

Implementation of the Right to an Impartial Trial as a Vector of the Rule of Law: European Standards and Ukrainian Experience

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BLAHUTA, R.: Implementation of the Right to an Impartial Trial as a Vector of the Rule of Law: European Standards and Ukrainian Experience. *Právny obzor*, 106, 2023, special issue, pp. 66-84. <https://doi.org/10.31577/pravnyobzor.specialissue.2023.04>

Implementation of the Right to an Impartial Trial as a Vector of the Rule of Law: European Standards and Ukrainian Experience. The right to an impartial trial is one of the most important principles of the administration of justice, and its significance and necessity to the rule of law is recognised and observed at both an international and national level. If judges fail to adhere to the principle of impartiality and favour one of the parties during the proceedings, doubt is cast on the right to a fair trial and the expectation that a decision will be made on the merits of the case guaranteed by international law. This article will examine the issue within the context of the Ukrainian legal system and offer substantiated conclusions on efforts to bring the country into line with international and European standards. The text will analyse the challenges involved in reforming the Ukrainian judicial system and investigate the experience of European countries in ensuring an impartial trial by conducting an analysis of international and national legislation and the existing practice of the ECHR. The research applies the methodologies of analysis and synthesis, an examination of comparative and formal legal methods and legal interpretation within the context of the implementation of the right to an impartial trial as a direct demonstration of the rule of law.

Keywords: impartial trial, right to a fair trial, independence of the court, rule of law, impartiality of the court.

Introduction

Every democratic state recognizes and values human rights and freedoms and sees the maintenance of these rights as a high priority both at the national and international level. In Ukraine, the rights and freedoms of individuals and citizens is guaranteed by a system of legal norms, organizational means and methods, conditions and requirements provided for by the Ukrainian Constitution and its legal framework, but the effectiveness of these guarantees is directly dependent on the level of development of the legal principles of the state, the sphere of economic relations, the level of development in democratic institutions, compliance with the fundamental principle of the rule of law and the effective implementation of legal norms, the level of legal consciousness and legal culture of the population, the coherence of the interests of the population and society, and the presence of a highly effective body of constitutional control. This issue remains relevant in contemporary Ukraine and is always high on the agenda of international organizations when formulating development strategies and solving the global problems

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of humanity. The Constitution of Ukraine recognises that the life, health, honour, dignity, inviolability and security of an individual are of the highest social value, and that it is the main duty of the state to affirm and protect human rights and freedoms (Constitution of Ukraine, 1996).

One of the key human rights in a modern democratic state is the right to a fair trial. This is confirmed by Article 6 of the European Convention on Human Rights, which guarantees the right to a fair and public trial within a reasonable time by an independent and impartial court established by law, when determining a person's civil rights and obligations or when considering any criminal case charges against a person.¹ This right is enshrined within the framework of the Constitution of Ukraine, the laws of Ukraine and international laws which have been ratified and integrated into national legislation. The right to a fair trial ensures that the interests of an individual and society as a whole are protected by independent and impartial courts which carry out their activities on the basis of the rule of law and the laws, taking into account the principle of competition between parties.

As part of the research, it is important to define the essence of the concept of impartiality. In modern Ukrainian, the word "impartial" is defined as the state of lacking a deceptive, negative, pre-formed opinion or prejudice against anyone, anything.²

The Constitution of Ukraine recognizes and applies the principle of the rule of law.³ The rule of law is a fundamental principle of law which states that no individual can be considered above the law; no one can be punished by the state, except for a direct violation of the law; no one can be prosecuted for an offence other than in accordance with the procedure established by law. Accordingly, as the fundamental principle of a democratic society, the rule of law entails its implementation in the law-making and law-enforcing activities of the state. It, in turn, involves the implementation of the idea of social equality, justice and respect for human rights and freedoms into legal norms. The unique nature of the rule of law as a fundamental principle lies in the fact that it not only serves to regulate the life of people and their coexistence but also to regulate the relations between the population and the state represented by state bodies. It also applies to the legal regulation of relations between public authorities themselves. Accordingly, it directly concerns the judiciary, because the rule of law is characterized by an independent judiciary which protects people from arbitrariness on the part of the state, while respecting human rights and freedoms.⁴

It is important to note that the importance and value of the concept of the rule of law lies in the power in which this principle denies to the state and society and also in the discipline that the representatives of the state must observe; indeed, these requirements are conditional for the exercise of power in a democratic society in which

¹ European Convention on Human Rights. (1950). Available at: <<https://rm.coe.int/1680063765>>.

² BUSEL, V.T.: *A Large Explanatory Dictionary of the Ukrainian Language*. Irpin: Perun, 2005.

³ Constitution of Ukraine, No. 254k/96-BP. (1996). Available at: <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>>.

