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PROBLEMS AND CONFLICTS RELATED TO MEASURES TO ENSURE THE RIGHT TO A FAIR TRIAL IN ACCORDANCE WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

Notwithstanding the law governing the dispute, everyone has the right to a fair and impartial trial, as stated in the first paragraph of Article 6 of the European Convention on Human Rights. This provision emphasises an impartial trial within a reasonable time without taking into account the civil, administrative, criminal nature of the case. Because the court`s decision is announced publicly, the press and the public may not be allowed into the courtroom in order not to harm the interests of justice. This process is implemented in the interests of a democratic society, namely public order, national security and morality. The purpose of the article is an analysis of problems and conflicts in the field of criminal and constitutional law related to measures to ensure the right to a fair trial in the light of the European Convention on Human Rights, including the analyses of the cases in the ECtHR related to Article 6 of the European Convention on Human Rights and the consideration of the problems faced by the two sides of the lawsuit. The main research methods are analysis and synthesis, comparative and formal legal methods, using of which ensured an analysis of the legal framework of national and international law, doctrinal approaches and practise of the ECtHR in the context of the problems, conflicts and counteractions encountered in ensuring the right to a fair trial. The conclusions point to conflicts in such cases, and provide theoretical advice on how to improve them.

Keywords

Fair trial, European Court of Human Rights, protection of human rights, human freedom

Resumo

Independentemente da lei que rege o litígio, todas as pessoas têm direito a um julgamento justo e imparcial, tal como previsto no primeiro parágrafo do artigo 6º da Convenção Europeia dos Direitos do Homem. Esta disposição sublinha a necessidade de um julgamento imparcial num prazo razoável, sem ter em conta a natureza civil, administrativa ou penal do processo. Uma vez que a decisão do tribunal é anunciada publicamente, a imprensa e o público não podem ser autorizados a entrar na sala de audiências, a fim de não prejudicar os interesses da justiça. Este processo é implementado no interesse de uma sociedade democrática, nomeadamente a ordem pública, a segurança nacional e a moralidade. O objetivo do artigo é analisar os problemas e conflitos no domínio do direito penal e constitucional relacionados com as medidas destinadas a garantir o direito a um processo equitativo à luz da Convenção Europeia dos Direitos do Homem, incluindo a análise dos processos no TEDH relacionados com o artigo 6. Os principais métodos de investigação são a análise e a síntese, os métodos jurídicos comparativos e formais, que permitiram analisar o quadro jurídico do direito nacional e internacional, as abordagens doutrinais e a prática do TEDH no contexto dos problemas, conflitos e contra-acções encontrados na garantia do direito a um processo equitativo. As conclusões apontam para os conflitos existentes nestes casos e fornecem conselhos teóricos sobre a forma de os melhorar.

Palavras chave

Julgamento justo, Tribunal Europeu dos Direitos do Homem, proteção dos direitos humanos, liberdade humana.

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Introduction

The main guideline for the development of the domestic legal system is proclaimed that the highest priority is the human person, his rights and freedoms, which are embodied in Art. 3 of the Constitution of Ukraine. Thus, Art. 59 of the Constitution enshrined the right to legal aid for every citizen of Ukraine, both free and paid. This right is proclaimed in paragraphs. "C" Article 6. Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe on April 11, 1950 and ratified by the Law of Ukraine No. 475/97VR of July 17, 1997, and recognised as the right to legal aid, is guarantee[1].

Despite the fact that every day we hear from all sources of telecommunications and Internet resources about the overthrow of judicial reform, at the same time, there is a decriminalisation of articles that directly hold judges accountable for wrongful sentencing[2].

Thus, on June 11, 2020, case No. 7-r /2020 which was initiated at the request of 55 people's deputies of Ukraine, on the constitutionality of Article 375 of the Criminal Code

[1] M. G. Haustova. "Implementation of European legal standards in the legal system of Ukraine". *Legal scientific electronic journal* no. 6 (2016): 34-36. http://lsej.org.ua/6_2016/8.pdf (accessed March 22, 2023).

[2] European Convention on Human Rights, 1950.

of Ukraine, was decided by the Decision of the Constitutional Court of Ukraine that it does not comply with the Constitution of Ukraine.

The reason for the exclusion was the position that Ukraine is a democratic state where the main requirement for legislation is that the norms (laws) must meet the principles and criteria set out in the Constitution of Ukraine, namely the principle of the rule of law. While the wording of Art. 375 of the Criminal Code came to us from Soviet times, where the word (combination of words) "knowingly unjust" is taken from Art. 176 of the Criminal Code of the UCPC of 1960, in the norm of which the responsibility was specified, if for selfish motives or other personal interests the judges passed a "knowingly unjust" sentence, decision, ruling, or resolution. In the opinion of the Constitutional Court, these features are inherent in the policy of the Soviet Union and, accordingly, the Constitution of the Soviet Union, while completely contradicting the Constitution of Ukraine and not reflecting the system of principles and values enshrined in the current Constitution.

Examining the historical context of the legal practise of the Soviet Union, it can be argued that Art. 375 of the Criminal Code of Ukraine is a failed imitation.

Arguing the recognition of Art. 375 of the Criminal Code of Ukraine, the Constitutional Court of Ukraine proceeds from the fact that in Art. 375 of the Criminal Code quite a large number of evaluative concepts do not establish criteria, which the legislator understands as "unjust". Accordingly, it is not clear which "knowingly unjust" actions can be considered as such: a decision, ruling, sentence, or ruling of a judge (judges), which may lead to an ambiguous understanding of the composition of the criminal offence for which the qualification is committed.

At the same time, the Constitutional Court emphasises that in case of disagreement with this decision of the Court, investigators, prosecutors, or any other person may consider it "unjust" in terms of subjective perception, while the disposition of Art. 375 of the Criminal Code of Ukraine allows the possibility of such abuse by the bodies of pre-trial investigation, as a result of which a judge may be prosecuted only for the fact that he issued a court decision[3].

