*Polina Smirnova*

**ACCESS TO AN INDEPENDENT AND IMPARTIAL COURT IN UKRAINE**

Independent and impartial courts are fundamental elements in every country’s legal system that ensures the proper functioning of the rule of law principle, in particular, checks and balances system. They make it possible for the judiciary as one of the three branches of power to act without external influence, which provides the right to a fair and public hearing within a reasonable time by an independent and impartial court, which is one of the basic human rights and is enshrined in Article 6 (1) of the European Convention on Human Rights (ECHR) [1].

Therefore, the **key elements of a fair trial** are as follows: access to court, publicity of the trial, reasonable time for consideration, equality of participants, proper procedure for consideration of the case. Herewith, I’d like to emphasize that the very principles of independence and impartiality seem to be the most crucial in this respect, since as practice shows, any court cannot function properly and ensure a fair outcome of the case, as well as trial proceedings if it is being influenced by any interested parties who do not have any direct and/or visible connection to the case, even if the consideration of the case is done in reasonable time and the trial is held publicly [2].

**Independence** means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation. The European Court of Human Rights (ECtHR) points out **four elements of judicial independence:** the manner of appointment, term of office, the existence of guarantees against outside pressure, including in budgetary matters, and whether the judiciary appears as independent and impartial (ECtHR judgement *Campbell and Fell v. the United Kingdom*, 28 June 2014, 7819/77 and 7878/77, § 78) [3, p. 35].

**Impartial court** means that the judicial branch is not prejudiced as to the outcome of the case [4, p. 12]. Impartiality of the judiciary must be ensured in practice, as well as in the law. The classical formula, as expressed for instance by the case-law of the ECtHR, is that “justice must not only be done, it must also be seen to be done” (ECtHR judgement *De Cubber v. Belgium*, 9186/80, 26 October 1984, § 26: *Micallef v. Malta*, 17056/06, 15 October 2009, § 98; *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, § 106). This implies objective, as well as subjective impartiality. The public’s perception can assist in assessing whether the judiciary is impartial in practice [3, p. 38].

Thus, the appointment and promotion of judges shall not be based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so [4, p. 35]. Another important consideration is, that the limited or renewable terms of office may make judges dependent on the authority which appointed them or has the power to re-appoint them [4, p. 35]. Sufficient resources are also essential to ensure judicial independence from state institutions and private parties, so that the judiciary can perform its duties with integrity and efficiency (for instance, the reduction of the judiciary’s budget by executive power as an example of how the resources of the judiciary may be placed under undue pressure) [4, p. 36]. Fair and sufficient renumeration is a concrete aspect of financial autonomy of the judiciary, it is a mean to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals [4, p. 37]. The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judgements when applying the law; judgements should not be a subject to supervision by their colleague-judges, and *a fortiori* to any executive hierarchical power, exercised, for instance, by civil servants, such supervision would contravene their individual independence [4, p. 38].

When it comes to the implementation of the independence and impartiality of court principles in Ukraine, it is important to mention that anti-corruption and judicial reforms were undertaken in 2014 and 2020 – 2021 to deal with problems in Ukrainian judicial system connected to violations of the rule of law principle, mainly concerning problems with independency of judges, connected to oligarchic interests and their potent influence.

I would like to name several gaps in Ukrainian legislation through giving example of a famous ECtHR case against Ukraine, namely the judgement of ***Oleksandr Volkov v. Ukraine***,[2] where Mr Volkov was working as a judge of a local court since 1983 (when the legislation did not demand taking an oath by a judge), and then in 2001 he was appointed as a judge of the Supreme court of Ukraine, from the office of which he was illegally dismissed by the Parliament (political authority) of Ukraine for an alleged breach of an oath in 2010. However, there was no strict and precise definition in Ukrainian legislation of the very concept of “the violation of an oath by a judge”.

