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JUDICIAL INDEPENDENCE AND IMPARTIALITY OF JUDICIAL PROCEEDINGS IN THE SYSTEM OF PRINCIPLES OF MODERN CONSTITUTIONALISM UNDER SPECIAL LEGAL REGIMES

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INTRODUCTION

Modern constitutionalism is based on the idea of limiting public power by law, and its practical implementation primarily lies in the functioning of an independent and impartial judiciary. Judicial independence and the impartiality of judicial proceedings serve not only as organizational foundations of justice, but also as key guarantees for the implementation of the rule of law and the effective protection of human rights and freedoms.

In constitutional and legal doctrine, judicial independence is understood as the institutional and personal autonomy of the judiciary from the legislative and executive branches, as well as from any other unlawful influence. Judicial impartiality, in turn, is a functional dimension of independence that manifests directly in the administration of justice and is assessed from the perspective of the parties and society as a whole.

Judicial independence and the impartiality of judicial proceedings are traditionally regarded as key elements of modern constitutionalism, without which the genuine assurance of the rule of law, the effective protection of human rights and freedoms, and public trust in the judiciary are impossible. Under conditions of special legal regimes, in particular martial law or a state of emergency, these principles do not lose their significance. On the contrary, it is precisely in crisis circumstances that the risk of concentration of power, the narrowing of procedural guarantees, and, as a consequence, the disruption of the balance between public interests and individual rights increases. In this context, the judiciary acquires the role of a stabilizing constitutional institution.

In the case law of the European Court of Human Rights (ECtHR), judicial independence and impartiality are regarded as interrelated components of the right to a fair trial guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court consistently emphasizes that judicial independence is assessed concerning the method of appointment of judges, the duration of their terms of office, the existence of safeguards against external pressure, and the outward manifestations of institutional autonomy. At the same time, impartiality has both a subjective and an objective dimension, which is of particular importance in conditions of social tension and extraordinary circumstances.

The ECtHR consistently proceeds from the premise that the introduction of special legal regimes does not imply an automatic derogation from all Convention guarantees. Even in the event of an official derogation pursuant to Article 15 of the Convention, the state may not negate the very essence of the right to a fair trial.

The judiciary must retain the capacity to exercise effective oversight over the actions of the other branches of power.

In this context, judicial independence and impartiality perform the role of the "red lines" of constitutionalism, which the state may not cross even under conditions of martial law. Any procedural simplifications, changes in jurisdiction, or restrictions on access to court must be proportionate, temporary, and duly justified.

The ECtHR has repeatedly emphasized that even under a state of emergency or martial law, the state is not relieved of its obligation to ensure minimum standards of judicial independence. Special legal regimes may give rise to certain procedural restrictions; however, they must not undermine the very essence of the right to a fair trial or create an appearance of the judiciary's dependence on the executive or legislative branches of power.

These approaches of the European Court of Human Rights logically lead the research to a more general level of reflection on the fundamental principles governing the functioning of the judiciary. Indeed, the requirement to preserve judicial independence even under extraordinary legal regimes directly derives from the principle of the rule of law as a core value of a democratic state. It is precisely through the prism of this principle that the permissibility of any restrictions on rights and freedoms, as well as the limits of influence of other branches of power on the administration of justice, are assessed–an approach that finds its doctrinal and institutional reflection in the positions of the Venice Commission.

The European Commission for Democracy through Law (the Venice Commission), in its report *"On the Rule of Law,"* stated that the rule of law is an integral component of any democratic society. Moreover, it is regarded as a specific marker–a litmus test and a reflection of whether laws operate in a given state and whether universal human values are respected. This appears entirely logical, since, based on the very essence of the concept of the "rule of law," all persons responsible for decision-making must treat every individual with respect for their dignity, adhere to the principle of equality, act rationally and in accordance with the law, and each person must have the opportunity to challenge any unlawful decisions before independent and impartial courts through a fair procedure (para. 16).

Moreover, in the above-mentioned report, the Venice Commission emphasized that in a state governed by the rule of law–that is, where it is observed by all without exception–the judiciary plays a key role in the protection of individual rights and freedoms guaranteed by international and national legal instruments, above all by the European Convention on Human Rights. This is explained by the fact that the judiciary acts as the guarantor of justice–a fundamental value of a state governed by the rule of law. On this basis, it is vitally important that the judiciary (which, pursuant to Article 124 of the Constitution of Ukraine, is exercised exclusively by specially authorized bodies–namely, the courts) be vested with the authority to determine which legal norms and of which legal acts apply to a specific situation, to adjudicate cases concerning the establishment of facts, and to apply the law thereto in

accordance with an appropriate–that is, sufficiently transparent and foreseeable–methodology of interpretation (para.54)[1].

It follows from the foregoing that the judiciary must be independent, that is, free from external pressure and not subject to political influence or manipulation, in particular on the part of the executive branch. This requirement constitutes an essential component of the fundamental democratic principle of the separation of powers. Judges must not be subjected to political pressure or manipulation[2].

