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THE JUDGE AS AN IMPARTIAL SUBJECT IN CRIMINAL PROCEEDINGS: THE CASE OF LITHUANIA

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Abstract. This article analyses the judge's role as an impartial subject in criminal proceedings. Lithuania's legal system belongs to the Romano-Germanic system characterised by the inquisitorial model of criminal process. However, the prevailing constitutional doctrine that separates the procedural functions of criminal procedure and jurisprudence of the Constitutional Court obliges the judge to seek to establish the strict truth by giving him/her a procedural tool – namely, an obligation to be active and act impartially. To reduce the possible misuse of judicial discretion, the law establishes the factors that limit it and ensure impartiality, including imperative procedural rules, the obligation of motivation for a judgment, the instance system of courts, and the system of guarantees ensuring the judge's independence.

Keywords: judge, impartial proceedings, independence of the judge, system of guarantees

Introduction

Herbert L. A. Hart noted that "in any legal system there will always be certain legally unregulated cases, in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete" (Hart, 1997, p. 417). The aspiration is for legal disputes to be resolved in a way that people accept the final judgment as just, because the perception that justice has been done is important for a variety of reasons, such as obedience to laws (Petkevičiūtė-Barysienė and Valickas, 2016, p. 20). As noted in the doctrine, a just judgment lies not at the intersection of flexibility and rigour, but is a matter of the degree of flexibility. However, the choice of power for the judge is not absolute and is always associated with procedural constraints, such as impartiality, and subjective limitations, such as rationality (Barak, 2006). Procedural rules are established to protect the rights and freedoms of individuals, and to prevent state representatives, including judges, from abusing their powers and acting arbitrarily. This is because judges may be inclined to distance themselves from the source of their authority, and substitute their public standards with their own (Gumbis, 2004, p. 45).

In Lithuania today, there is an attempt to "bring the court closer to the people". The aim of this idea is to make the courts more open to the public by, for example, expanding access to hearings for journalists; in addition, a push is being made for judges to comment on the motives for their judgments and means are being sought of increasing the somewhat low confidence in courts. In such an environment, ensuring effective judicial impartiality (although it has not yet lost its impartiality) is highly relevant because judges do not live in isolation, being influenced by the social environment and its norms. This creates a risk that the opinion of certain groups in society presented in the media may unacceptably affect judges in the decision-making process, giving rise also to the risk of aiming to please the public to gain their confidence.

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This study examines the judge's role with respect to impartiality in the Lithuanian constitutional model of criminal process, as well as guarantees for ensuring their duty to remain impartial. This is considered in light of the relevant case law of the European Court of Human Rights (ECHR), the Supreme Court of Lithuania (hereinafter SCL) and legal doctrine[2].

1. The role of the judge in the Lithuanian constitutional model of criminal process

Several classifications of types (models) of criminal process are outlined in doctrine for criminal procedure law. Almost all specialists in this area contend that there are several types characterised by certain principles and associated procedural forms (Ažubalytė et al., 2014, p. 13).

Theoretical models of criminal process provided by various authors and the basis for their differences and main features are very similar in nature, differing only in areas of emphasis and names of process types (Ažubalytė et al., 2014, p. 16). The theoretical types (models) that can be distinguished in scientific literature are: models of crime control and fair trial, with respect to objectives of criminal law and proceedings[3]; and ancient accusation, medieval inquisition and adversarial processes, as well as certain variations of these models, such as private and public contesting, when comparing the specifics of relations between an individual and the state from a historical perspective[4]. We can also identify a distribution of criminal process models based on the intensity of repression, with regard to repression of trust (authoritarian) and distrust of it (liberal) (Pradel, 2001, p. 118). However, what became predominant was a distribution of these models into contest and interrogation types, based on the nature of investigation of criminal offences and examination of cases, as well as the attribution of a mixed model to them[5]. According to the authors, the adversarial process for criminal proceedings prevails in countries characterised by the Anglo-Saxon (*common law*) system, as opposed to the Romano-Germanic legal system, in which preference is given to the interrogation system (Pradel, 2001, p. 117). The latter classifications will therefore be respected in this article, with the general features typical of these process types discussed in relation to the role of judges and their powers[6].