Thus, the reason for his dismissal was violation of an oath, and the procedure of this dismissal was later considered by the ECtHR as not independent and heavily politicized. This case directly caused the abovementioned reform, pointing out serious and systematic problems in Ukrainian judicial system, that are partly resolved at the moment. These issues included: inability to ensure a proper functioning of the checks and balances system, which leads to political and other dependence of courts and judges; politicization of the mechanism of formation of the judiciary, which causes significant political influence on it; absolute defencelessness of judges against unjustified disciplinary prosecution, in this case, against charges of violation of an oath, which with the other circumstances mentioned above, create an environment where judges are completely dependent, cannot guarantee their impartiality, thus cannot ensure the proper functioning of the rule of law.

Based on this, the necessary changes to the Constitution of Ukraine were made in 2016. According to those changes [5], the **High Council of Justise**, a newly created organ, became responsible for appointing and dismissing judges, which was a crucial change in the context of independence of judges, considering the fact that before these changes were made Verkhovna Rada was responsible for the tasks mentioned, which caused a lot of risks for the proper functioning of the checks and balances system.

Also, in the context of reforms that directly affect the level of independence of judges in Ukraine, it is important to mention the Law adopted in 2021 and resumed the work of the **High Qualification Commission of Judges**, which is an institution responsible for the formation of the judiciary, transfer of judges, and ensuring their proper qualification level [6]. Furthermore, according to the Law of Ukraine “On the Judiciary and the Status of Judges”, another new institution was created – the **Public Council of** **Integrity**, which, according to the Law, “is established to assist the bodies electing (appointing) members of the High Council of Justice in determining whether a candidate for the position of a member of the High Council of Justice meets the criteria of professional ethics and integrity” [7, art. 87].

Moreover, in 2016, within the framework of the reform of the judicial system, a new Supreme Court of Ukraine was established, where judges were selected due to the new competitive procedure, according to the Regulation on holding a competition for a vacant position of a judge [8], approved by the High Qualification Commission of Judges of Ukraine. As it is stated in this regulation, “the competition for vacant positions of judges of the Supreme Court is held on the basis of the rating of participants based on the results of the qualification assessment”.

As for now, after gaining an EU candidate state status Ukraine’s first step includes meeting a number of requirements set by the European Commission, which caused more reforms in our judicial system. Thus, it is crucial to cover Constitutional court reform, where on the 20th of August 2023 a new Ukrainian Law was adopted [9], which mainly focused on changing a procedure of competitive selection of candidates for the position of a judge of the Constitutional Court of Ukraine (CCU). Some key changes established by this new Law include: establishing an Advisory Group of Experts (AGE) consisting of Ukrainian and international experts who are responsible for the evaluation of professional competence and moral qualities of candidates for the position of a judge of the CCU and who have the deciding vote; CCU candidate judges are now able to undergo background checks during martial law [9], which was welcomed by the Venice Commission in its opinion from 16 – 17 December 2022 [10] and follow-up opinion from 9 – 10 June 2023 [11].

To conclude, on the one hand, the EU posted their opinion on recent changes in the context of fulfilling 7 groups of requirements, especially on the CCU reform and the reform of our judicial system, stating that: “The EU welcomes Ukraine’s recent significant efforts in consolidating the rule of law, despite the ongoing military aggression by Russia” [12]. Also, the Venice Commission stated in the follow-up opinion from 9 – 10 June 2023, that “despite the war of aggression of the Russian Federation against Ukraine, the Ukrainian authorities, as well as civil society, have shown an exemplary willingness to move forward with the reforms and to implement the Venice Commission recommendations” [11]. This shows that although the reform is still ongoing and there are a lot of obstacles on our way on creating independent and impartial courts in Ukraine, we are making a lot of progress, which is recognized by international community.

On the other hand, in the process of implementing reforms, there are some crucial recommendations. So, the European Commission in Ukraine 2023 report mentioned the following recommendations: “…relaunch the selection of ordinary judges on the basis of the improved legal framework, including clear integrity and professionalism criteria and the strong role of the Public Integrity Council; resume the evaluation of the qualification of judges (vetting), which was suspended in 2019” [13]. All this confirms that although the process of implementing innovations is ongoing despite Russian aggression, some of the reforms are accomplished poorly (for example, the Supreme Court of Ukraine reform where a new court was created to perform a high-quality personnel renewal on a competitive basis, but as a result of improper execution of this reform the old court was deprived of its powers illegally, thus resulting in a situation where 9 judges from the SCU were simply enrolled to the SC without a procedure of a fair competition), which, unfortunately, leads to a significant delay in a process of creating independent and impartial courts.