⁴ WALDRON, J.: *The Concept and the Rule of Law*. New York: Public Law Research Paper, 2008. Available at: <<http://ssrn.com/abstract=1273005>>.

power comes from the people, with the role of the government being to serve their needs. Judicial authority and prestige can only develop when people can see the actual administration of justice in accordance with the prescriptions of the law and the norms of legislation. Such actions correspond to the discipline of the law, which the courts are required to observe strictly. Public trust in legally elected governments rather than, for example, the armed forces is a crucial means of ensuring compliance with the rule of law. Judicial power is the measure of legality and determination of the essence of the law, and public trust is greatly dependent on the observance of the rule of law by the judiciary.⁵

Ian McDougall outlines four main components of the rule of law: equality before the law, access to the law, an independent judiciary, and access to all available legal remedies. The last two points are largely interconnected and cannot exist in isolation from the other. Access to legal remedies is manifested in achieving a result which can be considered reasonable and logical, and this inherently requires that the judiciary is free from external influence and can decide cases exclusively on the basis of the law, the provided evidence and the existing circumstances of the case. It also implies the absence of corruption and pressure for personal or political gain, but it is precisely these factors which most often lead to violations of the rule of law. When corruption runs unchecked, the rule of law is absent, and the consequences of such an absence are dire.⁶

Geranne Lautenbach notes that the rule of law is related to the control of public authority by means of law in order to protect the individual. Unfortunately, the supremacy of legislative provisions is commonly equated with the rule of law, but this statement is in fact incorrect. All legislation must comply with the rule of law, and laws can be considered legal once they are recognized as meeting the requirements of European standards. After all, legality is the main element of the rule of law. Lautenbach points out that legality obliges the government to act on the basis of the law, while the principle of the rule of law establishes a number of criteria for the law, such as generality and clarity. Legality also involves judicial review of the legality of government acts and the right of individuals to access to a fair hearing with an unbiased assessment of the facts of the case. In addition, the functional separation of powers into three branches is an integral part of the rule of law, as it ensures that no one can act as a judge in their own case and that laws are not made on a case-by-case basis. Impartiality and independence of the judiciary are necessary prerequisites for the implementation and observance of the rule of law, as it ensures respect for the established norms of the law. The above-mentioned elements and criteria are largely aimed at protecting individuals from the arbitrary exercise of state power.⁷

⁵ GLEESON, M.: Courts and the rule of law, Melbourne University, 2001 Available at: <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm>.

⁶ McDOUGALL, I.: Respecting Rule of Law Through The Judicial Process. In. LexisNexis. April 08, 2021. Available at: <<https://www.lexisnexis.com/community/insights/b/blog/posts/respecting-rule-of-law-through-the-judicial-process>>.

⁷ LAUTENBACH, G.: *The Concept of the Rule of Law and the European Court of Human Rights*. Oxford: Oxford University Press, 2013.

Without a doubt, the independence of the judiciary is a cornerstone of the rule of law, as this principle ensures respect for human rights but also provides for an independent and impartial judiciary in relation to state authorities and their representatives both in civil and criminal cases. Judges can only act as an impartial party in disputes between the state and citizens when the scope of judicial independence and impartiality towards the state in general is clearly defined. When free from pressure from the state, the judiciary can act as an effective controller of the state's functions.⁸ Without the rule of law and independent and impartial judges, the functioning of the state and its authorities would be distorted and arbitrary. As a result, an independent judiciary is a crucial element in maintaining the rule of law and ensuring an accountable and effective political structure.

While the right to an impartial (objective) trial is clearly a fundamental concept in the rule of law, it is important to note that it is not just a requirement which is logical within that more national framework. Impartial considerations of cases by courts is directly defined at the international level in the normative legal acts of the UN and the EU; similarly, it is highlighted in the practice of the ECHR and is enshrined in the current laws of Ukraine and other countries as a mandatory requirement.

Methodological Framework

The topic of impartial trials has been the subject of considerable discussion among academics and theoreticians, but also among practicing lawyers in various fields of law. The issue has also been studied from both national and international perspectives.

This study uses a number of methods generally accepted by legal science, both general and special. It is primarily based on the normative method used in clarifying the essence and forms of conducting an impartial trial, its origins, and the requirements that an impartial trial imposes upon individual judicial systems. The comparative method is also applied to identify the features of conducting an impartial trial in Ukraine and in other countries such as France, Italy, Germany, Sweden and Portugal. This comprehensive comparison allows a number of conclusions to be formed which are necessary to achieve the research goal. The complex use of methods of analysis and synthesis and the formal legal method provided an effective analysis of the legal framework of international and national law, doctrinal approaches and practice of the ECHR within the context of the implementation of an impartial trial as a direct manifestation of the rule of law. The judicial systems of several European states are also analysed in detail in order to determine their characteristic features, similarities and differences, thereby providing a qualitative account of the requirements related to ensuring an impartial trial and the diverse means by which this is achieved.

International legal acts, the Constitution of Ukraine and the national legislation of Ukraine formed the empirical basis of the research. Considerable attention is also paid to

⁸ Department for the execution of judgments of the European Court Of Human Rights: *Independence and impartiality of the judicial system*, 2020. Available at: <<https://rm.coe.int/thematic-factsheet-independence-impartiality-eng/1680a09c19>>.

the practice of the ECHR regarding impartiality and the objective consideration of cases by courts. At the same time, the method of interpretation of law was also applied in order to draw some specific conclusions on the topic.

Results and Discussion

Judicial Independence and Impartiality: Features and Characteristics

One of the most important tasks facing the judiciary is the implementation of impartial consideration and resolution of cases with the aim of protecting the violated, unrecognized or contested rights of individuals and legal entities. Due to its legal nature, the judiciary must embody and declare these aims in its activities.

