, as well as those that are the result of an attempt at an out-of-court settlement, that is, when the court performs the so-called 'control functions of the court' by examining the lawfulness of other jurisdictional authorities, such as arbitration.

At the level of the national legal order of Ukraine, the settlement of legal disputes takes place within the limits of legal proceedings (Art. 19, Para 1 of the CPC) as a specific procedure for the consideration and resolution of civil cases.[84] At the same time, one of the novelties introduced after the new version of the CPC of Ukraine is the introduction of the differentiation of proceedings[85] in general, and their simplification. The latter has no independent procedural status. It is a consequence of the differentiation of the civil procedure through the exclusion of certain judicial procedures and the establishment of optional procedures for some of them. It cannot be regarded as subsidiary to general proceedings because, although the parties may express their views on its application, the final decision on the type of procedure to be applied is made by the court.[86] Simplified procedure only deals with certain categories of cases, such as insignificant cases, or cases arising from labour relations. To 'simplify' proceedings (as in some other countries, where there is small claim procedure to review cases where claims are of a small value)[87] provides for shortened time limits, the absence of separate procedural steps and the possibility of case review without a court hearing with the parties in writing and with optional representation by a lawyer only.

It is embodied in such judicial procedures as proceedings to challenge decisions of arbitration tribunals, challenges of decisions of international commercial tribunals, the recognition and enforcement of decisions of foreign courts, international commercial arbitration in Ukraine, and authorization to enforce arbitration tribunals' decisions (section VIII, IX Civil Procedural Code of Ukraine). Despite the fact– when understanding the ECtHR – that the function of 'judicial control' is implemented only in the first two procedures, nevertheless,

80 Case no 757/43355/16-ц (Resolution of the Supreme Court of Ukraine, 21 November 2018)., Case no 295/7631/17 (Resolution of the Supreme Court of Ukraine, 20 March 2019).

81 Case no 607/15692/19 (Resolution of the Supreme Court of Ukraine, 28 April 2020).

82 Case no 438/610/14-ц (Resolution of the Supreme Court of Ukraine), 7 July 2020).

83 Case no 127/18934/18 (Resolution of the Supreme Court of Ukraine, 22 September 2020).

84 VV Komarov et al, *Claim proceeding: monograph* ['Pozovne provadzhennia: monohrafiia'] (Law 2011) 7. See also I Izarova, Yu Prytyka, 'Simplified action proceedings of the civil procedure of Ukraine: challenges of the first year of implementation' Problems of Legality No 145, 2019, Pp. 51-67.

85 See D Korol, 'The Value of the Case for the Applicant: A Criterion for the Differentiation of Case Proceedings or of Access to Justice?' Teisė, 2020, 1140, Pp 154-160. Doi: 10.15388/Teise.2020.114.11.

86 NY Sakara, 'Simplified Proceedings as a novelty of Civil Procedure Law' Problems of Civil Law and Procedure: Scientific-practical conference, Kharkiv, 25 May 2018.

87 E Silvestri, 'Small Claims and Procedural Simplification: Evidence from Selected EU Legal System' (2018) 1 Access to Justice in Eastern Europe 6-14; I Izarova, R Flejszar, V Vebraite, '*Access to Justice in Small Claims Procedure: Comparative Study of Civil Procedure in Lithuania, Poland and Ukraine*' International Journal of Procedural Law, Volume 9 (2019), No 1, Pp 97-117.

the ECtHR has investigated the observance of certain guarantees[88] arising from Art. 6, Para 1 of the ECHR also in the last two types of procedures, i.e. when the existence of a dispute over a right is presumed, although it may be manifestly expressed and not recognized.

In turn, undisputed procedures are generally outside the scope of Art. 6, Para 1 of the ECHR. However, there have been cases where the ECtHR has verified the observance of certain elements of the right to a fair trial in proceedings where no dispute of law has been recognized in the national legal order. As an example, in a case where the proceedings outcome resulted in the restriction of the legal capacity of the individual, a violation of the right to a fair trial was found due to the impossibility of personal explanations being provided [89] in cases involving the restoration of the legal capacity of a person whose judicial capacity had been restricted or whose legal capacity was impaired, the right of access to a court [90] and the right to a trial within a reasonable time;[91] appeals against decisions to admit a person and to provide involuntary psychiatric care – the right to a trial within a reasonable time.[92] At the same time, the ECtHR declared inadmissible the complaint concerning the violation of the procedural equality of the parties in a paternity case in which the decision had been overturned because of newly discovered circumstances because after its abolition the complainant has not exercised his right to bring an action and the continuation of the proceedings in an undisputed manner was contrary to the requirements of national law.[93]. In addition, the ECtHR discontinued the consideration of the complaint raising the issue of the initiation of Art. 6, Para 1 of the ECHR in the context of the failure to comply with the court order for payment because of the commencement of proceedings to review the legality of the use of budgetary funds, because the complainant did not use adequate and effective remedies. Thus, at the beginning, the complainant had a choice between filing an application for a court order and bringing an action under the general rules of civil procedure. The first way was cheaper and faster than the second, however, it was not sufficient because of the possibility of the authorization of expenditures being denied by the supervisory authorities of the Accounting Chamber. By contrast, the second way open to the complainant would have enabled a court decision to be obtained which was binding on the Accounting Chamber and would have overturned the order of the latter.[94]

The literature suggests that, in indisputable cases, the requirements of the right to a trial such as the independence and impartiality of the court, access to the court, the principle of legal certainty, a reasonable time for trial, etc. must nevertheless be secured. In other words, there are proposals to expand the scope of protection and the applicability of the right to a fair trial[95]. Excluding these proceedings from the scope of Art. 6 of the ECHR would mean that the State is relieved of its obligations to ensure the proper administration of justice in such unacceptable cases. While agreeing in part that it would be appropriate to extend the requirements of the right to a fair trial to certain undisputed procedures, it should be noted that the ECtHR has verified them only through procedures in which a person's condition has been established and has subsequently led to the restriction or the impossibility of rights

88 *Selin Asli Oztürk c Turquie* App no 39523/03 (ECtHR, 13 Octobre 2009); *Ern Makina Sanayi Ve Ticaret AŞ c Turquie* App no 70830/01 (ECtHR, 3 May 2007) para 33-34,; *Sholokhov v Armenia and Moldova* App no 40358/05 (ECtHR, 31 July 2012); *K v Italy* App no 38805/97 (ECtHR, 20 July 2004); *Saccoccia v Austria* App no 69917/01 (ECtHR, 18 December 2008).

89 *Winterwerp v Netherlands* App no 6301/73 (ECtHR, 24 October 1979) para 75, Series A no 33.

90 *Stanev v Bulgaria* App no 36760/06 (ECtHR, 17 January 2012) para 248; *Nataliya Mikhaylenko v Ukraine* App no 49069/11(ECtHR, 30 May 2013) para 40.

91 *Matter v Slovakia* App no 31534/96 (ECtHR 05 July 1999) para 61.

92 *Laidin c France (№ 2)* App no 39282/98 (ECtHR 7 Janvier 2003) para 91.

93 *Alaverdyan v Armenia* (dec) App no 4523/04 (ECtHR 24 August 2010) para 36.

94 *Beis v Greece* App no 22045/93 (ECtHR, 20 March 1997) para 31-36, Reports 1997-II.

95 TA Tsuvina, *Trial Right in civil proceedings: monograph* (Word 2015) 67-68.

being exercised, and the ultimate purpose of the application to the court was to determine the extent of the rights and the duties of the person. In this connection, the ECtHR has considered it advisable to provide these guarantees, since the court's activities were as close as possible to resolving disputes which could not be characterized as a dispute of law under the provisions of national law. The same was true of procedures that took place after a prima facie issue had been resolved on the merits through a unilateral, non-confrontational process. At the time the claims were being considered, there was disagreement between the concerned persons. These disagreements were the result of a court decision or arose after a certain period of time, but were directly related to its existence, provided that no other contentious procedure was envisaged at the national level. Thus, there has been a gradual conversion of undisputed procedures into contentious ones, and it is the latter that must be addressed in a fair trial. The ECtHR did not extend the requirements of Art. 6, Para 1 of the ECHR on 'classical' undisputed procedures.

Pursuant to Art. 19, Para 2 of the CPC of Ukraine, legal proceedings are conducted in accordance with the rules action proceedings and the written proceedings. The latter is intended to deal with applications for the recovery of a small claim for which there is no dispute or its existence is unknown to the complainant (Art. 19, part 3, Art. 161 of the CPC of Ukraine), that is, it is 'notionally' uncontested and essentially simplified because it takes place without a court proceeding and without summoning the parties where there would be the possibility of the debtor objecting to the court order. At the same time, the current version of the CPC of Ukraine establishes an alternative to ordinary legal proceedings, since, according to Art. 161, Para 2 of the CPC of Ukraine, a person has the right to apply the requirements set forth in Art. 161, Para 1 of the CPC of Ukraine, in action or summary proceedings of their own choosing. So, they are no longer as mutually exclusive[96] as they were before. Taking into account the above, as well as the introduction in Ukraine of a 'no-proof model' court order,[97] the guarantees of Art. 6, Para 1, of the ECHR should not extend to summary proceedings.

In civil proceedings, there is another type of procedure, which is a separate procedure, designed to deal with cases concerning the confirmation of the existence or the absence of legal facts that are important for the protection of a person`s rights and interests, or for the creation of conditions to be exercised by a person of personal non-property or property rights, or the confirmation of the existence or the absence of uncontested rights (Art. 19, Para 7, Art. 293 of the Civil Procedural Code of Ukraine). It takes the place of an undisputed production. However, the nature of the law of civil procedure is ambiguous in its evaluation, as some scholars argue that there is a dispute over the right in some cases[98] or a dispute over the facts.[99] However, on the basis of the legal positions of the ECtHR referred to above, despite the potential for conflicts, it is hardly possible to accept the 'classical' disputability of these cases on the basis of: (1) the absence of the parties (Art. 42, Para 3 of the CPC of Ukrainian) between which there is a dispute referred to a court for decision; (2) an undisputed procedure for the consideration of the plaintiff's claims addressed to the court and not to other persons; and (3) a direct prohibition to consider disputes about the rights in separate proceedings (Art. 294, Para 6 of the CPC of Ukraine). At the same time, an analysis of the norms of the current CPC of Ukraine makes it possible to classify into two groups the cases dealt with in

96 VV Komarov, *Civil procedural legislation in the dynamics and practice of the Supreme Court of Ukraine* (Law 2012) 45.

97 VV Komarov et al, *Court Administration of Ukraine: Basic State University: Monograph* (Law 2016) 605.

98 IV Udaltsova, 'Separate proceedings and problems of recognition of a citizen as having limited legal capacity or incapacity' (Cand of Law thesis, Kharkiv 1999) 4, 10; MI Stefan, *Civil Procedure Law of Ukraine: Academic course: Textbook for students* (Publishing House Book In Jure 2005) 434-435 ff.

