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THE RIGHT TO A FAIR TRIAL: BETWEEN NORMATIVE DOCTRINE AND PRACTICE IN THE FACE OF GLOBAL CHALLENGES

Abstract

The article is devoted to studying the exercise of the right to a fair trial in the face of global challenges, owing to the impact of the situation related to the spread of the SARS-CoV-2 coronavirus. Compared to martial law in Ukraine, the pandemic period is not the greatest challenge to the right to a fair trial. However, the experience is relevant for possible future similar emergencies and their impact. In addition, such an analysis allows us to understand the preconditions for the realization of human rights during the next global challenges, including martial law in wartime. The main tendencies of implementing certain aspects of the right to a trial in criminal proceedings are analysed and determined, in particular, the access to justice, observance of reasonable terms of proceedings, independence and impartiality of the court, and quality of court decisions, their proper validity and legality. With reference to the analysis of international acts, the legislation of Ukraine, the case law of the European Court of Human Rights, and the practice of

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the Supreme Court, court statistics during the sample period (2017–2021) the normative content, concepts and elements of the principle of the right to a fair trial are singled out. Analysis of statistical data, comparison of regulations, the practice of their application, and information from analytical reports of the judiciary made it possible to come to a conclusion about directions of the impact of coronavirus pandemic, restrictive quarantine norms on the exercise of the right to a fair trial, and the logical consequences that they have caused on the state of justice in Ukraine in recent years.

Keywords

the right to a fair trial; access to justice; pandemic; global challenges; reasonable time; independent and impartial court; court decision; validity and legality

Introduction

The issues of the functioning of the judiciary system in Ukraine have always been and remain in the field of view of politicians, jurists, scholars, and practitioners. Among other things, perhaps the most crucial aspect of the organization of the judiciary and the implementation of legal proceedings is to ensure the human right to go to law, complying with all guarantees and rights, which in general would ensure the right to a fair trial. The judicial system in Ukraine is constantly facing new challenges owing to dynamic changes in the current legislation, the reforming of the judiciary, digital transformation, introduction of electronic legal procedure, impact of emergencies such as the COVID-19 pandemic (since 2020), war time after the full scale Russian invasion (since 2022). These circumstances necessitate the rapid and flexible adaptation of the judiciary and citizens, the realization of the right of citizens to unhindered appeal to the court for the protection of their rights, compliance with the procedure for consideration of the case, and passing of sentence and enforcement of the decision by the court in criminal proceedings under new conditions. At the same time, the court decision should ensure the achievement of the goals of criminal proceedings and observance of human rights and freedoms in compliance with the requirements of legality and validity.

Meanwhile, according to Article 50 of the Constitution of Ukraine, everyone has the right to a safe environment for life and health and compensation for damage caused by violations of this right. The ques-

tion arises of how to ensure a fair balance in the exercise of the right to a fair trial, which cannot be limited, and the natural right of a person to life and health, namely to an environment safe for life and health. Since our state has a positive obligation to ensure these rights on the territory of Ukraine, there is a need in this study to single out the impact of the pandemic, as well as the dynamics and main trends in the legal regulation and practical implementation of some aspects of the right to a fair trial in the specific conditions of recent years.

The purpose of this study is to determine the impact of the coronavirus disease and restrictive quarantine norms on the right to a fair trial and the natural consequences that they have had on the state of justice in Ukraine over the past five years based on a comprehensive analysis of the regulatory legal norms on specific aspects of the right to a fair trial, judicial practice, and statistical analytical data on their implementation. Lessons learned from the Covid period may be useful for future legal practice.

The methodological basis of the study implies the general dialectical method of cognition, which allows us to study the subject of research in connection with other legal phenomena, and general and specific scientific methods. The use of the comparative law method allows us to single out the differences between the Ukrainian legal regulation of the right to a fair trial and other international legal regulations. The systemic method is used to clarify the place and significance of certain aspects of the right to a fair trial. The study is based on the analysis of judicial statistics in the judicial branch of government in Ukraine, namely reports of local courts about the consideration of materials of criminal proceedings (Form No. 1-k), reports of courts of appeal on the consideration of appeals as a part of criminal proceeding (Form No. 2-k), and analytical reports of the Supreme Court on the state of legal proceedings in Ukraine performed by courts of criminal jurisdiction.[1] Statistical data

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[1] No. 1-k Report of the courts of first instance on consideration of materials of criminal proceedings for 2021, available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/main_site/1k_2021_02.xlsx [last accessed 12.2.2024]; No. 2-k Report of the courts of appeal on consideration of appeals in criminal proceedings for 2021, available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/main_site/2k_2021.xlsx [last accessed 12.2.2024]; No. 1-k Report of courts of first instance on consideration of materials of criminal proceedings for 2020, available at: https://court.gov.ua/userfiles/

were analysed for the period from 2017 to 2021, which was marked by changes in the legal system of Ukraine.

I. Regulation of the Right to a Fair Trial in the Ukrainian and International Context

The Constitution of Ukraine proclaims human and civil rights and freedoms as the supreme value of the state, establishing the basic principles

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of the structure and functioning of the judicial system designed to ensure the protection and restoration of violated rights. According to Article 8 of the Constitution of Ukraine, the principle of the rule of law[2] is recognised and operates in Ukraine. The right to appeal to the court, guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (the right to a fair trial), is a component of this fundamental legal principle.

The right to a fair trial is enshrined in international legal instruments of the universal and regional levels of international systems to protect human rights and fundamental freedoms. The first universal international instrument is the Universal Declaration of Human Rights, whose Article 8 declared the right to judicial protection at the level of soft international law: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law". Also, Article 10 of the Universal Declaration of Human Rights proclaims that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him".[3]

Subsequently, the right to a trial was embodied in the International Covenant on Civil and Political Rights; in particular, Article 14 stipulates that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[4]

It is worth analysing regional international normative legal acts as norms of international hard law, namely the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (from now on referred to as the Convention), which occupies a special place among

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[2] Constitution of Ukraine of 28.06.1996, no. 254k/96-VR, available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [last accessed 12.2.2024].

[3] The Universal Declaration of Human Rights, adopted and proclaimed by resolution 217 A (III) of the UN General Assembly of December 10, 1948, available at: https://zakon.rada.gov.ua/laws/show/995_015#Text [last accessed 12.2.2024].

[4] International Covenant on Civil and Political Rights: adopted on December 16, 1996 by the UN General Assembly (ratified by Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR No. 2148-VIII dated October 19, 1973), available at: https://zakon.rada.gov.ua/laws/show/995_043#Text [last accessed 12.2.2024].

international instruments and is the basis of the European mechanism for the protection of human rights. As can be seen from the preamble to the Convention, the States which are Parties have confirmed that "the High Contracting Parties, following the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights." In accordance with paragraph 1 of Article 46 of the Convention, "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." Consequently, the decisions of the European Court of Human Rights provide concrete, practical content to the fundamental values and rights proclaimed in the Convention.