Judicial independence and impartiality would be little more than a chimera without sufficient political and legal-operational guarantees for their realization. Basic political guarantees generally include the maintenance of a democratic political system which is committed to the rule of law. Legal-operational guarantees are those provisions (laid down in Constitutions, statutes or other legal rules) that ensure that the position of judges and courts in the structure of public power is determined in such a manner as to prevent the exertion of influence on judicial activities.⁹

The principle of impartiality (or objectivity) of a judge is one of the first in the list of principles defined by the Bangalore Principles of Judicial Conduct, approved by the UN ECOSOR Resolution on July 27, 2006. According to the provisions of this document, “the objectivity of a judge is a necessary condition for the proper performance of his duties. It is manifested not only in the content of the decision, but also in all procedural actions accompanying its adoption”.¹⁰

The Bangalore Principles of Judicial Conduct provides several indicators of a judge’s impartiality. First, a judge must be free from all kinds of superstitions, prejudices and inclinations while performing the duties assigned to him. Secondly, the behaviour of a judge, both during the direct realization of justice and during his free time, should invoke public trust in the representatives of the legal profession and their objectivity while performing their professional activities. Thirdly, the judge is obliged to analyse all his actions and refrain from any activities which could be grounds for depriving him of the right to participate in court hearings and make decisions in cases.

The right to an impartial trial is enshrined in a number of international legal acts, the provisions of which are of key importance within the context of this research. One of the most important international treaties is the International Covenant on Civil and Political Rights. Article 14 of the Covenant states that “all persons shall be equal before courts and

⁹ General issues. Judicial independence as a fundamental value of the rule of law and of constitutionalism. (n.d.). Available at: <<https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html>>.

¹⁰ Bangalore Principles of Judicial Conduct. (2006). Available at: <https://zakon.rada.gov.ua/laws/show/995_j67#Text>.

tribunals” and that “in the course of any criminal charge, everyone shall have the right to a fair and public trial by an independent, competent and impartial tribunal established by law”. The Human Rights Committee also determined that “the right to an independent and impartial trial is an absolute right that cannot be exempted.” These rights must be applied under all circumstances in various types of courts, both general and special.¹¹

Second, Article 7 of the African Charter on Human and Peoples’ Rights provides that “everyone has the right to be heard”. Such a right includes the following components: “the right to be presumed innocent until proved guilty by a competent court or tribunal” and “the right to be tried within a reasonable time by an impartial court or tribunal”. It is also important that Article 26 of this Charter declares that the participating states “must guarantee the independence and impartiality of the courts”. The African Commission on Human and Peoples’ Rights believes that Article 7 is not derogable, as it provides a “minimum protection for citizens”.¹²

Third, Article 8 of the American Convention on Human Rights contains specific provisions regarding the right to a fair trial, namely, “everyone has the right to a hearing with adequate safeguards and within a reasonable time by a competent, independent and impartial tribunal established and operating on the basis of law, in substantiation of any accusation brought against him of a criminal nature or to determine his rights and obligations of a civil, labour, financial or any other nature”.¹³

As we have already seen, Article 6 of the European Convention on Human Rights also proclaims the right to a fair trial.

With the signing of the Association Agreement with the European Union in 2014, Ukraine agreed to strengthen cooperation in the sphere of security, justice and freedom with the aim of ensuring the rule of law and the strengthening of the judiciary, increasing its effectiveness, guaranteeing its independence and impartiality, and promoting respect for human rights and fundamental freedoms. Consequently, European standards in the field of justice are expected to become a priority for Ukraine in its further development. At the same time, it is necessary to analyse the European experience in ensuring impartiality in the judicial process to allow Ukraine to adopt the experience of European colleagues in the course of reforming the judicial system in the coming years.

Within the context of this study, it would be useful to clarify the differences between the requirements for an impartial trial in the European Union (EU) and those set out in the European Convention on Human Rights (ECHR). While the two frameworks are based on similar principles with considerable overlap, the mechanisms for ensuring the impartiality of courts during trials does differ to some extent. The EU has its own legal framework which contains provisions on ensuring a fair trial and the impartiality of courts within the framework of antitrust law, protection of EU citizens’ rights and

¹¹ International Covenant on Civil and Political Rights states in its article. (1966). Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

¹² International Covenant on Civil and Political Rights states in its article. (1966). Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

¹³ American Convention on Human Rights. (1969). Available at: <https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf>.

consumer protection which are contained in the Charter of Fundamental Rights of the European Union. Central to the enforcement and compliance with EU standards is the Court of Justice of the European Union, which directly hears cases related to EU law. The CJEU has the power to review decisions of national courts if such decisions are directly related to EU law.

The European Convention on Human Rights is a separate international treaty which, although it is not directly related to the EU, applies to all 47 member states of the Council of Europe, including Ukraine. Article 6 of the Convention guarantees compliance with the Convention, including the right to an impartial court in both criminal and civil proceedings. The European Court of Human Rights is the central body for ensuring compliance with the Convention and has the power to hear cases brought by individuals who claim that their rights under the Convention have been violated.¹⁴

Undoubtedly, both EU and European Convention on Human Rights requirements declare and emphasise the importance of strict adherence to the principle of impartiality in judicial proceedings, but they operate in different areas and legal frameworks, cover different branches of law and are guaranteed by different judicial bodies. While the relevant EU regulation covers directly EU-related issues decided by the Court of Justice of the European Union, the European Convention on Human Rights covers a wider range of issues and is regulated by the ECHR. It is for this reason that when applying directly to these structures, it is worth analysing the circumstances of the case in great detail.