99 VI Tertyshnikov, *Civil Process of Ukraine*, 4th ed (Publishing house 'Jurait', 2012) 226; DM Chechot, *Non-Contentious Proceeding* (Publishing house of Law Faculty of St. Petersburg State University 2005) 448 ff.

separate proceedings. The first group consists of those in which the existence of a dispute over a right results in the denial of the opening of proceedings or the abandonment of an application without consideration and an explanation to the persons concerned that they are entitled to bring an action on a general basis, i.e. that it is 'indeed indisputable'. However, these allow for the conversion of an undisputed claim into a disputed claim, which should be considered in the proceedings (the establishment of facts of legal significance, the restoration of rights to lost securities bearer and promissory notes, the transfer of abandoned property to communal property, and the recognition of inheritance as extinct). The second group consists of cases which cannot be converted to contentious cases because of the expressed provision in the law that they can be considered in separate procedure only, that is, they are subject to the established law the 'presumption of indisputability' (the restriction of the legal capacity of a natural person, the recognition of a natural person as lacking legal capacity,[100] the restoration of the legal capacity of a natural person; the granting of full civil capacity to a juvenile; the recognition of the natural person as missing [101] or declaring a person dead[102]; adoption; involuntary psychiatric care[103]; compulsory hospitalization in an anti-tuberculosis institution; the disclosure by a bank of information containing bank secrecy concerning legal and natural persons; the issuance and extension of a restraining order). However, since the outcome of the review is determinative of the extent of the rights and duties of the person against whom the decision is made, and this may be objected to by the concerned person as well as by there being no procedure at the national level to influence such subjective rights and duties without altering the relevant court decision in special proceedings, then such cases shall be dealt with in accordance with the requirements of Art. 6, Para 1 of the ECHR.[104] An exception to this is for adoption cases, as Art. 236 of the Family Code of Ukraine provides for the possibility of filing an action for adoption annulment and abolition.

The 'disputable' and 'indisputable' procedures referred to above, within which the merits of the case are considered, qualify as the main ones, which are opposed by others, such as 'preparatory'[105] or, as they are still defined in decisions of the ECtHR as 'intermediate' and 'supportive' procedures. The latter, until 2009, were not considered as such to 'resolve' a dispute over civil rights and duties,[106] however, the ECtHR subsequently changed its position by stating the rule that Art. 6, Para 1, of the ECHR is applicable to such procedures under two conditions. First, the right affected in the main proceedings, that is, when considering the merits of the case and when applying restrictive measures, must be 'civil' in its understanding of the ECHR. Second, the interim measure must affect the right in one way or another and it is a subject of court protection.[107] Thus, the ECtHR applied Art. 6, Para 1, of the ECHR to the procedures solving the issue of the interim injunction and where the subject matter and the interim measure were more or less the same[108] their results were decisive for civil rights;[109] the 'status quo' was kept until the final court decision of the case was adopted, otherwise

100 Case no 88/680/15-ц (Resolution of the Supreme Court of Ukraine, 6 June 2018).

101 Case no 397/712/17-ц (Resolution of the Supreme Court of Ukraine, 14 November 2018).

102 Case no 494/601/16-ц (Resolution of the Supreme Court of Ukraine, 26 September 2018).

103 Case no 523/4937/18 (Resolution of the Supreme Court of Ukraine, 14 January, 2019).

104 Case no 2-2195/05 (Resolution of the Supreme Court of Ukraine, 8 August 2018); Case no 756/552/17 (Resolution of the Supreme Court of Ukraine, 20 June 2018); Case no 607/114/15-ц (Resolution of the Supreme Court of Ukraine, 7 November 2018).

105 R Clayton, H Tomlinson, *Fair Trial Rights*, 2nd ed (Oxford University Press 2010) 197.

106 *Libert c la Belgium* (dec) App no 44734/988 (ECtHR, Juillet 2004).

107 *Micallef v Malta* [GB] App no 17056/06 (ECtHR 15 October 2009) para 83-86.

108 *Micallef v Malta* (n 109); *AK v Liechtenstein* App no 38191/12 (ECtHR, 9 July 2015) para 49-55.

109 *Udorovich v Italy* App no 38532/02 (ECtHR, 18 May 2010) para 37, *Pekárny a Cukrárny AS v The Czech Republic* App nos 12266/07, 40059/07, 36038/09 and 47155/09 (ECtHR, 12 January 2012) para 66-70.

the results of the main proceedings would have been nullified,[110] and an interim decision adopted.[111] However, the requirements of Art. 6, Para 1 of the ECHR do not apply if the interim measure is only protective in nature, i.e. when it is intended to ensure future court decision,[112] as well as when procedures are needed for setting aside interim measures.[113] The ECtHR considers that, in exceptional cases, for example, where the effectiveness of an required intervention depends on the speed of the decision-making process, it may not be possible to respect all procedural guarantees and they should be applied to the extent that is compatible with the nature and purpose of the procedure applied. This concerns primarily the requirement of a public trial.[114] However, such restrictions may in no case affect the requirement of independence and the impartiality of the court or the judge.[115] Today in addition to this requirement,[116] interim measures or procedures have already been subject to violations of the right of access to court[117] and the enforcement of the court decision by the ECHR, otherwise the right of access to the main court is violated[118].

In procedural law science, it is suggested that interim measures should be understood as limitations, prohibitions and duties imposed by the court for a specific period of time to give rise to special material obligations, the legal regime governing the security and the guarantee of the execution of judicial acts, the cessation of unlawful activities, the prevention of damage and the obtaining of necessary evidence by the court. These include: the provision of evidence (Arts. 116–119 of the CPC of Ukraine), the security and prepayment of court costs (Arts. 135 of the CPC of Ukraine), the provisional seizure of evidence for court examination (Art. 146 of the CPC of Ukraine), and claim enforcement and counter enforcement (Arts. 149–159 of the CPC of Ukraine). At the same time, it seems that, according to the position of the ECtHR, the requirements of Art. 6, Para 1 of the ECHR should be observed only when the enforcement of a claim, by prohibiting certain actions, establishes a duty to perform certain acts: prohibiting other persons acting in relation to the subject matter of the dispute, from making payments, transferring property to the respondent or performing other duties towards it; halting the sale of seized property, if an action for the recognition of ownership of the property and for the removal of the arrest is filed; and so on. We believe that the other means to enforce the claim listed in Art. 150, Para 1 of the CPC of Ukraine are only protective in nature and intend to ensure the continued enforcement of the court decision, that is, the provisions of Art. 6, Para 1 of the ECHR do not expand to their application.

Although Art. 6, Para 1 of the ECHR does not provide for the right of appeal and cassation, the ECtHR relies on States that establish a system of courts for the review of judicial decisions with requirements to ensure that the fundamental guarantees enshrined in this note are provided within their jurisdiction.[119] However, the manner in which the right to a fair trial is applied in the proceedings before such courts depends on their specificities, taking into account the continuity of these proceedings in national proceedings and the role

110 *Kübler v Germany* App no 32715/06 (ECtHR, 13 January 2011) para 48; *Sharxhi and Others v Albania* App no 10613/16 (ECtHR 11 January 2018 para 94).

111 *Mercieca and Others v Malta* App no 21974/07 (ECtHR, 14 June 2011) para 35.

112 *Štokalo and Others v Croatia* (dec) App no 22632/07 (ECtHR, 3 May 2011); *Imobilije Marketind DOO and Debelić v Croatia* (dec) App no 23060/07 (ECtHR, 3 May 2011).

113 *Fedotova v Russia* (dec) App no 73225/01 (ECtHR, 1 April 2004).

114 *Udorovich v Italy* App no 38532/02 (ECtHR, 18 May 2010) para 48-51.

115 *Micallef v Malta* [GB] App no 17056/06 (ECtHR, 15 October 2009) para 86;

116 *Micallef v Malta* (n 109) para 103; *K v Liechtenstein* (n 110) para 84.

117 *Mercieca and Others v Malta* (n 113) para 50-51; *Pekárny a Cukrárny AS v The Czech Republic* (n 111) para 76-79.

118 *Kübler v Germany* (112) para 64-66; *Sharxhi and Others v Albania* (n 112) para 95-97.

119 *Levages Prestations Service v France* App no 21920/93 (ECtHR 23 October 1996) para 44, Reports 1996-V.

of the higher courts therein.[120] In other words, the ECtHR emphasizes the need to respect the right to a fair trial, not only in the first instance, but also in the review of judgements by the courts of appeal and cassation. However, appealed court decisions should relate to subjective rights, freedoms or interests that are subject to judicial protection, and should not be limited to procedural matters (the referral of cases to the courts,[121] the enforcement of a claim abolition,[122] etc.). At the same time, the ECtHR recognizes as lawful, and in the interest of the proper administration of justice, the imposition of certain additional restrictions, both in the exercise of the right of access to a court (*ratione valoris*,[123] the period of the resourse to the court,[124] follow-ups to complaints procedures [125] etc.), and directly before such courts, taking into account the extent to which the case has been tried in the lower courts, whether or not there are issues related to the fairness of the proceedings before the lower courts, as well as the nature of the court powers under consideration.[126] That is to say, the ECtHR provides a certain degree of 'restrictive' interpretation of individual provisions of Art. 6, Para 1, of the ECHR on procedures for a review of court decisions. This position also applies to a review of newly discovered circumstances.[127] At the same time, the established practice of the ECtHR is that complaints about exceptional circumstances that require the reinstatement of closed proceedings do not, as a rule, include the resolution of a dispute over 'civil nature rights and duties'. So, Art. 6, Para 1 of the ECHR is therefore considered inapplicable for review procedures. However, if an extraordinary complaint concerns or results in a retrial, the rule will apply to 'retrial' proceedings, as a general rule[128].

It should be noted separately that the ECtHR as well applies Art. 6, Para 1 of the ECHR to procedures that take place after the adoption of the court , thus distinguishing between jurisdictional activities and the execution of the judgement. Thus, as already mentioned, the latter is considered as an integral part of the 'trial'. However, regardless of the application of Art. 6, Para 1 of the ECHR to the initial review, an executive document that establishes civil rights and duties need not necessarily be issued in the dispute that is the subject to this provision.[129]

### *3.4 Civil nature of the rights and duties as the protection objects*

'Civil' nature is the most controversial and, we might say, the least defined concept in ECtHR practice. At the beginning, despite the autonomous interpretation of the categories used in the text of the ECHR, civil rights and duties were interpreted exclusively as being covered by the concept of 'private rights', that is the association of civil law with private law.[130] Since then, the ECtHR has changed its approach by adopting an evolutionary approach, on the basis that the legal qualification of rights and duties depends not so much on their characterization by domestic law as on their material content, and its implications.[131] For the application of Art. 6, Para 1 of the ECHR it is necessary that the claim is for a property item and it is based

120 *Tolstoy Miloslavsky v United Kingdom* App no 18139/91 (ECtHR, 30 July 1995) para 59, Series A no 316-B.