1. The Right to Judicial Protection and the Principle of Judicial Independence in Ukraine

In Ukraine, the constitutional principle of judicial independence is enshrined in the Basic Law as one of the fundamental principles of the administration of justice and is further specified in the legislation on the judiciary and the status of judges. Judicial independence is regarded as an institutional guarantee of the realization of human rights and freedoms, which precludes unlawful influence by other branches of power and ensures the objectivity and impartiality of judicial decisions. The right to judicial protection at the national level is guaranteed by Article 55 of the Constitution of Ukraine, which enshrines everyone's right to challenge in court decisions, acts, or omissions of state authorities, local self-government bodies, and officials. At the same time, this right also has a clearly expressed international legal dimension, as it is provided for by several universal and regional international instruments, in particular the Universal Declaration of Human Rights (Articles 8 and 10) and the International Covenant on Civil and Political Rights (Article 14); however, its content is most fully and systematically elaborated in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In particular, paragraph 1 of Article 6 of the Convention declares that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall determine disputes concerning his or her civil rights and obligations or determine the validity of any criminal charge brought against him or her. Proceeding from the above, it may be asserted that the right to a fair trial has a complex, multi-level structure and encompasses several interrelated elements, each of which constitutes a necessary condition for its full realization. Such elements include: a) *the right to have one's case heard by a court*, ensuring access to justice; b) *the fairness of judicial proceedings* as a requirement of due process of law; c) *the publicity of court proceedings and the pronouncement of judicial decisions* as a guarantee of transparency of justice; d) *a reasonable time for the consideration of a case*, aimed at avoiding excessive delays in proceedings; e) *the consideration of a case by a tribunal established by law*, which presupposes

[1] Доповідь Європейської комісії «За демократію через право» (Венеційська комісія) від 04.04.2011 № 512/2009, схваленої Комісією на 86-му пленарному засіданні 25–26 березня 2011 року «Верховенство права» (CDL-AD (2011) 003rev). URL: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev2-ukr (дата звернення: 20.01.2026).

[2] Мірило правовладдя. Дослідження № 711/2013: ухвалено Європейською Комісією «За демократію через право» (Венеційська комісія) на 106-му пленарному засіданні (Венеція, 11–12 березня 2016 р.) /неоф. пер. з англ. С. Головатого. 2017. С. 17.

compliance with the rules of jurisdiction, competence, and the lawful composition of the court; f) *the independence and impartiality of the court* as key conditions for public trust in the judiciary and the legitimacy of its decisions. Taken together, these elements form a single standard of a fair trial, which is binding on the state both under normal circumstances and in the presence of special legal regimes.

However, a universal guarantee–that is, one that can be applied to the realization and protection of almost all fundamental human and civil rights and freedoms–is the right of access to a court. In this sufficiently developed and extensive sphere of the protection of human rights and freedoms, Article 55 of the Constitution of Ukraine is pivotal. Thus, the first paragraph of the said article establishes the right to judicial protection, which in international practice has come to be known as the "right to a court" or the "right to justice." Since in this right it is not the proclaimed aim but the result that is decisive, it is conditioned by rather strict criteria and standards. The right to a fair trial is a fundamental principle underlying the entire system of guarantees of human rights and freedoms.

The requirements of universality and practical effectiveness of the protection of human rights, which underlie the Convention for the Protection of Human Rights and Fundamental Freedoms, may in certain cases justify the primary involvement in a case of bodies that do not directly exercise a judicial function. Such an approach is обусловлено the need to ensure real, rather than merely formal, access of an individual to mechanisms for the protection of his or her rights, especially in situations where traditional judicial procedures are excessively lengthy or ineffective. Illustrative in this context is the judgment of the ECtHR in the case of *Oleksandr Volkov v. Ukraine* of 1 September 2013, in which the Court found the involvement of the Verkhovna Rada of Ukraine in the procedure for dismissing a judge to be permissible, while at the same time emphasizing that such involvement does not relieve the state of the obligation to ensure subsequent effective judicial review of the relevant decisions. A similar approach can also be observed in the case-law of the ECtHR concerning administrative authorities and professional bodies, as well as quasi-judicial institutions, which in themselves may not fully comply with the requirements of Article 6 of the Convention, in particular the criteria of independence and impartiality. In the case of *Le Compte, Van Leuven and De Meyere v. Belgium*, the Court stressed that what is decisive is not so much the initial nature of the body examining the case as the existence of subsequent judicial control by a court that meets the standards of a fair trial. Thus, the case-law of the ECtHR demonstrates a functional approach to the assessment of mechanisms for the protection of human rights, within which a multi-level decision-making model is permissible, provided that a final judicial review is ensured in compliance with the principle of the rule of law.

It should be emphasized that the right to judicial protection has a complex, multi-component legal nature and may simultaneously operate in two interrelated dimensions. First, it constitutes a procedural right, the exercise of which is ensured through the functioning of a mechanism by which the state fulfills its constitutional obligation to guarantee human and civil rights and freedoms. A violation of this right, in turn, enables an individual to challenge the relevant acts or omissions of public authorities before the competent national bodies, primarily the courts, as well as–after the exhaustion of domestic legal remedies–before international judicial

institutions. Second, the right to judicial protection simultaneously serves as a legal guarantee, that is, as an autonomous legal instrument ensuring the reality and effectiveness of the entire system of human rights and freedoms. It is precisely through access to an independent and impartial court that rights proclaimed in legal instruments are transformed into rights that are genuinely exercisable and effectively protected.

In this context, the right-guarantee to judicial protection belongs to the category of fundamental, inalienable human rights and freedoms that constitute the core of an individual's legal status in a democratic state governed by the rule of law. Its significance lies not only in the possibility of restoring a violated right, but also in the preventive restraint of arbitrariness on the part of state authorities and officials. In view of this, the right to judicial protection may not be abolished or restricted even under conditions of martial law or a state of emergency, since any derogation from it would undermine the very foundations of the rule of law and deprive the individual of an effective mechanism for the protection of his or her dignity, rights, and legitimate interests.

