





The methodological basis of the study relies on a variety of methods that make it possible to ensure an adequate level of objectivity and reliability of results. The dialectical method is used to know the content of due process; concrete historical method helps to study the specifics of due process, to trace the dynamics of its formation and development, to characterize the main stages of its formation, development and legal registration; formal-dogmatic method is used to analyze the content of legal norms that enshrine elements of due process and understanding of the category “due process of law”; the comparative-law method identifies traditions and innovations in the development of an institution of due process, and the elements of due process are revealed on the basis of an analysis of the rules of international, regional and national law.

## 2. DEVELOPMENT OF THE IDEA OF DUE PROCESS OF LAW

Thus, the problem of defining the concept and content of due process has been actively addressed recently. Increased interest in these issues is explained by essential social importance of the procedure in law as a guarantee of lawmaking effective process, law enforcement, as well as protection of human and citizen’s rights and freedoms. The idea of due process has its roots mainly in the common law system, where, from the first half of the 13th century, the due process concept was first laid down and enshrined in the Grand Charter of Freedoms (*Magna Charta Libertatum, 1215*) and the basic procedural guarantee of rights was recognized – the possibility of deprivation of liberty and property no less than by the legal definition of peers of realm and the country’s law – within the due process of law (Art. 39) (*Krestovskaya and Tsvirkun, 2010*).

In other words, procedural rights are legally enshrined before the first generation of human rights emerges. In June 1215, the King of England was forced to sign and swear to observe the Grand Charter of Liberties (1215). According to Article 38 of the Charter, government servants and judges could not be held liable solely on the basis of an oral statement and without credible witnesses. Article 39 stated that “no free person shall be arrested and imprisoned or deprived of property, or outlawed, or expelled, or in any way deprived of, except by virtue of legitimate sentence of equal treatment under the law of the country” (*Tyschuk, 2006*). The king also pledged “to no one ... sell rights and justice, to anyone ... to refuse or delay them” (Article 40). He also promised not to appoint to the posts judges, constables, sheriffs and bayliffs, persons who did not know the laws of the country and did not wish to fulfill them voluntarily (Article 45) (*Tyschuk, 2006*).

In 1354, King Edward III proclaimed that “no person, whatever his status and from any country, can be expelled from leased land, taken into custody, captured, inherited or be subject to death without being brought to justice in accordance with due process of law”. Since 1368, the notion of due process has also included the possibility of summoning a person to answer charges against him/her (*Makarchuk, 2006*). Consequently, the concept of due process originates in England, where from the very beginning it was perceived by English judges as the equivalent of natural law. It is the constitutional concept of due process used in the United States to judicially protect the basic constitutional rights enshrined in the Bill of Rights and subsequent amendments to the US Constitution. The concept of due process is also enshrined in the Fifth and Fourteenth Amendments to the US Constitution of 1787. Under the Fifth

Amendment (1791), no one will be deprived of his/her life, liberty or property without due process of law. The Fifth Amendment to the US Constitution provides for a fair trial for a person charged with a crime (Fulei, 2015).

Also, under this amendment, no person can be charged twice for the same crime: “No one shall be held responsible for committing a serious criminal offense or other dishonorable act, except by the submission or conclusion of a grand jury, with the exception of crimes committed by persons belonging to the ground or naval armed forces or militia when these persons are in active service, during war or other public danger. No one can be held responsible for a crime a second time; no one shall be compelled to testify against himself or herself on charges of any criminal offense, and no one shall be deprived of his/her life, liberty or property without due process of law. Private property cannot be seized for public purposes without a fair reward” (Maklakov, 1999). The Fourteenth Amendment to the US Constitution, adopted after the Civil War in the United States in 1868, enshrined that no state would deprive anyone of life, liberty or property without due process of law and deny any person subject to its jurisdiction equal protection (Maklakov, 1999).