121 *Kolomiyets v Russia* App no 76835/01 (ECtHR, 22 February 2007) para 34.

122 *Fedotova v Russia* ((n 115).

123 *Brualla Gómez de la Torre v Spain* App no 26737/95 (ECtHR, 19 December 1997) para 36, Reports 1997-VIII.

124 *Pérez de Rada Cavanilles v Spain* App no 28090/95 (ECtHR, 28 October 1998) para 45, Reports 1998-VIII.

125 *Walchli v France* App no 35787/03 (ECtHR, 26 July 2007) para 29-37.

126 *Zubac v Croatia* App no 40160/12 (ECtHR, 5 April 2018) para 84.

127 *Pravednaya v Russia* App no 69529/01 (ECtHR, 18 November 2004) para 27-34.

128 *Bochan v Ukraine (no 2)* App no 22251/08 para 44, 46, ECtHR 2015.

129 *Buj v Croatia* App no 24661/02 (ECtHR, 1 June 2006) para 19.

130 TA Tsuvina, *Trial Right in civil proceedings: monograph* [Pravo na sud u tsyvilnomu sudochynstvi: monohrafiia] (Slovo 2015) 60.

131 *Kőnig v Germany* App no 6236/73 (ECtHR, 28 June 1978) para 89, Series A no 27.

on an infringement of property rights, despite the existence of a dispute and the competence of the administrative authority to deal with it.[132] At the same time, the monetary nature of a claim is important but not decisive.[133] For example, an action for compensation for the denial of housing and granting refugee status does not change the situation that, in fact, the person contests the legality of the decision.[134] Moreover, this rule is also used in the consideration of non-property claims.[135] To qualify the claim as 'civil', the elements of private law should prevail over the elements of public law.[136] However, the practice of the ECtHR has not developed universal criteria that are taken into account.

If, in the national legal order, private disputes are defined as civil disputes, the provisions of the domestic law are unconditional for the EctHR, and they are subject to the requirements of Art. 6, Para 1 of the ECHR accordingly.[137] However, as already noted, this rule also applies to other cases in which the rights of public law are decided, but whose effects are decisive for the rights and obligations of private persons.[138] Thus, the ECtHR extended the regime of disputes concerningrights and obligations of a 'civil nature' to disputes that were related to family;[139] to residence;[140] to land relations;[141] to social security relations;[142] to the privatization of State property;[143] to the licensing and the authorization of certain activities;[144] to relations with securities;[145] to bankruptcy;[146] to the termination of the activities of a legal person, including a bank;[147] to access information if this is necessary for the reporter to carry out duties;[148] to appeals against decisions of the authorities;[149] to compensation for damage caused by unlawful

132 *Procola v Luxemburg* App no 14570/89 (ECtHR, 28 September 1995) para 38-39, Series A no 326.

133 *Pierre-Bloch v France* App no 24194/94 (ECtHR, 21 October 1997) para 51, Reports 1997-VI.

134 *Panjeheighalehei v Denmark* (dec) App no 11230/07 (ECtHR, 13 October 2009).

135 *Taşkin and Others v Turkey* App no 46117/99, (ECtHR, 10 November 2004) para 133, ECHR 2004-X.

136 *Deumeland v Germany* App no 9384/81 (ECtHR, 29 May 1986) para 59-74, Series A no 100.

137 *Airey v Ireland* App no 6289/73 (ECtHR, 09 October 1979) para 21, Series A no 32.

138 *Ringeisen v Austria* App no 2614/65 (ECtHR, 19 March 1970) para 94, Series A no 13.

139 *W v the United Kingdom* App no 9749/82 (ECtHR, 08 July 1987) para 72-79, Series A no 121; *Olsson v Sweden (№ 1)* App no 10465/83 (ECtHR, 24 March 1988) para 88-90, Series A no 130; *Olsson v Sweden (№ 2)* App no 13441/87 (ECtHR, 27 November 1992) para 95-107, Series A no 250; *Keegan v Ireland* App no 16969/90, (ECtHR, 26 May 1994) para 57, Series A no 290; *Johansen v Norway* App no 17383/90 (ECtHR, 7 August 1996) para 87-88, ECHR 1996-III, *Görgülü v Germanu* Appno 74969/01 (ECtHR, 26 February 2004) para 56-50; *Bianchi v Switzerland* App no 7548/04 (ECtHR, 22 June 2006) 101-115.

140 *Gillow v the United Kingdom* App no 9063/80 (ECtHR, 24 November 1986) para 68-75, Series A no 109.

141 *Allan Jacobsson v Sweden (№ 1)* App no 10842/84 (ECtHR, 25 October 1989) para 72-74, Series A no 163; *Hentrich v France* App no 13616/88 (ECtHR, 22 September 1994) para 52, Series A no 296-A; *Aldo and Jean-Baptiste Zanatta v France* App no 38042/97 (ECtHR, 28 March 2000) para 22-26.

142 *Felbrugge v Netherlands* App no 8562/79 (ECtHR, 29 May 1986) para 29-40, Series A no 99; *Salesi v Italy* App no 13023/87 (ECtHR, 26 February 1993) para 17-19, Series A no 257-E; *Schouten and Meldrum v Netherlands* App nos 19005/91, 19006/91 (ECtHR, 09 December 1994) para 47-60, Series A no 304; *Mennitto v Italy* [GC] App no 33804/96, para 21-28, ECHR 2000-X.

143 *Industrial Financial Consortium Investment Metallurgical Union v Ukraine* App no 10640/05 (ECtHR, 26 June 2018) para 113-115.

144 *Sporrong and Lönnroth v Sweden* App nos 7151/75, 7152/75 (ECtHR, 23 September 1982) para 72-79, Series A no 121; *Benthem v the Netherlands* App no 8848/80 (ECtHR, 23 October 1985) para 36, Series A no 97; *Tre Traktörer Aktiebolag v Sweden* App no 10873/84 (ECtHR, 7 July 1989) para 41-43, Series A no 159; *Pudas v Sweden* App no 10426/83 (ECtHR, 27 October 1987) para 36-38, Series A no 125-A.

145 *Bakiyevets v Russia* App no 22892/03 (ECtHR, 15 June 2006) para 32-40.

146 *Ceteroni v Italy* App nos 22461/93, 22465/93 (ECtHR, 15 November 1996) ECHR 1996-V; *Bassani v Italy* App no 47778/99 (ECtHR, 11 December 2003) para 13-14.

147 *Capital Bank AD v Bulgaria* App no 4942/99 (ECtHR, 24 November 2005) para 88.

148 *Loiseau c France* App no 46809/99 (ECtHR, 28 Septembre 2004) para14-16; *Kenedi v Hungary* App no 31475/05 (ECtHR, 26 May 2009) para 33-34; *Shapovalov v Ukraine* App no 45835/05 (ECtHR, 31 July 2012) para 42-50; *Rosiianu v Romania* App no 27329/06 (ECtHR, 24 June 2014) para 35.

149 *Alatulkkila and Others v Finland* App no 33538/96 (ECtHR, 28 July 2005) para 49-50.

acts or inaction of the police;[150] to the illegal detention[151] or the inaction of a public authority,[152] etc. In addition, this provision applies to constitutional proceedings if they have a significant impact on the outcome of a civil rights and duties dispute,[153] as well as to criminal proceedings in which a civil action is brought,[154] except those cases when the presentation of the latter is made purely for the purpose of personal vengeance,[155] or as punishment.[156]

The evolution of the position of the ECtHR in extending Art. 6, Para 1 of the ECHR to cases involving a public servant is noteworthy. Thus, at the beginning, in order to exclude disputes concerning recruitment, service and dismissal from the scope of its application of Art. 6, Para 1 of the ECHR, the presumption was applied, except for those cases where the claims were 'economic' in nature, i.e. payment of wages,[157] retirement[158] or were in essence 'economic' (recovery of wage difference, compensation for late execution of judgment)[159] if the relevant decision of the public authority was not contested.[160] The 'functional' criterion, according to which the nature of the powers and duties performed by the civil servants has to be taken into account, was developed. The ECtHR was of the view that Art. 6, Para 1 of the ECHR should exclude only disputes between public officials whose duties include specific activities, given that they perform the functions of a public authority for the protection of the interests of the State, for example, where disputes are between military and police personnel.[161] In 2007, the approach changed and the presumption began to apply to all fair trial guarantees. At the same time, it may be derogated under a number of conditions. First, the State must expressly exclude from its national legislation access to a court for certain public offices or categories of public officials. Second, such exceptions must be subject to objective considerations of public interest. This obliges the State to justify that the subject matter of the dispute in question relates to the exercising of governmental authority otherwise the special relationship between a public official and the State can be called into issue.[162] On the basis of these criteria, the ECtHR applied Art. 6, Para 1 of the ECHR in cases involving the employment of embassy staff,[163] police officers,[164] judges,[165] and parliamentary assistants[166] etc.

However, despite the property nature of tax disputes and the direct impact of their outcome on the financial situation of a party, they are not used at the time of their adjudication under Art. 6, Para 1 of the ECHR, except for disputes concerning the recovery of excessive taxes paid.[167] The ECtHR takes the position that tax matters form a part of the main package of

150 *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) para 138-140, Reports 1998-VIII.

151 *Georgiadis v Greece* App no 21522/93 (ECtHR, 29 May 1997) para 35, Report 1997-III.

152 *X v France* App no 18020/91 (ECtHR, 31 March 1992) para 28-30, Series A no 234-C.

153 *Ruiz-Mateos v Spain* App no 12952/87 (ECtHR, 23 June 1993) para 59, Series A no 262; *Kübler v Germany* App no 32715/06 ECtHR 2011, para 44-48.

154 *Perez v France* [GC] App no 47287/99 (ECtHR,12 February 2004) para 70-71, ECHR 2004-I.

155 *Mihova v Italy* (dec) App no 25000/07 (ECtHR, 30 March 2010).

156 *Sigalas v Greece* (App no 19754/02, ECtHR 22 September 2005) para 29-30.

157 *De Santa v Italy* App no 25574/94 (ECtHR, 2 September 1997) para 18, Reports 1997-V.

158 *Massa v Italy* App no 14399/88 (ECtHR, 24 August 1993) para 26, Series A no 265-B.

159 *Nicodemo v Italy* App no 25839/94 (ECtHR, 2 September 1997) para 18, Reports 1997-V.

160 *Benkessiouer v France* App no 26106/95 (ECtHR, 24 August 1998) para 30, Reports 1998-V.