European Experiences in Determining Impartiality in the Judicial Process

The experience of European countries will be crucial in ensuring the success of Ukrainian efforts to implement effective judicial reform and to improve existing legislation. An important element in ensuring judicial impartiality in countries such as France, Italy and Germany is the process of appointing court officials and the direct appointment of judges.

For example, in France, judges are appointed through the involvement of several institutions in the system of selection and appointment to ensure fairness and integrity and to guarantee their impartiality in the consideration of cases on the merits. These bodies include the Higher Council of Magistracy, the National School of Magistracy, the Promotion Commission and the Ministry of Justice. In Italy, an Expert Commission appointed by the High Council and chaired by a judge of the Court of Cassation is responsible for appointments of judges.¹⁵ As we will discuss below, this is the basis for the recently introduced requirements in Ukraine.

¹⁴ General issues. Judicial independence as a fundamental value of the rule of law and of constitutionalism. (n.d.). Available at: <<https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html>>.

¹⁵ FEDORCHUK, A.: Implementation of foreign experience of administrative and legal regulation of the legal status of judges. *Entrepreneurship, economy and law*, 8/2019, pp. 110-118.

The Italy legal system also ensures impartiality through a series of conditions. The first of these is the right to a double instance in which the accused is entitled to a second trial before the appellate authority. This measure ensures the correctness of decisions made by courts and the observance of guarantees of the rights of the accused. All criminal cases in Italy require the mandatory involvement of a lawyer in order to ensure the rights and legal interests of the defendant.

The prosecutor's office is also an autonomous institution in Italy, another means of ensuring the observance of objectivity and impartiality during the investigation of cases and the presentation of charges. Italian judges are also randomly assigned to hear cases, with an automated system of selection providing a greater possibility of a case being heard on its own merits.

The German judicial system differs to some degree from those of other European countries, but it also shares some common features regarding the independence of judges and guarantees of ensuring the rights of individuals, Courts in Germany are categorised as district, regional and federal courts, with each body aiming to provide more specialization and greater insight into the issues under consideration.

In Germany, the so-called "principle of the record" ("Grundsatz der Aktenmaximierung") applies in which all court decisions are based only on the materials and evidence provided in the court.

The German judicial system is characterized by procedural time saving, because all cases must be considered within a reasonable time, with any delays minimized as much as possible. In addition, trials in Germany are often heard by three judges. While these requirements are characteristic of many European states, including Ukraine, they are observed most rigorously in Germany.

As in the above-mentioned EU countries, and also in Sweden, Portugal and other states, an impartial trial is carried out under conditions of transparency and in compliance with the principle of non-interference of the legislative or executive authorities in the activities of courts.

The judicial system of Sweden is also characterized by the presence of the so-called inquisitorial judicial process in which the judge is involved both in the gathering of evidence and in considering the merits of the case in order to ensure a more detailed consideration and decision-making process. A fairly common phenomenon in Sweden is the search for alternative means of resolving cases, such as mediation or out of court settlements. This helps to save time and preserve relations between the parties by reaching an agreement on a voluntary basis. Juries are actively involved in the consideration of some criminal cases in Sweden.

Portugal also turns to mediation as an alternative solution to trials. A fairly well-known indicator of the judicial system of Portugal is the process of keeping minutes of court sessions. This ensures transparency, because proceedings can be easily reviewed in order to verify the legality of adopted court decisions. As in Sweden, the judge actively investigates the circumstances of the case and may conduct additional investigations.

Guarantees of Judicial Impartiality in the Context of the Case Law of the European Court of Human Rights

The European Court of Human Rights guarantees the impartiality of trials in its signatory countries. The impartiality of a court proceeding generally understood as the absence of bias and impartiality, and the ECHR states that there are two criteria which must be met in order to achieve this. The objective criterion examines whether the court itself has provided sufficient guarantees to exclude any reasonable doubt about its impartiality. The subjective criterion determines whether a particular judge has a personal bias in a particular case based on his or her behaviour.

However, the division between these two concepts is somewhat porous. The subjective test of impartiality assesses the situation from the point of view of the presence or absence of various kinds of personal biases in the judge or a direct bias in the given case. The judge's interests, preferences and beliefs, as well as his behaviour in a specific case, are far from the least important factors in determining subjective impartiality. As an example, we can cite a situation in which a judge showed hostility towards the parties in a trial due to personal reasons.¹⁶ Due to the existence of a subjective criterion, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary.¹⁷ Therefore, it may be difficult (or in some situations impossible) to establish a violation of Article 6 on the basis of subjective impartiality. In this connection, the Court often takes into account the objective criterion of impartiality as it is often more realistic to prove the absence of objective impartiality rather than the absence of subjective impartiality.¹⁸ It is worth noting that under certain conditions, the behaviour of judges may be sufficient to indicate a violation of impartiality according to a subjective criterion. Some examples of such behaviour include a vivid manifestation of personal feelings in connection with the actions of any of the parties which appear before them; the use of various gestures during the consideration of the case; or expressing an opinion about the applicant's guilt at the early stages of the trial. In such situations, it is quite realistic to draw a conclusion about a violation of impartiality based on a subjective criterion.¹⁹

In addition to evidence of his or her personal conduct, the objective test of a judge's impartiality lies in the existence of facts that could cause reasonable doubts or concerns about the lack of impartiality, either in the case of an individual judge or a tribunal. Examples of this might be situations in which there are personal or hierarchical connections between the judge and other parties to the proceedings or cases in which a judge performs two or more roles in a single proceeding. In order to satisfy the requirements of objective impartiality, there must be sufficient safeguards to eliminate any legitimate doubts about the judge's impartiality. These guarantees are an essential

¹⁶ Case of De Cubber v. Belgium. (1984). Application no. 9186/80, § 25.