Materials and Methods

Arguing their decision, the judges of the Constitutional Court point out that they do not decide anything at all; they only pass a sentence on the basis of the work of the pre-trial investigation bodies[4]. And they - what? Nothing! They only make decisions without leaving their offices. Everyone has to bring their evidence, and they can only state, based on their subjective reasoning, "no", for example, "insufficient evidence", "poor vision", "hard of hearing", and so on. And for this, they can not be attracted! Because they can't float to anything at all. And in some thoughts quoted, for example, O. Hamilton noted

[3] Decision of the Constitutional Court of Ukraine. Case No. 1-305 / 2019 (7162/19), 2019.
[4] Constitutional Court of Ukraine. A separate opinion of the judge of the Constitutional Court of Ukraine Horodovenko V.V. concerning the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 55 people's deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with Article 375 of the Criminal Code of Ukraine. (2020).

that "the executive not only distributes benefits and honours in society, but also holds a sword over him. The legislature not only manages the treasury but also establishes rules that govern the rights and responsibilities of every citizen. The judiciary does not dispose of either the sword or the treasury. It affects neither the strength nor the wealth of society and cannot make any effective decisions. It would be correct to say that it has neither strength nor will, but only prudence"[5], in addition, the author supports the position that "this branch is undoubtedly the weakest of the three departments of power, that its encroachment on the powers of either of the other two branches will never succeed, while it needs all possible caution to protect them from encroachment".[6] In our opinion, the judiciary is not only the most corrupt, but also one that no one can influence at all. They work for themselves and no elections or re-elections that affect both the legislature and the executive affect the court at all. They have the right, "in their subjective judgement" - to determine many decisions that relate not only to certain powers, as in the executive and legislative branches, but anything. For example, to determine the legality of dismissal and restore the rights of the individual, to determine the legality of the occupation of land, and so on.

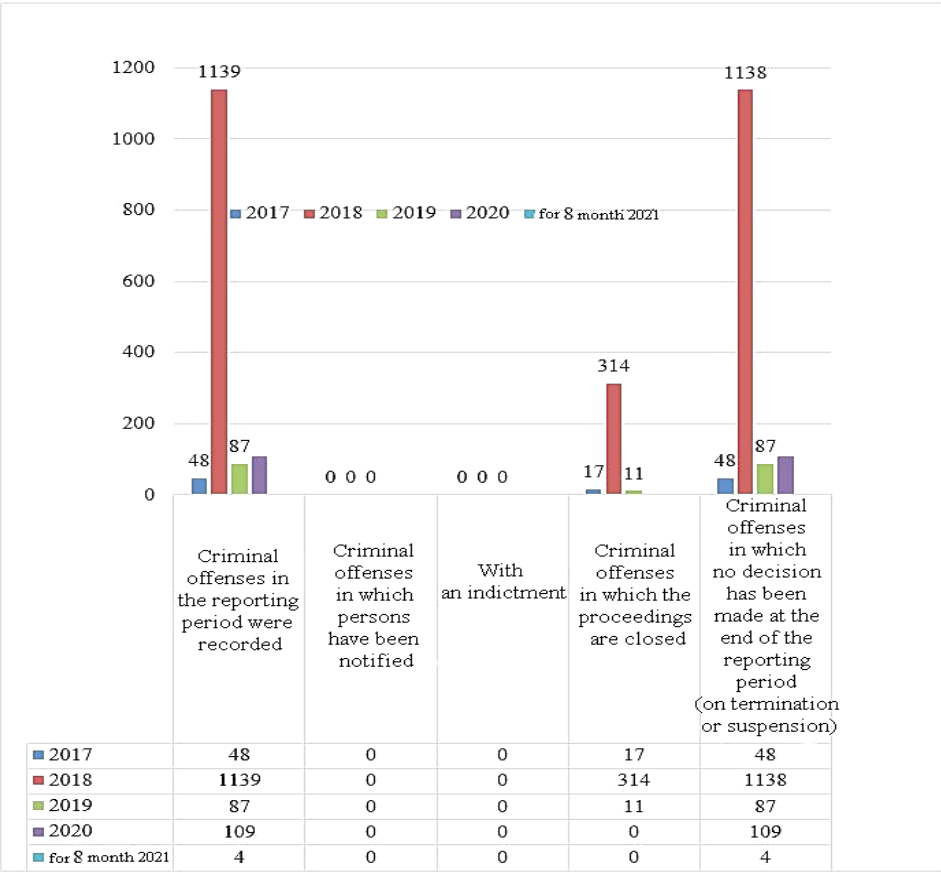
The Judges further emphasise that the pre-trial investigation bodies threaten the Judges in making a decision, so the Judges consider that Art. 375 of the Criminal Code of Ukraine should be decriminalised[7], but the Constitution of Ukraine provides for immunity for judges in Art. 126 of the Constitution of Ukraine in case of their administration of justice by criminal prosecution. In addition, the inviolability and independence of judges are guaranteed by the Constitution of Ukraine and the laws of Ukraine; any influence and pressure on judges is prohibited; decisions made by judges cannot be brought to justice, the only exception is the commission of a criminal offence or disciplinary offence[8].

At the same time, it should be borne in mind that, although the independence of judges is an integral part of their status, it cannot be absolute. In cases where a judge, in the course of his or her professional activities, makes a knowingly unjust sentence, decision, ruling, thereby encroaching not only on the basis of justice but also on the rights and legitimate interests of the victim concerned, he or she should obviously be prosecuted. criminal liability. This is a generally accepted position. Now let's look at the statistics on the prosecution of judges. So, statistics show that in 2017, 48 criminal offences were registered under Art. 375 of the Criminal Code of Ukraine; in 2018 - 1139, in 2019 – 87; in 2010 – 109; for 8 months in 2021 - 4. At the same time in 2017, no suspicion was reported in any case and accordingly sent to court with an indictment transferred – 0. At the end of the reporting period, a decision was not made in 48 criminal proceedings, closing criminal proceedings - 17. In 2018, suspicion of 0 criminal proceedings was reported, 0 was transferred to the court with an indictment, and at the end of the reporting period, a decision was not made in 1138 criminal proceedings; 314 criminal proceedings were closed.