161 *Pellegrin v France* [GC] App no 28541/95 (ECtHR, 8 December 1999) para 64-66, ECHR 1999-VIII.

162 *Vilho Eskelinen and Others v Finland* [GC] App no 63235/00 (ECtHR, 19 April 2007) para 62, ECHR 2007-II.

163 *Cudak v Lithuania* [GC] App no 15869/02 (ECtHR, 23 March 2010) para 44-47.

164 *Šikić v Croatia* App no 9143/08 (ECtHR, 5 July 2010) para 18-20.

165 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) para 87-91; *Baka v Hungary* [GC] App no 20261/12 (ECtHR, 23 June 2016) para 100-106.

166 *Savino and Others v Italy* App nos 17214/05, 42113/04, 20329/05 (ECtHR, 24 April 2009) para 70-79.

167 *Editions Périscope v France* App no 11760/85 (ECtHR, 26 March 1992) para 40, Series A no 234-B; *National & Provincial Building Society and Others v the United Kingdom* App nos 21319/93, 21449/93, 21675/93 (ECtHR, 23 October 1997) para 94-99, ECHR 1997-II.

public authorities' prerogatives . The relationship between the taxpayer and the tax authority is essentially public. Bearing in mind that the ECHR and its Protocols must be interpreted in the light of their totality, the ECtHR notes that Art. 1 of Protocol 1, which deals with the protection of the ownership, retains the right of the State to enact the laws it deems necessary, to ensure the payment of taxes.[168] In addition, elements of public law prevail in customs cases,[169] political cases,[170] selective relations,[171] immigration relations, including the granting of asylum[172] or deportation,[173] extradition,[174] citizenship,[175] the performance of military duty,[176] education,[177] access to information and reporting related to trials,[178] changing personal data,[179] tendering and public contracts,[180] disputes between State and local authorities,[181] etc.

Following from the above, civil proceedings in Ukraine deal with cases arising from civil, land, labour, family, housing and other legal relations (Art. 19, Para 1 of the CPC of Ukraine). It is undeniable that civil proceedings must respect the guarantees of a fair trial. This rule may be derogated only in cases of orders and certain special proceedings, as discussed above, since the latter are indisputable and therefore not covered by Art. 6, Para 1 of the ECHR.

## 4 CONCLUSIONS

We believe that it is appropriate to conclude that the right to a fair trial is a substantive right, manifested in a combination of its fundamental and positive natures; its national and supranational regulation; and the simultaneous embodiment of the elements of both subjective law and axiom, as well as the elements of procedural and substantive law. Even though Ukraine has assumed the obligation to guarantee rights in ratifying the ECHR, the substance of this right is only partially incorporated into the national legal system, since the latter is not yet recognized as a separate protection object.

The scope of applicability of this right is not universal and it is determined by the legally binding subjects and procedures to which the guarantees of Art. 6, Para 1 of the ECHR apply.

168 *Ferrazzini v Italy* [GC] App no 44759/98 (ECtHR, 12 July 2001) para 29, ECHR 2001-VII.

169 *Emesa Sugar v the Netherlands* (dec) App no 62023/00 (ECtHR, 13 January 2005).

170 *Refah Partisi (the Welfare Party) and Others v Turkey* (dec) App no 41340/98-41344/98 (ECtHR, 3 October 2000); *Herri Batasuna et Batasuna c Espagne* (dec) App nos 25803/04, 25817/04 (ECtHR, 11 Décembre 2007).

171 *Pierre-Bloch v France* App no 24194/94 (ECtHR, 21 October 1997) para 50; *Žd anoka v Latvia* (dec) App no 58278/00 (ECtHR, 6 March 2003); *Paksas v Lithuania* [GC] App no 34932/04 (ECtHR, 1 June 2011) para 65-67; *Cherepkov v Russia* App no 51501/99 (ECtHR, 29 January 2000).

172 *Panjeheighalehei v Denmark* (dec, App no 11230/07 (ECtHR, 13 October 2009).

173 *Maaouia v France* [GC] App no 39652/98 5 October 2010, para 38, ECHR-X.

174 *Peñafiel Salgado v Spain* (dec) App no 65964/01 (ECtHR, 16 April 2002); *Mamatkulov and Askarov v Turkey* [GC] App nos 46827/99, 46951/99 (ECtHR, 4 February 2005) para 81-83; *Schuchter c Italie* (déc) App no 68476/10 (ECtHR, 11 octobre 2011).

175 *Sergey Smirnov v Russia* (dec) App no 14085/04 (ECtHR, 6 July 2006).

176 *Nicolussi v Austria* (dec) App no 11734/85 (ECtHR, 8 May 1987) DR no 52.

177 *Simpson v the United Kingdom* (dec) App no 14688/89 (ECtHR, 4 December 1989) DR no 64.

178 *G Hodgson D Woolf Productions Ltd and National Union of Journalists v the United Kingdom and Channel Four Television Co Ltd v the United Kingdom* (dec) App nos 11553/85, 11658/85 (ECtHR, 9 March 1987) DR no 51; *MacKay and BBC Scotland v the United Kingdom* App no 10734/05 (ECtHR, 7 December 2010) para 22; *Truckenbrodt v Germany* (dec) App no 49849/08 (ECtHR, 30 June 2015).

179 *Dalea c France* (dec) App no 964/07 (ECtHR, 2 Fvrier 2010).

180 *ITC LTD v Malta* (dec) App no 2629/06 (ECtHR, 11 December 2007).

181 *Hatzitakis et les Mairies de Thermaikos et Mikra c Grece* (dec) App nos 48391/99, 48392/99 (ECtHR, 18 Mai 2000).

These are not only 'courts', but also in some cases, other jurisdictional bodies authorized to provide administrative and alternative forms of protection, as well as authorities and persons which carry out the implementation of decisions. In turn, procedures based on whether or not there is a dispute over a right are divided into 'disputable' procedures within which guarantees of a fair trial right must always be respected; and 'conditionally disputable' procedures i.e. those which are, as a rule, intended for the review of indisputable issues, but which can presumably transform into 'disputable' procedure. This implies a need to re-establish the requirements of Art. 6, Para 1 of the ECHR for consideration at a later stage when there is a need to verify disputability or to settle the dispute between the persons concerned, which may be of a latent nature. There are also 'indisputable' procedures of which the main purpose is to resolve purely procedural matters; the procedure for review is not regulated by the ECHR and is subject to the supervision of the ECtHR. As for a general rule, these procedural matters always belong to a disputable or 'conditionally' disputable procedure, however, are autonomous in nature, that is, in most cases they arise on the condition that the parties show initiative, if they consider this initiative necessary. Their integration may be different, that is, they either precede the trial or take place simultaneously with it, pursuing both their own objectives and, indirectly, the common objectives of the trial. Within the framework of such procedures, the protection of 'civil' rights and freedoms must be carried out and must fully correspond to the subject area of civil procedure in Ukraine.

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# THE IMPACT OF THE HUMAN RIGHTS CONVENTION ON THE DEVELOPMENT OF THE ADMINISTRATIVE JUDICIARY OF UKRAINE

*Yana Sandul and Andriy Strelnykov*

**Summary:** 1. – Background of the Emergence of Administrative Proceedings in Ukraine. – 2. Problems of Determining the Body of Power and the State and its Bodies as Parties to the Case. – 3. Features of the Exercise of the Right to a Fair Trial in Administrative Proceedings. *– 3.1. Access to Court and the Principle of Equality of Parties. – 3.2. Orality and Openness of Administrative Proceedings. – 3.3. The Aversarial System and the Right of the Court to Establish the Circumstances of the Administrative Case.* – 4. Concluding Remarks.

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# THE IMPACT OF THE HUMAN RIGHTS CONVENTION ON THE DEVELOPMENT OF THE ADMINISTRATIVE JUDICIARY OF UKRAINE

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***Abstract*** *The administration of justice on the basis of a fair trial is not an easy task, as both parties to the dispute are usually certain of their rightness, which they are trying to prove to the court. If one of these parties is a state or its bodies, the judiciary can become a dangerous tool to influence any process in society. Specific cases against Ukraine show that high-ranking officials of all periods of power did not neglect the possibility of influencing the outcome of the case, pursuing goals not related to the administration of justice. The influence of the European Convention and the case law of the European Court of Human Rights has become decisive for Ukraine in the formation of a separate procedure for the administration of justice: administrative proceedings. Some aspects of its functioning are investigated in this work, in particular, the preconditions for the differentiation of administrative proceedings in Ukraine, the problem of defining the concept of the authorities and the state as a party to the case, the implementation of the right to a fair trial in administrative proceedings, access to court and the principle of the equality of parties; oral and open administrative proceedings; adversarial proceedings and the right of the court to establish the circumstances of the administrative case.*

***Keywords:*** *administrative proceedings; the right to a fair trial; access to court; the principle of equality of parties; oral and open administrative proceedings; the right of the court to establish the circumstances of the administrative case.*

## 1 BACKGROUND OF THE EMERGENCE OF ADMINISTRATIVE PROCEEDINGS IN UKRAINE

In the independent Ukrainian state, since 1991, the jurisdiction of general courts to resolve individual administrative complaints has gradually expanded. The Code of Civil Procedure of that time contained three main types of proceedings: action procedure, designed to consider and resolve disputes arising from civil relations, separate procedure, which mainly dealt with undisputed cases, as well as proceedings on administrative and legal relations, which included proceedings to consider specific categories of cases. In particular, chapter 31-A of the CPC of Ukraine, as amended on 31 October 1995, established the court to

consider cases concerning violations of election law; on applications for the early termination of powers of the People's Deputy of Ukraine in case of non-fulfillment by him or her of requirements concerning the incompatibility of deputy activity with other types of activity; on complaints against actions of bodies and officials in connection with the imposition of administrative penalties; on complaints against decisions, actions or omissions of public authorities, local governments and officials; on complaints against decisions made regarding religious organizations; according to the prosecutor's statements on declaring the legal act illegal; on complaints against decisions, actions or inaction of the state executor or other official of the state executive service; on the recovery of arrears of taxes, the self-taxation of the rural population and state compulsory insurance, as well as other cases arising from administrative and legal relations, referred by law to the jurisdiction of the courts.[1]

Before 2004, which was marked by the adoption of the new Civil Procedure Code of Ukraine, this chapter was supplemented by various categories of cases, until in 2005 the Code of Administrative Procedure of Ukraine was adopted.[2]

It is worth mentioning that starting from the first steps of statehood in the Ukrainian lands in the early XX century, Ukraine has tried to introduce a model of administrative justice, similar to European models. It can be illustrated by Art. 158 of the Ukrainian Code of Administrative Procedure of 12 October 1927,[3] according to which important measures for the implementation of administrative acts could be challenged.