It introduced the granting of citizenship to any person born in the United States, and prohibition on deprivation of rights other than by court order. Therefore, the Fourteenth Amendment guarantees equality of citizens of the United States and prohibits the adoption by any state of discriminatory laws “... all persons born or naturalized in the United States and subject to their jurisdiction are citizens of the United States and the state where they reside. No state may promulgate or enforce laws that restrict the privileges and immunities of United States citizens. No state can deprive someone of life, liberty or property without legal procedure, and it cannot deprive anyone under its jurisdiction of equal protection by law” (Maklakov, 1999). Similar provisions are in Article 7 of the French Declaration of Human Rights and the Citizen of 1789, which provides that no one may be charged, detained or imprisoned except in the cases provided for by law and in certain forms (Shevchuk, 2002).

It should also be noted that under the influence of US constitutional law, the principle of due process has been formally enshrined in the constitutions of many Latin American countries. The legal status of the person in custody and the procedure for judicial confirmation of the grounds for arrest were settled by the Parliament of England on 27 May 1679, named habeas corpus. The Habeas Corpus Act (1679) sets out the rules for the arrest and prosecution of a defendant, gives the court the right to control the lawfulness of detention and arrest of citizens, and to require citizens to commence such proceedings (Sakara, 2010).

### **3. DUE PROCESS OF LAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW**

The most important safeguards for freedom and inviolability of a person were further reflected in the international human rights treaties and enshrined in the constitutions of modern states. Elements of habeas corpus as a guarantee of judicial protection against unlawful encroachment on liberty and security of person are contained in the Universal Declaration of Human Rights (1948) (arts. 3, 9 and 10) and the International Covenant on Civil and Political Rights (1966) (Art. 9, 10, 14, 15) and includes principle of open nature of trial, principle of the presumption of innocence, principle of ne bis

in idem (not punish for the same offense twice) and the right to legal assistance with their choice.

But the most detailed principles are set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which contains the inalienable rights and freedoms for each individual and the duty of the State to guarantee them to anyone under its jurisdiction. The Convention was opened to be signed by the member states of the Council of Europe on November 4, 1950 in Rome and entered into force on September 3, 1953. It commenced formal approval in the constitutional system of rights and freedoms of those rights which are divided into a group of procedural rights, the peculiarity of which is that their realization is connected with the need to protect the rights of everyone, provided that these rights are violated or exposed to a potential threat violation. First of all, we are talking about such areas of application as criminal justice. Accordingly, the holders of such rights are persons who are brought to justice or victims of unlawful acts and persons whose interests may be violated in this regard. The intergovernmental body in the field of human rights protection is the European Court of Human Rights, established within the framework of an international regional organization – the Council of Europe. Intergovernmental cooperation within the Council of Europe is based on the rule of law and respect for human rights.

In the Romano-German system of law, the doctrine of “due process” is reproduced: first, in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which in Art. 6 enshrined the right to a fair trial; second, the case law and decisions of the European Court of Human Rights, which contain interpretations of this right, and determine the criteria for a fair trial. The provisions of Art. 6 of the Convention are imbued with the rule of law and extend guarantees of protection to public-law disputes between the individual and the state. Thus, in the European experience, violations of the right to a fair trial have become a prerequisite for significant changes. For instance, in the case of “*Rumpf v. Germany*” (2010), the ECtHR found a violation of the right to a fair trial against Germany, as the applicant’s administrative dispute lasted over 13 years. The decision of the Court led to amendments to the law that provides legal protection in case of the civil proceedings of excessive length.

Considering the experience of Ukraine, the Convention (1950) and its Protocols have been ratified and undertaken to guarantee to everyone within its jurisdiction the rights and freedoms set out in the Convention and the Protocols. Paragraph 1 of Part One of the Law of Ukraine On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols Nos. 2, 4, 7, 11 to the Convention states that: “Ukraine fully recognizes in its territory ... recognizing that the jurisdiction of the European Court of Human Rights in all matters relating to interpretation and application of the Convention is binding and without special agreement” (Law of Ukraine..., 2006). Domestic courts are required to apply the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms in their case-law and decisions and practices of the European Court of Human Rights, such sources of law are granted an advantage over the norms of current Ukrainian legislation. Constitutional provisions guaranteeing the procedural rights of an individual in the event of deprivation of their right to life, liberty and property are included in the concept of due process of law. The Constitution of Ukraine guarantees that the rights and freedoms of citizens are protected by the court, and provides everyone with the right to appeal in court against decisions, actions or omissions of public and local authorities, as well as officials.

