ТЕОРІЯ ТА ІСТОРІЯ МІЖНАРОДНОГО ПРАВА

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TEMPORARY FACTORS OF THE EUROPEAN DETERMINATION OF A FAIR COURT

Summary. The article is devoted to the study of the topical issue of implementation into the Ukrainian national legal system of the basic principles of a fair trial, defined by the Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, it is emphasized that not only decisions concerning Ukraine, but also others should be taken into account and properly analyzed in the administration of justice. Attention is paid to the temporal dimensions of the concept of a fair trial. It is emphasized that in Ukraine there are numerous violations of reasonable deadlines not only for the consideration of court cases, but also for the execution of final decisions. The problem of unjustified delays in the process has become systemic, which does not meet the criteria of reasonableness of the term of consideration, developed in the established case law of the European Court of Human Rights. After all, according to it, the reasonableness of the duration of the proceedings should be determined taking into account the circumstances of the case and taking into account the following criteria: complexity of the case, behaviour of the applicant and relevant authorities, and the degree of importance of the dispute for the applicant. Instead, our judicial system is dominated by subjective delays, which should not be the case. Practical examples illustrate the issue of untimely court proceedings, as well as improper compliance with the principle of non-cancellation of final verdicts by national courts. As a result of such neglect of democratic principles in the field of Ukrainian judiciary, there is often an arbitrary and subjective interpretation of European case law, which does not add legal certainty to public relations. In most cases, the European Court concludes that the primary responsibility for the excessive length of proceedings lies with the public authorities, as the organization of proceedings must be done in such a way that it is expeditious and efficient, and that is the task of national courts. The paper concludes that in Ukraine the unity of criteria for the use of the case law of the

European Court in court proceedings has not been developed. Preferably, in real proceedings, if the ECtHR decision is referred to, it is abstract. Quite often, such a reference to international case law is simply irrelevant to the facts of the case.

Key words: reasonable time, fair trial, temporal certainty.

Formulation of the problem. The Convention for the Protection of Human Rights and Fundamental Freedoms is the main document that introduces world values into national legal systems and promotes fair and just justice. It is noteworthy that the European Court of Human Rights, which is called upon to apply and interpret convention provisions, is guided in this matter by the principle of legal certainty as the main determinant of a fair trial. However, the Convention itself does not contain normative enshrinement of legal certainty in the form of clear and unambiguous prescriptions. In such circumstances, awareness of the content and real essence of the legal certainty of norms and court decisions is achieved through the judicial application of its elements in the decisions of the European Court of Human Rights. The practice of this body is called precedent, because in resolving cases it tends to generally follow the approaches used by it before, if it does not consider it necessary to change them. In particular, in the motivating part of the decision, the court, instead of reproducing the arguments previously expressed by it, may refer to the arguments expressed in previous decisions. However, the Court has repeatedly emphasized that it is not bound by its own previous decisions, its enforcement has an evolutionary component and the ECtHR changes its legal position from time to time [1, p. 50]. This body, developing case law, provides certain clarifications of the definitions and rules of use in the conduct of proceedings of certain provisions of the Convention.

National legislation seeks to incorporate these principles into the Ukrainian legal system. Article 17 of the Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights" indicates the need for courts to apply the Convention and the case law of the ECtHR as sources of law, and Article 18 of this Law defines the reference to the Convention and case law. As we can see, the law is about "the practice of the Court" in its general sense, i.e. not only decisions concerning Ukraine, but also others must be taken into account and properly analyzed in the administration of justice. The main thing is not the subjective composition of the parties to the dispute, but its content. In this case, the defining principle of a fair court is the ability to obtain fair justice, regardless of which social group a person belongs to, or other personal characteristics [2, p. 178]. The principles of equality and adversarial proceedings are an integral part of the right to a fair trial guaranteed by Article 6 of the Convention. It is their proper observance that the ECtHR often refers to when justifying its decisions.