The deep understanding of the content of administrative proceedings and its differentiated consideration primarily in constitutional rule-making is evidenced, for example, by the current rule 58 of Chapter VII of the Constitution of the Ukrainian People's Republic of 1918,[4] as well as its concretization in the Law on the Abolition of the State Senate and the Introduction of the Supreme court,[5] which provided for the existence not only of administrative proceedings as a specialized process, but also the relevant department, which, along with civil and criminal ones was a way of organizing the work of the court. The provisions of the alternative draft Constitution of the Ukrainian People's Republic, developed by O. Eichelman,[6] among other things, defined in some detail certain aspects of the idea of administrative justice.

The preconditions for the introduction of administrative proceedings in Ukraine were formed gradually. The Constitution, adopted on 28 June 1996,[7] established the principles of the division of state power of Ukraine into legislative, executive and judicial. Art. 55 of the Constitution of Ukraine declares that everyone is guaranteed the right to appeal against decisions, actions or inaction of public authorities, local governments and officials in court.

The concept of judicial reform, approved by the Verkhovna Rada in 1992,[8] provided for the gradual introduction of administrative justice: from the specialization of judges and the formation

1 Civil Procedural Code of Ukraine (as amended of 02 February 1996) Chapters 123- 288 <https://zakon.rada.gov.ua/laws/show/1502-06/ed19960202#Text> accessed 18 January 2021.

2 Code of Administrative Procedure of Ukraine <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 18 January 2021.

3 V Verstiuk, O Boiko, R Pyrih et al (eds), *Directory, Council of People's Ministers of the Ukrainian People's Republic 1918–1920: Documents and Materials*, Vol 2 (Vydavnytstvo Oleny Telihy 2006).

4 Verstiuk (n 4).

5 Verstiuk (n 4).

6 O Eihelman, *Draft constitution - the basic state laws of the Ukrainian People's Republic* (Kyiv-Tarniv 1921).

7 The Constitution of Ukraine (of 28 June 1996).

8 Verkhovna Rada of Ukraine, 'Resolution 'On the Concept of Judicial and Legal Reform in Ukraine' (1992) 4 Vidomosti of the Verkhovna Rada of Ukraine.

of specialized judicial boards to the creation of the hierarchy of administrative courts.[9] The introduction of a system of administrative courts for the purpose of full-fledged judicial protection of the rights and freedoms of citizens in the sphere of executive power was also envisaged by the Concept of Administrative Reform in Ukraine, approved by the President of Ukraine in 1998.[10]

The first real step towards the establishment of administrative courts was taken during the so-called 'minor judicial reform' of 2001, when the law recommended that the Chairman of the Supreme Court of Ukraine and the Minister of Justice of Ukraine prepare and submit the establishment of Supreme Administrative Court to the President of Ukraine.[11] However, this law did not provide for the peculiarities of the status of specialized courts, including administrative ones, as well as the characteristics of the system of these courts.

The next important step was the adoption on 7 February 2002 by the Verkhovna Rada of Ukraine of the Law of Ukraine 'On the Judiciary of Ukraine', which determined the place of administrative courts in the system of courts of general jurisdiction, thus dividing administrative courts into a subsystem of specialized courts.

On 6 July 2005, the Code of Administrative Procedure of Ukraine was adopted,[12] which defined the powers of administrative courts to hear cases of administrative jurisdiction, the procedure for appealing to administrative courts and the procedure for conducting administrative proceedings.

The Code of Administrative Procedure of Ukraine (CAP) defines the powers of administrative courts regarding the consideration of cases of administrative jurisdiction, the procedure for appealing to administrative courts and the procedure for conducting administrative proceedings, namely, it consists of 391 articles, which are grouped into five sections.

The main task of administrative proceedings under Art. 2 of the CAP is a fair, impartial and timely resolution by the court of disputes in the field of public relations in order to effectively protect the rights, freedoms and interests of individuals, and the rights and interests of legal entities from violations by bodies of power. Thus, the most important question facing scholars and practitioners is the definition of the concept of the body of power. At the same time, this was significantly influenced by the provisions of the ECHR, as well as the practice of the ECtHR, which formed the basis of the concept of public authority in Ukraine. The second part of the work is devoted to this issue. The participation of such an entity is conditioned by the peculiarities of consideration of an administrative case in the light of the case law of the ECtHR and ensuring the right of a person to a fair trial. This issue is considered in the third part of our note. The study of these aspects made it possible to summarize certain conclusions at the end.

## 2 PROBLEMS OF DETERMINING THE BODY OF POWER AND THE STATE AND ITS BODIES AS PARTIES TO THE CASE

The main purpose of the separation of administrative proceedings in the justice system of Ukraine was to ensure the right of a person to a fair trial in disputes to which the state or the body of power is a party.

9 IB Koliushko, RO Kuibida, Administrative justice: European experience and proposals for Ukraine (Fakt 2003).

10 Decree of the President of Ukraine of 22 July 1998 'On measures to implement the Concept of Administrative Reform in Ukraine' [1998] 7 Vidomosti of the Verkhovna Rada of Ukraine.

11 Law of Ukraine of 21 June 2001 'On Amendments to the Law "On the Judiciary of Ukraine"' [2001] 6 Bulletin of the Verkhovna Rada of Ukraine.

12 Code (n 2).

The concept of 'public law dispute' is distinguished by defining a specific party of this kind of dispute, namely, a body of power.

Public law dispute is a dispute in which:
- at least one party performs public authority management functions, including the performance of delegated powers, and the dispute arose in connection with the performance or non-performance of these functions by such party; or
- at least one party provides administrative services under the law that authorizes or obliges exclusively the body of power to provide such services, and the dispute arose in connection with the provision or non-provision of such services by such party; or
- at least one party is the subject of an election or referendum process and the dispute has arisen in connection with the violation of its rights in such a process by the body of power or another person.

At the same time, the law does not provide for a list of such bodies of power or their powers, so they are separated as representatives of public service in state political positions, state collegial bodies, the professional activities of judges, prosecutors, the military service, alternative (non-military) service, other civil service, the patronage service in state bodies, the service in the authorities of the Autonomous Republic of Crimea, and in local self-government bodies.

At the same time, such a definition does not give a complete, clear idea of the criteria for classifying a service as public. The scope of the current Law of Ukraine 'On Civil Service'[13] has no clear boundaries. Therefore, the case law of the ECtHR provided an opportunity to identify several important criteria by which to differentiate public law disputes.

In particular, the continuity and professionalism of the body's performance of its powers is emphasized by the decision of the European Court of Human Rights in the case of *Chuikin v. Ukraine,*[14] in which paragraph 1 of Art. 6 of the Convention was breached, as the case was closed in connection with the liquidation of a public body, thus depriving the applicant of access to a court without deciding the merits of the claim and allowing the State to avoid liability for the illegal actions of its body.

The decision of the European Court of Human Rights in the case of *Agrocomplex v. Ukraine* [15] is also important in this respect. In this case, the ECtHR examined in detail the documentary evidence of various Ukrainian authorities that repeatedly interfered in the proceedings, openly and persistently, often at the request of the applicant's opponent. In particular, such requests included LyNOS's[16] appeal to the First Vice-Speaker and the Speaker of Parliament, as well as to the Prime Minister and the President of Ukraine to intervene in the proceedings, as well as letters from these officials to the Chairman of the Supreme Court with orders to cancel or reconsider decisions made by the court earlier, to terminate the proceedings or simply to add requirements from LyNOS. At the same time, some Ukrainian officials even responded to some of these letters by providing reports on the status of the case, as well as by explaining the measures taken during the trial, and LyNOS openly thanked the President of Ukraine for his intervention, which was considered successful, suggesting that 'positive results speak for themselves.'

The ECtHR has repeatedly condemned attempts by non-judicial authorities to interfere in the proceeding, as this is a violation of an 'independent and impartial court' within the meaning

13 Law of Ukraine 'On Public Service' [2016] Vidomosti of the Verkhovna Rada 4/43 <https://zakon.rada.gov.ua/laws/show/889-19#Text> accessed 18 January 2021.

14 *Chuykina v Ukraine* (App no 28924/04) ECHR 13 January 2011.

15 *Agrokompleks v Ukraine* (App no 23465/03) ECHR 06 October 2011. http://hudoc.echr.coe.int/fre?i=001-106636

16 LyNOS - the Lysychansk Oil Refinery, renamed LysychanskNaftoOrgSyntez ("LyNOS").

of Art. 6 Item 1 of the Convention, in particular in the well-known case of *Sovtransavto Holding v. Ukraine* [17] and *Agrotechservice v. Ukraine.* [18]

Having regard to the fact that the case concerned the bankruptcy of the enterprise, which at that time was the largest oil refinery in Ukraine, and the State was the main shareholder, the attention paid by the State authorities to these lawsuits is quite natural. The violation was that these authorities, however, did not limit themselves to passive monitoring of the proceedings in the context of their extrajudicial efforts to overcome the crisis in LyNOS, but brazenly interfered with the trial.

At the same time, in the cases of *Melnyk v. Ukraine* [19] and *Karuna v. Ukraine* [20] the ECtHR noted that it was a well-established practice to apply to Ukraine all the guarantees enshrined in Art. 6 before the court of cassation in both civil and administrative cases despite their Ukrainian classification.

## 3 FEATURES OF THE EXERCISE OF THE RIGHT TO A FAIR TRIAL IN ADMINISTRATIVE PROCEEDINGS

Certain provisions of the CAP were adopted under the influence of the provisions of the European Convention and in accordance with the practice of the ECtHR. Among them, for example, are:

1) the impartiality of the court considering the administrative case (Decision in the case *Belukha v. Ukraine);*[21]

2) the requirement that the body of power observe the principle of equality before the law, preventing unfair discrimination by establishing the principle of equality of the parties to the proceedings (*Nadtochiy v. Ukraine,*[22] Decision in the case *Bendersky v. Ukraine*);[23]

3) the requirement for the subject of power to comply with the principle of proportionality (Decision in the case of *Volovik v. Ukraine*) [24]. More details about these cases are given below.

### *3.1 Access to Court and the Principle of the Equality of Parties*

Access to justice is a cornerstone of the rule of law and access to justice in general in a democratic state governed by the rule of law. However, the right of access to a court may be limited, but at the same time it must have an aim and be proportionate between the means used and the objectives achieved.