By clause 1 of Art. 6 of the Convention, "in the determination of his/her 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".[5] Under clause 1 55 of the Constitution of Ukraine, everyone is guaranteed judicial protection of his/her rights and freedoms. Constitutional guarantees have higher legal force and are implemented through procedural mechanisms for the judicial protection of rights and legitimate interests established by sectoral legislation. In addition, Article 64 of the Constitution of Ukraine provides that human and civil rights and freedoms may not be restricted, except as otherwise provided by the Constitution of Ukraine. The Constitution emphasizes that the right to a fair trial may not be restricted during martial law and states of emergency.[6] Thus, according to Article 2 of the Law of Ukraine "On the Judiciary System and the Status of Judges", the court, exercising justice based on the rule of law, entitles everyone to a fair trial and respect for other rights and freedoms guaranteed by the Constitution and the laws of Ukraine, as well as international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine. Article 7 of this law, referred to as "the right to a fair trial", specifies that "everyone is

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[5] Convention on the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, available at: https://zakon.rada.gov.ua/laws/show/995_004#n328 [last accessed 12.2.2024].

[6] Constitution of Ukraine, *supra note* 2.

guaranteed the protection of his rights, freedoms, and interests within a reasonable time by an independent, impartial and fair court established following the law." Part 3 of Article 7 provides that the accessibility of justice for each person is ensured following the Constitution of Ukraine and in the manner prescribed by the laws of Ukraine.[7]

Since March 12, 2020, in Ukraine, in pursuance of the Resolution of the Cabinet of Ministers of Ukraine of March 11, 2020, "On the Prevention of the Spread of the COVID-19 Coronavirus in Ukraine", restrictive measures have been introduced to prevent the spread of the COVID-19 coronavirus in the territory of Ukraine[8]. On March 26, 2020, the Highest Council of Justice adopted the decision "On Access to Justice in the Context of the Pandemic of Acute Respiratory Disease COVID-19 caused by the Coronavirus SARS-CoV-2" and recommended that the courts strictly adhere to the prescriptions of the Resolution of the Cabinet of Ministers of Ukraine of March 11, 2020 No. 211 on the introduction of quarantine to prevent the spread of the COVID-19 coronavirus, and also provided the courts with appropriate recommendations. Among them, in the context of the right to a trial, the following are essential: to hold court hearings in real time on the Internet when it is possible; to restrict access to court hearings for persons who are not participants in proceedings; to hold court hearings using personal protective equipment by judges and parties to cases; to process correspondence in electronic form; to provide the employees of the court apparatus with conditions for the performance of official duties remotely when it is technically possible; to bring the possibility of postponing the hearing of cases owing to quarantine measures to the attention of participants in court proceedings.[9]

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[7] About the judiciary and the status of judges. Law of Ukraine. Bulletin of the Verkhovna Rada (VVR), 2016, No. 31, Article 545, available at: https://zakon.rada.gov.ua/laws/show/1402-19#Text [last accessed 12.2.2024].

[8] On preventing the spread of the acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus on the territory of Ukraine. Resolution No. 211 of the Cabinet of Ministers of Ukraine dated March 11, 2020, available at: https://zakon.rada.gov.ua/laws/show/211-2020-%D0%BF#Text [last accessed 12.2.2024].

[9] On access to justice in the context of the pandemic of the acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus. Decision of the High Council of Justice of March 26, 2020, available at: https://hcj.gov.ua/doc/doc/2412 [last accessed 12.2.2024].

Subsequently, in order to establish an appropriate balance between the procedural principle of hearing the case within a reasonable time, and guaranteeing the safety of citizens during the pandemic, as well as to develop a unified approach to the peculiarities of court cases in the context of the pandemic caused by the coronavirus SARS-CoV-2, the Highest Council of Justice also adopted decision No. 763/0/15-21 of April 1, 2021 "On providing unified recommendations for courts of all instances and jurisdictions on safe work during quarantine". Among the unified recommendations, a particular chapter identifies recommendations on access to justice during quarantine, in particular: the need to strictly comply with the prescriptions of the acts of the Cabinet of Ministers of Ukraine on preventing the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in Ukraine; to ensure the right of persons to access to justice during quarantine by holding meetings of judicial authorities in real time on the Internet, to conduct online broadcasts of such court hearings and/or immediately post a video recording of the meeting in the public domain; to conduct court proceedings in urgent cases determined by procedural codes and courts (judges); to bring to the attention of participants in court proceedings the possibility of postponing the hearing of cases in connection with quarantine measures; to introduce the familiarization of the participants of the court process with the materials of the court case in remote mode; to reduce the number of court hearings scheduled for consideration within a working day; if possible, to consider cases without the participation of the parties, by means of written proceedings, except for cases when the participation of the parties is mandatory; to speed up the work over the Unified Judicial Information and Telecommunication System/Subsystem "*Електронний суд*" ("Electronic Court").[10]

During extreme events, such as a pandemic and martial law, it is common to hypothesize the priority of certain rights or the hierarchy of some over others, so there is the question of their correlation. The first chapter of the Convention establishes a list of equal rights and freedoms that are not hierarchically dependent on each other. This means

[10] On providing unified recommendations for courts of all instances and jurisdictions regarding safe work in quarantine conditions. decision No. 763/0/15-21 dated April 1, 2021, available at: https://zakon.rada.gov.ua/rada/show/v0763910-21#Text [last accessed 12.2.2024].

that, for example, the right to life and the right to a fair trial do not compete with each other, but are equal. At the same time, these rights, being fundamental, are not absolute since they have certain conditions for implementation and may be subject to interference. Any interference with human rights in the law enforcement practice of the ECtHR undergoes a so-called "three-part test" and should: firstly, be provided by law; secondly, have a legitimate purpose; thirdly, be necessary for a democratic society (proportional and sufficient).

In fact, the legal regimes that determine the peculiarities of the state's life in emergencies include additional requirements and guarantees and, ultimately, specific conditions in which the legal system operates to implement human rights effectively. The legal regime of quarantine set particular aspects of implementing the right to a fair trial, holding meetings of judicial authorities in real-time via the Internet and extending (suspending) the time limits for appealing against court decisions.