5 A. Hamilton et al. *Commentary on the Constitution of the United States*. (Kyiv: Sfera, 2002).
6 A. Hamilton et al. *Commentary on the Constitution of the United States*. (Kyiv: Sfera, 2002).
7 Decision of the Constitutional court of Ukraine. Case No. 1-305 / 2019 (7162/19), 2019.
8 Constitution of Ukraine, 1996.

In 2019, suspicion of 0 criminal proceedings was reported, 0 was transferred to the court with an indictment, and at the end of the reporting period, no decision was made in 87 criminal proceedings, of which 11 were closed. In 2020, suspicion of zero criminal proceedings was reported. At the end of the reporting period, no decision had been made in 109 criminal proceedings. In the first eight months of 2021, 0 criminal proceedings were reported, 0 were transferred to the court with an indictment, and at the end of the reporting period, no decision was made in 4 criminal proceedings (General Prosecutor of Ukraine, 2021) (Fig. 1). From the given statistical data, it is seen that a large enough surge occurred in relation to violations of criminal liability under Art. 375 of the Criminal Code of Ukraine for 2018, which was difficult to say, but in our opinion, there is the beginning of the State Bureau of Investigation, which deals with the involvement of judges for wrongful sentences and in accordance with Art. 375 of the Criminal Code of Ukraine. So, in order to prevent the flow of criminal prosecution, the judges of the Constitutional Court decided to declare this article unconstitutional. Why do we draw such a conclusion? And because the current Code was adopted in 2001, it is 20 years old, and for 20 years the judges of the Constitutional Court did not notice the unconstitutional provisions of this article, while after the surge in 2018, they immediately noticed the discrepancy.

Figure 1. Data on criminal prosecution under Art. 375 of the Criminal Code of Ukraine



	Criminal offenses in the reporting period were recorded	Criminal offenses in which persons have been notified	With an indictment	Criminal offenses in which the proceedings are closed	Criminal offenses in which no decision has been made at the end of the reporting period (on termination or suspension)
2017	48	0	0	17	48
2018	1139	0	0	314	1138
2019	87	0	0	11	87
2020	109	0	0	0	109
for 8 month 2021	4	0	0	0	4

Source: Authors

This research was carried out using a number of methods generally accepted by legal science. The main research method was the normative method, which was used to clarify the essence and forms of ensuring the right to a fair trial. Using the comparative method, the features of ensuring the right to a fair trial in Ukraine and abroad are highlighted. The use of methods of analysis and synthesis and the formal legal method provided a thorough analysis of the legal framework of international and national law, various doctrinal approaches, and significant practice of the ECtHR in the context of ensuring the right to a fair trial and the problems that arise in the course of such ensuring.

Results

From this, it can be concluded that it is precisely this pressure that the Judges of the Constitutional Court testify about, that they are allegedly afraid of pressure, and that this pressure is unacceptable to the Judges. Thus, the judges almost say that these pagan prosecutors, investigators, and others are putting pressure on the government precisely by threatening to use Art. 375 of the Criminal Code of Ukraine. But how does it actually happen? Is the threat of instituting proceedings under any article applicable to an innocent person under pressure? In any case, if a person is innocent, no pressure is terrible for him. However, if these prosecutors and pre-trial investigation bodies are pagans, can threaten both life and health, right? What is this threat that does not exist? Amazingly. But this is not the end of the decision of the Constitutional Court on the unconstitutionality of Art. 375 of the Criminal Code. It refers to the prosecutor's office and pre-trial investigation bodies, but the decision, sentence and ruling, as well as other procedural actions of the court belong not only to cases involving the prosecutor; there are cases without the participation of the prosecutor in civil and administrative disputes.

Who can put pressure on judges, midwives and defendants? Accordingly, this cannot serve as a sufficient argument for the decriminalisation of this criminal offence. After all, the higher the objective harmfulness of the socially dangerous act, the lower its prevalence may be (for example, the lack of data for several years on the existence of convictions that have entered into force against persons who committed espionage (Article 114 of the Criminal Code) does not indicate the need to exclude the specified composition of the criminal offence from the Criminal Code). In addition, the fact that for several years no judge has been prosecuted under Art. 375 of the Criminal Code may indicate the latency of the offence, the insufficient professional level of authorised law enforcement agencies, the shortcomings of the legislative description of the characteristics of the specified composition of the criminal offence, and so on.

You will probably have a question. And why did we study the end of 2020 and 2021 in relation to this article, if it is no longer defined as constitutional? This is where the fun begins. The Law of Ukraine on Criminal Liability is adopted by the Verkhovna Rada of Ukraine, and in accordance with the provisions of Part 6 of Art. 3 of the Criminal Code of Ukraine, any amendments to the Criminal Code of Ukraine may be made only if they are made by the law amending this Code and/or the criminal procedure legislation of Ukraine,

and/or the legislation of Ukraine on administrative offences.[9] According to these provisions, articles cannot be considered decriminalised until they are published by laws amending the Criminal Code of Ukraine, and accordingly, the articles are currently in force, but with the indication that they are declared unconstitutional. For example, our article 375 of the Criminal Code of Ukraine reads:

- Article 375. Ruling by a judge (judges) of a knowingly unjust sentence, decision, ruling or resolution
- (Article 375 was declared unconstitutional) (according to the Decision of the Constitutional Court No. 7-r/2020 of 11 June, 2020)

1. A judge's (or judges) knowingly unjust sentence, decision, ruling, or resolution shall be punishable by imprisonment for a term of up to five years or imprisonment for a term of two to five years.
2. The same acts that caused grave consequences or were committed for selfish motives, in other personal interests, or in order to interfere with the lawful professional activity of a journalist shall be punishable by imprisonment for a term of five to eight years (Article 375, as amended by Law No. 421-VIII of May 14, 2015).