In its judgment in *Volovik v. Ukraine,*[25] the Court noted that the provisions of the CPC of 1963 provided for a 'filter' of appeals against decisions and rulings of the court of first instance by the same court that had the right to decide the admissibility of the complaint, although this

17 *Sovtransavto Holding v Ukraine* (App No 48553/99) ECHR 2002-VII para 80.
18 *Agrotehservis v Ukraine* ((App no 62608/00) ECHR 19 October 2004.
19 *Melnyk v Ukraine* (App no 23436/03) ECHR 28 March 2006 para 25.
20 *Karuna v Ukraine*, decision on application approval (App no 43788/05) ECHR 3 April 2007.
21 *Biluha v Ukraine* (App no 33949/02) ECHR 9 November 2006.
22 *Nadtochiy v Ukraine* (App no 7460/03) ECHR 15 May 2008.
23 *Benderskiy v Ukraine* (App no 22750/02) ECHR 15 November 2007).
24 *Volovik v Ukraine* (App no 15123/03) ECHR 6 December 2007.
25 *Volovik v Ukraine* (n 23).

procedure was probably designed to ensure the proper administration of justice. However, regarding the procedural requirements in force at the time of the proceedings and the manner in which they were applied in the applicant's case, the Court concludes that the means applied were not proportionate to the purpose pursued. Thus, the Court considers that the courts of first instance have uncontrolled power to decide whether an appeal against a decision of the same court may be lodged with a higher court. Such a situation is likely to result in the appeal never being referred to a higher court, as happened in the applicant's case.

The principle of equality has been repeatedly applied by the ECtHR in cases concerning Ukraine. But in cases of administrative proceedings, it becomes especially important. For example, in the case of *Nadtochiy v. Ukraine,* [26] The ECtHR noted that during the administrative proceedings against the applicant, the applicant was serving a sentence in a place of imprisonment and did not take part in the administrative proceedings. Of note is there being no evidence that he had received summons or notices. Due to his being in prison, he was virtually unable to fulfill his obligation to remove the car. However, the domestic authorities did not analyze these circumstances on their own initiative and did not allow the applicant to raise the issue. Instead, the domestic authorities reclassified the applicant's actions to another offence: the loss of property under customs control. Thus, the Court found a breach of important procedural guarantees, in particular the principle of equality.

In *Benderskiy v. Ukraine*,[27] the ECtHR states that in his statements of claim the applicant referred to the doctors' testimony, asking the judges to decide whether there was a specific circumstance in the case, but the courts did not satisfy them, noting simply that there could be 'other means of introducing a foreign body into this organ, even if they are unlikely'. The ECtHR considers that there were no obstacles to examining the case in more detail in the direction indicated by the applicant, particularly given that the expert medical report was incomplete and did not contain relevant information. Consequently, the right to a fair trial within the meaning of Art. 6 para 1 of the Convention was not guaranteed.

### *3.2 Orality and the Openness of Administrative Proceedings*

In the decision in the case of *Luchaninov v. Ukraine,*[28] the Court notes that, although the public's access to the trial in question was not formally restricted, the circumstances in which it took place were a clear obstacle to its publicity, particularly as the trial took place in a restricted dispensary and the court did not allow persons other than the participants in the proceedings to remain in or enter the trial chamber. Also, the information on the date and place of the hearing was not provided.

### *3.3 The Adversarial System and the Right of the Court to Establish the Circumstances of the Administrative Case*

The peculiarity of administrative proceedings regarding the court's ability to establish circumstances in an administrative case on the basis not only of evidence collected by the parties or on their initiative, but also of evidence collected by the court on its own initiative (paragraph 5 of Art. 11, paragraph 2 of Art. 69, paragraph 5 of Art. 71 of the CAP).

At the same time, in the judgment in *Plakhteyev and Plakhteyeva v. Ukraine*[29] the Court notes that the applicants' claim mentioned State Tax Administration as another defendant and it

26 *Nadtochiy v Ukraine* (n 21).

27 *Benderskiy v Ukraine* (App no 22750/02) ECHR 15 November 2007.

28 *Luchaninova v Ukraine* (App no 16347/02) ECHR 9 June 2011.

29 *Plakhteyev and Plakhteyeva v Ukraine* (App no 20347/03) ECHR 12 March 2009.

was alleged that: (i) they had not been able to obtain the return of the car and the wheat from the State Tax Administration after the court had ruled in the administrative case, that is, when there were no legal grounds for further maintenance of their property; and (ii) that the property was significantly damaged during the State Tax Administration's disposal. These complaints had nothing to do with the district court and were clearly addressed to the State Tax Administration. However, the domestic courts did not respond to this part of the action and did not explain why it could not be considered in an adversarial trial. In particular, the Supreme Court dismissed the applicants' cassation appeal without giving any explanation.

## 4 CONCLUDING REMARKS

Administrative proceedings are part of the justice system of the state, thus ensuring the realization of the right of a person to the protection of their rights, if the party to the case is the state or its bodies.

The need to further develop the administrative justice of Ukraine is primarily due to the fact that the universal provisions of civil procedure may not fully ensure the realization of the right to a fair trial, as a party to the case is the state or its body. State bodies representing branches of government other than the judiciary can influence the course of proceedings (this is notably illustrated in the case of *Agrocomplex v. Ukraine*), so additional guarantees to ensure the protection of the rights of the average person are needed. Specifically, it is extremely important to ensure access to justice and the principle of equality of parties.

At the same time, the problems of determining the subject of power and the state as a party to the case can be solved through the application of ECtHR practice, particularly through such features of the right to a fair trial in administrative proceedings as the openness and the publicity of the trial, the court's obligation to establish the circumstances of the case officially, etc. The court, as the main body resolving the administrative cases, should play a more active role in establishing the circumstances of the case in order to ensure the effective protection of the rights of individuals.

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SPECIAL NOTE

# UKRAINIAN - ENGLISH TRANSLATION OF LEGAL TERMS: A CASE STUDY OF INSIGNIFICANT CASES AND SMALL CLAIMS

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**Summary:** 1. Introduction. – 2. Translation of Legal Terminology within the European Union-Ukraine Approximation Process. – 3. Translation of the Ukrainian Term 'Maloznachna Sprava' in English within the Scope of Simplified Civil Procedure. – *3.1. Small Claim – 'Maloznachna Sprava' Correlation: Concept Analysis*. – *3.2. Term Translation: Options and Choices*. – 4. Concluding Remarks.

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## CONFLICT OF INTEREST

The author serves as a Managing Editor in AJEE, nevertheless, this contribution passed through the publishing process properly. The author is not bound by her service and has declared that no conflict of interest or competing interests exist.

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# UKRAINIAN-ENGLISH TRANSLATION OF LEGAL TERMS: A CASE STUDY OF INSIGNIFICANT CASES AND SMALL CLAIMS

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***Abstract*** *The article is devoted to the problem of translating legal terms from Ukrainian into English on the basis of a case study of a newly-coined term in Ukrainian legislation – 'maloznachna sprava'. The relevance of the topic of legal translation from English into Ukrainian and vice versa has become especially acute in light of the Ukraine-EU approximation agreement. The author emphasises the necessity to perform concept analysis between the terms in the EU and Ukraine simplified procedures and comes to the conclusion that despite having surface similarity to the EU term 'small claim', the Ukrainian term 'maloznachna sprava' is, in fact, a much wider concept. A range of translations of legal neologisms are described in the article, and the need to use a literal translation of the term is substantiated. As a result of the analysis of possible translation options and the ECtHR translation precedent, it is recommended that the term 'maloznachna sprava' should be translated as 'insignificant case' within the sphere of Ukrainian civil procedure.*

***Keywords:*** *legal translation, Ukrainian-English translation, small claim, insignificant case.*

## 1 INTRODUCTION

The reform of Ukrainian civil procedure in 2017 has led to the introduction of simplified civil procedure – a reform welcomed by scholars[1] and positively assessed as a step in the approximation of Ukraine to the European standards of justice. Most Member States of the Council of Europe and the European Union have a long tradition of civil dispute resolution in simplified procedure. However, for Ukraine, such a mechanism is a novelty, which has brought not only new legislative concepts but also new terminological items and linguistic neologisms.

Ukraine's approximation to the European legislation is one of the aims of the EU-Ukraine Association Agreement.[2] When it came into force in 2014, an urgent need arose for the translation of a framework of normative documents from English into Ukrainian and vice versa to provide a so-called *linguistic approximation*. To this end, a full-scale A4U Project within the support for the implementation of the EU-Ukraine Association Agreement was established. The project aims to raise capacities in the public administration of Ukraine to design and implement key reforms stemming from the Association Agreement and Deep and Comprehensive Free Trade Agreement concluded between Ukraine and the European

1 I Izarova, Y Prytyka, 'Simplified lawsuit of civil proceedings in Ukraine: The challenges of the first year of application in judicial practice' (2019) 145 Problems of Legality 51.

2 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/5.

Union.[3] One of its tasks is to provide a translation of legal and Association Agreement implementation related documents from English into Ukrainian and vice versa. As of December 2018, more than 20,000 pages of legal documents have been translated,[4] but this is only the start. Further approximation will lead to the need to translate not only the EU acquis but also a whole framework of EU law and legislative texts. In the future, as a full member of the EU and according to the principle of multilingualism, Ukraine will have to translate the entire EU legal framework, ie, about 108,000 documents, including EU treaties, laws, international agreements, standards, court decisions, and fundamental rights provisions.[5] This constitutes a tremendous amount of work, bearing in mind that a single document – for example, the EU-Ukraine Association Agreement itself – can be over 1,200 pages long. Moreover, constant changes and amendments to the legal framework of the EU mean that all these changes must also be translated into other 24 official languages of the EU; thus, the process of legal translation within the EU has an ongoing character.

Another problem is the translation of Ukrainian legal documents into English, which is very important because it helps to maintain international relationships and foster partnerships between Ukraine and foreign businesses and institutions. An acute problem arises here when it is not clear who is responsible for such translation. The Ministry of Justice of Ukraine works in this direction within the scope of Euro-integration. However, the official site of the Ministry of Justice provides an open access, official translation of the Constitution of Ukraine only.[6] It does have the list of laws and regulations of Ukraine translated into English (360 in total), but to access any of them, one must file a request for the information and methodological support from the Office of European Integration in the Department of International Law and Cooperation. A year ago, the vice-head of the Verkhovna Rada announced that some laws of Ukraine would be officially translated into English by people's deputies and the Ministry of Foreign Affairs.[7] However, it has previously been stated that the issue of official Ukrainian translations of international agreements of Ukraine, including bilateral ones, is beyond the competence of the Ministry of Foreign Affairs of Ukraine.[8] The official site of the MFA does not provide any translations of Ukrainian codes or laws. Thus, it is obvious that the discussion and overall presentation of the Ukrainian legislative novelties in the English-speaking world are only within the scope of unofficial translations by scholars, lawyers, interested companies, or persons, etc. Here, the so-called informative translation (as opposed to translation for publication) starts to play a decisive role, although its unofficial status does not spare it the necessity to follow the standards of translation quality.