In Art. 21 of the Criminal Procedure Code of Ukraine, among the general principles of criminal proceedings, the legislator simultaneously determined two principles: access to justice and the binding nature of court decisions, interpreting their content in terms of the concept of the right to a fair trial, which is recognised by the international obligations of the state. Thus, under Part 2 of Art. 21 of the CPC of Ukraine, everyone is guaranteed the right to a fair hearing and resolution of the case within a reasonable time by an independent and impartial court established based on the law. The verdict and decision of the court, which have entered into force in the manner prescribed by this Code, are binding and subject to unconditional fulfilment throughout Ukraine.[11]

Jurists such as Komarov V.V. and Sakara N.Y. distinguish the following essential elements of the right to a fair trial: access to a judicial institution not burdened with legal and economic obstacles; due process of law; public trial; a reasonable time for trial; consideration of the case by an independent and impartial court established by law.[12]

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[11] Criminal Procedure Code of Ukraine. Bulletin of the Verkhovna Rada of Ukraine (VVR), 2013, No. 9-10, No. 11-12, No. 13, Article 88, available at: https://zakon.rada.gov.ua/laws/show/4651-17#Text [last accessed 12.2.2024].

[12] N. Sakara, *The problem of access to justice in civil cases: a monograph*, Kharkiv: Pravo, 2010, 256 p.

In our opinion, the accessibility of justice and the quality of the final court decision on the case's merits are the main aspects that indicate the effectiveness of compliance with the right to a fair trial in a state. It is advisable to analyse the practical application of these aspects through quantitative indicators of judicial statistical data.

II. Certain Aspects of the Right to a Fair Trial: a Practical Dimension

Initially, the right to a trial is ensured to create a free opportunity for everyone to apply to the court to protect their violated rights without hindrance. For example, R. Stepaniuk believes that the content of access to the court as the basis of criminal proceedings in the procedural sense should be defined as the right to appeal to the court.[13]

In 2017, local general courts received 954,033 cases and materials (including petitions, complaints, and statements during the pre-trial investigation (investigating judges), while in 2018, there were 1,221,894, and in 2019 – 1,292,012. In 2020, their number decreased to 931,513; in 2021, there were 947,148. At the same time, 919,305 cases/materials were heard in 2017 with a verdict, a decision, or a ruling; in 2018, there were 1,195,607; in 2019 – 1,272,933; in 2020 – 921,296, and in 2021 – 945,395. In 2017, 1,172,613 court decisions were included in the Unified State Register of Court Decisions taken by the courts of the first instance based on the results of criminal proceedings (Chart 1); in 2018, there were 1,483,737 court decisions; in 2019 – 1,604,275 court decisions, in 2020 – 1,147,469 court decisions, and 2021, 1,051,832 court decisions respectively.

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[13] R.L. Stepaniuk, D.R. Stepaniuk, "Normative and legal content of access to court and the binding nature of court decisions as the basis of criminal proceedings", *Journal of East European Law,* 2018, No. 51, pp. 51-58.

Chart 1. Number of cases/materials nad court decisions in criminal proceedings in local courts in 2017–2021

Chart 1 shows that, according to judicial statistics, during 2017-2019, the trend towards increasing the number of appeals to the court dominated from year to year, while compared to 2020, the number of cases received in criminal proceedings and considered with a court decision significantly decreased. Thus, we conclude that such global challenges as the introduction of quarantine in the country caused a decrease in the dynamics of citizens' appeals to the court to protect their rights.

Special legal regimes also affect the timing of proceedings in criminal proceedings and the observance of reasonable terms. At the same time, the violation of reasonable terms has the effect of legal uncertainty of the participants in the proceedings, complicating the settlement of issues of protecting the rights of participants in the proceedings, and ultimately obtaining a court decision. The ECtHR in *Ringeisen v. Austria* noted that the reasonableness of the duration of the proceedings should be assessed in the light of the specific circumstances of the case and taking into account such criteria as the complexity of the case, the behaviour of the applicant, and the relevant authorities. The requirements for the prompt consideration of criminal proceedings in cases where the

defendant is held in custody are based on increased requirements for a reasonable investigation period.[14]

Thus, in 2017 there were 26,316 criminal proceedings not considered in the time range between 6 months and more than two years; in 2018, they were 39,224; in 2019 – 51,310; in 2020 – 60,019, and 2021 – 60,200.

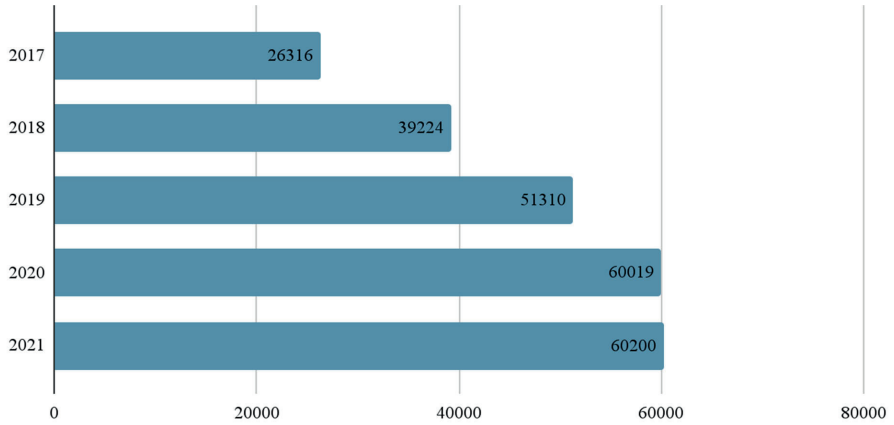

Chart 2. Number of pending criminal proceedings in local courts at the end of the reporting pediod in 2017–2021

Chart 2 shows that since 2019, there has been a tendency for a sharp increase in the number of cases not considered following the established terms (from 6 months to 2 years). The main reasons for the postponement of the trial are failure to deliver to the court the accused kept in custody, the non-arrival of the accused, the illness of the accused, the non-arrival of the prosecutor, the non-arrival of the defence counsel, the non-arrival of witnesses, victims, the non-arrival of other participants in the criminal proceedings, and other grounds. Their ratio varied from 2017 to 2022, as shown in Charts 3 and 4.

Thus, the most significant percentage of reasons for the postponement of hearings in criminal proceedings is associated with the non-arrival of participants in criminal proceedings at the court session, in

[14] Judgment of the European Court of Human Rights, Ringeisen v. Austria, 22 June 1972, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57567&filename=001-57567.pdf&TID=ihgdqbxnf [last accessed 12.2.2024].

particular, the non-arrival of the accused (53.1%), the non-arrival of witnesses, victims (23.7%), the non-arrival of the defence counsel (8.6%), the non-arrival of the prosecutor (2.7%).

