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Exercising the right to a fair trial during the Covid-19 pandemic in Ukraine and the European Union

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Abstract

The purpose of the scientific research is to explore the problem of exercising the right to a fair trial during the COVID-19 pandemic and suggest solutions. To achieve this purpose, general and special scientific research methods were used, in particular system-functional method, dialectical and statistical methods, method of hermeneutics. The right to a fair trial cannot be limited, as the main function of the state is to ensure the protection of the rights and freedoms of citizens. According to the legislation of most countries, the principle of the rule of law is recognized, an important component of which is the right to apply to the court, as provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) as the right to a fair trial. Courts exist to meet human needs and to promote the preservation of social values. The judicial system must be efficient, simple and accessible to the average citizen. However, in connection with the coronavirus pandemic, the judicial system has faced the issue of how to simultaneously ensure the rights of citizens to judicial protection and protect the population from acute infectious diseases.

Keywords: the right to a fair trial; protection of human rights; enforcement of the right to a fair trial; elements of fair trial; criminal proceedings.

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Ejercicio del derecho a un juicio justo durante la pandemia de covid-19 en Ucrania y la Unión Europea

Resumen

El propósito de la investigación fue explorar el problema del ejercicio del derecho a un juicio justo durante la pandemia de COVID-19. Para lograr este propósito se utilizaron métodos de investigación científica generales: en particular el método sistema-funcional, métodos dialécticos y estadísticos y el método de la hermenéutica. El derecho a un juicio justo no puede ser limitado, ya que la función principal del Estado es garantizar la protección de los derechos y libertades de los ciudadanos. De acuerdo con la legislación de la mayoría de los países, se reconoce el principio del Estado de derecho, cuyo componente es el derecho a recurrir a los tribunales, tal como prevé el artículo 6 del Convenio para la Protección de los Derechos Humanos y las Libertades Fundamentales de 1950 (CEDH), como derecho a un juicio justo. Los tribunales existen para satisfacer las necesidades humanas y promover la preservación de los valores sociales. Se concluye que el sistema judicial debe ser eficiente, sencillo y accesible al ciudadano medio. Sin embargo, en relación con la pandemia del coronavirus, el sistema judicial se ha enfrentado al problema de cómo garantizar simultáneamente los derechos de los ciudadanos a la protección judicial y proteger de esta enfermedad.

Palabras clave: derecho a un juicio justo; protección de los derechos humanos; aplicación del derecho a un juicio justo; elementos de un juicio justo; proceso penal.

Introduction

The COVID-19 pandemic has caused the need for changes in the practice of exercising the right to a fair trial. The courts faced a difficult task: to ensure the protection of human rights, including the realization of the right to a fair trial, but at the same time to ensure the protection of life and health of both citizens and employees of the judicial system. For the successful implementation of this task, changes to the legislation are necessary, which would ensure transparency and clarity in the administration of justice, as well as optimal coordination of the interests of all parties. Countries approached this task in different ways. Considering that this topic is new, it is useful to compare the approaches to solving this issue that have been applied in different countries.

During the quarantine in the EU member states, a number of changes were made to the legislation in order to protect the health of the population, but at the same time to ensure the right of citizens to a fair trial. It is useful to

consider a positive experience that has proven itself in practice (Oleksenko *et al*., 2021).

Insufficient coverage in domestic and foreign literature on the theory and practice of realization of the right to a fair trial during the COVID-19 pandemic, insufficient consideration and incomplete analysis of its implementation mechanisms, lack of comparative analysis of legislation in this sphere in different states, as well as the urgency of solving the the problem of realization of the right to a fair trial in Ukraine during the war determined the choice of of the theme of this article.

The right to a fair trial is one of the main preconditions for ensuring the rule of law. Therefore, the realization of this right must be ensured under any circumstances (Villasmil, 2021)

1. Objectives

The purpose of this scientific article is to determine and justify main features of the realization of the right to a fair trial in Ukraine and the EU during the COVID-19 Pandemic.

