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## JUDICIAL PRACTICE AND DOCTRINE OF 'FAIR TRIAL' IN THE PRACTICE OF INTERNATIONAL COURTS

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**Vdovichen V., Huralenko N. Judicial practice and doctrine of "legal procedure" in the practice of international courts.**

Currently, due process faces complex challenges arising from social, technological, and political transformations that test its ability to adapt and evolve. One of the most pressing problems is the crisis of access to justice, which affects many countries where large segments of the population face economic, geographical, or cultural barriers to effectively defending their rights. This situation gives rise to what some authors call "differentiated citizenship", where the degree of legal protection that people receive varies according to their economic capacity, level of education, or belonging to marginalized groups. The collapse of many judicial systems under the weight of excessive procedural burden exacerbates this problem, leading to delays that are themselves denials of justice. Faced with this challenge, different jurisdictions have implemented reforms such as shortened processes, alternative dispute resolution mechanisms, and the use of technology to streamline procedures, while always taking care not to sacrifice fundamental guarantees for the sake of efficiency.

The growing interest in defining the essence and content of due process is due to the significant social importance of procedure in law as a guarantee of effective law-making, law enforcement, and the protection of the rights and freedoms of individuals and citizens. Due process is a fundamental concept in the legal field that ensures that all people have the right to a fair trial and to be heard. This principle underlies many legal systems worldwide and is essential for protecting individual rights. In this article, we will take a detailed look at what due process is, its importance, its components, and how it is applied in various legal situations.

The article examines the most important guarantees of personal freedom and inviolability, which are reflected in international human rights agreements and enshrined in the constitutions of modern states, and analyses international judicial practice.

**Key words:** due process, principles of Law, judicial practice, international standards, human rights, judicial process.

**Вдовічен В.А., Гураленко Н.А. Судова практика та доктрина « належної правової процедури » у практиці міжнародних судів.**

Наразі належний процес стикається зі складними викликами, що виникають у зв'язку з соціальними, технологічними та політичними трансформаціями, які перевіряють його здатність до адаптації. Однією з найгостріших проблем є криза доступу до правосуддя, яка зачіпає багато країн, де великі верстви населення стикаються з економічними, географічними чи культурними бар'єрами для ефективного відстоювання своїх прав. Ця ситуація породжує те, що деякі автори називають « диференційованим громадянством », коли ступінь правового захисту, який отримують люди, варіюється залежно від їхніх економічних можливостей, рівня освіти чи приналежності до маргіналізованих груп. Колапс багатьох судових систем під вагою надмірного процесуального навантаження загострює цю проблему, що призводить до затримок, які самі по собі є відмовою у правосудді. Зіткнувшись із цим викликом, різні юрисдикції впровадили реформи, такі як скорочені процеси, альтернативні механізми вирішення спорів та використання технологій для оптимізації

процедур, але завжди дбаючи про те, щоб не жертвувати фундаментальними гарантіями заради ефективності.

Зростання зацікавлення до питання окреслення сутності та змісту належної правової процедури, зумовлюється значущою суспільною вагою процедури у праві, як безпеки дієвого ходу правотворення, правореалізації, правозастосування, а також охорони прав і вольностей особи та громадянина. Належна правова процедура є основоположним поняттям у правовому полі, яке гарантує, що всі люди мають право на справедливий судовий розгляд і бути почутими. Цей принцип лежить в основі багатьох правових систем по всьому світу і має важливе значення для захисту прав особистості. У цій статті нами детально розглянемо, що таке належна правова процедура, її важливість, її складові та як вона застосовується в різних правових ситуаціях.

У статті розглянуто найбільш важливі гарантії свободи та недоторканності особи, які відображені в міжнародних угодах про права людини та закріплені в конституціях сучасних держав та здійснено аналіз міжнародної судової практики.

**Ключові слова:** належна правова процедура, принципи права, судова практика, міжнародні стандарти, права людини, судовий процес.

**Problem statement.** Due process is a set of legal safeguards that ensures that a person is not deprived of their liberty or property without following a fair and equitable procedure. This concept is rooted in the idea that all human beings have fundamental rights that must be respected and upheld. The concept of due process is enshrined in many constitutions and international treaties, underscoring its significance in the realm of human rights.