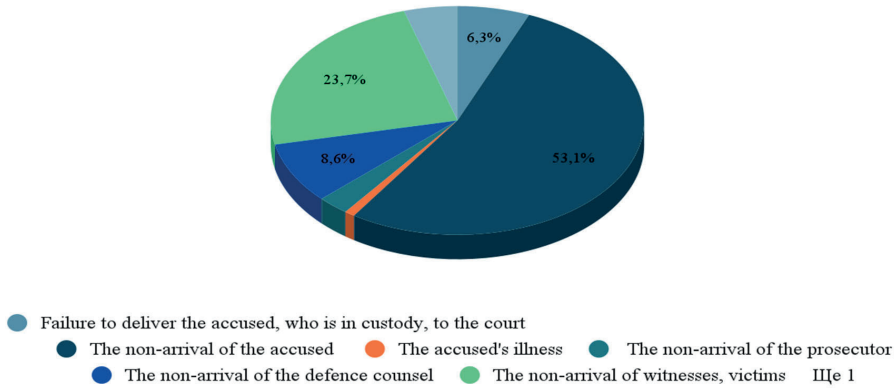

Chart 3. Percentage ratio of reasons for postponement of proceedings in criminal proceedings in 2017–2021

Thus, it can be argued that the pandemic, and specifically the legitimate restrictive measures introduced by the Cabinet of Ministers of Ukraine in connection with the prevention of the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in Ukraine, as well as the recommendations adopted to ensure epidemiological security in the courts, caused the bulk of the increase in the number of cases of non-arrival of participants in criminal proceedings in court, and therefore the increase of the delay in hearing cases, the increase in the time of completion of criminal proceedings, and the increase in the number of cases with the use of the mode of videoconferencing and the digitalization of judicial proceedings.

The coronavirus pandemic (COVID-19) has significantly influenced the judicial process in Ukraine; restrictive quarantine measures cause the restriction of citizens' mobility and therefore change the formats of investigative, judicial, and other procedural actions in criminal justice proceedings. In view of the above, it became necessary for the trial participants to be present at the court session in the videoconference mode outside the court building using their own technical means, so the im-

portance of the use of technical means of video recording and remote technologies is growing. This statement is confirmed by the indicators of statistical data, from which the dynamics of the growth of cases in court proceedings in videoconference mode is seen.

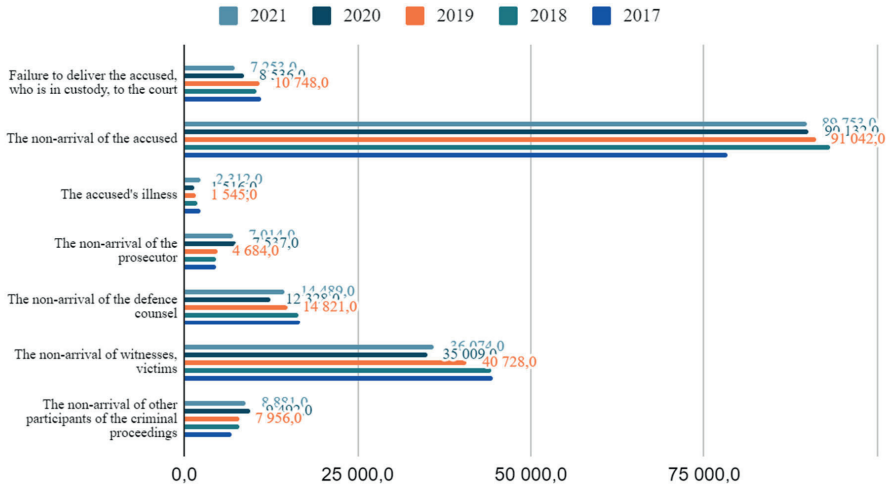

Chart 4. Reasons for postponement of proceedings in criminal proceedings in 2017–2021

According to Part 6 of Article 11 of the Law of Ukraine, «On the Judiciary System and the Status of Judges», the participants of the trial, on the basis of the court decision, are provided with the opportunity to attend the judicial sitting in the mode of videoconference in the manner prescribed by the law.[15] According to Part 1 of Article 336 of the Criminal Procedure Code of Ukraine, the proceedings may be carried out in the videoconference mode during the broadcast from other premises, including those located outside the court building (remote court proceedings), in case of the impossibility of direct participation of a participant in the criminal proceedings in court proceedings for health reasons or other valid reasons. According to the Supreme Court, the participation

[15] About the judiciary and the status of judges. Law of Ukraine. Bulletin of the Verkhovna Rada (VVR), 2016, No. 31, Article 545, available at: https://zakon.rada.gov.ua/laws/show/1402-19#Text [last accessed 12.2.2024].

of a person in the court hearing by videoconference is the actual participation in the trial, but in a different format (the case of the Supreme Court consisting of a panel of judges of the First Trial Chamber of the Cassation Criminal Court No. 320/2582/July 19 July 29, 2021)[16]. Cases, in which the court proceedings were carried out by videoconference, numbered: in 2017 – 2,060; in 2018 – 12,287; in 2019 – 14,781; in 2020 – 16,002, in 2021 – 14,624.

Therefore, recent amendments to procedural legislation and restrictive quarantine measures have undoubtedly influenced the increase in criminal cases and the judicial proceedings carried out by videoconference. If in 2017 this figure was equal to 2060, in 2018, it increased sharply almost sixfold, up to 12,287. This dynamics of growth of court proceedings by videoconference continued in 2019 and 2020, but slipped in 2021, which is explained by a decrease in the number of appeals to the court and proceedings in 2021 (see Chart 5).

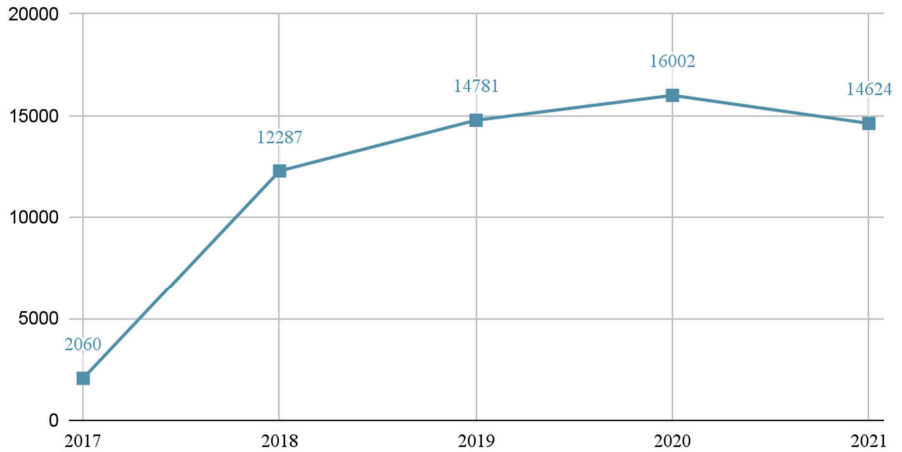

Chart 5. The number of criminal cases in which court proceedings were conducted via video conference 2017–2021

