

Adversarial proceedings as a guarantee of the right to a fair trial in the interpretation of European court of human rights

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The article is devoted to investigating the essence of the competitiveness of proceedings as an element (guarantee) of the human right to a fair trial. The article analyzes a number of judgments of the European Court of Human Rights in which the court interprets the content of the right to a fair trial. The authors concluded that the right to a fair trial is a multifaceted concept elements of which are derived from the content of Article 6 of the Convention and from the case-law of the ECHR. The European Court often interprets the content of the right to a fair trial beyond the scope of Article 6 of the Convention, in particular by drawing out certain elements of the right to a fair trial from the rule of law principle. One of such examples is the European Court consideration of the adversarial proceedings as an element of the right to a fair trial. The authors distinguished two essential features of the adversarial proceedings: 1) the presence of a neutral jurisdiction body – an independent and impartial court; 2) equality of opportunities of the parties to participate in the trial and to defend their positions. In accordance with the case law of the European Court the following criteria are used to interpret the principle of court independence: the procedure for appointing a judge, the length of a judge's tenure, the presence of external signs of independence, the existence of guarantees for judges' activities. The principle of court impartiality takes into account both the absence of subjective bias in the trial and the presence of objective signs of the court's impartiality. The principle of equality of arms is determined by the European Court not based on the quantitative characteristics of the granted powers, but on the procedural status of the parties during the entire process, which provides for a real opportunity for the parties to present their legal position. The adversarial proceedings as an element of the right to a fair trial encompass a system of other guarantees, in particular, an independent and impartial tribunal, equality of arms, the right to legal assistance, the presumption of innocence and the like.

Змагальність провадження як гарантія права на справедливий суд в інтерпретації Європейського суду з прав людини

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Стаття присвячена дослідженню сутності змагальності судочинства як елементу (гарантії) права людини на справедливий суд. У статті проаналізовано низку судових рішень Європейського суду з прав людини, в яких суд тлумачить зміст права на справедливий суд. Автори дійшли висновку, що право на справедливий суд є багатограним поняттям, елементи якого впливають із змісту статті 6 Конвенції та судової практики Європейського суду. ЄСПЛ часто трактує зміст права на справедливий судовий розгляд за межею статті 6 Конвенції, зокрема шляхом виведення певних елементів права на справедливий судовий розгляд з принципу верховенства права. Одним із таких прикладів є розгляд Європейським судом змагального судочинства як елементу права на справедливий судовий розгляд. Автори виділили такі дві істотні ознаки змагального судочинства: наявність нейтрального органу юрисдикції – незалежного та неупередженого суду; рівність можливостей сторін брати участь у судовому процесі та відстоювати свої позиції. Відповідно до судової практики Європейського суду, для тлумачення принципу незалежності суду застосовуються такі критерії: процедура призначення на посаду судді, тривалість роботи судді на посаді, наявність зовнішніх ознак незалежності, існування гарантій діяльності суддів. Принцип неупередженості суду враховує як відсутність суб'єктивного упередження у суді, так і наявність об'єктивних ознак безсторонності суду. Принцип рівності можливостей визначається Європейським судом не за кількісними ознаками наданих повноважень, а за процесуальним статусом сторін протягом усього процесу, який передбачає реальну можливість сторін представляти свою правову позицію. Змагальне провадження як елемент права на справедливий судовий розгляд охоплює систему інших гарантій, зокрема наявність незалежного та неупередженого суду, рівність можливостей сторін провадження, право на правову допомогу, презумпцію невинуватості.

Introduction. The twentieth century entered the history under the sign of unprecedented growth in human rights protection. Universal Declaration of Human Rights proclaimed that “recognition

of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” [1].

For the development of the provisions of the Declaration on 4 November 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – “Convention”) was adopted and initially signed by the governments of eleven Council of Europe member states. To date, all 47 Council of Europe member states have signed the Convention.

Not only did the Convention proclaim fundamental human rights, but it also created a special mechanism for their protection. Special bodies, in particular, the European Court of Human Rights (hereinafter – “ECHR” or “European Court”), have been set up to ensure that the parties fulfill their obligations under the Convention. European Court deals with and resolves specific cases on the basis of applications filed by individuals, groups of persons, non-governmental organizations.