¹⁷ Case of Kyprianou v. Cyprus. (2005). Application no. 73797/01, § 119, Case of Hauschildt v. Denmark. (1989). Application no. 10486/83, § 47.

¹⁸ Case of Micallef v. Malta. (2009). Application no. 17056/06, § 95.

¹⁹ Case of Kyprianou v. Cyprus. (2005). Application no. 73797/01, § 119.

component of national procedures and rules to ensure impartiality and could even lead to the withdrawal of a judge if these rules are violated.²⁰

This analysis touches upon the concept of the “binary nature of judicial impartiality” discussed by the legal scholar T. A. Tsvina. As Tsvina explains, “subjective impartiality is associated with the personality of the judge, with his or her personal beliefs. From this point of view, judges should be free from personal bias towards the parties. Objective impartiality relates to structural issues of the organization of the court and consists in the absence of any legitimate doubts that it is ensured and guaranteed by the court. To test for objective impartiality, it is necessary to determine whether there are facts that do not depend on the judge’s behaviour, but which may cause doubt on his impartiality. It is about the trust which courts in a democratic society should a priori evoke in the participants of the process”.²¹

As part of our research, we will now analyse the main guarantees of the impartiality of court proceedings. These primarily aim to protect the non-interference of legislative and executive authorities in court proceedings and the absence of influence within the justice system. Such interference can also take the form of appointment of judges and the formation of the judiciary. This type of intervention can result in biased considerations of cases but can also lead to direct violations of the principle of the rule of law and damage to the rights and freedoms of citizens in particular and the state in general.

Thus, in the case of *Campbell and Fell v. the United Kingdom*, the ECHR established an absence of violation as per paragraph 1 of Article 6 of the Convention regarding the applicant’s complaint that the Board of Visitors was not an independent and impartial judicial body. The Court noted that the members of the Board of Visitors who were appointed by the Home Secretary to manage prisons in England and Wales could not confirm their independence from the executive branch. If the Board of Visitors was ruled to be insufficiently independent, this would mean that any judges appointed by or on the recommendation of the Home Secretary (the state official who is responsible for the administration of the courts) would also be considered insufficiently independent. Although the Home Office issued guidelines to the Board of Visitors on how to perform its functions, the Board was not subject to its instructions when making judicial decisions. With regard to the independence of the Board of Visitors, given that it performed both judicial and supervisory roles, the ECHR noted that the prisoners’ belief that the Board of Visitors was closely linked to the executive and prison administration must comply with the rule that “justice must not only be done, it must be seen to be done”. At the same time, the existence of such impressions on the part of prisoners, an unavoidable phenomenon given the conditions of imprisonment, was not sufficient to establish a lack of independence in the Board of Visitors, and the ECHR therefore ruled that no violation of Article 6 of the Convention could be identified.²²

²⁰ Case of *Mežnarić v. Croatia*. (2005). Application no. 71615/01, § 36, Case of *Wettstein v. Switzerland*. (2000). Application no. 33958/96, § 47.

²¹ TSUVINA, T. A.: Independence and impartiality of the court as components of the rule of law in civil judiciary. *Theory And Practice Of Law*, 2(16), 2019, pp. 1-9.

²² Case of *Campbell and Fell v. the United Kingdom*. (1984). Application no. 7819/77.

A radically different conclusion was reached in the case of *Toni Kostadinov v. Bulgaria*, in which the ECHR found a violation of Article 6 of the Convention had occurred in the aspect of the levelling of the presumption of innocence. The Court found that the comments of the Minister of Internal Affairs had violated the applicant's right to the presumption of innocence. The ECHR noted that the presumption of innocence was and remains one of the elements of a fair criminal trial, and that this can be violated not only by a judge, but also by other public representatives such as lawyers, the Speaker of the Parliament, prosecutors, the Minister of Internal Affairs or police officers. Given the special circumstances of the case and in view of his position as a high-ranking government official, the ECHR considered that the Minister of Internal Affairs was obliged to take the necessary precautions to avoid confusion about the extent of the impact of his comments on the conduct and results of the applicant's case.²³

An important guarantee of an impartial trial is the absence of family, professional or other ties between the judge and the parties in the case, as well as the absence of personal interests on the part of the judge or his relatives in the resolution of the case. If judges believe that they are at risk of violating this principle, they can apply the remedy of recusal or self-recusal to ensure objective and fair justice. A full list of such grounds, including those mentioned above, is contained in the procedural codes of Ukraine. In the context of procedural violations in the application or non-application of recusal or self-recusal, the ECHR forms legal positions on the content and criteria of judicial impartiality.²⁴

One example of this potential violation is the conflict of interest which formed the subject of the case of *Škrlj v. Croatia*. Conflicts of interest are a regular feature of impartiality cases, and it is important to define this concept in more detail. The Law of Ukraine "On Prevention of Corruption" distinguishes two types of conflicts of interest:

1. "potential conflict of interest" shall mean the presence of a person's private interest in the area in which he/she exercises his/her official or representative powers that may affect the objectivity or impartiality of his/her decisions or affect the commitment or non-commitment of actions in the exercise of these powers;
2. "real conflict of interest" shall mean the contradiction between the private interest of a person and his/her official or representative powers, which affects the objectivity or impartiality of his/her decisions and commitment or non-commitment of actions in the exercise of these powers.²⁵

In the case of *Škrlj v. Croatia*, the applicant's argued that "during the trial against him in summary proceedings, the trial was not impartial, as required by Article 6 § 1 of the Convention, since the judge who heard the case, in another proceeding against him, agreed to be recused from the case, due to a conflict with the applicant's mother".²⁶ The judge had agreed to be recused in another case only a few days previously, a fact which

²³ Case of *Toni Kostadinov v. Bulgaria*. (2015). Application no. 37124/10.

²⁴ LEVENETS, A. V., SADOVSKA, O. M.: Case law of the European court regarding compliance with the principle of impartiality in judicial proceedings. *Pravova Derzhava*, 41, 2021, pp. 24-30.

²⁵ Law of Ukraine, № 1700-VII „On Prevention of Corruption“. (2014). Available at: <<https://zakon.rada.gov.ua/laws/show/1700-18?lang=en#Text>>.

²⁶ Case of *Škrlj v. Croatia*. (2020). Application no. 32953/13.

created reasonable doubts in the applicant's mind about the Court's impartiality. Also relevant to the case was the Court's position that "when the judge became aware of the circumstances that lead to his recusal from the case before the hearing," he "should have requested the President of the Pazin Minor Crimes Court to recuse him from the case".²⁷ The above circumstances are an unconditional basis for the conclusion that a judge should recuse themselves from a case if there are any doubts about the judge's own impartiality, regardless of the presence or absence of a corresponding application from the parties of the proceedings.

An important role in determining a judge's impartiality is played by their own public statements, including those made on social networks or mass media. Conversely, a judge's silence can also give grounds to doubt their impartiality, for example, when the court declines to reject racist statements or discrimination against women. These types of expression can indicate the personal beliefs and views of judges which may unduly influence their ability to hear a case impartially, and potential bias can therefore be confirmed by objective data.

An equally important guarantee is the protection of the absence of interference by the parties in the law. Conclusions on the prohibition of interference of the parties in the proceedings are covered in detail in the case of *Sramek v. Austria*. In this proceeding, the ECHR noted that in order to determine whether or not the court was independent, as is required by Art. 6 of the Convention, the visibility of this independence may be important. The ECHR decided that there had been a violation of Clause 1 of Art. 6 of the Convention in the applicant's case due to the fact that in this case one of the members of the judicial body was a subordinate of one of the parties to the case, a relationship which may cause legitimate doubts about their independence. The ECHR emphasized that such a situation seriously affected the trust which courts should aim to uphold in a democratic society.²⁸

Another important principle of legality and impartiality in judicial proceedings is that of compliance with the rules of jurisdiction in civil proceedings.²⁹ While the primary task of courts in such proceedings is to consider the merits of the case in and of themselves, actual practice is replete with situations in which the rules of jurisdiction have been disregarded. In several cases, plaintiffs have knowingly filed lawsuits in the appropriate court but the case is in fact heard in an unsuitable court. Similarly, there have also been cases in which the plaintiff has submitted identical lawsuits with the same subject of dispute to several courts at the same time to increase their chances of being heard by a judge who may be more amenable to their complaint. In this case, there can be no question of objectivity and impartiality, and it would be appropriate to amend the procedural codes to establish liability for such actions in order to prevent the above situations from recurring.

²⁷ *Ibidem*.

²⁸ Case of *Sramek v. Austria*. (1984). Application no. 8790/79.

²⁹ Civil Procedure Code of Ukraine. (2004). Available at: <<https://zakon.rada.gov.ua/laws/show/1618-15?lang=en>>.

The positions adopted by academics and practitioners regarding indefinite terms of office for judges is also worthy of attention.³⁰ Some authors have argued that the appointment of judges to a position for an indefinite period is an important guarantee of their impartiality and independence as the probability of judges falling under the influence of the legislative or executive authorities or external political forces is much lower. However, it should not become the basis for an effective professional impunity for judges, and indefinite terms should be accompanied by systematic attestations to determine the standard of judicial proceedings and judges' compliance with procedural rules and principles, including the fundamental principle of the rule of law. Therefore, it is safe to say that the indefinite election of judges is also one factors of judicial impartiality which plays a role in ensuring cases are judged on their own merits.