The profession of judge is not only the pinnacle of jurisprudence; it requires compliance with specific standards in a judge's professional and

[16] Judgment of the Supreme Court No. 320/2582/19 of 29 July 2021, available at: https://verdictum.ligazakon.net/document/98728751 [last accessed 12.2.2024].

everyday life. N. Kumar, a senior judge of the Supreme Court of the state of Karnataka, India, sagaciously said on this topic: "A misconduct of one judge will affect the reputation of the entire judicial system."[17] According to Clause 22 of Opinion No. 3 (2002) of the CCJE, "public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system: the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts. In the professional life of judges, their reputation depends on factors such as independence, impartiality and neutrality. They are the yardstick of justice of the court.[18]"

In *Piersack v. Belgium*, the ECtHR stated: "Whilst impartiality normally denotes the absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways"[19]. A distinction can be drawn in this context between a subjective approach, that is, endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is, determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect." A well-known slogan regarding the independence and impartiality of the court was the ECtHR's expression that "Justice must not only be done but must be seen to be done" (p. 26); therefore, "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw". It concerns the trust that courts in a democratic society should inspire in the public and, above all, in the accused if it comes to the criminal process. From the analysis of judicial statistical data (Chart 6) on the number of applications for recusation of a judge (investigating judge), it can be seen that

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[17] 'Bad behaviour by one judge will impact the reputation of the entire judiciary' – cited after N. Kumar, senior judge of the Karnataka High Court, available at: http://www.thehindu.com/news/cities/bangalore/%E2%80%98Bad-behaviour-by-one-judge-will-impact-reputation-of-entire-judiciary%E2%80%99/article14404942.ece [last accessed 12.2.2024].

[18] Opinion no. 3 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. Strasbourg, 19 November 2002, document CCJE (2002) Op. N° 3, available at: https://rm.coe.int/168070098d [last accessed 12.2.2024].

[19] Judgment of the European Court of Human Rights, Piersack v. Belgium. 1 October 1982, available at: https://www.osce.org/files/f/documents/4/7/232716.pdf [last accessed 12.2.2024].

in 2017 their number amounted to 14,661; to 15,972 in 2018; to 15,972 in 2019; to 14,727 in 2020, and 14,384 in 2021. Here, a pattern can be traced concerning the steady and unchanged number of applications during the period selected for the study. Therefore, the epidemic of COVID-19 caused by the coronavirus SARS-CoV-2 and regulatory requirements in the context of ensuring epidemiological safety in the court cannot be considered as a factor affecting such a component of the right to a fair trial as the independence and impartiality of the court.

Given the peculiarities of the case law of the ECtHR and its autonomous interpretation of terms and concepts, it is seen that access to the court does not include only the persons' right of unimpeded recourse to the court for the protection of their rights. The category of access to the court includes many organizational (judiciary) elements, such as the development of an accessible court system taking into account the territorial location in the country, the selection of qualified persons for the position of judge, organizational support for the functioning of the courts, etc., as well as functional, for example, the procedure for initiating a case in the court, compliance with the terms of proceedings, the possibility of appealing against the actions or inaction of officials, compliance with the procedure for hearing a case, enforcement of a decision, etc.[20]

The judicial reform in Ukraine, in which both the lawmaker and society placed great hopes, has been going on for several years. However, the process has been long-lasting, complicated, and is unfinished: there are still quite a few unsolved problems. In particular, there has been the procedure of qualification assessment of judges for the position and selection of candidates for the position of judges of local general courts. One of the first challenges that judges had to experience in performing their professional duties was a dramatic decrease in the judicial workforce. The reason for this, in particular, is that many experienced and professional judges with the necessary experience and expertise decided not to await an unscheduled qualification assessment and resorted to their right to resign. As a result of such a drain of experienced personnel, the workload of the remaining judges has increased. According to the information provided by the Highest Council of Justice, as of Sep-

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[20] O.R. Balatska "Access to justice as a general framework of criminal proceeding", *Entrepreneurship, economy and law,* 2020, No. 8, pp. 262-268, available at: http://pgp-journal.kiev.ua/archive/2020/8/44.pdf [last accessed 12.2.2024].

tember 2021, the actual number of judges in the courts of Ukraine was 5,273 instead of the stipulated 7,304. The power to administer justice is vested in 4,899 judges. Two thousand thirty-one positions of judges remain vacant. Now about three thousand judges are missing in Ukraine: owing to the high workload, even a high salary does not attract people.[21]

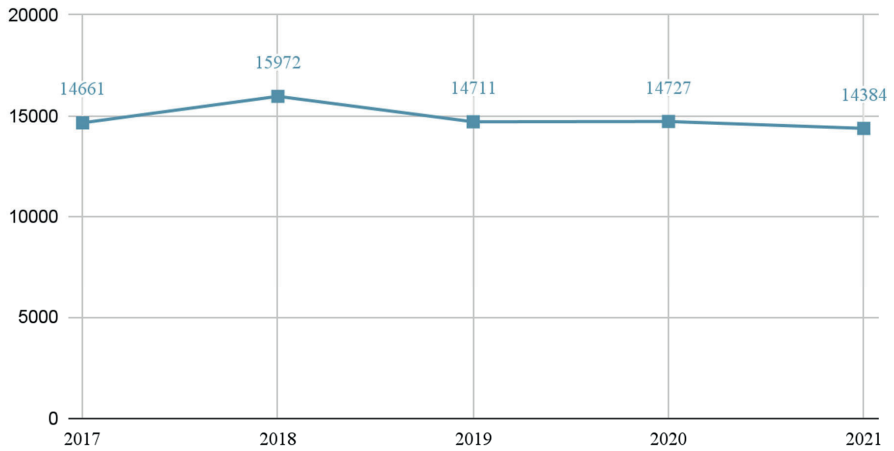

Chart 6. The number of applications for recusation of a judge in criminal proceedings in local courts in 2017–2021

The above is confirmed by the following data of judicial statistics, from which we can observe the dynamics of the yearly growth of the number of cases considered per judge of the local general court. Thus, the next indicator is the average number of cases heard per judge of the local general court. In 2017 - 980; in 2018 - 1028; in 2019 – 1,080; in 2020 – 872; in 2021 – 1,000. The average number of cases and materials being heard in the reporting period per judge in 2017 - 1139; 2018 - 1195, in 2019 was 1,257; in 2020 – 1,047; in 2021 – 1,193.