Ukraine ratified the Convention on 17 July 1997. Ukraine is the only country that has adopted a special law aimed at: ensuring the implementation of ECHR judgments against Ukraine; eliminating of the reasons for violation of the Convention and its protocols; implementing of European human rights standards in the Ukrainian judiciary and administrative practice; creating preconditions for reducing the number of applications to the ECHR against Ukraine (Law of Ukraine “On the Enforcement of Judgments and the Application of the Case-law of the European Court of Human Rights” [2]. By this Law Ukraine recognized the European Court practice as a source of national law.

At the same time, statistics show that Ukraine is consistently among the leaders of the countries against which most cases are pending (2017 – the first place; 2018 – the fourth place; 2019, 2020, 2021 – the third place). This indicates that there is a problem in Ukraine of ensuring compliance with the Convention on Human Rights at national level.

One of the fundamental rights guaranteed by the Convention is the right to a fair trial. Its legislative framework, guarantee system and provision mechanism determine the status and level of development of legal culture in society.

The right to a fair trial, of course, has a complex structure as it is composed of many elements and the identification of this right solely with a fair procedure is not entirely correct. In the context of this article, we have a goal to focus on such a guarantee of the right to a fair trial as the adversarial criminal proceedings. The principle of adversarial proceedings is today the starting point for the modern procedure of litigation in all civilized countries of the world to be based on. The ECHR broadly interprets the right to a fair trial, often going beyond Article 6 of the Convention. Therefore, the problems of this study are quite relevant.

Results and discussion. The current provisions of Article 6 of the Convention guarantee: “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” [3].

However, scholars have different approaches while determining the elements of the right to a fair trial. For example, V. Komarov and N. Sakara emphasize the following elements of the right to a fair trial: unburdened by legal and economic obstacles access to a judicial institution; due litigation procedure; public litigation; reasonable time for trial; consideration of the case by an independent and impartial tribunal established by law [4, p. 13].

According to U. Koruts the structure of a person’s right to a fair trial substantively includes the following components: publicity of the trial; fairness of the judges in deciding the merits of the case; consideration of the case by the judicial authorities within a reasonable time; independence and impartiality of judges in the judicial process [5, p. 373].

Kh. Romaniv and E. Tregubov based on the construction of Paragraph 1 Article 6 of the Convention, concludes that it enshrines the following elements of the right to a judicial protection: 1) the right to a trial; 2) fairness of the trial; 3) publicity of the trial; 4) a reasonable time for hearing the case; 5) independence and impartiality of the court established by law [6, p. 133; 7, p. 359].

A. Buchyk outlines the basic tenets that make up the right to a fair trial: 1) the right of access to court; 2) the principle of equality of opportunity; 3) an independent and impartial tribunal; 4) a reasonable time for consideration; 5) publicity of the trial; 6) presumption of innocence; 7) procedural guarantees of participants, inadmissibility of cancellation or limitation of judicial control in certain areas or in certain categories of cases [8, p. 3–4].

As O. Banchuk and R. Kuybida rightly point out, the person’s right to a fair trial, enshrined in Article 6 of the Convention, is inherently a complex subjective right. It consists of a lot of other rights that must be respected during the trial. The components of the right to a fair trial can be found directly in the text of Paragraph 1 Article 6 of the Convention, which deals with independence and impartiality of tribunal hearing of the case, openness of the trial and public announcement of the judgment, reasonableness of the time for the trial. And other elements of that right, such as equality of arms and adversarial proceedings as well as the right to legal aid are not reflected in Article 6 of the Convention, but have been deduced by the European Court on the principle of the rule of law, which is set out in the preamble to the Convention [9, p. 13]. In addition, we can deduct from ECHR decisions other provisions that can be considered as elements (guarantees, standards)

of the right to a fair trial, in particular the right to a reasoned judgment [10], the use of admissible evidence [11] etc.

As we have noted, one of the elements of the right to a fair trial is the adversarial nature of the proceedings. The following two essential features of the adversarial proceedings are distinguished in the scientific legal literature: 1) presence of a neutral jurisdiction body – an independent and impartial court; 2) equality of opportunities of the parties to participate in the trial and to defend their positions.

Above all let's consider the essence of the first feature of adversarial proceedings through the lens of the European Court's interpretation. In accordance with the requirements of Article 6 of the Convention, cases should be considered by an independent and impartial tribunal established by law. When it comes to the independence of the tribunal, it is generally means its independence from other state bodies and officials.