The most prominent feature of process under the adversarial model is the judge's assumption of a passive role, a factor that determines the other specifics of this process. The consolidation of the court as an impartial arbitrator is the background to the entire process: the court only passively observes the dispute between parties to the proceedings (with those parties the most active in the process (Ambos, 2003, p. 4)) and is not permitted to initiate the proceedings. The judge presiding over the case can summarise the facts examined, present his/her own assessments, issue instructions that are not compulsory for the jury to follow, and prevent questions being addressed to witnesses that are outside the confines of the case[7]. The court is not liable for seeking the strict truth during the adversarial process, but is only obliged to provide the parties to the proceedings with the opportunity and conditions for investigating the circumstances of the case during the trial (Abramochkin et. al., 2010, p. 54).

[2] The case law is presented in this work using a large number of excerpts, so as to avoid ambiguities and uncertainties, with the aim of familiarising the reader more widely with the circumstances of cases to give them a more comprehensive overview.
[3] For more information, see (Packer, 1968, p. 154-158).
[4] For more information, see (Smirnov, 2000).
[5] For more information, see (Goda et al. 2005; Kalinovsky, 2002).
[6] It is interesting to note that the concept of a judge as the performer of the legal role who lacks the power to create law, but exercises the sovereign's will and seeks counsel elsewhere is typical of the Romano-Germanic legal tradition. Under this system, a judge acts as an important but non-creative clerk in performing his or her functions, unlike judges in the Anglo-Saxon legal system, where becoming a judge means the culmination of one's career, here judges are more respected, more creative and considerably more powerful. For more information, see (Machovenko, 2013).
[7] For more information, see (Pradel, 2001, 366-368).

Meanwhile, a feature of the inquisitorial process that differentiates it from the adversarial process is that the judge instead has an active role. This process is most often criticised for this reason, based on the argument that it leads to the judge losing impartiality and often becoming the accuser along with the prosecutor (Goda, 1999). The court has a duty to critically evaluate the evidence provided by the parties and, if necessary, perform procedural actions. Under the inquisitorial process, it is no longer an observer in this process, but the sole "host" of the trial (Smirnov and Kalinovsky, 2004). The aspect of the judge's professionalism is emphasised in legal doctrine when examining the role of the judge in the process of an inquisitional type (Gutsenko, 2005) because when hearing the case and passing a verdict, he/she must use a large amount of mastery to establish the truth (Ramanauskas, 2005, p. 51). The aim of establishing the material truth of a case determines such a role for the judge (Beulke, 2010, p. 3).

However, it is emphasised in the doctrine that the process models are only theoretical and necessary to emphasise certain features typical of the process, such as defining the purpose of criminal proceedings and revealing common aspects; they cannot be treated as opposites (Pradel, 2001, p. 118; Packer, 1968, p. 154). Streaming itself shows the predominance of ideal procedural features, with the ideal typology based on abstract logical process constructions that do not have an analogue in real life (Vandyshev, 2010, p. 641). It is therefore possible to talk about a pure adversarial or pure inquisitorial process only as about abstract theoretical ideas, because the positive processes contain elements attributed both to the adversarial and investigative models; in other words, the positive process is between *due process* and the *crime control process* (Ažubalytė, 2009, p. 515).

In the 20th century, constitutionalisation, internationalisation and Europeanisation of ordinary law took place in democratic European states. Researchers of comparative criminal procedure law have noted that many states have defined such different procedural forms in their laws that it has become impossible to tell which features of the theoretical models – of the contest or the interrogation – dominates in the criminal procedure of the specific state (Ažubalytė, 2008, p. 41, with reference to Rau, Countries in Transition: Effects of Political, Social and Economic Change on Crime and Criminal Justice. European Journal of Crime, Criminal Law and Criminal Justice, Vol. 7/4, 1999, p. 435). However, an opinion is supported here that despite the convergence of criminal procedure systems based on different models, the impact of the historically established model on modern criminal procedure law remains (Ažubalytė et al., 2014, p. 17), whereas the perception and interpretation of the purpose of modern procedure is mainly determined by the imperatives of the Constitution and international human rights (Ažubalytė, 2009, p. 522).

The Constitutional Court of the Republic of Lithuania (hereinafter referred to as the Constitutional Court) recently formed a constitutional doctrine, which consolidated the constitutional concept[8] of the general criminal process model (Jurgaitis, 2009, p. 39). An analysis of this allows the interpretation (without contradicting the doctrine of criminal procedure law) that the current law has never been "pure" and contains features of both models (Ažubalytė, 2002, p. 64, with reference to: Foinitsky, 1996, p. 61; Viktorsky, 1997, p.15). However, Lithuania belongs to the Romano-Germanic legal system, meaning that the investigative (inquisitorial) side of the process is more prevalent in its criminal procedure (and when analysing the latest jurisprudence of the Constitutional Court, it can be cautiously stated that it has recently become increasingly evident)[9].