There are a sufficient number of such articles in the Criminal Code. The axis, for example, excludes the article as Art. 368¹ which expired on the basis of Law No. 2808-VI of December 21, 2010 and instead uses Art. 368-2. Illegal enrichment, which, like the previous one, was declared unconstitutional, nevertheless exists and is valid.

Article 368^{-2}. Illegal enrichment

(Article 368^{-2} has been declared unconstitutional (is unconstitutional), according to the Decision of the Constitutional Court No. 1-r/2019 from 02/26/2019)

1. Acquisition by a person authorised to perform the functions of the state or local self-government of ownership of assets in a significant amount, the legality of the grounds for acquisition of which is not confirmed by evidence, as well as the transfer of such assets to any other person shall be punishable by imprisonment for a term up to two years with deprivation of the right to hold certain positions or engage in certain activities for a term up to three years with confiscation of property.
2. The same acts committed by an official holding a responsible position shall be punishable by imprisonment for a term of two to five years with deprivation of the right to hold certain positions or engage in certain activities for up to three years with confiscation of property.

[9] Verkhovna Rada of Ukraine. Law №619-IX of 2020, "About the modification of some legislative acts of Ukraine concerning the improvement of procedure of modification". https://zakon.rada.gov.ua/laws/show/619-20#n9 (accessed March 22, 2023).

3. The acts provided for in part one of this Article, committed by an official who holds a particularly responsible position, shall be punishable by imprisonment for a term of five to ten years with deprivation of the right to hold certain positions or engage in certain activities for up to three years with confiscation of property.

> Note. 1. The persons authorised to perform the functions of the state or local self-government are the persons specified in paragraph 1 of part one of Article 3 of the Law of Ukraine "On Prevention of Corruption".

4. Assets in a significant amount in this article mean cash or other property, as well as income from them, if their size (value) exceeds one thousand non-taxable minimum incomes.
5. The transfer of assets in this article means the conclusion of any transactions on the basis of which the right of ownership or right of use of assets arises, as well as the provision of cash or other property to another person for the conclusion of such transactions[10].

In practice, this may lead to the fact that, although the courts may not hear cases, public authorities (prosecutors) have the right to enter information into the Unified Register of Pre-trial Investigations under this article and refer the case to the Court on such charges. fact is unconstitutional, but de jure it exists in the Criminal Code of Ukraine and will not be able to interfere with the relevant. In such cases, conflicts (contradictions) arise, which create legal uncertainty.

What is the problem? The problem is that the pre-trial investigation does not want to investigate criminal offences that are considered unconstitutional, because first, the prosecutor's office, knowing that they are not defined as unconstitutional by the Constitutional Court, does not want to sign them. And secondly, even if the case is brought before the Court, no judge will consider it because it is not collegial with the judges, who are more respectful and have a different position. There is no conflict of norms and inconsistencies between the judiciary and the legislature, where everyone tries to prove to others their more respectable significance. And the law, the rule of law, the bodies of pre-trial investigation, and accordingly, people (citizens of Ukraine) suffer, and what can the ECtHR tell us about this?

Answering the questions, we can refer to the case law of the European Court of Human Rights, so in the case of "Eloev v. Ukraine" of November 6, 2008, the European Court of Human Rights in its decision drew attention to the fact that identifying legislative gaps (conflicts) may lead to situations of non-compliance with the principle of legal certainty in cases where there is no clarity of the formulated provisions as one of the main elements

[10] Verkhovna Rada of Ukraine. Law №770-VIII of 2015, "About the modification of the Criminal Code of Ukraine concerning the improvement of the institute of special confiscation for the purpose of eliminating corruption risks at its application". https://zakon.rada.gov.ua/laws/show/770-19#Text (accessed March 22, 2023).

of the rule of law[11]. It follows that legislative gaps (conflicts) may lead to non-compliance with the principle of legal certainty as one of the main elements of the rule of law, while the Ukrainian authorities create such conflicts with their own understanding that contradictions arise. But why? To prove its significance? However, the country suffers, and the people suffer. Returning to the case of Yeloyev v. Ukraine, the application of a measure of restraint in the form of detention at the stage of judicial investigation, which is elected for an indefinite period, does not meet the criterion of "predictability of law" for the purposes of paragraph 1 of Art. 5 of the Convention. A very large number of complaints concern the very practise that arises regarding existing conflicts in the law regarding the detention of persons for an unlimited and unpredictable period. However, the ECtHR often reminds that such detention in case of unforeseen legislation is in itself contrary to the principle of legal certainty, which is implemented by the Convention and is one of the elements of the rule of law.[12]

So, if there are so many appeals to the ECtHR regarding illegal detention, and, accordingly, detention orders are challenged by the ECtHR, then what kind of pressure will be put from the prosecutor's office, if the recognition of illegality takes place at the level of the ECtHR! The judges of the Constitutional Court do not mention this.[13]

However, in Article 91 of the Law of Ukraine "On the Constitutional Court of Ukraine" and in Article 152 of the Constitution of Ukraine, the Court exercises all its powers for the purpose of effective constitutional review, taking into account all the circumstances of the case. In its opinion, the Constitutional Court found that the existence of the criminal liability of a judge for a "knowingly unjust" decision creates grounds for the emergence of risks related to the fact that it is allegedly possible to influence the judge by coercion and coercion due to the assessment concepts at the disposal of Art. 375 of the Criminal Code of Ukraine. The Recommendation, with reference to Article 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, adds that the aim is to ensure the independence of the judiciary, which guarantees everyone the right to a fair trial by law and without any influence from outsiders"[14]. Here, the judges emphasise that they are being resisted by the pre-trial investigation, but they do not see their guilt in passing an unjust sentence, ruling, or ruling.