Analysis of recent research and publications. Such scholars as S.P. Golovaty, O.V. Demin, Y.I. Matveeva, M.I. Kozyubra, S.P. Pogrebnyak, M.V. Smutok, O.V. Solovyov, V.S. Stefanyuk, U.Z. Koruts and others studied this problem. At the same time, having carefully studied the issue of definiteness of the rule of law

and court decisions in general, scholars still do not pay enough attention to the analysis of compliance with the requirements of fairness of justice in Ukrainian law enforcement verdicts in certain civil disputes. In particular, the timeliness of trials, adherence to the principle of non-repeal of final verdicts and the development of mechanisms for the timely enforcement of national courts have not been properly scientifically clarified. As a result, in the field of Ukrainian judiciary, there is often an arbitrary and subjective interpretation of European case law, which does not add legal certainty to public relations. The theoretical solution of these issues is the **purpose** of this work. This will provide practical recommendations for improving approaches to the fair application of justice.

Results. The requirement of fair trial is aimed at a specific decision as a result of law enforcement activities. In this regard, the requirements concern both the content of the court's verdict (its clarity, consistency, validity, legality and motivation), and the stability and stability of the final court decision, designed to be a regulator of public relations. The ECtHR has repeatedly pointed out that contradictory decisions of national courts may be a separate and additional source of legal uncertainty and, consequently, a violation of the right to a fair trial established by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [3, p. 75]. In carrying out their application of the law, courts often have to carry out so-called judicial law-making, which is concerned with the interpretation of national law in accordance with European standards, that is, creative work, in particular on the specification of fundamental rights and freedoms. And it is this activity that is largely based on the doctrine of judicial precedent, the content of which is the obligation of the judiciary to enforce their previous decisions (stare decisis). This means the need to adhere to the resolved and not to change the resolved issues [4, p. 316].

In this sense, when respecting the principles of justice that are consistent with the case law of the European Court, special attention should be paid to the issue of respect for final judgments, in the sense that the final judgment should not be questioned in the absence of substantial and irrefutable circumstances can justify. Otherwise, the verdicts of the Ukrainian courts will be considered as violating the human right to a fair trial. Unfortunately, such cases, far from the principles of justice, are currently quite common. For example, the Commercial Court of Kyiv committed these violations in the case No. 910/22191/13 [5]. In this case of bankruptcy of the Accord Credit Union, which began in 2013, no practical progress has been made until the end of 2019. But the steps taken by the improper debtor to freeze the process and get rid of the demands of annoying creditors indefinitely were taken by a surprisingly lenient court. Namely, in December 2014, an amicable settlement was approved in the process of bankruptcy, according to which more than 40% of the debt was written off, and the rest was rescheduled for a considerable period, which was the subject of a court ruling. In fact, at least until the end of this period, which is 2022, the debtor is relieved of the hassle of repaying his creditors, which he had to pay back in 2008. And after the delay, as is traditionally the case, he will declare his next

failure, "throwing" the believers. Such schemes with the active and, we assume, not free assistance of Ukrainian commercial courts in our country do not surprise anyone.

Thus, in the order of amicable settlement in the bankruptcy process was, in particular, written off part of the debt of KU "Accord" to the creditor G. On this basis, the debtor together with the court concluded that the court decision approving the amicable settlement in bankruptcy is a novelty of the debt all debt relations between the debtor and his creditors. This approach can be considered fair, but only within the requirements that were stated by the participants in the bankruptcy process: their level with the conclusion of an amicable agreement has really changed. But this does not apply to Mr. G.'s claims. In 2009, he filed a lawsuit against the Accord Constitutional Court to recover the amounts due to him, won the dispute, and the decision came into force. Moreover, the local court of general jurisdiction, which ruled on the dispute in 2009, secured its execution by seizing the debtor's funds, and this measure is known to be in effect until the final execution of the judgment. In November 2009, enforcement proceedings were instituted by a civil court, which have not been enforced to date. Moreover, the problems with the implementation of this decision are in the plane of interference in the enforcement process by the Commercial Court of Kyiv. Apparently, having a very warm relationship with his long-term relative – the debtor, the court in the appeal of the actions of the executor in the enforcement proceedings since 2009 for some reason persistently produces regular rulings, which effectively overturns the final decision of another court. At the same time, the commercial court does not care at all that no procedural decision can review and revoke the verdict of the court, which has long become final. The fact that only a court that has made a specific decision (Article 448 of the CPC of Ukraine, Article 338 of the Code of Civil Procedure of Ukraine, Part 1 of Article 74 of the Law of Ukraine "On Enforcement proceedings").