There are various approaches to defining the right to judicial protection. Thus, the right to judicial protection is understood as a complex right of an individual, consisting of a number of procedural and substantive-law elements that ensure unhindered access to a court, fair justice, and full and effective restoration of rights [1, p. 303][3].

According to V. V. Lemak, "the right to judicial protection is the subjective public right of an individual to access the independent and impartial resolution of disputes in accordance with an established legal procedure, based on the rule of law and justice" [2, p.119][4]. The procedural aspects of this right consist of the opportunities afforded to an individual at the stage of judicial proceedings (the right of access to a court, the right to personal participation in the case, the right to be heard by a lawfully constituted court, the right to appeal a judicial decision, the right to seek its enforcement, etc.). The substantive-law aspect of the right under consideration is associated with the restoration of a violated or disputed right or a legally protected interest, which constitutes the subject matter of judicial review.

The significance and content of the right to judicial protection have also been repeatedly addressed in the decisions of the Constitutional Court of Ukraine. According to the legal positions of the Constitutional Court of Ukraine, the rule of law, as one of the fundamental principles of a democratic society, presupposes judicial control over interference with every person's right to liberty; the constitutional right to judicial protection is a guarantee of all human and civil rights and freedoms (para. 9, item 9 of the reasoning part of the Decision of 30 January 2003 No. 3-rp/2003; para. 14, sub-item 4.1, item 4 of the reasoning part of the Decision of 2 November 2004 No. 15-rp/2004; para. 1, sub-item 2.2, item 2 of the reasoning part of the Decision of 1 June 2016 No. 2-rp/2016; para. thirteen, sub-item

[3] Конституційне право України: підручник / [Т.М. Слінько, Л.І. Летнянчин, Ф.В. Веніславський та ін.]; за заг. ред. Т.М. Слінько.- Харків: Право, 2020. – 592 с. С. 303.

[4] Лемак О.В. Соціальна і правова природа права на судовий захист в умовах перехідного конституціоналізму в Україні / О.В. Лемак //Науковий вісник Херсонського державного університету. – Серія «Юридичні науки». – 2014. –Вип. 3.-Т.1. – С. 119.

2.1, item 2 of the reasoning part of the Decision of the Constitutional Court of Ukraine of 23 November 2017 No. 1-r/2017).

It should be noted that within the mechanism for guaranteeing constitutional rights and freedoms, the court occupies a key position. First, the Constitution defines the court as the body which, in most cases, decides issues relating to restrictions on the exercise of constitutional rights and freedoms (Parts 2 and 3 of Article 29, Part 2 of Article 30, Article 31, Part 4 of Article 37, Part 2 of Article 39, Part 6 of Article 41, Part 3 of Article 47). Second, pursuant to Part 3 of Article 8 of the Basic Law, recourse to a court for the protection of constitutional rights and freedoms directly based on the Constitution is guaranteed; according to Part 1 of Article 55 of the Constitution of Ukraine, human and civil rights and freedoms are protected by the court. The Constitution guarantees the possibility of challenging in court decisions, acts, or omissions of state authorities, local self-government bodies, and officials (Part 2 of Article 55). Taking into account the important role of this body, one of the objectives of the judicial constitutional reform of 2 June 2016 was, in particular, «to ensure everyone's right to a fair hearing of a case by an independent and impartial court.»

According to the European Commission for Democracy through Law (the Venice Commission), «judicial independence is not only the independence of the judicial system in relation to the other branches of power; it also has an internal aspect. Every judge, regardless of his or her position within the judicial system, exercises the same powers in relation to other judges; <…> a judge makes decisions exclusively based on the Constitution and the legislation of the country, and not based on instructions given by higher-ranking judges»[5].

2. Judicial Independence and Impartiality: Standards Established by the European Court of Human Rights

The European Court of Human Rights, in its well-established case-law, consistently emphasizes the multidimensional nature of judicial independence, viewing it as a key prerequisite for the realization of the right to a fair trial. In particular, the Court identifies four interrelated components of judicial independence: first, the method of appointment of judges, which must be designed to minimize the risks of political influence and to ensure the transparency and objectivity of the relevant procedures; second, the term of office of judges, which should guarantee the stability of their status and protect them from arbitrary dismissal or non-renewal of their mandate; third, the existence of effective institutional and legal safeguards against external pressure, including from other branches of power, in particular in the financial and budgetary sphere, which may serve as an instrument of indirect influence on the administration of justice; and fourth, the manner in which the judiciary appears in the eyes of society, that is, whether the court is «seen» as an independent and impartial body. The latter element is of particular importance, since, according to the ECtHR's approach, justice must not only be administered impartially, but must also appear to be administered

[5] Доповідь Європейської Комісії «За демократію через право» (Венеційська комісія) щодо незалежності судової системи, частина I: незалежність суду: прийнята Венеційською комісією на 82 пленарному засіданні (Венеція, 12-13 березня 2010 р.), пункти 56, 71. Європейські та міжнародні стандарти у сфері судочинства. Київ, 2015. С. 88-105.

independently and objectively, with a view to maintaining public confidence in the judicial system. Taken together, these components form a coherent standard of judicial independence, failure to comply with which calls into question the conformity of the national judicial system with the requirements of Article 6 of the Convention and the principle of the rule of law.

The institutional elements of the right to a fair trial include the independence and impartiality of the court, as established by law. Let us consider the first component– *judicial independence*. One of the most important characteristics of a state governed by the rule of law, and a real and effective means of protecting human rights, is the independence of the judicial branch of power.