The Venice Commission or the European Commission at the 86th plenary session "For Democracy through Law" noted that legal certainty is one of the essential elements in the rule of law[15]. According to legal certainty, the requirement is as follows: clarity and

[11] European Court of Human Rights. The case of Yeloyev v. Ukraine (2008). Application no. 17283/02 of 2008. https://zakon.rada.gov.ua/laws/show/974_433#Text (accessed March 22, 2023).

[12] European Court of Human Rights. Case of Kawka v. Poland. (2001). Application no. 25874/94 of 2001. https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_25874-94_001-46067 (accessed March 22, 2023). European Court of Human Rights. Case of Baranowski v. Poland. (2000). Application no. 28358/95 of 2000. https://www.stradalex.com/nl/sl_src_publ_jur_int/document/echr_28358-95_001-4020 (accessed March 22, 2023).

[13] Josef Abrhám et al., "Energy security issues in contemporary Europe". *Journal of Security and Sustainability Issues* 7, no. 3 (2018): 387-398. https://doi.org/10.9770/jssi.2018.7.3(1)

[14] "Guide to article 6. The right to a fair trial (civil part)". European Court of Human Rights. (2013). https://www.echr.coe.int/Documents/Guide_Art_6_UKR.pdf (accessed March 22, 2023).

[15] "Item 41 European commission "For democracy through law". Venice commission. (2011). https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-ukr (accessed March 22, 2023).

accuracy, which are aimed at ensuring legal norms in which legal relations are predictable[16].

The Committee of Ministers of the Council of Europe in its decision of September 23–25, 2019 noted its uncertainty about the threat to judicial independence in cases under Article 375 of the Code of Abuse of Prosecutors of Criminal Investigations, the oversight procedure for the implementation of the European Court of Human Rights in the Ukraine case "Alexander Volkov v. Ukraine".

One of the main tasks of the criminal law policy of the state of Ukraine is to counteract and prevent criminal offences committed by judges in the field of justice, which is committed to facilitating the administration of justice, based on justice, legality, and assistance in making reasonable and lawful judgements in Ukraine. Mechanisms for ensuring the principles of the rule of law under the provisions of the Constitution of Ukraine.

In connection with the recognition of Article 375 of the Criminal Code as unconstitutional, the judge was supposed to "decriminalise" a deliberately unjust decision, but as mentioned earlier, this was not blown away due to the fact that a law was passed according to which any changes could take place. In the Criminal Code only in cases of amendments to the Laws of Ukraine concerning pre-trial investigation of certain categories of criminal offences[17].

For example, the case of "Gelenidze v. Georgia", which is relevant to the exclusion of Art. 375 of the Criminal Code of Ukraine from the criminal legislation of Ukraine. In this case, the judge was prosecuted under an article similar to Art. 375 of the Criminal Code of Ukraine. But during the trial, she was decriminalised in Georgia. At that time, the prosecutor's office decided to reclassify this article to another, which did not concern the special subject "Judge", but the general one as an abuse of office. The court granted the prosecutor's request and prosecuted the judge, with both the appellate court and the Supreme Court upholding the decision.

In this connection, the applicant applied to the ECtHR for a violation of Art. 6 of the Convention. Thus, the ECtHR satisfied the petition of the plaintiff, having defined a violation of Art. 6. However, the applicant's complaint under Article 6 of the Convention was twofold: first, the prosecutor's application and the subsequent decision of the appellate court to change the legal classification of the offence for which she had been convicted were arbitrary; second, the applicant was not given sufficient time to prepare his defence on the new charges.

As for the reasoning for the reclassification of the said decision, the government noted that Art. 336 of the Criminal Code of Georgia is a lex specialis to Article 332 of the Criminal Code of Georgia. In its objections, the government stated that no retraining had

[16] "Item 46 European commission "For democracy through law". Venice commission. (2011). https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-ukr (accessed March 22, 2023).

[17] Verkhovna Rada of Ukraine. Law №2617-VIII of 2019, "About the modification of some legislative acts of Ukraine concerning the simplification of pre-judicial investigation of separate categories of criminal offences". https://zakon.rada.gov.ua/laws/show/2617-19#n42 (accessed March 22, 2023).

taken place and that the amount of the original charge had been exceeded. However, the judges of the ECtHR did not agree with this argument. The basis of the statement was the assertion, however, that the bill on decriminalisation, which was prepared and adopted by the legislator, contradicts the law. Paragraph 18 of this decision stated that the purpose of the proposed changes is to decriminalise the rule (exclusion) for the adoption of an illegal decision or court decision, which was clearly stated in the explanatory note to this bill. However, referring to the case in which paragraph 6 of this decision stated that the only charge against the applicant was the adoption of an illegal court decision in the prosecutor's decision of October 26, 2005 transferring the case to court. Other references that would relate to the lex specialis nature of Art. 336 and Art. 332 of the Criminal Code of Georgia were not made, and accordingly, the charges. It can be concluded from the above that the investigation into the applicant concerned exclusively an offence related to the adoption of an illegal court decision. The same conclusions can be drawn with regard to the subsequent proceedings against the applicant in absentia. The regulatory part of the relevant ECtHR decision stated that the issue of the possibility of criminalising the applicant for abuse of office as an alternative rule was not considered or raised at all[18]. In the Court of Appeal, the court replaced one article with another in view of the above, after which the applicant lodged a complaint. The appellate court reclassified without taking into account the differences between these norms under Georgian law[19]. The composition of the criminal offence under Art. 336 of the Criminal Code of Georgia consisted in the adoption of an illegal court decision or decision without any motive that was illegal and improper (improper motive), but was a mandatory element of a criminal offence of abuse of office under Article 332 of the Criminal Code of Georgia[20].