The Experience of Ukraine in Ensuring an Impartial Trial and the Challenges the Country Currently Faces

The national legislation of Ukraine already includes several provisions which are intended to protect the right to an impartial trial. Article 7 of the Law of Ukraine "On the Judiciary and the Status of Judges" states that all citizens are guaranteed the protection of their rights, freedoms and interests within a reasonable time by an independent, impartial and fair court established by law.³¹ Article 2 of the Civil Procedure Code of Ukraine determines that the task of civil justice is the fair, impartial and timely consideration and resolution of civil cases with the aim of ensuring the effective protection of violated, unrecognized or contested rights, freedoms or interests of persons, rights and interests of legal entities or the interests of the state.³² Article 2 of the Criminal Procedure Code of Ukraine establishes that the purpose of criminal proceedings is to protect individuals, society and the state from criminal offenses, to protect the rights, freedoms and legitimate interests of participants in criminal proceedings, as well as to ensure a quick, complete and impartial investigation and trial, so that everyone who commits a criminal offense is prosecuted to the extent of his guilt, that no innocent person is accused or convicted, that no person is subjected to unreasonable procedural coercion and that due legal procedure is applied to each participant in criminal proceedings.³³

Furthermore, a number of reforms and changes which have been implemented in the judicial system confirm the veracity of Ukraine's attempts to integrate towards European standards of justice. The first notable example of this is the introduction of e-justice, which has emerged and continues to evolve as an integral part of the e-government

³⁰ ROMANYUK, Y.: Reforming the judiciary in Ukraine. *Law Of Ukraine*, 11, 2014, pp. 119-126.

³¹ Law of Ukraine, № 1402-VIII "On the Judiciary and the Status of Judges". (2016). Available at: <<https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>>.

³² Civil Procedure Code of Ukraine. (2004). Available at: <<https://zakon.rada.gov.ua/laws/show/1618-15?lang=en>>.

³³ Criminal Procedure Code of Ukraine. (2012). Available at: <<https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>>.

model, an increasingly important aspect of the modern information society. This model is designed to provide fast and efficient services to the public and is intended to relieve some of the burdens placed upon the judicial system as a whole; the system should also lead to faster and better consideration of cases by judges. Benefits such as allowing information on the stages of a court case to be made available more promptly or sending procedural documents by e-mail to the parties to the trial contribute towards simplifying the judicial process and provide new opportunities to improve impartial judicial reviews. Moreover, the need to disclose information in bankruptcy cases will oblige the court to consider such cases objectively and impartially. A direct manifestation of the impartiality and fairness of e-justice is also strengthened by ensuring the possibility of external audits.

Another important development came on 1 June 2023, when the High Council of Justice appointed the authorised members of the High Qualification Commission of Judges of Ukraine (HQCJ), thereby unblocking the work of the key body for the formation of the judiciary. This move has huge implications for ensuring the right to an impartial trial, as it will allow the selection of judges for more than 2,000 vacant positions and complete the qualification assessment of judges, and it is hoped that these measures will do much towards restoring public confidence in the judiciary. The sustainable and democratic development of the state is impossible without access to justice for all citizens, and the formation of the new High Qualification Commission of Judges was a top priority for Ukraine, an important step on the path to EU candidatureship.

Similarly, the Decision of the National Security and Defence Council of Ukraine of 23 June 2023 “On Accelerating Judicial Reform and Overcoming Corruption in the Justice System” once again showed the vector of Ukraine’s movement towards European integration. It also pointed out the need for further reform of the judicial system and the implementation of a system of urgent steps to restore confidence in the judiciary.³⁴

This need was also the motivation behind the Law on clarifying the procedure for selecting judges of the Constitutional Court of Ukraine. One of the main innovations of this legislation was the creation of an independent body, the Advisory Group of Experts, the main task of which is to assess the professional and moral qualities of candidates for the position of constitutional judge. An innovative feature of the Advisory Group is the fact that half of the members of the Group are representatives of Ukraine’s international partners. This step is necessary to ensure the impartiality and objectivity of the Court and to protect it from political pressure. Currently, several judicial vacancies remain open in the Constitutional Court, and this law guarantees that only candidates with high moral and professional qualities and a capacity for impartiality and objectivity will be appointed to the Court.³⁵

³⁴ Decision of the National Security and Defence Council of Ukraine, „On Accelerating Judicial Reform and Overcoming Corruption in the Justice System“. (2023). Available at: <<https://www.president.gov.ua/documents/3592023-47185>>.

³⁵ Law of Ukraine, № 3277-IX „On Amendments to Certain Legislative Acts of Ukraine to Clarify Provisions on Competitive Selection of Candidates for the Position of a Judge of the Constitutional Court of Ukraine“. (2023). Available at:

While these reforms are crucial steps on the path to European integration, Ukraine still faces a number of challenges in terms of ensuring impartial judicial proceedings.

The first of these is the continuing political influence on the judiciary, with powerful political actors interfering with deliberations in certain cases through bribery and rampant corruption among judges and court staff. Whether individually or in total, such actions undermine public trust in the court and its objectivity and also damage Ukraine's reputation with its international partners. The main obstacle to the full compliance of judges with the rule of law and objectivity in their professional activities is, to a large extent, due to the unsatisfactory remuneration and material support which does not adequately reward them for the difficult conditions under which they work. Moreover, the number of cases assigned to judges is increasing year on year. This not only affects the quality of the investigation of the circumstances of the cases, but also the correctness and fairness of the decision. At the same time, to put it bluntly, the desire among judges to carry out their duties well under such a heavy workload and the discrepancy between the salary and the workload, is gradually declining, and this goes hand in hand with the increased temptation to accept benefits from one or other of the parties in a case. This trend obviously poses a huge threat to the impartiality of the legal system.