According to the Basic Principles on the Independence of the Judiciary, endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. All governmental and other institutions are obliged to respect and observe the independence of the judiciary.

Taking into account that the UN approach conceptualizes "impartiality" as a precondition for "independence," this requires further clarification. First of all, it should be noted that independence relates to the judicial body as such, to the court itself, whereas impartiality is connected with the individual; that is, a particular judge authorized to resolve a dispute between the parties must make decisions without favoritism. An additional distinction concerns "neutrality," which relates to the interests influencing a specific judicial case. As can already be seen, it is important to clarify the meaning of the correct/incorrect binary code: the judiciary is not isolated from society but is exposed to a multitude of influences, interests, and interactions, which, according to some scholars, should not be erased but rather metabolized in the pursuit of justice. Traditional jurisprudence finds the foundation of judicial independence in the parties' right to a fair trial***3[6],** since the Recommendation adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 (CM/Rec(2010)12) formulates the following provision: the purpose of independence, as referred to in Article 6 of the Convention, is to guarantee to every person the fundamental right to have his or her case decided within a fair trial solely based on law and without any improper influence. Accordingly, it is not a privilege of the judge, but a right of the citizen. This observation should be borne in mind when considering the issue that certain aspects of judicial independence are sometimes associated with corporatism, that is, with the professional interests of the judiciary as a lobby or as a self-sufficient group detached from society.

When determining whether a judicial body is independent, the ECtHR takes into account the following factors: 1) the procedure for appointing its members; 2) the duration of their term of office; 3) the existence of safeguards against external influence; 4) whether the court also presents outward signs of independence. For example, in its judgment in *Campbell and Fell v. the United Kingdom* of 28 December 1984, the Court formulated the basic criteria for assessing the

[6] Рішення КСУ від 30 січня 2003 р. № 3–рп/200. URL : https://zakon.rada.gov.ua/laws/show/v003p710-03#Text

independence of a court, which include the manner of appointment of judges, the length of their terms of office, the existence of guarantees against external pressure, and the institutional separation of the court.

In another judgment, the Court indicated that a tribunal must be "independent" both of the executive and of the parties to the case (see *Le Compte, Van Leuven and De Meyere v. Belgium* (1981), § 55), and also drew attention specifically to the procedure for appointing the members of the Disciplinary Board, the duration of their service as such (see ibid., § 57), the existence of guarantees against pressure being brought to bear on them (see *Piersack v. Belgium* (1982), § 27), as well as whether the body concerned displays outward attributes of independence (see *Delcourt v. Belgium* (1970), § 31).

The issue of a court's impartiality is traditionally analysed by the ECtHR through the prism of the subjective and objective tests, as clearly formulated in the cases of *Piersack v. Belgium* (1982) and *De Cubber v. Belgium* (1984). The subjective test is linked to the personal convictions of a particular judge, whereas the objective test concerns whether there are circumstances that may give rise to legitimate doubts, on the part of the parties, as to the court's impartiality.

Of particular importance for the analysis of contemporary challenges is the Grand Chamber judgment of the ECtHR in *Guðmundur Andri Ástráðsson v. Iceland* (2020), in which the Court emphasised that a breach of the procedure for the appointment of judges may call into question the legitimacy of a court as a "tribunal established by law". This approach is of direct relevance to the assessment of judicial institutions during periods of special legal regimes.

In cases against Poland, in particular *Reczkowicz v. Poland* (2021), *Dolińska-Ficek and Ozimek v. Poland* (2021), and *Xero Flor w Polsce sp. z o.o. v. Poland* (2021), the ECtHR found violations of Article 6 of the Convention in connection with problems concerning the independence of judicial bodies. The Court emphasised that even in conditions of political or institutional crisis, the State is obliged to ensure such mechanisms for the formation of the judiciary that do not create an appearance of its dependence.

As has already been emphasised, the term "independent" must mean both the independence of the judiciary from the other branches of power – the executive and the legislative (see the Court's judgment in *Zumtobel v. Austria* of 21 September 1993; see also *Kleyn and Others v. the Netherlands* (2003)) – as well as independence from the parties to the dispute (see the Court's judgment in *Sramek v. Austria* of 22 October 1984)[7]**[256].**

The case-law of the European Court of Human Rights (ECtHR) consistently proceeds from the understanding that the notion of an "impartial tribunal" has a complex content and encompasses two complementary elements – the subjective and the objective. The subjective element relates to the personal attitude of the individual judges toward the case and its participants and involves an assessment of whether members of the judicial body have displayed any personal bias, interest, or hostility. In this respect, the ECtHR proceeds from the presumption of the personal impartiality of a

[7] Рішення КСУ від 2 листопада 2004 р. № 15–рп/2004. URL : https://zakononline.com.ua/documents/show/246850___246915

judge, which may be rebutted only on the basis of convincing evidence to the contrary. The objective element, in turn, is aimed at assessing the external circumstances of the administration of justice and involves determining whether the court, from the standpoint of an external observer, could be perceived as sufficiently independent and impartial. Within this approach, the analysis concerns not only the conduct of individual judges but also the institutional and procedural guarantees of impartiality, in particular the manner in which the composition of the court is formed, the existence of grounds for recusal, as well as the overall context of the examination of the case. The ECtHR emphasises that even in the absence of proven facts of subjective bias, the mere appearance of a possible conflict of interests or doubts as to impartiality may be sufficient to establish a violation of Article 6 of the Convention, provided that such doubts are objectively justified. Thus, the Court's approach is aimed at ensuring the highest possible level of public confidence in the judiciary, since justice must not only be administered impartially, but must also be seen to be so in the perception of the parties to the proceedings and the public at large.