## 4. CONTENT ARTICLE 6 OF THE CONVENTION AND ITS PROVISIONS

The Convention is an integral part of Ukrainian national legislation, and its provisions correlate with those of the Constitution of Ukraine (1996). The Part 1 of Art. 6 of the Convention is consistent with the provisions of Art. 129 of the Constitution of Ukraine, which contains the basic principles of justice and may act by analogy with the criteria for verifying compliance with the legal procedure. Article 6 of the Convention contains the following important provisions:

1. The principle of fair trial, which applies to both civil and criminal proceedings. So, in Part 1, Art. 6 of the Convention states that the right to a fair trial stipulates that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will resolve the dispute over civil rights and obligations or establish the merits of any criminal charges against a person. The judgment is publicly announced, but the press and the public may not be admitted to courtroom throughout all or part of the trial in the interests of morality, public order or national security in a democratic society, if required by interests of minors or protection of the parties' privacy, or to extent strictly necessary by the court – when, in special circumstances, the publicity of proceedings may prejudice the interests of justice (Law of Ukraine..., 2006). An example is the case of “Alexander Volkov v. Ukraine” (Decision of the European..., 2013), a case heard by the European Court of Human Rights in 2013. The decision in the applicant's favor concerns not only the restoration of the rights of illegally dismissed judge, but also general principles of state authorities' activity in Ukraine.

The ECHR has revealed in this case the serious systemic problems of judicial system of Ukraine, which have not yet been fully resolved. In the judgment, the Court unanimously held that there had been a violation of Article 1 § 1. 6 of the Convention on the Principles of: independence and impartiality of the Court; legal certainty and no limitation period for proceedings against an applicant; legal certainty and dismissal of an applicant at a plenary session of Parliament; providing a person with a “court established by law”. The Court also found a violation of Art. 8 of the Convention and established the obligation of Ukraine to ensure that the applicant is reinstated as a judge of the Supreme Court of Ukraine as soon as possible. In addition, the Court held that Ukraine should pay the applicant six thousand euros (EUR) in respect of non-pecuniary damage and twelve thousand euros in damages (Decision of the European., 2013).

The ruling in the case of “Alexander Volkov v. Ukraine” is key to understanding the criteria of independence and impartiality, the principle of legal certainty and the requirements for a “court established by law” as elements of a fair trial guaranteed by Art. 6 of the Convention. The right to a fair trial is, by its nature, a complex subjective right, and it consists of a large number of other rights that must be upheld when considering cases in court. Based on the content of Part 1 of Article 6 of the Convention, it can be concluded that it enshrines the following constituent rights to judicial protection: the right to a trial; fair trial; the publicity of case and decision; a reasonable time for hearing the case; consideration of case by a court established by law; independence and impartiality of the court.

The principle of the presumption of innocence: everyone charged with a criminal offense shall be presumed innocent until proven guilty (Convention on the Protection., 1950). The presumption of innocence is one element of a fair trial. There are a number of ECHR decisions that define the notion of the presumption of innocence and state

the signs of its violation: “Deweere v. Belgium” (1980), “Minelli v. Switzerland” (1983), “Allenet de Ribemont v. France” (1995), “Shagin v. Ukraine” (2009b), “Kryvolapov v. Ukraine” (2018), “Grabchuk v. Ukraine” (2006). This principle is violated if the accused is found guilty, while the guilt has not been previously proven. In the absence of formal evidence to support this, it is sufficient for the judge to be motivated to think that he had assumed the accused of being guilty (Decision of the European., 1995). In the case of “Kryvolapov v. Ukraine” (2018), the ECHR found that negligent public statements made by state representatives about the guilt of a person at the investigation stage violate the principle of the presumption of innocence and affect the impartiality of the court. The ECHR emphasized that, in accordance with established case-law, paragraph 2, Art. 6 of the Convention prohibits officials from being found guilty until convicted by a court. Officers may inform the public of the circumstances of the investigation, but only with due care and caution (Decision of the European., 2018). The presumption of innocence of a person is closely related to the ability to testify or to refuse to give and answer questions. The Court recalls that the right to remain silent and its constituent part not to testify against oneself are the generally recognized international norms that underlie the concept of due process (Decision of the European., 1995).