We believe that it is true that in this direction of the Court of Appeal's arguments regarding the provisions of the ECtHR, which were particularly impressive, as Art. 3 of the Criminal Code of Ukraine clearly provided for the retrospective application of the decriminalized rule of the law of Ukraine on criminal liability. According to Art. 28 of the CPC of Ukraine, which provides for the immediate and mandatory termination of proceedings if there is a decriminalization of a socially dangerous act, the only exception is when the accused wants to continue the trial. But even in this case, the law of Ukraine stipulates that even if he is found guilty, the court must release the person from serving the sentence. It did not end there, and the Supreme Court upheld the decision of the Court of Appeal, excluding the above provisions from its grounds and failing to consider their application to the specific circumstances of the applicant's case, which was both procedural and essentially unfair. However, the ECtHR found that both the procedure and the manner in which the applicant was charged were in breach of the principle of equality of arms and arbitrary.[21] The Supreme Court did not correct the arbitrary decision of the appellate court. Therefore, the ECtHR concluded that paragraph 1 and subsequent

[18] European Court of Human Rights. Case of Anđelković v. Serbia. (2013). Application no. 1401/08 of 2013. http://www.zastupnik.gov.rs/uploads/Andjelkovic_1401-08_eng.pdf (accessed March 22, 2023).
[19] Criminal Code of Georgia,1999, Article 332/336.
[20] Criminal Code of Georgia, 1999, Article 332/336.
[21] European Court of Human Rights. Case of Anđelković v. Serbia. (2013). Application no. 1401/08 of 2013. http://www.zastupnik.gov.rs/uploads/Andjelkovic_1401-08_eng.pdf (accessed March 22, 2023).

paragraphs had been violated. "A" and "b" paragraph 3 of Art. 6 of the Convention apply in this case.

According to this provision, the ECtHR has noted in advance that this will not be the case in Ukraine and that the prosecutor's office will not be able to reclassify Art. 375 of the Criminal Code as Art. 364 of the Criminal Code of Ukraine. However, our legislation, namely the Criminal Code, is formulated somewhat differently than in Georgia. For example, Art. 364 of the Criminal Code of Ukraine is formulated as a material composition in contrast to Art. 375 of the Criminal Code, which is a formal composition. What it means and the fact that in violation of Art. 364 of the Criminal Code necessary consequences have been caused significant damage to the rights protected by law, where under the damage according to Note 3 is recognized the amount that is 100 times or more than the tax-free minimum income. For 2021, one NMDG is UAH 1,147, and accordingly, 114700 is the amount that must be determined as a consequence of the commission of Art. 364 of the Criminal Code of Ukraine. How to determine the damage caused and how difficult it is to prove it when a judge (judges) makes a knowingly unjust sentence, decision, ruling or resolution? In our opinion, it is almost impossible.

Let us turn to the analysis of the criminal legislation of some foreign states, regarding the similar composition of the criminal offence available in their national legislation. The Criminal Code of Spain provides for several types of criminal offences relating to judges, as follows: Art. 446 of the Criminal Code of Spain: "Issuance of an illegal sentence or decision"; Art. 447 of the Criminal Code of Spain: "Passing a clearly illegal sentence or decision due to gross negligence or ignorance"; Art. 448 of the Criminal Code of Spain: "Refusal to make a sentence or decision without a legitimate reason or under the pretext of alleged ambiguity, inadequacy of the law or a gap in the law"; Art. 449 of the Criminal Code of Spain: "Malicious delay of justice to achieve any illegal goal."

Criminal liability is also established in the French Criminal Code: malicious refusal to administer justice after receiving the relevant procedural appeal (Article 434-7-1). Paragraph 339 of the German Penal Code establishes liability for an unfair decision, sentence or ruling, meaning a refusal to hear a case or decisions rendered in favor of or to the detriment of a procedural party by judges or other officials or arbitrators. In the Criminal Code of Serbia In the Criminal Code of Serbia, Art. 243 of the Criminal Code of Serbia defines criminal liability for intentional acts committed by judges in the performance of their functions. The Criminal Code of Bulgaria (Articles 294), the Criminal Code of Denmark (§ 146, § 148), the Penitentiary Code of Estonia (Part 4 of Article 311), and the Criminal Code of Latvia (Articles 291-293).

In our opinion, based on the above considerations, it is possible that criminal liability for the decision of judges making knowingly unjust decisions can not be considered only "unsuccessful borrowing" from the Soviet Union because the modern law of Ukraine on criminal liability exists in other countries and has similar criminal structures of offences. In addition, it should be noted that there is no criminal liability, judges are not subject to criminal liability for their decisions, rulings and resolutions in countries such as Ireland, Great Britain and Cyprus. In some countries, judges are liable for wrongful decisions only

if they have committed corruption offences, namely Italy, Liechtenstein, Norway, Portugal, Romania, Slovenia, Hungary, Croatia and Sweden.

Discussion

In 2018, amendments to Art. 375 of the Criminal Code of Ukraine, namely before it was declared unconstitutional according to the decision of the Constitutional Court No.7-r/2020 of November 6, 2020, namely in the Draft Law of Ukraine of February 28, 2018 No. 8077, it was proposed to amend Part 1 of Art. 375 of the Criminal Code in the following wording: "for intentional adoption by a judge or investigating judge of a knowingly illegal or unreasonable sentence, decision, ruling or court order made for selfish or other personal reasons, or if it caused significant damage to legally protected rights, freedoms and interests of citizens; state or public interests, or the interests of legal entities".[22] The proposals were made as a result of the recommendations of the Council of Europe's Group of States against Corruption (GRECO) in 2017, following the Fourth Evaluation Round on the Prevention of Corruption among MPs, Judges and Prosecutors. unjust sentence, decision, ruling or resolution "and / or at least other security[23].