But the main problem of the commercial court is a misunderstanding of the concept of debt, and thus a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of res judicata – the invariability of the final decision. The fact is that the settlement agreement may be an innovation of the regulatory (secured by state coercion through a court decision) requirements that were presented to the debtor in the bankruptcy process. In fact, this is exactly what is written in the commented settlement agreement. However, in relation to our specific case, these regulatory requirements ceased to exist in 2009. Because at this time (long before the bankruptcy case was initiated) by a court decision in a civil dispute, this monetary obligation was granted the protection and legal status of a debt, which is subject to unconditional recovery in Ukraine on the basis of a final decision of a national court. This debt, established by the court, was not and in essence could not be recovered in the bankruptcy process, so it cannot be reorganized during the settlement agreement and, moreover, cancelled by the commercial court.

Meanwhile, in our state, both the general theoretical foundations of substantive law and international convention principles are often treated in a simplistic and even sloppy manner. Therefore, we have that the inviolable final court decision, which came into force more than ten years ago, is currently not enforced, because it is called into question by the procedural decision of the commercial court. It should be noted that such a frankly illogical and illegitimate decision was supported by the Northern Commercial Court of Appeal. Therefore, "problems in the conservatory", as the classic said, are systemic. And they will once again lead to the responsibility of the state of Ukraine for the violation of fair trial in terms of non-compliance with the principle of res judicata.

In fact, cases of arbitrary review of final decisions by Ukrainian national law enforcement agencies are duly assessed by the European Court of Human Rights. Thus, in the case of Yushchenko and Others v. Ukraine [7], the ECtHR found that virtually the same issue concerning the material relations between the parties had been the subject of a civil action in a criminal case and a separate civil proceeding. The criminal case was considered earlier, and the decision on the civil aspect became final. But in civil proceedings, the verdict on the content of the same substantive legal relations, namely the issue of civil liability for possession of certain property, had a completely opposite form. The Court therefore emphasized that in the absence of any indication of any defects in the criminal proceedings, the Court concluded that the new resolution of the same issues nullified the previously concluded proceedings, which meant the actual annulment of the earlier final decision, therefore, did not comply with the principle of legal certainty.

Another element of the requirements of Art. 6 of the Convention requires that the case be heard within a reasonable time. Improper application in Ukraine is also recorded in the case law of the European Court. Thus, the Court has repeatedly found a violation of Article 6 § 1 of the Convention in cases which raise temporal issues of unreasonableness of the terms of the judiciary in such cases as "Pavlyulinets v. Ukraine" (§ 53), "Vashchenko v. Ukraine" (§ 50), "Pisatyuk v. Ukraine" (paragraphs 24, 30–34) and "Popilin v. Ukraine" (paragraphs 24–31).

For example, in Andrenko v. Ukraine [8] the applicant challenged her father's will in a local court in 2002. In November 2008 the court denied her claim as unfounded. After a lengthy appellate review of the dispute, the first-instance decision was overturned and the case remanded to the local court. There, in fact, the case was without any movement at the time of the ECtHR. In deciding on the excessive length of the proceedings, the Court stated that the eight-year and nine-month proceedings, which had not yet been concluded, did not meet the criteria for reasonableness of the time-limit established in its established case-law.

After all, according to it, the reasonableness of the duration of the proceedings should be determined taking into account the circumstances of the case and taking into account the following criteria: the complexity of the case, the behaviour of the applicant and relevant authorities. In the circumstances of the present

case, even though the applicant had twice supplemented her claim and the courts had been awaiting an expert opinion for a decision in the case, it could not be considered particularly difficult. Although the applicant contributed somewhat to the increase in the length of the proceedings, her conduct alone could not justify a total duration of more than eight years and nine months. Therefore, the Court considers that in the present case there are no delays caused by the applicant's conduct which should not be included in the total length of the proceedings. The Court therefore concludes that the primary responsibility for the excessive length of the proceedings in this case lies with the public authorities. There has accordingly been a violation of Article 6 § 1 of the Convention in the present case. However, the Court's position on the assessments of the various factors leading to delays in the proceedings is also stable. Thus, as a rule, the Court does not accept the Government's assertion that the applicant contributed to the increase in the length of the impugned proceedings. The applicant may not be charged with making a complaint and using the means available to him under national law to protect his interests. The conduct of the parties does not release the respondent State from liability, as the organization of the proceedings must be done in such a way that it is fast and efficient, is the task of national courts [9, paragraph 43].