Thus, in *Fey v. Austria* (24 February 1993), the Court emphasised that the existence of impartiality within the meaning of Article 6 § 1 must be determined in accordance with both a subjective approach – that is, on the basis of the personal conviction of a particular judge in a given case – and an objective approach, which consists in assessing whether that judge offered sufficient guarantees to exclude any legitimate doubt in this respect.

In *Morris v. the United Kingdom* (26 February 2002), the Court explained the notion of the "impartiality" of a tribunal, stating that "there are two aspects to these requirements. First, the tribunal must be subjectively free of personal prejudice or bias. Second, it must also be impartial from an objective point of view, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."

The European Court of Human Rights has delivered some judgments against Ukraine in which it found violations of the requirements of Article 6 of the Convention due to non-compliance with the standard of judicial impartiality. In these cases, the Court consistently emphasised that impartiality is one of the key components of the right to a fair trial and must be assessed based on both subjective and objective criteria. In particular, in the case of *Belukha v. Ukraine* (9 November 2006), the issue concerned the bias of the President of the Artemivsk District Court, who had examined the applicant's cases at first instance as a single judge, while at the same time requesting and receiving property free of charge from the respondent company. In such circumstances, the applicant's fears as to the impartiality of the court president were found to be objectively justified, notwithstanding the fact that he had upheld one of the applicant's complaints during the proceedings and that his decisions had been upheld by the higher courts. The ECtHR concluded that the participation of a judge in the examination of a case in circumstances capable of giving rise to legitimate doubts as to his impartiality is incompatible with the requirements of the Convention, even in the absence of proof of personal bias.

In the case of *Reznichenko v. Ukraine*, the ECtHR also established the bias of the court of first instance that convicted the applicant and, consequently, a violation of Article 6 § 1 of the Convention, noting that the presiding judge, who had examined

the applicant's case as a single judge, herself had doubts as to her impartiality in the examination of that case.

Similar approaches were applied in the case of *Oleksandr Volkov v. Ukraine*, in which the Court drew attention not only to the individual conduct of judges, but also to systemic deficiencies in the procedures that created a risk of influence over the judiciary and undermined confidence in its impartiality. In some other cases against Ukraine, the ECtHR likewise emphasised that even formal compliance with procedural rules is not sufficient if the overall context of the case allows an external observer to doubt the impartiality of the court. Thus, the ECtHR's case-law concerning Ukraine demonstrates not only individual violations, but also the existence of structural problems in ensuring standards of judicial impartiality, which require comprehensive changes to the national judicial system in order to affirm the principle of the rule of law and restore public confidence in the administration of justice.

Another fundamental requirement of the right to a fair trial is that the tribunal must be established by law. This requirement is aimed at guaranteeing that the judicial branch of power in a democratic society does not depend on the executive authorities, but functions exclusively based on, and within the limits of, the law adopted by parliament. This approach was clearly formulated by the European Court of Human Rights in its judgment in *Zand v. Austria* of 12 October 1978, in which the Court emphasised that the principle of a "tribunal established by law" is one of the key institutional safeguards against the arbitrary administration of justice. Importantly, in that case, the Court also stated that the phrase "established by law" applies not only to the legal basis for the very existence of a "tribunal", but also to compliance by the judicial body with certain rules governing its organisation, composition, and the manner in which justice is administered. Notably, in Article 6 § 1 of the Convention, the term "tribunal established by law" is used to denote the entire organisational structure of the courts, including matters falling within the jurisdiction of particular categories of courts. In view of this, a body cannot be regarded as a "tribunal established by law" if, lacking proper jurisdiction or exceeding the powers conferred on it by law, it examines cases based on its own practice that is not provided for by the applicable legislation.

Similar approaches were consistently applied by the ECtHR in cases against Ukraine. In particular, in the cases of *Sokurenko and Strygun v. Ukraine* and *Veritas v. Ukraine*, the Court concluded that a violation of the requirement of a "tribunal established by law" had occurred due to the absence of a clear legislative provision conferring on the Supreme Court of Ukraine the authority to adopt the relevant decisions. The ECtHR emphasised that the general provisions of the Constitution of Ukraine relied upon by the Government could not be regarded as a sufficient legal basis for endowing the court with such specific competence, if it was not expressly provided for by procedural legislation. In the Court's view, by exceeding the limits of the powers clearly defined by the Commercial Procedural Code of Ukraine, the Supreme Court failed to meet the criterion of a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention.

In addition, in its case-law, the ECtHR has repeatedly drawn attention to the issue of the lawful composition of a court as a component of this requirement. For example, violations may occur in cases of unlawful replacement of judges,

participation of a judge appointed in breach of the procedure established by law, or examination of a case by a court sitting in an improper composition. In such situations, even the formal existence of a judicial body does not compensate for the absence of a clear and foreseeable legislative basis for its activity.

Thus, based on the established case-law of the ECtHR, a tribunal may be regarded as "established by law" only if the following conditions are met cumulatively: it must be created directly based on law, act exclusively within the limits of the competence defined by law, and administer justice in a lawful composition of the court with due observance of all procedural requirements. Failure to comply with any of these elements calls into question the conformity of the judicial proceedings with the standards of a fair trial and the principle of the rule of law.