While the introduction of simplified civil proceedings is itself a step towards the approximation of Ukrainian legislation to the EU, the next stage will inevitably be comparing

3 Association 4U (official website) <https://association4u.com.ua/> accessed 25 January 2021.

4 B Jarabik, 'Status of the A4U Project and the AA/DCFTA Implementation in December 2018' (2018) 18 A4U Reviews-Comments-Briefs <https://eu-ua.org/sites/default/files/inline/files/a4u_reviews-comments-briefs_n18_status_of_the_a4u_project_and_the_aa-dcfta_impl._in_dec._2018_.pdf> accessed 25 January 2021.

5 J Vizerington, 'Translation Difficulties. Information Exchange between English-speaking World and Ukraine' (*Europeiska Pravda*, 11 March 2015) <https://www.eurointegration.com.ua/experts/2015/03/11/7031726/> accessed 25 January 2021.

6 Ministry of Justice of Ukraine, 'Translations into English of acts of legislation of Ukraine, their projects and other information and analytical materials related to the implementation of the National Program for Adaptation of Legislation of Ukraine to EU Legislation' <https://minjust.gov.ua/azu_es_4_4> accessed 25 January 2021.

7 'Some laws will be officially translated into English' (*Yurydychna Gazeta*, 4 February 2020) <https://yur-gazeta.com/golovna/deyaki-zakoni-oficiyno-perekladut-na-angliysku.html> accessed 10 January 2021.

8 Ministry of Foreign Affairs of Ukraine, Letter No 72/14-612/1-2013 of 8 August 2019 'On coming into force of a foreign agreement' <https://zakononline.com.ua/documents/show/413224___413289> accessed 9 February 2020.

and contrasting the existing terms within the Ukrainian and EU civil procedures. Ukrainian simplified procedure aims at considering *insignificant cases* (Ukr. – *'maloznachni spravy'*) in a speedy manner, while EU accelerated and simplified civil procedure uses the term 'small claims' for cases with a claim value for up to EUR 5,000. Obviously, these notions are not equivalent, but their meaning overlaps, creating pitfalls for translation. Thus, for proper translation, it is important to specify how the concept of small claims fits into Ukraine's national context. The notion of insignificant cases illustrates the relevance of the linguistic study of legal translations, as well as a need for the consolidation of practical achievements in the field of translation of legal discourse and, in particular, legal neologisms. This paper focuses on the challenges of Ukrainian-English legal translation in view of the ongoing Ukraine approximation to the EU legislation.

## 2 THE TRANSLATION OF LEGAL TERMINOLOGY WITHIN THE EU-UKRAINE APPROXIMATION PROCESS

The basic elements in the theory of translation are a source text (the one to be translated) and a target text (the result of the translation) and, thus, a source language (SL) and a target language (TL). The aim of translation is to provide an equivalent item or text, which means, as J. Catford puts it, 'SL and TL texts or items are translation equivalents when they are interchangeable in a given situation'.[9] In legal translation, a translator must render not only the message expressed in the source language but also preserve cultural (hence legal, as law and culture are closely interrelated) differences between languages.[10] It is usually expected that the translation should have equal value in the SL and TL, to the extent that there is no difference in meaning from one language or the other.[11]

The notion of equivalence, however, is one of the most debatable cornerstones in the theory of translation. This concept is an umbrella term that includes several aspects. W. Koller[12] specifies five types of equivalence: 'denotative equivalence', relating to the content conveyed by the text, 'connotative equivalence', referring to the connotations caused by the selection of register, social and regional dimensions or frequency, etc.; 'genre equivalence', applicable to certain text types and genres; 'pragmatic equivalence', referring to audience orientation, and 'formal equivalence', referring to the specific features of aesthetic form or individual style.[13] A translation should meet all of these equivalence criteria in order to properly reflect the concept, intention, purpose, and form of the text in certain linguistic and extralinguistic dimensions.

As we can see, the requirements for equivalent translation are high and, in some cases, even unachievable. It has been argued that symmetry in translation is an illusion and that the concept of equivalence may be highly problematic.[14] More recently, some scholars[15]

9 JC Catford, *A Linguistic Theory of Translation* (OUP 1965).

10 A Čavoški, 'Interaction of law and language in the EU: Challenges of translating in multilingual environment' (2017) 27 The Journal of Specialised Translation 58. https://www.jostrans.org/issue27/art_cavoski.pdf

11 A Pym, *Exploring Translation Theories* (Routledge 2010).

12 W Koller, 'Grundprobleme der Übersetzungstheorie. Unter besonderer Berücksichtigung schwedisch-deutscher Übersetzungsfälle' (1972) 9 Stockholmer germanistische Forschungen 181.

13 K Reiss, HJ Vermeer, *Towards a General Theory of Translational Action: Skopos Theory Explained* (C Nord tr, Routledge 2014).

14 L Stern, Book review of *Translation Issues in Language and Law* by F Olsen, A Lorz D Stein (eds) (2009) 17 (1) The International Journal of Speech, Language and the Law 161.

15 JR Ladmiral, 'La traduction comme linguistique d`invention' in W Pockl (ed), *Europaische Mehrsprachigkeit. Festschrift zum 70. Geburtstag von Mario Wandruszka* (Tubingen Niemeyer 1981).

have rejected the concept as being an 'idealization' or too prescriptive and have suggested replacing it with the concept of 'approximation'. This problem becomes even more important with legal translation, which is often regarded as the most demanding type of translation because the translator must simultaneously be an interpreter of a legal system concerned while preserving the fidelity of the ST.[16] Hence, some argue that legal translation is frequently equated with untranslatability.[17]

In translation studies, equivalence includes not only the relationship between the texts but also between individual linguistic signs (words, word-combinations, terms). What plays the most important role here is, first of all, the translation of legal terminology. The problem of overlapping and inconsistent terminologies has always existed in many spheres of science and technology due to the fact that documents are created in different circumstances of time, location, and scope. Concepts and terms develop differently in individual languages, depending on professional, technical, scientific, social, economic, linguistic, cultural, or other factors. Inconsistency between terminological concepts and terms create communicational barriers because terms that are similar on the surface but even slightly different in meaning will mislead and even create a shockwave of their subsequent misuse. To address this issue, ISO standard 860:2007 'Terminology work — Harmonization of concepts and terms' was developed, which provides a route to the technological part of the translation and stresses the importance of harmonisation. The standard stresses that in order to provide a consistent and proper translation of terms, their meanings, ie, concepts they denote, should be harmonised. Such harmonisation is desirable because differences between concepts do not necessarily become apparent at the designation level. Likewise, the designation level does not necessarily mean that the concepts behind the designations are identical, and mistakes occur when a single concept is designated by two synonyms that are considered to designate two different concepts by mistake.

As mentioned in the standard, harmonisation starts at the concept level and continues at the term level. It is an integral part of standardisation. Concept harmonisation means the reduction or elimination of minor differences between two or more closely related concepts. Concept harmonisation is not the transfer of a concept system to another language. It involves the comparison and matching of concepts and concept systems in one or more languages or subject fields. Concept harmonisation means the activity leading to the establishment of a correspondence between two or more closely related or overlapping concepts having professional, technical, scientific, social, economic, linguistic, cultural, or other differences in order to eliminate or reduce minor differences between them.

Concept harmonisation is followed by term harmonisation – the activity leading to the selection of designations for a harmonised concept either in different languages or within the same language.[18] Term harmonisation is possible only when the concepts that the terms represent are almost exactly the same. This roadmap, borrowed from standardisation procedures, has proved to be effective in the process of translation.

Terminology harmonisation within the EU is a difficult task because it should take into account the differences between the use of terms in different Member States. EU supranational terms must have 24 equivalents in national laws, and national terms must not be confused with supranational ones. B. Defrancq, speaking about characteristics of legal translation in the EU, stated that the terminology of the member states' domestic legislation

16 Čavoški (n 10).

17 M Mac Aodha, 'Legal translation –an impossible task?' (2014) 201 (1–4) Semiotica 207.

18 ISO 860:2007(en) 'Terminology work — Harmonization of concepts and terms' <https://www.iso.org/obp/ui/#iso:std:iso:860:ed-3:v1:en) accessed 9 February 2021.

should be autonomous from EU legislation terms.[19] This means that within the EU legislative framework, there is a uniform terminological system that is separated from the respective terminological systems of the Member States. For this purpose, sometimes it is even required to change generally acknowledged terms so that they are not confused with national terms. For example, the term 'civil service' in the treaties of the EU is replaced with the term 'public service', despite the fact that it has another meaning in English.[20] Further examples include the use of the word 'undertaking' instead of 'company', 'large goods vehicle' instead of 'lorry', and 'state aid' instead of 'subsidy'. Such terms are called 'deculturalized terms.'[21] The use of deculturalised terms is necessary to sustain the uniformity of EU law.

In sum, the purpose of legal translation is to create a text that will be interpreted in the same way by legal professionals in the target legal system as it would be in the original legal system. The aim of translation is not to erase linguistic and cultural differences but to accommodate them, fully and unapologetically. The challenge is to convey the legal text as a fragment of a living legal system.[22] When translating, a translator should strive for equivalence, bearing in mind the harmonisation and approximation of terminologies. The linguistic approximation of national Ukrainian legal terms to the EU terminology should be carefully considered to avoid their misinterpretation with the supranatural terms.

## 3 TRANSLATION OF THE UKRAINIAN TERM 'MALOZNACHNA SPRAVA' IN ENGLISH WITHIN THE SPHERE OF SIMPLIFIED CIVIL PROCEDURE

Having outlined the theoretical basis for the legal translation process, we will narrow it down to problems arising in the translation of certain legal terms within the scope of a newly-introduced simplified civil procedure in Ukrainian legislation. As we have already mentioned, this procedure has been brought into Ukrainian legislation as a part of the EU-Ukraine approximation process. This means that it is meant to establish similar civil procedure mechanisms available both in Ukraine and the EU. However, a translator should carefully assess the correlation between the terms used in both legislations in order to avoid potential pitfalls of translation of similar concepts. The focus of this research is the translation of a legal neologism 'maloznachna sprava' (insignificant case) coined by the Ukrainian legislator and its correlation to the terms of Small Claims Procedure of the EU.

### *3.1 Small Claim – 'Maloznachna Sprava' Correlation: Concept Analysis*

The first step of translation is to assess to what extent the concepts are harmonised, thus leading us to original sources of the terms.

19 B Defrancq, 'Principles of EU Legal English and Terminology' (Presentation given at the Conference 'EU Translated: Towards Better Quality Legal Translations for Better Implementation of the EU-Ukraine Association Agreement' 2019) <https://www.youtube.com/watch?v=kxPpqzZBwzw&t=141s> accessed 13 February 2021.