[21] The Supreme Court of Ukraine assessed the lack of judges in Ukraine: almost three thousand vacancies. 10.10.2021, available at: https://www.ukrinform.ua/rubric-society/3330335-u-vsu-ocinili-brak-suddiv-v-ukraini-majze-tri-tisaci-vakansij.html; The Supreme Council of Justice has dismissed 167 judges since the beginning of the year. 09.24.2021, available at: https://www.ukrinform.ua/rubric-society/3321196-visa-rada-pravosudda-z-pocatku-roku-zvilnila-167-suddiv.html [last accessed 12.2.2024].

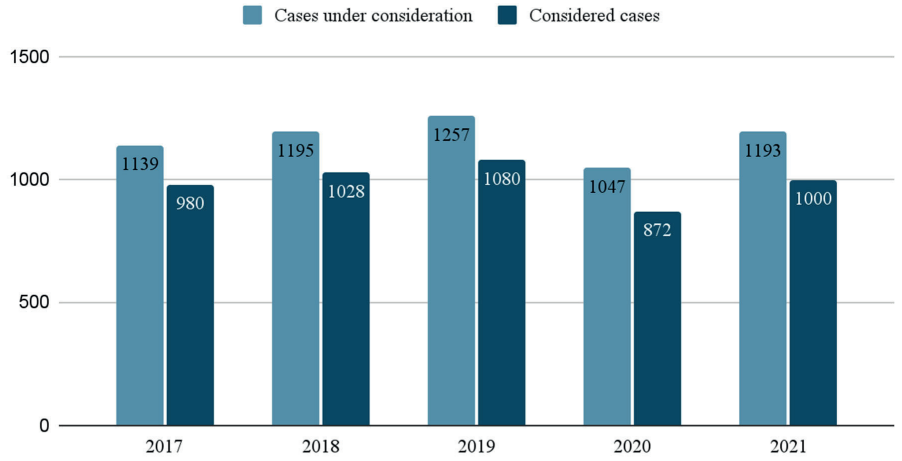

Chart 7. The average number of cases and materials under consideration and considered per judge in 2017–2021

Given that the data in Chart 7 confirm the dynamics of the decrease in the number of cases received in criminal proceedings and heard with a court decision since 2020, simultaneously increasing the average number of cases and materials under consideration and heard per judge in 2017-2021, we conclude that the lack of judicial personnel and the failure to complete judicial reform aggravate the crisis of the judicial branch and, accordingly, affect the quality of the right to a fair trial and the motivation of the court decision.

Also, an important indicator in confirming the impact of the crisis of the judicial system on justice is the average duration of criminal proceedings in days, which also increases from year to year. In 2017, they were 44; in 2018 – 46; in 2019 – 34; in 2020 – 41; and in 2021 – 54.

Therefore, we should agree with the proposal made in the report of the International Expert Group "Access to Justice and the COVID-19 Pandemic" that in order to respond to the challenges of the pandemic and to minimize the impact of risks, the world justice movement can jointly take certain steps, among which is the need to minimize the need for recourse to the formal justice system, since, with the closure of the courtroom, restrictions on movement, and a decrease in productivity, ministries of justice should immediately carry out a rapid reassessment

of the work of the justice system in order to determine what is critical in it during this emergency, what is urgent and what is not a priority.[22]

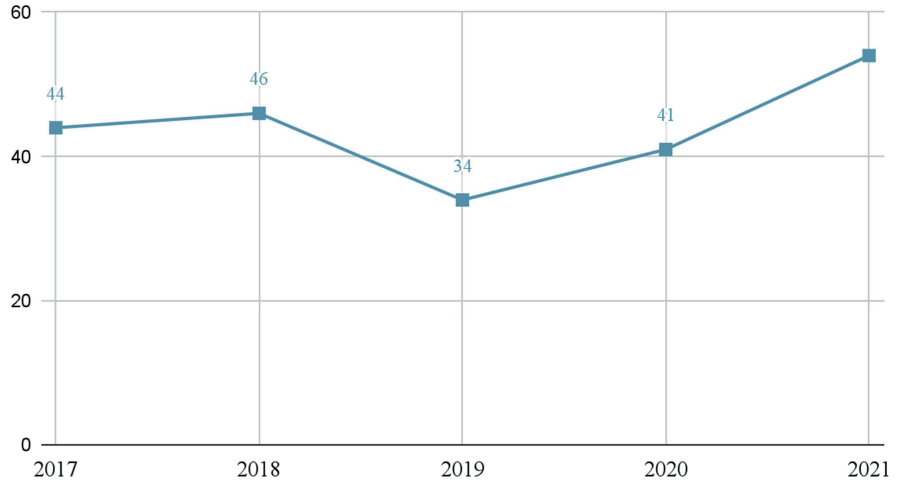

Chart 8. The average length of consideration of criminal justice cases in days in 2017–2021

Regardless of particular legal regimes, the argumentation of the choice of regulations to be applied in a particular criminal case, as well as the evidence and arguments of the parties that become the basis for a court decision, remain an essential part of the court's activities in criminal proceedings, and therefore an important aspect of the right to a fair trial. In the theory of criminal procedural law, there are views on the concept of a decision as a legal document that corresponds to a specific form, the requirements of legality and validity, in which the establishment of factual circumstances shapes a conclusion. Answers are given to legal questions, and theauthoritative expression of will about actions arising from the established circumstances and the rules of law is made.[23]

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[22] Pathfinders for Peaceful, Just and Inclusive Societies, Justice in a Pandemic - Briefing One: Justice for All and the Public Health Emergency (New York: Center on International Cooperation, 2020), available at: https://www.justice.sdg16.plus/ [last accessed 12.2.2024].

[23] V. Savitsky, A. Larin, *Criminal process: a dictionary-reference book*. ed. V. M. Savitsky, INFRA-M, 1999, p. 129.

Also, the decision is defined as a necessary element of procedural activity, the essence of which is "to choose, within its competence, from the alternative goals and means determined by law, those arising from the factual data established at the time of the decision-making, the expression of authoritative command, the focus on the implementation of the tasks of the proceedings, and, as a rule, the statement in the form of an individual law enforcement act".[24] Jurists suggest various definitions of their legal content when analysing and determining the nature and content of the requirements for a court decision (legality, validity, motivation, fairness, etc.) in criminal proceedings. A. D. Khachirov considered the verdict's legality, validity, and fairness as criteria for an effective trial.[25] I. F. Soloviov defined legality, validity, and justice as requirements that together make up the justice of the sentence as its complex characteristic[26]. In the science of criminal procedural law, the properties of court decisions and requirements relating to them include legality, reasonableness, justice, motivation, verity, prejudicialness, reasonableness, legal force, legal certainty, expediency, immutability, irrefutability, stability, feasibility, obligatoriness, exclusivity, and many others. The fact that all court decisions must comply with legal norms and be valid, fair, and cannot be reasonably objected to and does not require additional argumentation. However, not every court decision has these properties to the fullest extent, and therefore needs to be reviewed, specified, and modified. In some cases, the Criminal Procedure Code allows for eliminating the shortcomings of a court decision by the court that adopted it. The court may clarify the judgment and correct typos and obvious arithmetical errors contained in the judgment. Thus, the number of court decisions to consider the issues about correcting typos and obvious arithmetical errors in the court decision; explanation of the court decision amounted to: in 2017 - 2599, 2018 - 4830, 2019 – 5,469; in 2020 – 4,958; in 2021 – 5,562.