2. Materials and methods

During the writing of the scientific work, both general and special scientific research methods were used. Using the system-functional method, the analysis of the constituent elements of the right to a fair trial as well as the criteria for reasonable time in civil cases was carried out. The dialectical method was used to clarify the prospects for further development of e-justice.

The method of hermeneutics was used to analyze the current legislation of the EU member states and Ukraine, aimed at supporting the exercise of the right to a fair trial. The statistical method was used to obtain an empirical basis, which has become one of the main sources of information on the success of legal regulation of realization of the right to a fair trial in individual states.

3. Results and discussion

The right to a fair trial is one of the main preconditions for ensuring the rule of law. The right to a fair trial is addressed in Article 6 of the ECHR, which has become the basis for the creation of a number of international legal treaties in the field of human rights, as well as a model for drafting legislation of individual countries.

In the above-mentioned article, when settling the right to a fair trial, attention is focused on the following constituent elements: fair hearing; public consideration; reasonable time; independence and impartiality of the court; public proclamation of a court decision with an indication of exceptions to this general rule, when such factors as the interests of morality, public order, national security have place; declaration of the presumption of innocence; the right to be informed in native language about the nature and causes of the accusation; providing opportunities and time to prepare for the defense; dispositive Ness in choosing the method of defense (personally or with the help of a defender).

In criminal cases, the emphasis is on the following components of the right to a fair trial: the provision of free legal aid in the case of an objective impossibility to pay for the services of a lawyer; equal rights, responsibilities, defense of witnesses; providing the accused with free assistance of an interpreter in case of misunderstanding of the language used in court, or inability to speak the language (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950).

The general right to a fair and public trial before a competent, independent and impartial tribunal is also provided for in the International Covenant on Civil and Political Rights (article 14). Everyone accused of a criminal offense has the right to be presumed innocent until proved guilty according to law (United Nations, 1966).

Access to court also provides for the right to appeal independently, if the person believes that his/her rights and interests are violated, and national law should not create obstacles to individual appeal, with the motivation that this right belongs to the competent authority or other entity (Ladychenko and Golovko, 2018). The reasonableness of the length of the proceedings is extremely important and conditioned by the public interest, as well as the independence and fairness of the trial and the predictability of court decisions. Cases should not be considered for too long. At the same time, in appropriate circumstances, the consideration should not be too rapid if it affects the right to a fair trial.

Trial time management should be adapted to the needs of each individual case, paying special attention to the needs of the parties. Normative time limits established by law or other normative legal act should be used with caution, taking into account possible differences between cases.

If the time limit is set at the legislative level, its observance and compliance should be a subject to constant monitoring and evaluation. If the law also establishes that certain types of court cases have priority or are considered urgently, such a general rule is subject to reasonable interpretation, taking into account the purposes for which priority was granted or the urgent nature of the case.

Time limits set by the court (for example, the time limit for remedying deficiencies in the statement of claim or appeal) must comply with the principle of reasonableness. In determining the duration of these terms (at its own discretion), the court must take into account the principles of dispositive Ness and adversarial, time limits established by law when determining the timing of specific proceedings based on the complexity of the case, the number of participants, possible difficulties in requesting and examining evidence.

In particular, a period that is objectively necessary for the performance of procedural actions, adoption of procedural decisions and consideration and resolution of the case in order to ensure timely (without undue delay) judicial protection is considered reasonable.

Taking into account the case law of the European Court of Human Rights, the criteria for reasonable time in civil cases are: legal and factual complexity of the case; the conduct of the applicant, as well as other persons involved in the case, other participants in the process; actions of public authorities (primarily the court); the nature of the proceedings and their significance for the applicant (Case of Fedina v Ukraine of September, 2010; Case of Matica v Romania of November, 2006, etc).

In assessing the legal and factual complexity of the case, one should take into account, in particular, the existence of circumstances that make it difficult to consider the case; number of co-plaintiffs, co-defendants and other participants in the process; the need for examinations and their complexity; the need to interrogate a significant number of witnesses; participation in the case of a foreign element and the need to clarify and apply the rules of foreign law.