As we can see, the principles that ensure compliance with the requirements of a fair trial, including the legal idea of stability and timeliness of court decisions through the application of mechanisms established by the case law of the ECtHR, have been developed so far only theoretically. In practice, in national legal systems, including the Ukrainian one, the argument of uncertainty often works, the main focus of which is the court. It consists in the fact that in a significant class of cases the law does not provide a single correct answer or the existing body of legal norms allows to come to more than one result, and sometimes these results can be opposite [10, p. 50]. The European Court of Human Rights has repeatedly emphasized in its judgments the different and often contradictory approaches to the application and interpretation of domestic law by the Ukrainian judiciary. And it is the approach aimed at achieving legal certainty, eliminating unjustified differences and ambiguities in specific law enforcement should be adopted as a model of the national judicial system.

At the same time, the shortcoming is obvious that in Ukraine the unity of criteria for using the case law of the European Court in court proceedings has not been established. Preferably, in real proceedings, if a reference is made to a decision of the ECtHR, it is abstract in nature. Quite often, such a reference to international case law is simply irrelevant to the facts of the case. If, however, the decision of the Court used to substantiate the position of the national law enforcement authority is related to the circumstances of the case, the court shall not provide reasons for its compliance with Ukrainian law. In fact, the justification of the position of a party or court in the process is not only the mention of such a decision in the court verdict, but also a detailed analysis of its applicability to a particular case. This must be clearly and reasonably motivated by the court. Only under these conditions is the use of a judgment of the European Court of

Human Rights justified. If the relevant motivation confirms the legal side of the proceedings, this must be stated in the decision, and this argument is very important for the established concept of a fair trial. However, where the decision of the ECtHR is not relevant to the subject matter of the dispute, the court must reject the relevant reference as formal and inconsistent with due justification.

The application of the case law of the European Court in order to implement the effective protection of guaranteed rights and freedoms of citizens, as already mentioned, is authorized by law. Thus, non-application or misinterpretation of the Convention principles and practice of the European Court is a violation of national law. The role of European case law is that the ECtHR not only essentially decides the case, but also creates a legal judicial doctrine that allows the law to become a dynamic system that develops, through which human rights standards are formed [11, p. 71].

National law enforcement authorities must be guided by the case law of the European Court in deciding a particular case. If it is certain that the correctness of the position in the examination of the matter is confirmed by the case law of the ECtHR, the body may refer to such an act of the Court. At the same time, if the right of the subject has not been violated, it will also be very appropriate to substantiate the court's motivation that the case law of the ECtHR does not confirm the person's position. Such a mechanism will be effective in the presence of a reasonable and clear court decision in this aspect [12, p. 32–33]. Decisions of national courts taken in violation of these criteria violate fundamental human rights. They should be reviewed and cancelled. And this should be clearly in line with the rules of Recommendation No. R (2000) 2 of the Committee of Ministers of the Council of Europe of 19 January 2000, which calls on States to provide for a clear procedure for reviewing a court verdict [13].

From the above we can draw certain **conclusions.** Unfortunately, we must state that the Ukrainian judiciary is seriously abusing these subjective characteristics of the concept of "reasonable time", turning most lawsuits into endless procedural exercises that are not justified either theoretically or methodologically. For example, despite the legal provision that a cassation review should take place within two months, the Supreme Court today can boast of only a few cases reviewed in a timely manner, while the vast majority of cases have been pending before the Court of Cassation for years. And this despite the fact that the highest judicial body is fully formed and has no shortage of staff. Therefore, the problem lies in the plane of incorrect organization of the national judicial system, which requires a detailed legal analysis. A fair trial is a global and European asset as a manifestation of fair and impartial timely consideration of each person's case. There is still a lack of awareness of judges in the Ukrainian legal system about the basic principles of European fair judiciary. The problem is also that even when applying the case law of the European Court of Human Rights, courts do not always clearly and unambiguously understand the legal meaning of such an application. The solution is seen in the introduction of systematic training and increasing the responsibility of judges.