Due process can be divided into two main categories: due process on the merits and due process in general. Due process is concerned with the protection of fundamental rights, while procedural due process focuses on fair trial guarantees. Both categories are essential to ensure that people's rights are respected in any judicial process.

**The purpose of the research** is to examine the doctrine of 'due process' in the practice of international courts and its impact on the formation of uniformity in judicial practice.

**The state of the study of the problem.** The concept of due process is studied by Ukrainian scientists in various fields, including law theory, constitutional law, civil procedure, and international Law, among others, by authors such as A. Andreichenko, S. Pogrebnyak, N. Sakara, S. Shevchuk, and O. Shcherbanyuk.

**The state of the study of the problem.** International law does not recognize a sharp distinction between the substantive law and the adjectival Law [5]. Today, international judicial procedure in the International Court, and in international litigation between two or more States generally, is an entirely autonomous and independent institution of international law and practice having only superficial resemblances to domestic legal procedure and to the procedure of other institutions authorized to decide disputes and other cases in which a State may be involved as a party. In many respects, the situation is reversed; the practice of international arbitration between two or more States (and between a State and an international intergovernmental organization) is being closely influenced by the practices of the International Court. When evaluating procedural occurrences in other international tribunals, the Court tends to judge them in light of its own practices and procedures. Thus, in dealing with a question of costs before the United Nations Administrative Tribunal, the Court took account of the fundamental principle regarding costs in contentious proceedings before international tribunals and cited Article 64 of its own Statute. In the Arbitral Award of July 31, 1989, case, the Court referred in general terms to the practice of international tribunals which shows that it 'sometimes happens that a member of the tribunal votes in favour of a decision... though he might individually have been inclined to prefer another solution' [3].

Due process is a legal principle that stipulates that no free person may be arrested, or imprisoned, or deprived of liberty, or exposed to the Law or expelled, or in any other way restricted in rights, that the authorities will not act or order actions against him, except for actions provided for by the current Law Due process is an integral condition for the implementation by state bodies of the function of considering and resolving disputes, when their decision can potentially restrict civil liberties. The purpose of the procedural order in law is to ensure and protect human rights, freedoms, and legitimate interests, thereby guaranteeing the avoidance of arbitrariness by state authorities. Therefore, defining clear criteria for the propriety of the legal procedure is crucial for the practical implementation of legal prescriptions [6, p. 55].

V. Novozhylov notes that due process is a procedure for carrying out legally significant actions that puts into practice the rule of law by applying to each person those rules of law that fully correspond to all important objectively existing circumstances and allow unambiguously and in advance to predict such

application and its results [8, p. 116–117]. A “legal” procedure is a procedure that fully corresponds to and affirms in practice the principle of the rule of law. It is worth paying special attention to the fact that we are not talking about a legal procedure, one that takes place in accordance with the law, but rather about a legal procedure. In this regard, linguistically, the Anglo-American principle of “due process of law” reflects this important substantive emphasis less, because literally it is translated “in accordance with the process established by law” (continental Lawhistorically has less opportunities for transformation, filling old constructs with new meaning, which, in contrast, succeeds in the standard law system with the existence of a precedent in it and the role of the Court, which under certain circumstances can act as a generator and translator of law.

S. Nesterenko notes that “due legal procedure is a legal principle that provides that no free person may be arrested, or imprisoned, or deprived of liberty, or declared outlawed, or exiled, or in any other way limited in rights, unless the authorities take or order actions against him, except for actions provided for by applicable law [7, p. 381]. Due legal procedure is an indispensable condition for the implementation by state bodies of the function of considering and resolving disputes, when their decision can potentially limit civil liberties. The purpose of the procedural order in Law is to ensure and protect the rights, freedoms, and legitimate interests of a person, guaranteeing the avoidance of arbitrariness by state authorities. Therefore, determining clear criteria for the appropriateness of legal procedure is of great importance for the practical implementation of legal provisions.”