3. Ensuring Procedural Fairness: Key Elements of the Right to a Fair Trial

The procedural elements of the right to a fair trial comprise a set of interrelated guarantees that ensure the real and effective exercise of an individual's right to judicial protection. First and foremost, this concerns the publicity (openness) of judicial proceedings, which is aimed at ensuring the transparency of the administration of justice and fostering public confidence in the judiciary. An open hearing enables public oversight of judicial activity and, at the same time, serves as a safeguard against possible abuses, allowing restrictions on this principle only in exceptional cases expressly provided for by law.

Another important procedural element is the adversarial nature of judicial proceedings, which presupposes that the parties are afforded equal opportunities to present their arguments, evidence, and objections before the court. Adversarial proceedings are closely linked to the principle of equality of arms, which implies the absence of significant procedural advantages for one party over another and imposes an obligation on the court to ensure a fair balance between the participants in the proceedings. According to the case-law of the ECtHR, a violation of this balance may lead to a finding that the proceedings were unfair, even where other procedural requirements have been formally complied with.

A separate and significant place among the procedural elements is occupied by the requirement of a reasonable time for judicial proceedings. This requirement is intended to prevent excessive delays and to ensure the timely resolution of disputes, since a prolonged state of legal uncertainty may in itself constitute a violation of an individual's rights. In assessing compliance with this requirement, the ECtHR takes into account the complexity of the case, the conduct of the parties and the public authorities, as well as the importance of the dispute for the applicant.

Thus, publicity, adversarial proceedings, equality of arms, and reasonable time form a unified system of procedural guarantees, without the observance of which it is impossible to ensure the full realisation of the right to a fair trial and the effective implementation of the principle of the rule of law.

Within this system of procedural guarantees, the principle of the publicity of judicial proceedings occupies a special place, acting as the primary and most visible form of ensuring the openness of justice. It is precisely through the requirement of publicity that the idea of transparency in judicial activity is realised, enabling society

to exercise control over the administration of justice and preventing the emergence of practices of so-called "secret justice". In this regard, it is appropriate to examine in greater detail the content and limits of the principle of the publicity of judicial proceedings in the light of the case-law of the European Court of Human Rights.

The publicity of judicial proceedings means an open court hearing at which any persons may be present during the examination of a case, as well as the public pronouncement of the court's decision. The requirements relating to the content of the principle of publicity are set out rather generally. In particular, they emphasise the significance of this element and its importance as a safeguard against secret justice. In addition, the Court points to transparency as a condition of publicity. In particular, in its judgment in *Pretto and Others v. Italy* of 8 December 1983, the ECtHR stated that "the public character of proceedings referred to in Article 6 § 1 of the Convention protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society within the meaning of the Convention." In another judgment, *Diennet v. France* of 26 September 1995, the Court observed that a public hearing protects litigants against secret justice removed from public scrutiny. It should be added that the guarantee of publicity of the administration of justice is important for the core objective of Article 6 § 1, namely, ensuring a fair trial. The ECtHR links the principle of publicity with the holding of an oral hearing. At the same time, the rule of publicity of judicial proceedings is not absolute and may be subject to limitations. In accordance with the Convention, such limitations may be imposed for: 1) protecting morals, public order, or national security; 2) protecting the interests of minors (for example, in proceedings concerning the residence of minors following the divorce of parents, or in disputes between members of the same family (*B. and P. v. the United Kingdom*)); 3) protecting the private life of the parties (this concerns disciplinary proceedings against doctors, as well as situations where the need to protect personal data and the private life of patients may justify holding hearings in camera, which must, however, take place only under a limited set of circumstances (*Diennet v. France*)); 4) securing the interests of justice (where it is necessary to restrict the open and public nature of proceedings to protect and guarantee the confidentiality of witnesses, or to allow the free exchange of information and opinions for the proper administration of justice (*B. and P. v. the United Kingdom*, § 38; *Osinger v. Austria*, § 45*)* [8]**[256].**

Another requirement of the principle of the openness of judicial proceedings is the public pronouncement of the court's judgment, which, under the provisions of the Convention, may not be subject to any restrictions. At the same time, in practice there are certain exceptions, namely cases in which, following a hearing held in camera, only the operative part of the judgment may be pronounced.

[8] Доповідь Європейської комісії «За демократію через право» (Венеційська комісія) щодо незалежності судової системи, частина I: незалежність суду: прийнята Венеційською комісією на 82 пленарному засіданні (Венеція, 12-13 березня 2010 р.), пункти 56, 71. Європейські та міжнародні стандарти у сфері судочинства. Київ, 2015. С. 88-105.

In addition, the following situations do not constitute a violation of the requirement of publicity: 1) where a higher court, which did not publicly pronounce its decision, dismissed an appeal on points of law – taking into account the need to assess the proceedings as a whole in the light of the national legal order and the role of the court within it (judgment of the Court in *Pretto and Others v. Italy* of 8 December 1983); 2) where an appellate court publicly pronounced a summary of its decision and upheld the decision of the court of first instance, which had held an oral hearing but had not publicly pronounced its judgment (judgment of the Court in *Lamanna v. Austria* of 10 July 2001); 3) in cases concerning the residence of children, where the absence of a public pronouncement of the judgment may be justified by the need to protect privacy, provided that the right to obtain written copies of the judgment is granted to persons who demonstrate a legitimate interest in the case (judgment of the Court in *B. and P. v. the United Kingdom* of 24 April 2001).