References:

1. Коруц У.З. Міжнародно-правовий захист права на справедливий судовий розгляд у практиці Європейського суду з прав людини та правозастосовна практика України : дис… канд. юрид. наук : 12.00.11. Київ, 2015. 229 с.
2. Городовенко В. Принцип рівності громадян перед законом і судом. *Вісник Конституційного Суду України*. 2012. № 1. С. 178–186.
3. Рукавишникова А.А. Генезис категории «правовая определенность» в современной юридической науке. *Вестник Томского государственного университета. Серия «Право»*. 2014. № 3 (13). С. 71–81.
4. Шевчук С. Судова правотворчість: світовий досвід і перспективи в Україні. Київ : Реферат, 2007. 640 с.
5. Справа № 910/22191/13. Архів Господарського суду м. Києва за 2013 рік.
6. Справа № 2-2339/09. Архів Октябрського райсуду м. Полтави за 2009 рік.
7. Judgment of the European Court of Human Rights of 15 July 2010 in the case of Yushchenko and Others v. Ukraine, statements 73990/01, 7364/02, 15185/02 and 11117/05. URL: https://zakon.rada.gov.ua/laws/show/974_626.
8. Judgment of the European Court of Human Rights of 20 January 2011 in the case of Andrenko v. Ukraine, application No. 50138/07, URL: https://zakon.rada.gov.ua/laws/show/974_763.
9. Judgment of the European Court of Human Rights of 28 May 2009 in the case of Nesterova v. Ukraine, application No. 10792/04. URL: https://zakon.rada.gov.ua/laws/show/974_514.
10. Матвєєва Ю.І. Правова визначеність та суддівське правотворення. *Наук. записки нац. ун-ту «Києво-Могилянська академія»*. Київ, 2010. Т. 103. С. 50–53.
11. Травников М.А. Будущее Европейского суда по правам человека: тупик или смена концепции. *Журнал российского права.* 2002. № 6. С. 71–74.
12. Суддя Валентина Щепоткіна: «Більше половини звернень громадян до ЄСПЛ пов'язані із неефективним виконанням судових рішень». *Збірник виступів.* Українська Гельсинська спілка з прав людини «Precedent UA – 2015». С. 29–33.
13. Рекомендація КМ РЄ № R (2000) 2 щодо перегляду справ і відновлення провадження у справі на внутрішньодержавному рівні у зв'язку з рішеннями ЄСПЛ. URL: https://zakon.rada.gov.ua/laws/show/994_175.

Гуйван П. Д. Часові чинники європейського визначення справедливого суду

Анотація. Стаття присвячена дослідженню актуального питання про імплементацію до української національної правової системи основних засад справедливого судочинства, визначених Конвенцією про захист прав людини і основоположних свобод. При цьому наголошується, що мають прийматися до уваги і належно аналізуватися у разі здійснення правосуддя не лише рішення щодо України, а й інші. Приділена увага темпоральним вимірам поняття справедливого суду. Підкреслюється, що в Україні мають місце численні порушення розумних строків не лише самого розгляду судових справ, а і виконання остаточних рішень. Стала системною проблема невиправданих затягувань процесу, що зовсім не відповідає критеріям розумності строку розгляду, напрацьованим в усталеній прецедентній практиці ЄСПЛ. Адже згідно з нею розумність тривалості провадження має визначатися з огляду на обставини справи та з урахуванням таких критеріїв, як: складність справи, поведінка заявника та відповідних органів влади, а також ступінь важливості предмета спору для заявника. Натомість у нашій судовій системі переважають суб'єктивні

фактори затримки, що не повинне мати місце. На практичних прикладах проілюстрована проблематика несвоєчасності судових процесів, а також неналежного дотримання принципу нескасування остаточних вердиктів національними судами. Внаслідок подібного нехтування демократичними засадами у сфері українського судівництва часто відбувається довільне та суб'єктивне тлумачення європейського прецедентного права, що не додає суспільним відносинам правової певності. Здебільшого Європейський суд доходить висновку, що основну відповідальність за надмірну тривалість провадження у справах несуть державні органи, бо організація провадження повинна бути зроблена таким чином, щоб воно було швидким та ефективним, і то є завданням саме національних судів. У статті робиться висновок, що в Україні не напрацьована єдність критеріїв використання практики Європейського суду під час розгляду судових справ. Здебільшого в реальному судочинстві якщо і здійснюється посилання на рішення ЄСПЛ, то воно носить абстрактний характер. Досить часто взагалі подібна згадка про міжнародну судову практику просто не має відношення до фактів справи, що розглядається.

Ключові слова: розумний строк, справедливий суд, темпоральна визначеність.