**List of references:**

1. The European Convention on Human Rights. 1950. URL: <https://www.echr.coe.int/documents/d/echr/convention_ENG> (accessed: 14.02.2024).
2. Venice Commission. Report on the Rule of Law. 2011. URL: <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e> (accessed: 14.02.2024).
3. ECHR judgement. *Oleksandr Volkov v. Ukraine.* 2013. URL: <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-115871%22]}> (accessed: 14.02.2024).
4. Venice Commission of the Council of Europe. The Rule of Law Checklist. 2016. URL: <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> (accessed: 14.02.2024).
5. Law of Ukraine “On Amendments to the Constitution of Ukraine (regarding justice)”. Official web portal of the *Parliament of Ukraine*. 2016. [In Ukrainian]. URL: <https://zakon.rada.gov.ua/laws/show/1401-19#Text> (accessed: 14.02.2024).
6. Law of Ukraine “On Amendments to the Law of Ukraine “On the Judiciary and the Status of Judges” and Certain Laws of Ukraine on the Restoration of the Work of the High Qualification Commission of Judges of Ukraine”. 2021. [In Ukrainian]. URL: <https://zakon.rada.gov.ua/laws/show/1629-20#Text> (accessed: 14.02.2024).
7. Law of Ukraine “On the Judiciary and the Status of Judges”. 2016. [In Ukrainian]. URL: <https://zakon.rada.gov.ua/laws/show/1402-19#Text>. (accessed: 14.02.2024).
8. Regulations on holding a competition for a vacant position of a judge, approved by the decision of the Qualification Commission of Judges of Ukraine from 02 November 2016 No. 141/зп-16. [In Ukrainian]. URL: <https://vkksu.gov.ua/sites/default/files/polozhennya_0.pdf> (accessed: 14.02.2024).
9. Law of Ukraine “On Amending to some Legislative Acts of Ukraine on Clarification of Provisions on Competitive Selection of Candidates for the Position of Judge of the Constitutional Court of Ukraine”. 2023. [In Ukrainian]. URL: <https://zakon.rada.gov.ua/laws/show/3277-20#Text> (accessed: 14.02.2024).
10. The Venice Commission. Opinion on the draft law “On Amending to some Legislative Acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis”. 2022. URL: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)054-e> (accessed: 14.02.2024).
11. The Venice Commission. Follow-up opinion to the opinion on the draft law “On Amending to some Legislative Acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis”. 2023. URL: <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)022-e> (accessed: 14.02.2024).
12. Peter Stano, Paloma Hall Caballero. Ukraine: Statement by the Spokesperson on the appointments of High Council of Justice members and the reform of the Constitutional Court. Published on 13 January 2023. An official website of the *European Union*. European Union External Action. The Diplomatic Service of the European Union. URL: <https://www.eeas.europa.eu/eeas/ukraine-statement-spokesperson-appointments-high-council-justice-members-and-reform-constitutional_en> (accessed: 14.02.2024).
13. European Commission. Ukraine 2023 Report. URL: <https://neighbourhood-enlargement.ec.europa.eu/document/download/bb61ea6d-dda6-4117-9347-a7191ecefc3f_en?filename=SWD_2023_699%20Ukraine%20report.pdf> (accessed: 14.02.2024).
14. Law of Ukraine “On the Constitutional Court of Ukraine” from 2017. [In Ukrainian]. URL: <https://zakon.rada.gov.ua/laws/show/2136-19#Text> (accessed: 14.02.2024).
15. Law of Ukraine “On the legal regime of martial law”. 2015. [In Ukrainian]. URL: <https://zakon.rada.gov.ua/laws/show/389-19#Text> (accessed: 14.02.2024).
16. Law of Ukraine “On the High Council of Justice”. 2016. [In Ukrainian]. *LIGA:ZAKON*. URL: <https://ips.ligazakon.net/document/t161798?an=1243> (accessed: 14.02.2024).