Already in 2020, GRECO, evaluating the implementation of the recommendations provided to Ukraine based on the results of the Fourth Evaluation Round, stated that there was no progress in the implementation of this recommendation. The discrepancy of Art. 6 of the Convention on law and a fair trial are not fulfilled not only in the example given in Art. 375 of the Criminal Code of Ukraine. They are not fulfilled in others, so we offer a number of inconsistencies.

In our criminal law there are special rules that are designed to protect public relations that protect justice, for example in Art. 374 of the Criminal Code "Violation of the right to protection", and Art. 397 of the Criminal Code "Interference in the activities of a lawyer or a representative of a person." On the one hand, a socially dangerous act as part of a criminal offence, which exists in Part 1 of Art. 374 of the Criminal Code "inadmissibility or failure to provide timely defence counsel, as well as other gross violations of the rights of the suspect, accused to defense", in addition, this article clearly states the conduct of officials, namely investigators, prosecutors and judges, but this article`s liability only exists in cases concerning the right to defence in criminal proceedings. The literal interpretation of the Law of Ukraine on Criminal Liability shows that the violation of the right to legal aid does not apply to civil proceedings and is therefore not covered by this article. The conclusion is based on the fact that in Art. 374 of the Criminal Code of Ukraine, the actions of a participant in the process such as a defender, are not mentioned. A defender is not listed among the participants in civil proceedings, but in Art. 374 of the

[22] "On amendments to some legislative acts of Ukraine regarding the improvement of certain norms for the purpose of inevitability of punishment of persons who have committed corruption crimes". Draft law of Ukraine. (2018). https://ips.ligazakon.net/document/JH68D00A (accessed March 22, 2023).

[23] "On amendments to some legislative acts of Ukraine regarding the improvement of certain norms for the purpose of inevitability of punishment of persons who have committed corruption crimes".Explanatory note. (2018). https://ips.ligazakon.net/document/JH68D00A (accessed March 22, 2023).

Criminal Code of Ukraine, the victims are "suspect", "accused" and "defendant", who are participants in the criminal procedure legislation but are not defined in the civil procedure legislation.

To assist Art. 374 of the Criminal Code of Ukraine, various forms of obstruction may be brought to the attention of Art. 397 of the Criminal Code of Ukraine by the defence counsel or the person providing assistance in committing these actions. Again, defining the conduct of an official recognised by the Court as a violation of a socially dangerous act described in Art. 397 of the Criminal Code could cover the considered behaviour of the official recognised by the Court as a violation of item 1 of Art. 6 of the Convention. However, this article of the Criminal Code is intended to protect not just any defender and representative, but a specific defender and representative. When the issue of obtaining assistance in refusing the applicant arose, it was generally impossible to obtain legal aid in a civil case. In this example, the court found a violation of the right of access to justice; it does not matter the guilt of the person because any person has the right to protection. The ECtHR does not deal with the selection of guilty persons for violating the Constitution, but only characterises the existence of problems with the correct criminal-legal qualification of an act committed by a person. The Court of Justice of the European Court of Human Rights is not a court of higher instance in relation to the judicial system of a state party to the Convention[24].

Accordingly, the ECtHR cannot amend or revoke a judgement of a court of a country that has ratified the Convention, and the court does not give instructions to the legislator of a member state, but only determines the inconsistency of the decision of the Convention. Accordingly, it does not exercise control over the participating countries (Borisov, 2004). The ECtHR's recommendations are a test of decades of the Court's principles and guidelines. However, I would like to note that such a policy does not work in those countries where corruption prevails, and, accordingly, social needs and state policy are not aimed at meeting European human rights standards. As an example, a large number of ECtHR decisions recognising violations of life imprisonment rights, such as Kuznetsov v. Ukraine and Aliyev v. Ukraine, can be cited. Thus, there are a large number of decisions of the court concerning persons serving life sentences, in which the ECtHR has recognised the violation of the rights of these persons by the court in most cases; this applies to Art. 3 and 8 of the Convention, but as noted above, the court cannot decide on the prosecution of perpetrators, but can only determine the fact of violations.[25] However, at the same time, it can be argued that Art. 375 of the Criminal Code of Ukraine, if there are such a large number of appeals to the ECtHR regarding violations of Art. 6 of the Convention and just here there is no pressure from the pre-trial investigation, which draws the attention of the Constitutional Court of Ukraine.

From this, it can be concluded that the statement of the fact that certain (judges, officials) committed criminal offences against those persons whose complaints the Court considered the relevant cases. However, the impossibility in the decision of the Court to

[24] M. Inshyn et al., "Transformation of labor legislation in the digital economy". *InterEULawEast* 8, no. 1 (2021): 39-56. doi:10.22598/iele.2021.8.1.3

[25] European Court of Human Rights. Case of Aliev v. Ukraine. (2003). Application no. 41220/98 of 2003. https://zakon.rada.gov.ua/laws/show/980_202#Text (accessed March 22, 2023).

make an instruction on the need to prosecute the person who committed the identified violations makes it impossible to apply Art. 375 of the Criminal Code of Ukraine to judges who commit such acts. In this case, the ECtHR court pays the person for the violation of the court, the state suffers damages, and the courts do not feel any consequences. As regards persons in respect of whom they have been found guilty of life imprisonment, although they have received certain monetary compensation, their detention continues under the same conditions, and they do not have the right to seek redress from the Court on the same matter. There are exceptions, but this should be the rule, so in the case of Naumenko v. Ukraine, a report was submitted to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in respect of disciplinary sanctions and punishments applied in accordance with convicts' complaints. regarding ill-treatment[26].

From the documents that are publicly available, it is impossible to trace the involvement of at least one person in such acts. In the published case law of Ukraine in the Unified State Register there were no cases of initiation of cases against officials who committed criminal offences against convicts serving sentences in penitentiary institutions of different types of detention (closed and open). In view of this, it is argued that persons found by the ECtHR guilty of torture and inhuman treatment in our country are not even considered to be prosecuted, and information is not entered into the Unified Register of criminal proceedings. Accordingly, it appears that they remain unpunished[27].