20 Defrancq (n 19).

21 L Biel, 'Competencies for EU Legal Translation' (Presentation given at the Conference 'EU Translated: Towards Better Quality Legal Translations for Better Implementation of the EU-Ukraine Association Agreement' 2019) < https://www.youtube.com/watch?v=gvfPGUio454&list=PLbiaVfW3NyKCmyNQKkf96oQCz1L2Yud5U&index=5> accessed 12 February 2021.

22 L Wolff, 'Legal Translation' (2011) The Oxford Handbook of Translation Studies. DOI: 10.1093/oxfordhb/9780199239306.013.0017.

According to Part 1, Art. 274 Civil Procedure Code of Ukraine (CPC),[23] in simplified claim proceedings, the following topics are considered: 1) 'maloznachni spravy' (insignificant cases); 2) cases arising from labour relations; 3) cases on the granting by the court of permission for the temporary departure of a child abroad to a parent who lives separately from a child who has no arrears of alimony and who has been denied a notarised consent to the other parent for such a departure.

The latter two types of cases are worded in a descriptive manner and are quite self-explanatory, so they raise no specific problems in translation, but the notion of 'maloznachni spravy' needs clarification and is further explained in the CPC itself. According to Part 6 of Article 19 of the CPC, 'maloznachni spravy' include: 1) cases in which the value of the claim does not exceed one hundred per cent of the living minimum for able-bodied persons (as of 1 January 2021 – UAH 218,900, which is EUR 6,265 as of 5 January 2021); 2) cases of low complexity, recognised by the court as insignificant, except for cases that are subject to consideration only under the rules of general claim proceedings, and cases in which the value of the claim exceeds five hundred per cent of the living minimum for able-bodied persons (as of 1 January 2021 – UAH 1,094,500 UAH, which is EUR 31,325 as of 5 January 2021).

As stated in Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure,[24] small claims procedure shall apply in cross-border cases to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 5,000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses, and disbursements. That means that the concept of a small claim includes cases with the established value of a claim.

These provisions illustrate that the correlation between the concepts in the two legislations is rather complex. We can clearly state that despite the fact that the terms are both present in the scope of simplified procedure, small claims and insignificant cases are by no means interchangeable. If we operate at the concept level, small claims are instead correspondent to cases mentioned in Part 6, Article 19 of the CPC, ie, 'cases in which the price of the claim does not exceed one hundred living minimum for able-bodied persons'. However, we can also note the difference in the value of the claim in the Ukrainian and EU procedures – EUR 5,000 and 6,265, respectively.

### *1.2 Term Translation: Options and Choices*

When we deal with neologisms – newly created terms, words, or word-combinations – a translator usually faces the problem of non-equivalence since neologisms belong to culture-specific terms. Overcoming the absence of an equivalent and propose a new equivalent that will fit in the system of TL is one of the most difficult challenges of translation, and special translation techniques must be applied. In the translation of terms, especially if these terms are neologisms, the following methods of translation are usually used: 1) direct inclusion; 2) transcription or transliteration; 3) descriptive translation; 4) calquing; 5) choosing a variant equivalent. To illustrate how these methods are used in the sphere of legal translation, we will give some examples from the EU-Ukraine Association Agreement.

23 Civil Procedure Code of Ukraine (with amendments of 2020) [2004] Vidomosti of the Verkhovna Rada Ukrainy 40-41 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 9 February 2021.

24 Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2421&from=EN> accessed 9 February 2021.

First of all, it should be noted that sometimes, legal terms are not translated at all and are directly included in other languages. An example is EU's '*acquis*' – a term denoting a framework of common rights and obligations that are binding to all EU member states. The word '*acquis*' is not translated and is used in the original form in all 24 languages of the EU, as well as in the Ukrainian language.

Another method of translation is transcription and transliteration, which means preserving the sound or graphical form of SL word in translation by means of the TL alphabet.[25] Transcription or transliteration of neologisms is needed when the TL culture and language lacks the correspondent concept and equivalent, and a translator cannot choose in the TL the correspondent words to render the concept. In this case, a new word is created by transcription or transliteration, and this word will have one meaning and fulfil the need to create a single-meaning term. In the Ukrainian language, there are a lot of words borrowed from English in this way – sometimes such borrowing is even excessive, as national equivalents exist for transliterated terms. Transcription and transliteration are rarely used in their purest form, and the word is usually adapted to the characteristics of the Ukrainian language. Some examples of transcription and transliteration in the EU-Ukraine Agreement include: precursors – прекурсори ('prekursory') (Art. 21); verification – верифікація ('veryfikatsiia') (Art. 71); phytosanitary – фітосанітарний ('fitosanitarnyi') (Chapter 4, Art. 59); prudential carve-out - пруденційний виняток ('prudentsiinyi vyiniatok').

Descriptive translation is characterised by the replacement of a new element of the SL with a word-combination or phrase that adequately translates the meaning of this word. The drawback of this method of translation is its wordiness. For example, 'smuggling', in the absence of an equivalent, would be translated into Ukrainian in a descriptive manner as 'illegal traffic of illegal migrants through state border' (Art. 22); 'money laundering and terrorism financing' – as in, 'fight against the legalization (laundering) of money and terrorism financing' (Art. 20); 'Financial Action Task Force (FATF)' – as in, 'Groups on the development of financial means to fight against money laundering and terrorism financing (FATF)'.

The next method of translation often used in the translation of neologisms is calquing or literal translation. It is a method of translation when the first dictionary variant of a translation is chosen to translate an SL term into the TL. Sometimes, a separate part of the word is translated literally, thus creating a morphological calque. Some examples of calques that have transitioned into the Ukrainian language from English are: international – міжнародний ('mizhnarodnyi'); self-regulatory – саморегулівні ('samorehulivni') (Art. 131).

There are situations when the first dictionary variant of translation isn't appropriate, so the need to choose variant equivalent, use one of the possible variants of translation of a multi-meaning word, arises. Examples of such a way of translation include: 'national treatment', which is translated into Ukrainian as 'national regime', (Art. 94); 'anti-competitive' – 'monopolistic' (Art. 110); 'standstill' – 'status quo'.

The term 'maloznachna sprava', because it is a neologism, needs to be translated using one of these methods. Below, we will analyse which method of translation is the most appropriate.

When we speak about translation from Ukrainian to English, which belong to different subgroups of Indo-European language family and use different scripts – Cyrillic and Latin –, *direct inclusion* ('малозначний') and *transcription* ('maloznachnyi') of the term would be uncommon, as such terms would look quite artificial in the English text. The only possible situation in which to use a transliterated term is for information purposes. For example, in the present article, transliteration is used to stress the national peculiarity of a term.

25 VI Karaban, *Translation of English Scientific and Technical Literature* [Pereklad anhliiskoi naukovoi I tehnichnoi literatury] (4th edn, Nova Knyha 2004).

*Descriptive translation,* as mentioned before, is a very wordy method of translation. In legal discourse, descriptive translation is even more exuberant because legal terms have very precise meanings and sometimes, as in the case with 'maloznachna sprava', the description of the term includes the whole paragraph. This does not mean that there is no place for a descriptive translation of a term. In informative texts, a term may be translated descriptively in a footnote and used across the text in an agreed shortened form or transcribed/transliterated form.

The *literal translation* of the term 'maloznachna sprava' is an 'insignificant case'. In English, this can sound rather ambivalent due to its connotation both in general and legal use.[26] To illustrate this, the Oxford English Dictionary gives the following definition of 'insignificant': '1. Too small or unimportant to be worth consideration. 2. Meaningless'. This meaning is not relevant to the meaning of the legal term, which by no means denotes a case not worth considering. The list of proposed synonyms to the word 'insignificant' is even less inspiring.[27] It includes, *inter alia*, 'inconsequential', 'infinitesimal', 'irrelevant', 'meagre', 'meaningless', 'minimal', 'minor', – all of them, except perhaps the latter, having an implicitly negative connotation. The word 'minor', which could be considered as an alternative, is not included in the list because there already is a legal term 'minor case', which refers to cases connected with minors. Another alternative could possibly be 'small case', but this can lead to misinterpretation and confusion with the abovementioned 'small claims'. Thus, these *variants of equivalent* are inappropriate.

We can see from these variants of translation that there is no perfect solution to the problem. Each method of translation has drawbacks, and in such a situation, a translator should choose the best option from the existing ones. In our opinion, the best variant is a literal translation – 'insignificant case' – because it creates a new term in the English language that cannot be confused with other legal terms and meets the requirements of language economy. It acquires a special meaning within this terminological system. To corroborate this point of view, we can turn to the ECtHR case law.

In *Kateryna Makarivna Moldavska v Ukraine*[28] the ECtHR, when stating the circumstances of the case, needed to translate the term 'maloznachna sprava' into English: 'Article 12 of the Code, which defines types of commercial judicial proceedings, defines summary proceedings as "intended for the consideration of insignificant cases or cases of negligible complexity, in which priority is given to a quick resolution of the case."' As we can see, the ECtHR uses the literal translation, 'insignificant case', in this respect. This will stand as a set point for subsequent official translations of the term 'maloznachna sprava' as 'insignificant case'.

## 4 CONCLUDING REMARKS

Legal translation is one of the most difficult spheres of translation, requiring a deep understanding of the legal traditions of the SL and TL countries. Legal translation from English into Ukrainian and vice versa has become especially relevant in light of the Ukraine-EU approximation agreement. A tremendous number of legal documents are being translated within the scope of approximation, and a large corpus of legal EU-Ukraine terminology is

26 See, for example, H Easterbrook, 'The Most Insignificant Justice: Further Evidence' (1983) 50 The University of Chicago Law Review 481 <https://core.ac.uk/download/pdf/234129303.pdf> accessed 9 February 2021.

27 'Insignificant' (*Thesaurus.com*) <https://www.thesaurus.com/browse/insignificant> accessed 9 February 2021.

28 *Kateryna Makarivna Moldavska v Ukraine* App No 43464/18 (ECtHR, 14 May 2019) <http://hudoc.echr.coe.int/eng?i=001-193900> accessed 9 February 2021.

being developed. In the process of terminological base development, it is essential to follow standardisation recommendations and perform concept and term harmonisation. It is also necessary that domestic legal terms are not confused with supranational EU terms because this can lead to their misinterpretation.

Particular attention should be paid to the translation of legal neologisms, which appear as a result of introducing legislative novelties. Among the recent neologisms in the Ukrainian legislation, there is the concept of an insignificant case within the simplified civil procedure. Although it has a surface similarity to the EU term 'small claim', an insignificant case is, nevertheless, a much wider concept. With this in mind and to avoid confusion with the EU terms, it is recommended that 'maloznachna sprava' should be translated literally as 'insignificant case'. This point of view is corroborated by the ECtHR practice, where the term 'insignificant case' has already been used. In order to facilitate the Ukraine-EU translation, compliance with up-to-date special terminological dictionaries available in open access is highly recommended.

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