Despite the difficulties encountered by the doctrine in defining the concept of the right to a fair trial, which is the result of the merger of two quite different legal systems – continental and Anglo-Saxon –, the situation of the parties in the trial from a practical point of view is not affected, but, on the contrary, is facilitated, and this is due to the principle that the ECHR constantly applies in its jurisprudence, ensuring rights in an “effective and concrete” way, and not “illusory and purely theoretical”. All the conclusions highlighted in the study have led us to our own formulation of the concept of a fair trial, which, in our opinion, is a fundamental principle of public order, designed to ensure the procedural balance of the parties and the legality of the procedure by observing certain guarantees that provide for access, free access to justice, the public nature of the debate, held within a reasonable time, by an independent and impartial tribunal, established by law with the right to a lawyer and the issuance of a reasoned decision.

Speaking about the dimensions of due process, one can understand its double connotation: formal, which is related to respect for the basic, formal or procedural guarantees in the process, such as the right to defense, the right to proper motivation, the right to plurality of instances, etc.; and material, which is related to compliance with the requirements of justice and reasonableness through judgments of proportionality, the prohibition of arbitrariness, etc.

Through the study of due process and its dimensions, both formal and material violations are considered as an ideal method of analyzing the content of due process. We consider this point to be critical, since it takes into account not only the procedural, but also the purely formal aspects of the process; but a more comprehensive consideration of the negative consequences of the various principles and values that the Constitution protects equally; its quality as a fundamental right, which attributes to it both an objective and subjective aspect that must be protected and respected in the same dimension.

According to one of the well-known professors of the University of Oxford, D. Galligan, on the topic of fair procedure, the concept of “procedures” is the steps that are taken or the methods that are used to make a decision and introduce actions or decide a case in a certain way in a legal or administrative context. Moreover, the concept of “process” is a convenient general term that encompasses a set of procedures related to a decision or action [2].

The interpretation of due process in the United Kingdom is more restrictive. Despite various judicial opinions, the current understanding is that acts of the British Parliament are not subject to judicial review except in the context of due process. The British legal system also has other principles that aim, for example, to guarantee the equivalent of American due process in the administrative and executive spheres. In Australia, due to its parliamentary government, which entails a specific balance between the legislative and executive branches of power, the understanding of due process is also limited. Certain legislative acts are exempt from judicial review, which may result in restrictions on due process. The Constitution does not mention due process; therefore, the doctrinal interpretation of due process, which is limited to the judicial sphere, differs from that observed in the US and Brazilian legal systems.

The principles of legal procedure have become universal due to the decisions of the European Court of Human Rights and apply to both procedural proceedings and legal procedures that public authorities must follow when adopting relevant acts regarding human rights, freedoms, and legitimate interests.

However, this doctrine of legal procedure was used in the practice of the Constitutional Court of Ukraine. In its decisions of February 28, 2018 on the recognition of the LLawon language as unconstitutional and of April 26, 2018 on the recognition of the LLawon referendum as unconstitutional, the Constitutional Court of Ukraine, pointing out the direct connection between the observance of the "due process" and guarantees of the rights and legitimate interests of a person and a citizen, actually gave the procedural principles of the authorities a binding meaning. That is, if due process has been violated in parliament or another public authority, there is no point in examining the content of the relevant act, since it is null and void.

Procedural due process, also known as substantive due process, is considered more limited than substantive due process and is characterized by a simple rule of respect for a previously established procedure. Despite its limited scope, this aspect of due process is more frequently employed by the doctrine and users of the Law; perhaps precisely because of the word "process" in the principle under study, it has been underutilized in this sense.

The Due Process Clause in American constitutional law at the first stage (5th Amendment), as is well known, refers only to guarantees of a procedural nature, in fact the so-called procedures relating to the right to an orderly trial, ordered by principles such as, in the field of criminal procedure, the prohibition of the promissory note of achievement (a legislative act that is relevant for finding a person guilty of a crime, without the precedent of the ordinary process and the trial in which he is guaranteed sufficient protection) and retroactive laws (ex post facto law), in addition to the prohibition of coercive self-incrimination, twice trial on the same fact (double jeopardy) and the right to a complete defense and adversarial process.