As N. Hren rightly points out, the importance of this principle is manifested in the fact that judiciary should virtually be free from external, especially political, interference. First of all, there is a lack of direct subordination to the authority of another branch of government [12, p. 248–249]. For example, in the case of *Vasilescu v. Romania* ECHR stated that the case had been decided by the authority (State Counsel), subordinated firstly to the Procurator-General and then to the Minister of Justice. ECHR reiterated that “only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the description “tribunal” within the meaning of Article 6 paragraph 1” [13].

But the lack of direct subordination does not indicate absolute independence. It is secured not only by regulatory status but also by economic criteria. In accordance with the Basic Principles on the Independence of the Judiciary, endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions [14].

This principle also includes the independence of the judge from the head of the court. For example, many ECHR judgments focus on the breach of principle of independence because of violation of the procedure for appointing judges, influence on the judge through disciplinary or career advancement, and soon.

For example, in the case of *Oleksandr Volkov v. Ukraine* was found objective impartiality of High Council of Justice, which determined applicant's case by sixteen members who attended the hearing, only three of whom were judges. ECHR further noted that “only four members of the High Council of Justice

worked there on a full-time basis. The other members continued to work and received a salary outside the High Council of Justice, which inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality” [15].

In the case of *Salov v. Ukraine*, “taking into account the considerations as to the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in respect of possible pressure from the President of the Regional Court, the binding nature of the instructions given by the Presidium of the Regional Court and the wording of the relevant intermediary judicial decisions in the case” [16], ECHR found that the applicant's doubts as to the impartiality of the judge of the District Court may be said to have been objectively justified.

The principle of court independence in ECHR decisions has been summarized in the case of *Findlay v. the United Kingdom*. ECHR noted that “in order to establish whether a tribunal can be considered as “independent”, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence” [17].

The presence of external signs of the independence of the court and the existence of guarantees for the judges activities, which protect them from influence during the administration of justice, mean lack of their subordination to other state authorities (other branches of government).

A striking example of legislative authority intervention in the field of justice is the case of *Stran Greek Refineries and Stratis Andreadis v. Greece*. During the military regime in Greece, private limited company “Stran Greek Refineries” built oil refineries on the basis of a contract with the government. After the overthrow of the regime a new authority passed a law about termination of such contracts. The company went to the court to recover damages caused by the termination of the contract with the government under this law. Initially, the court ruled in favor of the company, but later, along with other similar court decisions, it was repealed by another law. Such decisions of the Greek Parliament were recognized by the ECHR as interference in the judiciary activities. European Court found violation of the company's right to a fair trial and emphasized that “state had effectively removed jurisdiction from the courts called upon to determine the validity of the arbitration award and prevented any proper judicial investigation of the subject of the dispute” [18].

Unlike the principle of the independence of the court, which is applied to the whole judicial system or the status of judges in the state, their inter-

action with other bodies, the principle of impartiality of the court implies an emphasis on a particular case. In the case of *Piersack v. Belgium* ECHR first identified criterias for impartiality of judges: “subjective approach, that is endeavoring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he is offered guarantees sufficient to exclude any legitimate doubt respect” [19].

The principle of impartiality of the judge also stipulates that the judge should not be in contractual, monetary, family or other relations with one of the parties of the case. The influence on a judge can be realized through some kind of bribery, and not necessarily in direct form. For example, in the case of *Belukha v. Ukraine* the applicant complained under Article 6 paragraph 1 that the Artemivsk Town Court and the President of that court, who had heard her case, had lacked impartiality, as the defendant company had supplied the court with window grids and a computer, and it had repaired the court’s heating system for free [20]. Accordingly the European Court acknowledged that even such actions could be indicative of the lack of impartiality of the court.

The violation of the requirement of impartiality of the court may also be manifested in relation to a particular participant in the trial. In the case of *Remli v. France* ECHR also questioned the impartiality of the court because of the jury’s racist sentiment about the defendants in a criminal case: “if a court trying people of foreign nationality or origin included a juror who, before the hearing, had publicly expressed racist sentiments, it lacked impartiality” [21].