Having examined the operation of this principle at the international level, it should be noted that in Ukrainian procedural legislation, the principle of the publicity of judicial proceedings corresponds to the principles of openness and transparency of the judicial process. The principle of publicity of judicial proceedings is enshrined in Article 129 of the Constitution of Ukraine, while the principle of publicity and openness of judicial proceedings is proclaimed in Article 6 of the Civil Procedure Code of Ukraine, Article 12 of the Code of Administrative Procedure of Ukraine, Article 20 of the Criminal Procedure Code of Ukraine, and Article 11 of the Law of Ukraine "On the Judiciary and the Status of Judges", which establish the rules of publicity and openness of judicial proceedings.

The next important element of the right to a fair trial is the adversarial nature of the proceedings.

According to the case-law of the ECtHR, in judicial proceedings involving opposing private interests, none of the parties should enjoy a clear advantage and, accordingly, each must be able to present its case and advance its own arguments during a public hearing. The right to adversarial proceedings means that the parties in civil and criminal proceedings must have the opportunity to be aware of and to comment on all evidence or submissions presented in the case, including those made by an independent representative of the national bar, with a view to influencing the court's decision (see, for example, the Court's judgment in *Ruiz-Mateos v. Spain* of 23 June 1993). In addition, in the Court's view, fairness is manifested through compliance with procedural equality of the parties and the right to submit observations in response to the arguments of the opposing party. In particular, in its judgment in *Khuzhin and Others v. Russia*, the Court noted that the principle of adversarial proceedings is one of the aspects of the concept of a fair trial in relation to the factual circumstances of a case. In both criminal and civil cases, this principle requires that each party be afforded a reasonable opportunity to know and comment on the observations or evidence submitted by the other party, as well as to present its own case under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent.

Thus, the principle of adversarial proceedings implies the right to be informed of all evidence presented by the opposing party and to comment on it.

The principle of "equality of arms" in judicial proceedings, according to the ECtHR, constitutes an element of the broader concept of a "fair trial". Thus, in *Nideröst-Huber v. Switzerland*, the Court held that where observations submitted to the court are not communicated to one of the parties, this constitutes a violation not only of the principle of equality of arms, but also of the broader notion of the fairness of the proceedings.

In defining the "equality of the parties to judicial proceedings", the Court employs the concept of a "fair balance". The requirement of "equality of arms", understood as a "fair balance" between the parties, is in fact applied in both civil and criminal proceedings (*Feldbrugge v. the Netherlands*, § 44).

Under the notion of a "fair balance" between the parties, the ECtHR understands equality of arms as requiring that each party be afforded a reasonable opportunity to present its case and evidence under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party (*Dombo Beheer B.V. v. the Netherlands*; judgment of 26 May 2009 in *Batsanina v. Russia*). The submission of materials to the court by one party is unacceptable if those same materials are not made available to the other party, as the latter would then be unable to comment on them. It is for the parties alone to decide whether the materials submitted call for a response (*APEH Üldözötteinek Szövetsége and Others v. Hungary*). For this reason, States must enshrine in their legislation equal procedural opportunities for the parties in the administration of justice.

It was precisely from the above perspectives that the ECtHR examined several cases concerning Ukraine. For example, in the case of *Fyodorov and Fyodorova v. Ukraine* of 7 July 2011, the Court found a violation of the requirement of equality of arms, namely due to the improper notification of the applicant of the time and place of the hearing before the appellate court. The ECtHR noted, in particular, that, having regard to the requirement under Ukrainian law that the parties be duly notified, a general entry in the record of the court hearing stating that the applicant had been duly informed of the time and place of the examination of his case was insufficient to refute the applicant's allegation of improper notification. In addition, the Court emphasised that the hearing before the appellate court lasted one and a half hours, during which the other party, represented by three persons, was allowed to present oral submissions, including the presentation of facts. As a result of the examination of the appeal, the judgment of the court of first instance was quashed. Accordingly, the ECtHR found a violation of Article 6 § 1 of the Convention on account of the failure to comply with the principle of equality of arms, since the judicial examination of the case took place in the absence of the applicant, but with the participation of the opposing party, which had the opportunity to present its position orally.

In one of the most recent judgments concerning Ukraine (*Loboda v. Ukraine*), the Court likewise concluded that procedural fairness required that the applicant also be allowed to make oral submissions at the court hearing, and that the principle of

procedural equality of arms had not been respected in that case. Accordingly, the ECtHR found a violation of Article 6 § 1 of the Convention[9].

The issue of the implementation of the right to a fair trial has become particularly acute in the context of Ukraine's European integration aspirations. However, its real and effective realisation remains problematic in countries of transitional democracy, to which our State also belongs. Ukrainian courts have not yet become an effective institution for the protection of human rights, and the level of public trust in them remains low. According to the Concept for Improving the Judiciary to Establish a Fair Trial in Ukraine in Line with European Standards, a comprehensive judicial reform is impossible without the reform and development of institutions that are directly related to the implementation of the right to judicial protection.

In conclusion, it should be emphasised that the foundations of modern constitutionalism are the principles of judicial independence and impartiality in the adjudication of cases. These fundamental principles determine the effectiveness of the legal system by ensuring justice and legal stability in society. Moreover, the independence of judges is a guarantee against undue influence by public authorities or other parties on the adoption of objective and fair judicial decisions, which is rightly regarded as an important element of the legal system that ensures public trust in the judiciary and guarantees the real enforcement of the law.