At the same time, the courts should proceed from the fact that such a circumstance as the consideration of a civil case by courts of various instances cannot in itself indicate its complexity.

When assessing the manner in which the investigator, prosecutor and court exercise their powers, the consistency and timeliness of procedural actions should be taken into account; the presence of periods of inactivity, the causes of which must be clarified in each case; timeliness of notification of a person about suspicion; the validity of the postponement and suspension of criminal proceedings; the timeliness of the appointment of criminal proceedings; holding court hearings at the appointed time; observance of terms of sending of copies of procedural decisions to participants of court proceedings; the completeness of the judge's control over the performance by court employees of their official duties, including the notification of participants in criminal proceedings about the time and place of the court hearing; completeness and timeliness of taking measures by the investigator, prosecutor, court (judge) to ensure criminal proceedings

and other measures aimed at preventing unfair conduct of participants in criminal proceedings; the nature and effectiveness of actions aimed at accelerating criminal proceedings, etc.

In connection with the coronavirus pandemic on March 11, 2020, the Cabinet of Ministers of Ukraine by its Resolution № 211 "On Preventing the Spread of COVID-19 Coronavirus in Ukraine" established quarantine. For this period a special operating regime was introduced in the courts of Ukraine.

On March 16, 2020, the Council of Judges of Ukraine, in letter № 9-rs-186/20, provided recommendations to establish a special working regime for the courts for the period from March 16, 2020 to April 3, 2020, in particular:

- To explain to citizens the possibility of postponing the consideration of cases in connection with quarantine measures and the possibility of considering cases in the mode of videoconference.
- To terminate all activities not related to the procedural activities of the court and ensuring the activities of the judiciary (round tables, seminars, open days, etc.).
- To terminate the personal reception of citizens by the court management.
- To restrict the admission to court hearings of persons who are not participants in court hearings.
- To restrict the admission to court hearings and court premises of persons with signs of respiratory diseases: pale face, red eyes, cough.
- To familiarize the participants in the trial with the materials of the court case, if there is such a technical possibility, to carry it out remotely, by sending scanned copies of the materials of the case to the email address specified in the application, to accept applications for familiarization via remote communication means.
- To reduce the number of court hearings scheduled for consideration during the working day.
- If possible, to carry out the consideration of cases without the participation of the parties, in the manner of written proceedings.
- Judges and employees of the court apparatus, at the slightest sign of illness, take measures for self-isolation, report their health status to the appropriate health care institution and the court management by telephone, e-mail (Letter of the Council of Judges of Ukraine, 2020).

When determining the peculiarities of the work of the court for the period of quarantine measures, one should take into account the specialization of the court, the jurisdiction and the corresponding categories of cases.

On March 26, 2020, the High Council of Justice adopted a Decision "On access to justice in the context of the pandemic of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2". According to the decision, during the quarantine cases should be considered online. The High Council of Justice appealed to the President of Ukraine and the Parliament of Ukraine with a proposal to amend the procedural codes that would ensure the right of individuals to access to justice under quarantine, introduced in order to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus on the territory of Ukraine.

It also appealed to the State Judicial Administration of Ukraine and the Judicial Protection Service for the urgent development of amendments to the Regulation on the temporary procedure for ensuring the protection of courts, bodies and institutions of the justice system, as well as maintaining public order in them, which provide for the specifics of admitting persons to court and acceleration of work on the Unified Judicial Information and Telecommunication System in part, ensuring the participation of persons in court hearings remotely (Decision of the High Council of Justice of Ukraine, 2020).

In order to ensure proper access to justice for participants, on March 30, 2020, the Parliament of Ukraine adopted Law №540-IX "On Amendments to Certain Legislative Acts Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-2019)". The above law provides for the possibility of holding court sessions in administrative, civil and economic cases using video conferencing. The Law contains a number of changes to procedural law, namely:

- during the quarantine established by the Cabinet of Ministers for the prevention of the spread of coronavirus disease (COVID-19), the procedural terms are extended for the period of quarantine. That is, the Law provided for the automatic extension of all general and special terms of limitations established by civil, commercial, family and labor legislation. In this case, the term set by the court in its decision may not be less than the quarantine period associated with the prevention of the spread of coronavirus disease;
- during the quarantine, the parties to the case may participate in the court hearing by videoconference outside the court premises using their own technical means. Confirmation of the identity of the party to the case is carried out by applying an electronic signature. Concerning the extension of court hearings, in our opinion, the lack

of a provision on the impossibility of postponing certain types of cases (for example, in cases of establishing the place of residence of a child) is a disadvantage.