The legal guarantees for securing this principle are the ability to withdrawal or recusal a judge. It is usually occurring in the following cases: participation of a judge in any judicial decision in the case at pre-trial stages; personal involvement of the judge in the case as a party of the proceedings; family relationship with the party or other person involved in the case; personal (direct or indirect) interest of the judge in the outcome of the case or the interest of his or her relatives; participation of the same judge in the hearing of the case in different judicial instances, as well as in the same instance in case of the reversal of a preliminary ruling by a higher court; other circumstances that cast doubt on the judge’s objectivity.

For example, in the case of *Hauschildt v. Denmark* the court, which applied preventive measures to the defendant at the stage of pre-trial investigation and later considered the case as essentially was found biased. In this case the applicant argued that “the kind of decisions a judge would be called upon to make at the pre-trial stage would require him, under the law, to assess the strength of the evidence and the character of the accused, thereby inevitably colouring his

appreciation of the evidence and issues at the subsequent trial”. ECHR stated that the most important is “the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw”. The European Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant’s fears in this respect can be considered objectively justified [22].

Another element of adversarial proceedings is equal opportunities of its parties in the trial (equality of arms). The principle of equality of arms in the trial was derived by the ECHR from the principle of the rule of law. In the case of *De Haas and Gijssels v. Belgium* the ECHR reiterated that “the principle of equality of arms – a component of the broader concept of a fair trial – requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent” [23].

The adversarial proceedings requirement was also formulated by the European Court in the case of *Vermeulen v. Belgium*: the right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision” [24]. In this case the European Court found violation of the right to adversarial proceedings and, accordingly, the right to a fair trial, since the prosecution party (*avocat general’s*) had participated in the Court of Cassation but the applicant had not such opportunity and therefore had not been able to answer to him before the ending hearing. The ECHR stated “that the breach in question was aggravated by the *avocat general’s* participation in the court’s deliberations, albeit only in an advisory capacity. The deliberations afforded the *avocat general* an additional opportunity to bolster his submissions in private, without fear of contradiction” [24].

The European Court made an important conclusion regarding the essence of adversarial proceedings in the case of *Jasper v. the United Kingdom*. In this case was indicated that “it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defense. The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party”. In the light of the requirements

of Article 6 paragraph 1 the prosecution should disclose to the defense all material evidence in their possession for or against the defense. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. Moreover, ECHR considers that in order to ensure that the accused receives a fair trial; any difficulties caused to the defense by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities [25].

V. Horodovko expresses the opinion that the European Court refers to other conditions of adversarial proceedings and equality of parties: the right of the person charged with a criminal offence to examine or have examined prosecution witnesses, as well as to obtain attendance and examination of defense witnesses under the same conditions as prosecution witnesses, both on the pre-trial investigation and on the judicial stages; the right of the defendant to appeal against a judgment in a high court; the right of the defendant to participate in the trial both in the court of the first instance and during the review of the case on appeal [26, p. 203–204].

The principles of equality of arms and adversarial proceedings as components of broader concept of a fair trial are partly embodied in Paragraph 3 Article 6 of the Convention. So, in the case of *Barbera, Messegue and Jabardo v. Spain* (1988) the ECHR explained: “paragraph 1 of Article 6 taken together with paragraph 3, also requires the Contracting States to take positive steps, in particular to inform the accused promptly of the nature and cause of the accusation against him, to allow him adequate time and facilities for the preparation of his defense, to secure him the right to defend himself in person or with legal assistance, and to enable him to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The latter right not only entails equal treatment of the prosecution and the defense in this matter, but also means that the hearing of witnesses must in general be adversarial” [27].

Implementation of the principle of equality of arms in criminal offence cases is impossible without guaranteeing the defendant’s right to participate in the trial. “Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person “charged with a criminal offence” is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to “everyone charged with a criminal offence” the right “to defend himself

in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”, and it is difficult to see how he could exercise these rights without being present”, – stated in the ECHR judgment in the case of *Colozza v. Italy* [28]. If, however, a criminal offence case has been considered in the absence of the defendant, then when he becomes aware of the fact of conviction, he should be given the right to petition the court to review the case.