It is interesting to note that back in 1999, the Constitutional Court held that the court could not be active, stating: *"The court's requirement provided for in the norms of the CCP [Code of Criminal Procedure] for the interrogator or the questioning authority, after having acknowledged that the preliminary investigation is, in essence, incomplete, for the submission of new evidence allows the assertion to be made that specific functions*

[8] The constitutional model of criminal procedure will be considered in this work only in so far as it relates to the role of the court (judge) in it.

[9] There are cases in which the Lithuanian criminal process model is attributable to the mixed model; for example, see (Goda et al. 2005).

are provided for the court. When the court or the judge instructs the interrogator or the questioning authority, corresponding procedural relations arise between these institutions, that may be a cause of concern for the court. Thus, preconditions for doubting whether the court, applying these norms, is an impartial arbitrator, are created. It must be noted that in such cases the judge himself/herself may find it more difficult to objectively assess the circumstances of the case" (Ruling of the Constitutional Court of the Republic of Lithuania of 5 May 1999). However, it also said that although "the Constitution does not provide for the court to rule on the merits of the case, taking guidance only from the evidence provided by the parties, and cannot show any initiative in this area – as already expressed in the expert opinions presented in the same ruling of the Constitutional Court – it is necessary to seek to establish the material truth in a criminal procedure for dealing with cases, without being limited to establishing the formal truth. If, in such a situation, the court sees that it is necessary and possible to obtain new evidence to establish the material truth in the case, but does not take any measures to do so , this would represent not the administration of justice, but a refusal to administer justice. [...] The requirement of the court to provide new evidence does not mean that the prosecutor is deprived of the function of controlling the activities of the questioning authority and the interrogator. The court demands the provision of new evidence to properly fulfil its obligation to justly resolve the case. It is incorrect to state that the requirement of the court to submit new evidence is equivalent to exercising control over the activities of the questioning authorities and interrogators, also because the content of the concept of control is different and more diversified." (Ruling of the Constitutional Court of 5 February 1999).

The court's position expressed in the ruling cited above was not taken into account in the new CCP, because the developers of the CCP implemented the idea of an active court. In doing so, they considered the position expressed by the Constitutional Court that the analogous legal regulation can be regarded as appropriate in another system of criminal procedure norms. The developers adhered to the position that the Constitutional Court was more focused in its ruling on the traditions of Anglo-Saxon rather than continental law when interpreting the principle of the court's impartiality and treated the active actions of the court as a violation of impartiality (Goda, 2011).

Ultimately, the Constitutional Court's position set out in the ruling of 5 February 1999 was reinterpreted. As stated in the doctrine, such a revision can be explained firstly by the necessity of ensuring the principle of the right to a defence, and secondly by a need to create conditions for the proper administration of justice so fair judgments are made (Goda, 2011, p. 86, with reference to Kūris, 2009, p. 141).

In its ruling of 8 May 2000, the Constitutional Court drew attention to the following perspective: *"The constitutional function of the court – the administration of justice – is fundamentally different from that of leading the pretrial investigation of a case, the control of the investigation, the maintenance of public accusation, etc. When administering justice, the court examines the already prepared criminal case, decides on the guilt of the defendant, and imposes a sentence or acquits him/her. On the other hand, the court and the judge, when administering justice, are not bound in the course of pretrial investigation [...] by the collected evidence: the constitutional duty of the court is to fully, completely and objectively examine the whole case and make an equitable judgment*[10]*."* In developing this doctrine, the Constitutional Court further detailed the role of the judge as follows: *"The rule of law states and the principles of justice presuppose such a model of the court, as the justice-administering institution, so that the court cannot be understood as a "passive" observer of proceedings and the administration of justice cannot depend only on the material submitted to the court. In order to objectively and thoroughly examine all the circumstances of the case and establish the truth of the case,*

[10] The Constitutional Court has also pointed out that constitutional value does not comprise the adoption of a judgment itself in court, but the adoption of a just judgment. The constitutional concept of justice presupposes not a formal, nominal exercise of justice by a court, nor the external appearance of justice administered by the court, but such court judgments (other final court acts) that are not incorrect from the point of view of their content. On its own, the justice formally administered by the court is not the justice that is enshrined, protected and defended by the Constitution. See Rulings of the Constitutional Court of 21 September 2006, 25 September 2012 and 8 May 2014.

the court has the authority to carry out procedural steps itself or to entrust the performance of the appropriate actions to certain institutions (officials), inter alia to prosecutors" (Ruling of the Constitutional Court of 16 January 2006). This finally, therefore, establishes the status of the Court as an active subject in the criminal process[11].