The procedure of holding court hearings is regulated in more detail by the Order of the State Judicial Administration №169 "On approval of the Procedure for working with technical means of videoconferencing during court hearings in administrative, civil and commercial proceedings with the parties outside the court" of April, 8, 2020. Participants in the trial shall take part in the court session by videoconference outside the court premises, provided that the court has the appropriate technical capability, which the court indicates in the decision, in the manner prescribed by procedural law.

Information about the conduct of procedural actions in the mode of videoconference is posted on the official web portal of the judicial authority of Ukraine. The responsibilities for the implementation of organizational measures related to the operation of the videoconferencing system in court are assigned to the chief of staff of the relevant court. The party to the case, who submitted the relevant application bears the risks of technical impossibility to participate in the mode of videoconference outside the courtroom, interruption of communication, etc.

Participants wishing to attend the court hearing by videoconference must: have an electronic digital signature and personal technical means (computer, video camera, etc.); register at the system on the official web portal of the judiciary of Ukraine at www.court.gov.ua; not later than five days before the court hearing to submit a standard application for participation in such a court hearing. Participants are identified by showing on the camera a page with a photo of a passport or other identity document (Order of the State Judicial Administration, 2020). The entire course of the trial is recorded by technical means, copies of which are stored in the case file on DVD.

As we can see, legislator established two conditions for the implementation of the videoconferencing regime - the use of its own technical means and electronic digital signature. The issue of protection of personal data of participants in court proceedings remains open, as there is no software in Ukraine that would allow for safe remote hearing of cases in court. It should be noted that scientists (Dubchak, 2019; Funta, 2021; Gulac, 2019; Klimek, 2017; Krasnova, 2019; Ladychenko *et al.*, 2019; Vasiuk, 2020; Yara, 2021) pay attention to the need to ensure the protection of personal data.

On April 23, 2020, the Order of the State Judicial Administration № 196 adopted a new procedure for the work with technical means of videoconferencing. In fact, the mechanism of access and holding a court hearing by videoconference is similar to the procedure provided by the Order № 169. The key innovations of the new order include:

- The possibility of holding court hearings by videoconference with the help of software on the participants' choice. These can be Zoom, Skype, EasyCon, etc.
- Demonstration on the camera of a page with a photo of a passport or other identity document is not mandatory and can be carried out only if necessary.
- The course and results of procedural actions carried out in the mode of videoconference are recorded by the court with the help of any digital media.

Order of the State Judicial Administration of Ukraine of July 17, 2020 № 314 On Amendments to the Order of the State Judicial Administration of Ukraine designated the State Enterprise "Center for Judicial Services" as a controller of personal data, which can be used to identify an individual who participates in a court hearing by videoconference.

With regard to the consideration of criminal cases during the quarantine, criminal proceedings in courts of all instances are open (Ladychenko *et al.*, 2021). Court may decide to restrict access of persons who are not participants in the trial to a court hearing during the quarantine established by the government in accordance with the Law of Ukraine "On Protection of the Population from Infectious Diseases", if participation in the trial will endanger life or personal health. I. Tautly pays attention to what exactly the legislator understands by the term "threat to life and health of the person".

According to the scientist, judges do not and should not have such special medical skills as "establishing a real threat". The judge may decide to conduct criminal proceedings in a closed court session only in the following cases: if the accused is a minor; in case of consideration of a crime against sexual freedom and sexual integrity of a person; if there is a need to prevent the disclosure of information about personal and family life or circumstances that degrade person's dignity; if the conduct of proceedings in open court may lead to the disclosure of secret information protected by law; if there is a need to ensure the safety of persons involved in criminal proceedings (Tatulych, 2020).