The requirement to secure the defendant’s right to participate in court hearings extends to the court of appeals too. In this regard, in the case of *Belziuk v. Poland* the ECHR recalled that “criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance. A State is required to ensure also before courts of appeal that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in this Article”. In this European Court also noted that “the principle of equality of arms includes the fundamental right to adversarial criminal proceedings, which right is intended to guarantee an opportunity to both parties to comment on each other’s submissions. However, in the instant case this principle was not respected since the applicant was not allowed to participate in the appeal hearing and thus could not reply to the public prosecutor’s submissions, which included a recommendation to the Regional Court to dismiss his appeal. For this reason, the Commission had unanimously concluded that there was a violation of the applicant’s right to a fair trial” [29].

The principle of adversarial proceedings implies the presence of two parties having opposite procedural interests and an independent, impartial court (tribunal). Considering that the prosecution party is represented by a professional lawyer (prosecutor), the adversarial trial also must make it possible to involve a professional lawyer (advocate) on the defense party. Of course, the defendant decides for himself whether to exercise such a right, but he must have it.

The ECHR fairly considers the right to legal assistance as a part of broader concept of the right of access to a court guaranteed by Article 6 of the Convention. In the case of *Van Geysegem v. Belgium* the European Court emphasized that “the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial” [30].

Article 6 paragraph 3 (c) of the Convention guarantees everyone charged with a criminal offence has the right 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 [3]. Important aspects of the right to legal assistance in criminal proceedings are formulated by the ECHR in the case of *Pakelli v. Germany*. The case referred to the situation when German criminal procedure law provided for the opportunity to represent their interests in person or to use the assistance of a lawyer. These possibilities were recognized as mutually exclusive, that is, defense in person made it impossible for defendant additional protection by a lawyer. As we can see Article 6 paragraph 3 (c) of Convention guarantees three rights to a person charged with a criminal offence: to defend himself in person, to defend himself through legal assistance of his own choosing and, on certain conditions, to be given legal assistance free. To link the corresponding phrases together, the English text employs on each occasion the disjunctive “or”; the French text, on the other hand, utilizes the equivalent – “ou” – only between the phrases enouncing the first and the second right; thereafter, it uses the conjunctive “et”. Having regard to the object and purpose of this paragraph, which is designed to ensure effective protection of the rights of the defense the ECHR recognized that the French text provides more reliable guidance [31]. Therefore, according to the case-law of the European Court, a person can defend himself in person and at the same time use the legal assistance of a lawyer chosen at his discretion.

The principle of adversarial proceedings is closely linked to another guarantee for the accused – the presumption of innocence. The adversarial is manifested in the fact that the guilt of the accused must be proved in the court, and only after the conviction and the sentence entry into force we can speak about the person as guilty of the crime.

An extensive interpretation of the presumption of innocence the ECHR has given in the case of *Allenet de Ribemont v. France*. European Court has made the following understanding of this principle: “The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1. It will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty” [32].

The ECHR also acknowledged that violation of the presumption of innocence may come not only from a judge or from a court, but also from other public authorities. So, in the said case the European Court noted that in the instant case some of the highest-ranking officers in the French police referred to Mr. Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. This was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 paragraph 2.

Thus, the presumption of innocence is intended not only to protect the honor and dignity of the accused person, but also to prevent the premature influence of the preliminary assessment of the facts in the case by the investigative bodies on the decision-making by the court, and accordingly ensure the conditions for adversarial proceedings.

Conclusions.

1. The right to a fair trial is a multifaceted concept elements of which are derived from the content of Article 6 of the Convention and from the case-law of the European Court. The ECHR often interprets the content of the right to a fair trial beyond the scope of Article 6 of the Convention, in particular by drawing out certain elements of the right to a fair trial from the rule of law principle.

2. Providing of adversarial proceedings as an element of the right to a fair trial encompasses a system of other guarantees, in particular, an independent and impartial tribunal, equality of arms, the right to legal assistance, the presumption of innocence and the like.

3. Despite the democratic nature of the Convention’s provisions and the ECHR’s activities in the area of the protection of violated rights, many problems regarding the exercise of the right to a fair trial remain in Ukraine. This is evidenced by the large number of European Court judgments against Ukraine. National legislation still needs to be reformed in the light of European and international human rights standards. The judicial system must really ensure the implementation of the rule of law, the priority of human rights and freedoms, the unimpeded, accessible and transparent right to judicial protection. Only under such conditions the right to a fair trial will become a reality for the national society.

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