Violation of the right to defense entitles violation of the presumption of innocence principle. The principle means no person accused of any crime can be identified as guilty until proven. Thus, in Europe, the importance of this principle was particularly emphasized in the Final Act of the Pan-European Conference on Security and Cooperation, enshrining the obligation to comply with international human rights pacts and to act in accordance with the purpose and principles of the Universal Declaration of Human Rights of 1948, which in Art. 11 proclaims: “Everyone charged with a crime has the right to be presumed innocent until his/her guilty plea has been established by public trial, in which they are afforded every opportunity to defend themselves” (Universal Declaration..., 1948). Thus, in “Telfner v. Austria”, the European Court ruled that the presumption of innocence principle resulted in two provisions for the criminal proceedings: the requirement to resolve doubts in favor of the accused (in dubio pro reo) and the prohibition against the burden of proof case (Decision of the European..., 2001). The principle of the presumption of innocence is a legal guarantee which must be respected at all stages of the proceedings in order to ensure respect for human dignity during the investigation and trial of the case.

2. The rights of an accused of a criminal offense, the so-called minimum criminal procedural standard, include the following rights:

- to be informed promptly and in detail in a language which he/she understands the nature and cause of accusation against him/her;
- to have time and facilities necessary to prepare their defense;
- to defend himself/herself or to use the legal assistance of a lawyer of their choice, or – in the absence of sufficient funds to pay the lawyer’s legal assistance, to receive such assistance free of charge when the interests of justice so require;
- to interrogate or require the prosecution witnesses to be questioned, as well as to require the defense witnesses to be summoned and interrogated on the same terms as prosecution witnesses;
- if he/she does not understand or speak the language used in court, receive free assistance from an interpreter (Convention for the Protection., 1950).

That is, in Part 3 of Art. Article 6 deals with the minimum rights guaranteed by Article 6 of the Convention. As to Ukraine, the violation of Part 3 was contained in the case of “Oleg Kolesnik v. Ukraine”, which stated that the conviction in his case was based on the confession obtained in violation of his right to “remain silent” and the right not to testify against him that deprived of the opportunity to question most of the prosecution witnesses and was prevented from effectively exercising their rights of defense during interrogation at the investigation’s initial stage (Decision of the European., 2009a). The right of a person to have sufficient time and opportunity to prepare his/her defense includes the opportunity to consult the pre-trial investigation’s materials. The Court does not set any specific time-limits for the defendant to be acquainted with the case file, as the issue depends on the case circumstances.

International experience shows that in the “Case of Campbell and Fell v. The United Kingdom”, The European Court of Justice found that a person was entitled to an unlimited number of meetings with his defense counsel. These meetings should be held in the absence of any prison officials (Judgment of the European., 1984). The principle of confidentiality of meetings with the defense counsel extends to correspondence of the person taken into custody with his lawyer. The European Court of Justice in *Domenicic v. Italy* found that reviewing letters to a lawyer was a violation of the right to defense and the right to secrecy of correspondence. The Court emphasizes that national law must clearly define the extent and manner of exercising the relevant discretion conferred on public authorities in order to provide persons with the minimum protection to which citizens are entitled under the rule of law in democratic society (Judgment of the European., 1996). Another important component of due process is the grounds and procedure for restricting human rights. S. Shevchuk states that the standards of the right to a fair trial, referred to in Art. 6 of the Convention, at the stage of litigation are not limited to the case consideration, since there is no definitive list of components of fair trial...” (Shevchuk, 2002). At the present stage of developing the concept of due process in the countries of the world, the tendency to expand its content, namely the spheres of due process, is quite clear.