During the quarantine in the EU member states, a number of changes were made to the legislation in order to protect the health of the population, but at the same time to ensure the right of citizens to a fair trial. It is useful to consider a positive experience that has proven itself in practice.

In Bulgaria, although during the quarantine, the procedural terms of consideration of cases in court were continued, while restrictions were imposed on the extension of procedural terms in certain types of cases, both in criminal proceedings (for example, seizure, parole), civil, economic (permission for the withdrawal of children's deposits), and administrative

cases (appealing against orders for the immediate implementation of administrative acts). Also, submission of all documents was possible in electronic form (Law of Ukraine, 2020).

Restrictions on the extension of procedural time limits in some cases were also established in Austria (2020), for example, in cases on imminent threat to security or personal liberty, payment deadlines (Law of Ukraine, 2020).

In Denmark, during quarantine, judges worked from home. The courts had considerable discretion while making decision which cases were critical, the term for consideration of which cannot be extended. Consideration of other cases was postponed (Nybroe, 2020; Ladychenko *et al.*, 2020). Given the fact that no changes were made to the procedural legislation, the courts themselves decided on the organization of work, taking into account the situation. Family disputes were considered without the participation of the parties.

In Estonia, procedural time limits were extended by courts depending on the specific case. As no changes were made to the legislation on this issue, the decisions were made by judges at their own discretion. Urgent cases were considered using electronic means of communication. According to the Estonian Civil Procedure Code, in exceptional and urgent cases concerning children, court may issue preliminary orders without hearing the parties in court. Judges often used this provision during quarantine. Legal disputes involving children often require immediate resolution. Therefore, this experience of Estonia is useful and worthy of adoption.

The Ministry of Justice in accordance with the amendment to § 3 par. 1 letter a) of Act № 62/2020 Coll. on certain emergency measures in connection with the spread of the dangerous contagious human disease COVID-19 and in the judiciary prepared a Decree on the conduct of hearings, main hearings and public meetings in times of emergency and state of emergency. The Decree stipulated in what matters hearings and sessions may take place.

These include custody cases, decisions of pre-trial judges, conditional release from prison, decisions on imposing protective treatment, changing the method of protective treatment, extension of protective treatment, dismissing and termination of protective treatment. Hearings, main hearings and public hearings may also be held in cases concerning minors, adoption, legal capacity, admissibility of detention in a medical facility or, for example, in asylum matters, detention and administrative deportation and civil and non - civil proceedings, if the parties to the dispute or the parties to the proceedings have agreed to a hearing in their absence. In addition to the matters mentioned above, a hearing, a main hearing and a public hearing may be held in the event of an emergency or state of emergency, even if the matter cannot be postponed.

Conclusions

Restrictions related to the COVID-19 pandemic have affected access to justice and the guarantee of a public trial in most countries. Some courts barred observers and journalists from accessing the premises during quarantine restrictions. In some countries, there have been obstacles to ensuring equal access to justice through digital technologies.

In Ukraine during the COVID-19 pandemic, the practice of conducting court hearings by videoconference is being actively introduced. In order to legally regulate such court hearings, a number of legal acts were adopted. However, unfortunately today the application of such a mechanism has faced the following problems.

At the moment in Ukraine electronic court is only being developed. The normative legal act on the Unified Judicial Information and Telecommunication System has not yet been adopted. The issue of protection of personal data of participants in court proceedings is still not regulated, because there is no software in Ukraine that would allow for safe remote hearing of cases in court. There is a lack of proper technical facilities in many courts.

It should also be noted the unequal opportunities of the parties to the dispute in protecting their rights, since in some regions of Ukraine access to the Internet is weak or even absent and not all Ukrainian citizens have the appropriate technical means.

Electronic court is the best solution, which provides an opportunity to consider cases within the time limits set by law and receive all the necessary documents from citizens to guarantee the protection of their rights. In any case, the right of citizens to a fair trial cannot be limited, as the main function of the state is to ensure the protection of the rights and freedoms of citizens.

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