The importance of judicial independence cannot be overstated. It must be strictly observed, as it is very easy for citizens to lose confidence in this principle. Ukraine should take into account the experience of the European countries analysed above and other more recent accessions to the EU such as Hungary and Poland. The latter have been criticised for measures that, in the opinion of some, undermine the independence of their judiciaries. By adopting amendments to the legislation, including in the aspect of the formation of the judges of the Constitutional Court, Ukraine has shown that it is moving in the right direction.

Another challenge is the unsatisfactory working conditions of judges. The condition of court facilities in many regions leaves much to be desired, with many long-neglected buildings failing to meet basic sanitary and epidemiological standards. This physical factor should also be considered in addition to the more purely legal reforms described above.

The next challenge is the untimely consideration of cases due to the ongoing hostilities on the territory of Ukraine. Constant rocket attacks and power cuts (especially in autumn and winter) cause significant obstacles to the consideration of cases. Courts are not always able to record court hearings in accordance with the law. In an effort to address this problem, a draft law has been developed at the legislative level to allow courts to hold hearings and deliver judgements in the absence of electricity without violating procedural requirements.³⁶

<https://ips.ligazakon.net/document/T233277?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl01&_ga=2.76801553.56297494.1696276136-1280524593.1696276136#_gl=1*1acddx3*_gcl_au*NDgzNDA5ODI4LjE2OTYyNzYxMzY>.

³⁶ MASLOV, D.: War is about challenges, decisions and steps that society expects. In: *lb.ua*, December 28, 2022. Available at: <https://lb.ua/news/2022/12/28/540556_viyna-tse_vikliki_rishennya_i_kroki.html>.

Given these difficulties, it should be noted that any, even minimal, doubt by a party to the proceedings as to the judge's impartiality should be the subject of a separate hearing, and it is judges themselves who must prove their impartiality in a manner that is absolutely clear to an outside observer. If they are unable to do so, the judge must withdraw from the case by recusal.

If it wishes to become a member of the European Union, Ukraine needs to carry out many reforms and overcome a wide range of obstacles and problems. In carrying out reforms and improving legislation, it is important to harmonise its provisions with those of the European Convention on Human Rights. After all, Ukraine is a member of the Council of Europe and falls under the jurisdiction of the ECHR. If they believe that their rights, including the right to an impartial trial, have been infringed, Ukrainian citizens have the direct right to apply to the ECHR to have their case considered. European values must be respected in ensuring the right to an impartial trial as a basic principle of the European Union and the European Convention on Human Rights.

Conclusions

As we have seen, judicial impartiality is a key characteristic of the right to a fair trial. This statement specifies that all judges must act objectively and make their decisions on the basis of the relevant facts and applicable law, free from personal bias or prejudiced ideas about the subject matter of the dispute and the persons involved and without favouring the interests of any party.

The analysis of the current legislation indicates that Ukraine is beginning to reform its judicial system and improving the provisions of the legislation in accordance with European values and legal acts. The analysis has shown this within the context of the experiences of individual states and their legal establishment of requirements for an impartial trial.

The current legislation of Ukraine contains provisions aimed at ensuring the independence and impartiality of judges, but these are more general recommendations than specific legal requirements. In our opinion, the provisions on the objectivity and impartiality of judges in the performance of their duties should be clarified in more detail, primarily in terms of providing legal definitions of "impartiality", "objectivity" and "an impartial trial". These facts are fundamental institutional requirements of the right to a fair trial and components of the rule of law which is recognized as one of the foundations of the judiciary.

However, recent changes in legislation, for example, in the context of the procedure for selecting candidates for the position of a judge of the Constitutional Court of Ukraine, already indicate the introduction of a specifically established mechanism for selecting and filling vacant positions which prioritises high professional and moral qualities.

The study also highlighted the need to make changes to the current legislation on the remuneration of judges and their workload. It is no surprise that independent and

impartial judges, who possess a high level of professional skills, high standards of integrity and decent remuneration, will be less prone to corruption mechanisms and fraudulent manipulations. Strong judicial institutions which are independent and impartial in the performance of their functions are essential in order to minimize the incidence of corruption. Unfortunately, persisting evidence of corruption in the justice system exists in many parts of the world, and the public acceptance of judicial corruption is also highly concerning. For many people, the judiciary is equated with a direct manifestation of corruption, so it is therefore essential that the causes of such phenomena must be investigated and eliminated.

However, the existence of effective legislation and decent remuneration of judges is only part of the process, because the culture of the rule of law should be reflected in all legal aspects. Based on the European experience of compliance with the principle of the rule of law, we suggest the consideration of the following steps to reduce the risk of bias in judicial proceedings:

1. to conduct in-service training of judges on the basis of comprehensive cooperation with European colleagues not in terms of specific legal norms, but to focus on the rule of law, its components and its role in court proceedings;
2. to create a program for mentoring judges, with former EU judges assisting Ukrainian colleagues on an exclusively confidential basis;
3. to carry out monitoring based on the above measures in order to prevent the appearance of bias in judicial proceedings, and to conduct analysis and present statistics based on the obtained data.

Our research has presented an in-depth analysis of the problem of impartiality in court proceedings in Ukraine. However, there are various cases where the right to a fair trial is guaranteed by law and international documents, but not in practice. Therefore, our conclusions will help to bring the practical aspect of the impartiality of the trial in accordance with the normative aspect, while creating an ideal balance of guaranteeing the rule of law in the judicial system.

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