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[24] A. Lomidze, *Prosecutor's supervision over the legality and validity of procedural decisions taken by the investigator*, Yurlittinform, 2000, 104 p.

[25] A. Khachirov, *Influence of the procedural status of the parties in criminal proceedings on the decision of the verdict:* extended abstract of candidate's thesis of legal sciences, 2009, p. 12.

[26] I. Solovyov, *Justice of the verdict in the criminal process of the Russian Federation:* extended abstract of candidate's thesis of legal sciences, 1992, p. 11.

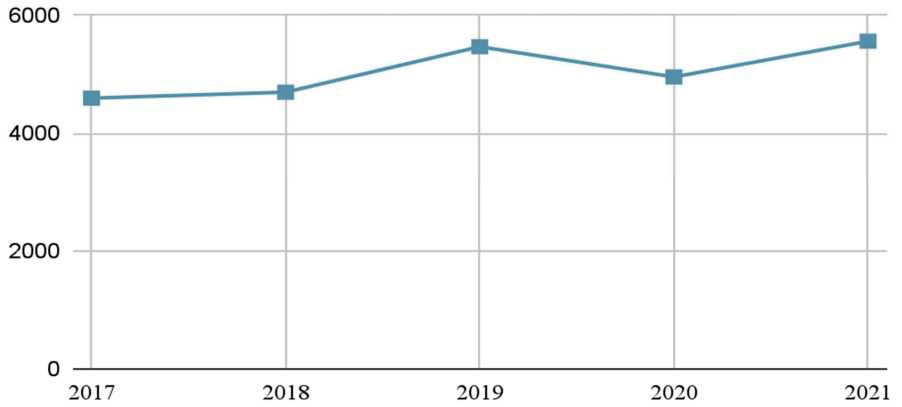

Chart 9. The number of court decisions to consider the issues about correcting typos and obvious arithmetical errors in the court decision; explanation of the court decision in 2017–2021

Statistical data show an increase in the number of such decisions in 2019. In our opinion, this is associated with increased appeals to the courts in criminal proceedings and, therefore, cases and materials in general. In addition, the increase in this indicator in 2021 is correlated with an increase in the number of cases and materials per judge and the workload of the judicial system. As well, there is no doubt that the aggravation of the crisis of the judicial system, the significant number of cases per judge, and the lack of judicial personnel have an impact on the growth of deficiencies in court decisions and the possible increase in typos, arithmetical errors, and, as a result of this, of the qualitative characteristics of court decisions.

The right to appeal and cassation against court decisions guarantees the proper administration of justice. The primary purpose of the appeal proceedings is to verify the court decision regarding its validity and legality. According to the results of the consideration of the appeal, the court has several options, in particular, to cancel or change the court decision. The court of appeal changes the sentence in the case of commutation of the sentence if it recognises that the severity of the punishment does not correspond to the severity of the criminal offence and the personality of the accused; changes in the legal qualification of the criminal offence and the application of Article (part of Article) of the Law of Ukraine

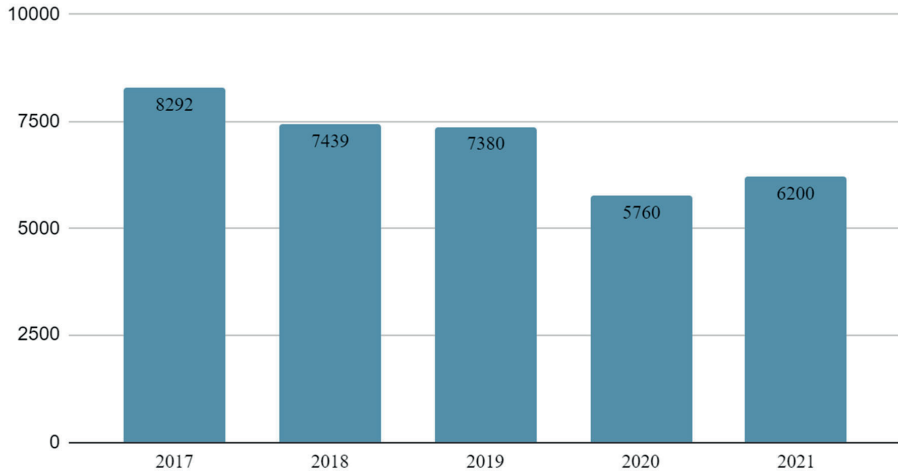

Chart 10. The number of persons in respect of whom the sentences of local courts were cancelled nad changed in the appeal procedure in 2017–2021

on Criminal Responsibility on a less serious criminal offence; a decrease in the amounts to be recovered, or an increase in these amounts, if such an increase does not affect the scope of the charge and the legal qualification of the criminal offence; in other cases, if the change in the sentence does not worsen the condition of the accused. The grounds for setting aside or changing the court decision during the consideration of the case in the court of appeal are the incompleteness of the trial; inconsistency of the court conclusions set out in the court decision with the actual circumstances of the criminal proceedings; a significant violation of the requirements of the criminal procedural law; wrong application of the law of Ukraine on criminal liability[27]. Thus, the number of persons in respect of whom the verdicts of local courts were set aside and changed on appeal was: in 2017 – 8,292; in 2018 – 7,493; in 2019 – 7,380; in 2020 – 5,760, and 2021 – 6,200 (Chart 10). The share of such persons in the total number of persons sentenced by local general courts was 9.2% in 2017, 8.4% in 2018, 8.8% in 2019, 7.3% in 2020, and 7.8% in 2021. So we can observe the tendency to a slight decrease in the number of persons in respect of whom the verdicts of local general courts were set aside and changed on appeal.

[27] Criminal Procedure Code of Ukraine, *supra note* 11.

However, in 2021 there was again a rise in this indicator, which is directly related to the dynamics of the number of appeals to the courts and other trends of changes in the judicial system, which were analysed above.

In its turn, the purpose of the proceedings in the court of cassation is to verify the correct application of the rules of substantive and procedural law, and the legal assessment of circumstances by the courts of the first instance and the court of appeal. As a result of the consideration, the court of cassation may set aside and change the court decisions of the courts of previous instances. However, the share of persons in respect of whom court decisions (sentences, resolutions, rulings) of local courts and courts of appeal were cancelled and changed on cassation is significantly lower than owing to the appeal proceedings: 0.5% in 2017, 0.7% in 2018, 1.0% in 2019, 0.6% in 2020, and 1.0% in 2021.