The impartiality of judicial proceedings also plays a key role in ensuring justice. This principle implies objectivity and neutrality in the resolution of disputes, allowing each party in judicial proceedings to feel that its rights and interests will be considered fairly and objectively.

The conducted research provides grounds to assert that judicial independence and the impartiality of judicial proceedings are not only components of the right to a fair trial, but also system-forming principles of modern constitutionalism, without which the functioning of a democratic state governed by the rule of law is impossible. Under conditions of special legal regimes, in particular martial law or a state of emergency, the importance of these principles does not diminish; on the contrary, it acquires increased significance, since it is precisely the judiciary that is called upon to ensure a balance between the public interests of the State and the need to protect fundamental human rights and freedoms.

The analysis of the case-law of the European Court of Human Rights demonstrates that even in crises, the State is not relieved of its obligation to guarantee minimum standards of judicial independence and impartiality. Permissible procedural restrictions resulting from special legal regimes may not undermine the very essence of the right to a fair trial, create an appearance of the judiciary's dependence on other branches of power, or erode public confidence in the administration of justice. The ECtHR consistently applies a functional approach to the assessment of judicial independence and impartiality, focusing both on institutional guarantees and on the specific circumstances of each individual case.

[9] The Independence of the Judiciary: Meaning and Threats Jesús Manuel Villegas Fernández, Victoria Rodríguez-Blanco. JURIDICA INTERNATIONAL 31/2022. P. 90. https://doi.org/10.12697/JI.2022.31.06chrome.extension://efaidnbmnnnibpcajpcglclefindmkaj/https://juridicainternational.eu/public/pdf/ji_2022_31_90.pdf

Within the framework of the study, it has been established that judicial independence is multidimensional in nature and encompasses the procedure for the appointment of judges, the duration and stability of their tenure, the existence of effective safeguards against external influence, including political and financial-budgetary pressure, as well as the perception of the judiciary by society as an independent and impartial institution. At the same time, the impartiality of judicial proceedings is assessed based on both subjective and objective criteria, which makes it possible to identify not only instances of personal bias, but also objectively justified doubts as to the appearance of impartiality of justice.

Particular attention in this section is devoted to the requirement of a "tribunal established by law" and to the procedural elements of a fair trial, such as publicity, adversarial proceedings, equality of arms, and a reasonable time. Compliance with these requirements is a mandatory condition for the legitimacy of judicial decisions and for the effective protection of human rights, even under conditions of special legal regimes. The ECtHR's case-law concerning Ukraine demonstrates that deviations from these standards lead not only to individual violations of applicants' rights, but also reveal systemic problems in the functioning of the national judicial system.

CONCLUSIONS

In conclusion, it should be stated that judicial independence and the impartiality of judicial proceedings act as a kind of "constitutional safeguard" against the concentration of power and abuses in crisis conditions. Ensuring these principles is a necessary prerequisite for preserving the rule of law, maintaining public trust in the judiciary, and affirming the values of modern constitutionalism even in the face of the most complex challenges to the State and the legal order.

Summarising the above, it should be emphasised that the introduction and prolonged operation of martial law in Ukraine have significantly transformed the conditions for the functioning of the entire system of public authority, but have not led to the cessation of the administration of justice as such. Even under conditions of armed aggression and heightened security risks, the judiciary continues to perform its constitutional function by ensuring the protection of human and citizens' rights and freedoms, as well as the maintenance of law and order. This attests to the preservation of the institutional capacity of the judicial system and its key role within the system of checks and balances, which is particularly important in times of crisis.

At the same time, the operation of martial law objectively necessitates the introduction of certain organisational and procedural adaptations in the administration of justice. However, such changes may not go beyond the limits defined by the Constitution of Ukraine and the State's international obligations, primarily in the field of ensuring the right to a fair trial. The case-law of the European Court of Human Rights convincingly confirms that even under conditions of special or emergency legal regimes, the State is obliged to guarantee minimum standards of judicial independence, impartiality of judicial proceedings, and access to justice.

Thus, Ukraine's experience under martial law demonstrates that the administration of justice is not only possible, but also essential for preserving the principle of the rule of law and the legitimacy of State authority. It is precisely the continuity of judicial protection, even in extraordinary circumstances, that serves as one of the

key indicators of the maturity of a constitutional system and its ability to safeguard human rights in the face of the most serious challenges.

SUMMARY

The article examines judicial independence and the impartiality of judicial proceedings as core principles of modern constitutionalism, with a focus on their application and resilience under special legal regimes, notably martial law. The study highlights the heightened risks to the rule of law, power concentration, and procedural guarantees in crises, drawing on the case-law of the European Court of Human Rights (ECtHR) regarding judicial independence, impartiality, and the requirement of a "tribunal established by law". Special attention is given to both institutional and functional dimensions of these principles, as well as subjective and objective tests for assessing impartiality. The analysis covers key procedural elements of the right to a fair trial under Article 6 of the European Convention on Human Rights, including publicity, adversarial proceedings, equality of arms, and reasonable time. Based on ECtHR judgments, including those against Ukraine, the research identifies systemic challenges to upholding fair-trial standards under extraordinary conditions. The findings confirm that even under martial law, the state remains obligated to maintain minimum standards of judicial independence and impartiality. It is concluded that these principles serve as essential constitutional safeguards against abuses of power, preserving the rule of law, public trust in the judiciary, and effective human rights protection in times of crisis.

Key words: judicial independence; impartiality of judicial proceedings; right to a fair trial; rule of law; European Court of Human Rights; martial law; special legal regimes; constitutionalism.

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