International and regional legal acts are the basis for the formation of domestic law foundation. In the XX century the rules on the right to a fair trial in the laws of many states have constitutional status. Similar rights are guaranteed in the national laws of modern states. The Constitution of Ukraine (1996) contains a sufficiently large set of such rights, which include: the right to liberty and security of person (Article 29); the right to judicial protection (Article 55); everyone’s right to receive professional legal assistance and free choice of the defender of their rights (Article 59); the inability to be twice prosecuted for one type of legal action for the same offense (Article 61); the presumption of innocence of a person (Article 62); the right not to testify or explain about himself/herself, family members or close relatives (Article 63); the right to defend a suspect, accused or defendant (Constitution of Ukraine, 1996). The judicial procedures, apart from the constitutional fixing, are governed by substantive norms that enshrine rules for the exercise of the citizen’s right to judicial protection of their rights (Gorodovenko, 2012).

According to Art. 2 of the Criminal Procedure Code of Ukraine, the tasks of criminal proceedings involve the following: to protect persons, society, and the state from criminal offenses; to defend the rights, freedoms, and legitimate interests of participants in criminal proceedings; to ensure prompt, complete, and impartial investigation and trial. The last point presupposes that anyone who commits a criminal offense is held guilty as guilty, no innocent is charged or convicted, and

no person is subject to unjustified procedural coercion. In other words, each party to criminal proceedings is subject to due process ([The Criminal Procedure Code of Ukraine, 2012](#)). Among advantages of the system is the fact that due process of law in criminal proceedings is reflected in guarantees of the right to protection of detained, presumption of innocence, competitiveness and equality of parties in the process.

The doctrine of legal procedure has been repeatedly used in the practice of the Constitutional Court of Ukraine. An example can be the decision of the Constitutional Court of Ukraine ([2018](#)) in the matter of conformity of the Constitution of Ukraine with the Law of Ukraine on the Principles of State Linguistic Policy. The Constitutional Court emphasizes the direct connection between the observance of the “due process” and the guarantees of the rights and legitimate interests of a citizen, in fact giving the procedural principles of imperative authority. Therefore, if the proper legal procedure for adopting a legal act by any public authority is violated, such an act is unconstitutional.

M. Bilak believes that in the Supreme Court’s judgment of July 25, 2019, in Case No. 826/13000/18, the doctrine of “legal procedure” was laid down, which in the law of the AngloSaxon countries constitutes a principle of the rule of law and provides for legal requirements for state legal acts, in any area of law. The Supreme Court, in this ruling, stated that the established legal procedure, as an integral part of the legality principle and rule of law, is an important guarantee of prevention of abuse by public authorities in the decision-making process and actions that should ensure fair treatment of persons ([Bilak, 2015](#)). The standards of independence of the legal profession indicate that a fair administration of justice is necessary to establish and maintain the rule of law.

However, the legislation of Ukraine does not contain definition of term “due process”, such a shortcoming complicates its application. Therefore, the notion of “due process” should be recognized and regarded as derived from the notion of “due process” developed by American constitutional doctrine and derived from the concept of the rule of law and generally accepted standards of justice. The current reforms in the judicial system and judiciary should be aimed at overcoming such downsides, which will strengthen the authority of judiciary among citizens.

## 5. CONCLUSIONS

Based on the foregoing, we can conclude that the concept of due process of law is the property of the centuries-old Anglo-Saxon legal tradition, it is embodied in international, regional human rights instruments and enshrined in the constitutions of modern states and comes from the concept of the rule of law and generally accepted standards of justice. The Convention for the Protection of Human Rights and Fundamental Freedoms makes a significant contribution to the development of the principles of due process and procedural guarantees of human rights at European level. The concept of legal procedure has become universal through the decision of the European Court of Human Rights and extends to both judicial and legal proceedings, which must be followed by the authorities when adopting relevant acts on human rights, freedoms and legitimate human interests. Due process of law is organically linked to civil society and the rule of law, it is inherent in any civil procedure and includes both procedural guarantees for protection of personal rights and legal mechanisms to limit the arbitrariness of the state. Violations of the right to a fair trial