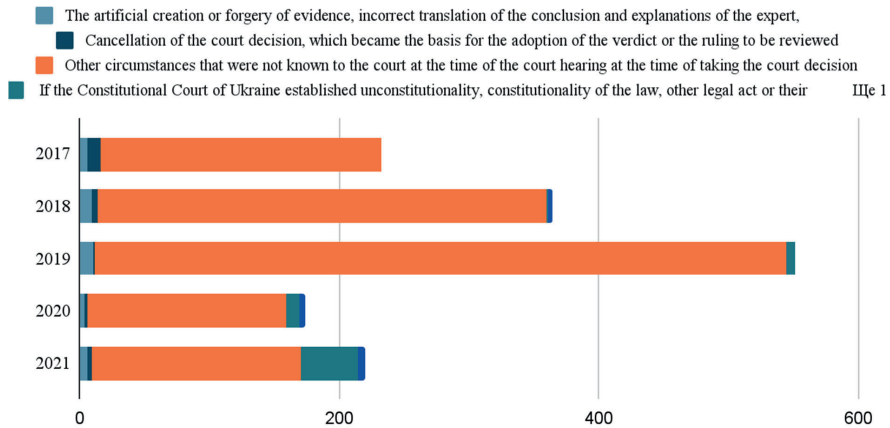

Chart 11. The number of applications for review of court decisions based on newly discovered or exceptional circumstances by courts of appeals in 2017–2021

Another indirect indicator pointing to the problems of ensuring the right to a fair trial in the context of the quality of a court decision is the number and grounds of applications for reviewing court decisions by the courts of appeal under newly discovered or exceptional circumstances. It is an extraordinary procedure of reviewing court decisions applied exclusively in cases provided for by the legislation. The criminal procedural legislation includes among them the artificial creation or forgery

of evidence, incorrect translation of the conclusion and explanations of an expert, knowingly false testimony of a witness, victim, suspect, accused, on which the verdict is based; cancellation of the court decision, which became the basis for the adoption of the verdict or the ruling to be reviewed; other circumstances that were not known to the court at the time of the court hearing at the time of taking the court decision and which, by themselves or together with the previously identified circumstances, prove the incorrectness of the verdict or decision to be reviewed; if the Constitutional Court of Ukraine established unconstitutionality, constitutionality of the law, other legal act, or their separate provision, applied by the court in resolving the case of establishing the judge's guilt in committing a crime, or abuse of an investigator, prosecutor, investigating judge, or court during criminal proceedings, as a result of which a court decision was made.[28] The ratio of the number of applications for review of court decisions under newly discovered or exceptional circumstances by the courts of appeal during 2017-2022 can be seen in Chart 11.

The main share of newly discovered and exceptional circumstances falls on other circumstances unknown to the court at the time of the trial when the court decision was made and which, by themselves or together with previously discovered circumstances, prove the wrongness of the verdict or decision to be reviewed; for example, the detection of a living person who was considered killed; the detection of the fact of the convict's lack of sanity (mental capability) at the time of committing a socially dangerous act; data on the innocence of the convict in one or another part of the crimes that are attributed to him/her.[29] 2020 and 2021 saw a considerable increase in the applications to review court decisions owing to unconstitutionality, the constitutionality of the law, other legal act, or their separate provision applied by the court in resolving the case of establishing the judge's guilt in committing a crime, which the Constitutional Court of Ukraine established. Most probably, it is related to the development of the institution of a constitutional complaint. Thus, this indicator enables us to analyse the right to a fair trial and the trends in the development of legal culture and awareness in the state.

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[28] Criminal Procedure Code of Ukraine, *supra note* 11.

[29] V. Malyarenko, K. Honcharenko, *Criminal Procedure Code of Ukraine. Scientific and practical commentary,* FORUM, 2003, p. 1217.

Conclusions

The right to a fair trial has been reflected in many normative legal acts, both international and Ukrainian, each of them containing features, aspects, and details of the law under study. The COVID-19 pandemic is an unprecedented global emergency. Lessons learned from this Covid period may be useful for the future. In the face of global challenges, specific, extraordinary national legislation appears, which, owing to the grounds for its adoption, creates a unique framework for implementing already existing norms. An effective legal response can stop the negative impact of the pandemic. In Ukraine, this is seen in the example of the legislation on preventing the spread of COVID-19. The existing norms of the current Criminal Procedure Code, ordinary laws, and by-laws are implemented within limits established by the regulations adopted to fight the pandemic. It results in the right to a fair trial being subject to additional regulation and the main elements being affected because of regulatory changes and the practice of their application.

On the basis of the analysis of statistical data, comparison of regulations, practice of their application, and information from analytical reports of the judiciary branch, it is possible to conclude that the epidemic of COVID-19 and restrictive quarantine norms influenced the exercise of the right to a fair trial and the state of justice in Ukraine in recent years. At the same time, it should be noted that some elements of the right to a fair trial are more sensitive to challenges and changes in external factors (in our study, it is the pandemic), such as, for example, the right to appeal, compliance with reasonable deadlines, the application of court proceedings by videoconference). In contrast, other elements (the implementation of legal proceedings by an independent and impartial court) are relatively stable, do not depend on environmental changes, or can sustainably respond to global challenges.

The effectiveness of a reference to the court depends on the availability of conditions that guarantee the absence of factual and legal obstacles in a person's appeal to court, exercising the right to judicial protection of human rights and freedoms. Taking into account the conducted research, the conclusion is made that the COVID-19 pandemic has become an external factor and created new challenges and condi-

tions for the implementation of some aspects of the right to a fair trial, which should be attributed to the aforementioned obstacles in the implementation of a person's right to access to justice. Therefore, such obstacles can level, nullify, or significantly impair the rule of law and the realization of human and civil rights and freedoms.

Proper quality and validity of the court decision are necessary for fully implementing the right to a fair trial; they contribute to increased confidence in the judicial system and create opportunities for appealing against court decisions indicating disagreement with the court's motivation. In the conditions of emergency, decisions in criminal proceedings must comply with all regulatory requirements; in case of inconsistencies, measures provided for by ordinary legislation are applied. The investigated indicators indicate that the qualitative and quantitative characteristics of a court decision are inseparably linked with access to justice and with the review procedure; in the case of the improper implementation of the two latter, the court decision does not fully meet the requirements and the procedures for correction of typos and obvious arithmetic errors, clarifications, appeals and cassations, or revision of court decisions in newly discovered or exceptional circumstances.