However, I would like to draw attention to the fact that this is happening not only in Ukraine. For example in the case of Labita v. Italy, which found a violation of several articles of the Convention, but also did not specify whether to prosecute those responsible. and made decisions[28]. In the case of Ertak v. Turkey, it was established that the death of Mehmet Ertak was in connection with the actions of officials during his imprisonment, and the court found that the Government had violated Art. 2 of the Convention. However, the ECtHR did not recognise the possible prosecution of officials responsible for the death and, consequently, did not conduct an effective and sufficient investigation into the circumstances of Mehmet Ertak's disappearance and death.[29] There are exceptions, for example, in Berktay v. Turkey, the ECtHR pointed out that a Turkish court acquitted officers without any justification for the lack of causation between the fall of Devrim Berktay and the actions of the accused[30].

The largest number of appeals from Ukraine concerns complaints concerning the non-execution of court decisions, namely the presence of violations in such cases of Art. 6 or

[26] European Court of Human Rights. Case of Naumenko v. Ukraine. (2004). Application no. 41984/98 of 2004. https://zakon.rada.gov.ua/laws/show/980_353#Text (accessed March 22, 2023).
[27] M. Inshyn, and O. Moskalenko. "Ensuring freedom of labor in Ukraine in the context of labor emigration". *Baltic Journal of Law and Politics* 11, no. 2 (2018): 1-31. doi:10.2478/bjlp-2018-0009
[28] European Court of Human Rights. Case of Labita v. Italy. (2000). Application no. 26772/95 of 2000. https://zakon.rada.gov.ua/laws/show/980_009#Text (accessed March 22, 2023).
[29] European Court of Human Rights. Case of Ismail Ertak v. Turkey. (2000). Application no. 20764/92 of 2000. http://search.ligazakon.ua/l_doc2.nsf/link1/SO2357.html (accessed March 22, 2023).
[30] European Court of Human Rights. Case of Berktay v. Turkey. (2001). Application no. 22493/93 of 2001. http://search.ligazakon.ua/l_doc2.nsf/link1/SO2494.html (accessed March 22, 2023).

Art. 13 of the Convention, which testifies to the crisis situation in Ukraine with respect for human rights and fundamental freedoms in this area of relations.

Conclusion

Proclaimed rights in Art. 6 of the Convention on the Right to a Fair Trial are designed to protect human rights in the first place. However, in our country, it is proposed to protect not the defenceless people, who stand against the background of the law, which is proclaimed in law and real, when Ukraine ranks 3rd in the world in the number of appeals to the ECtHR. And despite the fact that the Convention is designed to protect the most vulnerable in society, in practice, according to the decisions of the Constitutional Court, those people are judges. The register of court decisions shows that with the enactment of the Criminal Code in 2001, 15 convictions were handed down for criminal liability under Article 375. "Judgement (s) of a judge (judges) knowingly unjust sentence, decision or ruling". 15 sentences in 20 years. All this is happening along with the fact that almost 95% of the people do not trust and consider the courts to be the most corrupt branch of government. However, the Constitutional Court came to the conclusion that this article contradicts the Constitution of Ukraine and allows for pressure on the Court.

It is determined that the Constitutional Court has no right to decriminalise articles in the Criminal Code, but only the right to declare them unconstitutional, but their existence in law continues to exist, only with a sign of unconstitutionality. In the near future, it will be necessary to wait for the judges of the Constitutional Court to appeal to the European Court of Human Rights with a complaint about the non-execution of the Judgement. However, the analysis of statistical data shows that at the same time, the existence of Art. 375 of the Criminal Code meets the needs of all branches of government. Yes, no case is initiated at the stage of pre-trial investigation due to its unconstitutionality, but the authorities allegedly did not decriminalise it, and it remains in the law of Ukraine on criminal liability.

It is determined that some countries have articles for which judges can be prosecuted, while others do not have general liability, but can be prosecuted if a criminal offence is found to be corrupt. Recognition of Art. 375 of the Criminal Code of Ukraine as unconstitutional in practise will lead to the fact that the courts will not consider cases because Art. 375 of the Criminal Code is declared unconstitutional and cannot be de facto applied, while de jure it is not excluded and the pre-trial investigation bodies and the prosecutor's office may enter information into the Unified Register of pre-trial investigations under this article and refer the case to the Court. This creates legal uncertainty.

We have concluded that the decision of the European Court of Human Rights in the case "Gelenidze v. Georgia "to the exclusion of Art. 375 of the Criminal Code of Ukraine, because Art. 364 of the Criminal Code of Ukraine is formulated as a material composition in contrast to Art. 375 of the Criminal Code, which is a formal composition, what it means, and the fact that in violation of Art. 364 of the Criminal Code necessary consequences have occured that have caused significant damage to the rights protected by law. Where

under the damage according to Note 3 is recognised the amount that is 100 times or more than the tax-free minimum income. For 2021, one NMDG is UAH 1,147, and accordingly, 114700 is the amount that must be determined as a consequence of the commission of Art. 364 of the Criminal Code of Ukraine. How to determine the damage caused and how difficult it is to prove it when a judge (judges) makes a knowingly unjust sentence, decision, ruling or resolution? In our opinion, it is almost impossible.

In addition, the ECtHR, in determining the violation of Art. 6 of the Convention "Right to a Fair Trial", in which is the dominant quantitative component, on the appeals of Ukrainians to the ECtHR, has no right to influence national law to prosecute those guilty of wrongdoing, as a result of which judges remain unpunished and not prosecuted. responsibility. Which, in our opinion, is a gap that needs to be addressed by amending national legislation. And if there is a violation of Art. 6 of the Convention in relation to a certain person, in parallel, conduct a pre-trial investigation against the judges who made such a decision. In case of proving the illegality of the decision, rulings and resolutions to impose fines on judges and deduct the amounts imposed on the state as a result of the violation of Art. 6 of the Convention by this judge.

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