In a theoretical sense, "due process" refers to a form of justice administration, characterized by a set of procedural human rights guarantees designed to ensure procedural fairness in the justice system. The guarantees, which in their entirety form due process, include the right to judicial protection, the right to an effective investigation; the right to a speedy trial; the right to a public trial; the right to an impartial trial; the right to an impartial jury trial; the right to an adversarial process; presumption of innocence; the right not to testify against oneself; the right to interrogate prosecution witnesses in Court; the right to the assistance of a lawyer during the trial; the right to be heard; the right not to be punished twice for the same crime; the right to direct trial; the right to a continuous process; the right to appeal.

The application of due process is one of the constituent elements of the principle of the rule of law. It implies, among other things, that the prescriptions of law determine the powers of public authorities and officials who have permission to act, and continue to act within the limits of the powers granted to them.

While Article 6 of the European Convention and its interpretation by the Strasbourg Court remain a model for the right to a fair trial, constitutional Law has challenged the strengthening or expansion of European principles. Although Article 13 of the Convention does not require that the adequate remedy it guarantees to everyone be a judicial remedy, constitutional judges have enshrined the right of the judge by providing him with a fundamental basis that denies States the right to derogate from it.

Clearly enshrined in the constitutions of Germany, Italy, and Spain, it has been widely read by their constitutional courts [1].

The due process clause in American constitutional law at the first stage (the 5th Amendment), as is well known, refers only to procedural guarantees, properly so-called, relating to the right to an orderly trial, procedures regulated by such principles as, in the field of criminal procedure, the prohibition of a bill of attainder (a legislative act that is significant in finding a person guilty of a crime, without the precedent of a regular trial and trial in which he is guaranteed adequate protection) and retroactive laws (ex post facto law), in addition to the prohibition of forced self-incrimination, trial twice for the same fact (double jeopardy) and the right to a complete defense and adversarial process. Substantive due process is a manifestation of due process in the substantive sphere. Its scope is considered broader than the procedural side, since it manifests itself in all branches of law (administrative, civil, economic, tax, criminal, etc.).

Substantive due process of law protects the substantive right of a citizen, preventing the Law in the general sense or an administrative act from violating the rights of a citizen, such as life, liberty, and property, and others arising from the Constitution or included in it.

The US Supreme Court understands that it has the right to review any law and determine whether it is legal, not an abuse of state power.

The Minister of the Federal Supreme Court, Carlos Velloso, issued a decision that, in a few words, perfectly captures the essence of the substantive aspect of due process: "due process, with its substantive due process, constitutes a limit for the legislative power in the sense that laws must be

drafted with justice, must be endowed with reasonableness and rationality, and must maintain, in the opinion of W. Holmes, a real and substantial connection with the purpose to be achieved" [4].

**Conclusions.** Despite the unwavering importance of the principle of due process, some national proceduralists are content to only touch on its historical evolution. They refer to it in terms that go something like this: that it has its origins in Anglo-Saxon Law, but that national constitutions have always accepted it, and only in the 1988 Constitution was it directly elevated (or elevated) to a constitutional category. A static definition for the institution is difficult, if not impossible, since it must not be limited to pre-established concepts, and it must adapt to new rights arising from change and social progress. It is considered a fundamental principle because it is closely linked to all other principles applicable to the process and also ensures the exercise of these rights against obstructive facts such as laws or unjust administrative acts.

The European Court also bears witness to a large number of issues related to due process, with a strong emphasis on the criminal aspect. Some national analysts draw attention to the frequency of cases heard by this Court on issues of judgment, as well as the frequency of cases heard by the national jurisdiction under Article 6 of the 1950 Convention, which concern us today. The right to due process of law must always aim at equality, impartiality, respect, truth, justice and legality and the correct application of the law within the framework of respect for human dignity, understood as a progressive and methodical activity that must be carried out in accordance with pre-established rules, the result of which will be the dictate of an individual norm of conduct (whether an acquittal or a conviction). In order to declare the applicability of substantive law to a legal case.

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