To help prevent doubts about the weaving of functions and strengthen the role of an active and impartial judge, along with his or her duty to establish the strict truth in a case, the Constitutional Court has stated: *"The Constitution, inter alia the principles of the rule-of-law state, justice and division of powers enshrined in it, presupposes that the court, when giving the above-mentioned orders, must act in such a way as not to create preconditions for believing that the court is biased. It must be emphasised in this context that the court, when giving an order to carry out a pretrial investigation or perform separate procedural steps (which cannot be performed in court), must not specify how such an order is to be executed, what the desired result is, etc."* (Ruling of the Constitutional Court of 16 January 2006).

In analysing the tendencies of the Constitutional Court's jurisprudence, it has been noted that the role of the court as an active participant in criminal proceedings is increased by providing it with additional powers to properly carry out its constitutional function. For example, the norm of the CCP in the ruling of 15 November 2013 was acknowledged as contrary to the Constitution, insofar as it does not state that the court may, under its own initiative, substitute the factual circumstances of the offence referred to in the accusation with substantially different ones. The possibilities have also been expanded for the court to requalify the offence referred to in the accusation in accordance with criminal law, providing for a lighter crime or offence in which different or new features of the offence or other circumstances relevant for qualifying the offence are stated. On 26 June 2017, the Constitutional Court recognised that Paragraph 4, Part 1 of Article 326 of the CCP, insofar as it does not establish the powers of the court of appellate instance – after having ascertained that the factual circumstances fundamentally differ from those established by the court of first instance and that this may lead to a significant worsening of the situation for a sentenced or acquitted person, or a person whose case was terminated – to refer the case back to the court of first instance for examination is in conflict with the Constitution. In this case, the Constitutional Court has interpreted the limits of two fundamental principles of appeal – *non reformatio in peius* and *tantum devolutum quantum appellatum.* As stated in a Council of Europe recommendation, in the event that only the accused person appeals against a judgment, the principle of *reformatio in peius* prohibition must be taken into account. The explanatory memorandum of the recommendation also states that it is fundamentally wrong to impose a more severe punishment if the complaint is lodged only for the purposes of the defence. Injustice can arise not only from unexpectedness (when the prosecutor has not lodged a complaint), but also from deterrence of the accused from their right to appeal against a judgment (Recommendation No. R (92) 17 of the Committee of Ministers of the Council of Europe of 19 October 1992 regarding consistency in the imposition of sentences (Part F of the Annex)). However, without disregarding the importance of these principles and the limitations imposed on them, the Constitutional Court held that the current legal regulation[12] did not create the preconditions for the court to make a fair judgment in cases and properly administer justice (Ruling of the Constitutional Court of the Republic of Lithuania of 26 June 2017).

[11] Being guided by Constitutional jurisprudence, the SCL also keeps to analogous positions, noting that "the right of a person that his/her case would be publicly and fairly examined by an independent court, the rule of law and the principles of justice presuppose such a model of the court, as the justice-administering institution, that the court cannot be construed as a passive observer in the proceedings and that the administration of justice cannot depend solely on what material is provided to the court; in order to objectively and thoroughly examine all the circumstances of the case and to establish the truth therein, the court has the power to carry out procedural actions itself or to instruct certain authorities to perform the relevant actions (...)." Supreme Court of Lithuania case No. 2K-7-398/2013.

[12] According to this, the court of appeal instance, after examining new evidence or evidence that has already been examined by the court of first instance that could lead to a conclusion that the facts differ substantially from those established by the court of first instance and that may lead to a worsening of the situation for a convicted or acquitted person, or a person whose case is terminated, and being restricted by the *non reformatio in peius* and *tantum devolutum quantum appellatum* principles of criminal procedure law, does not have the power to refer the case back to the court of first instance.

However, it should also be noted that the general concept of the administration of justice has been formed in the constitutional jurisprudence, in which not only the pursuit of material justice (the adoption of a fair decision) but also the procedural exercise of justice (strict adherence to procedural rules) has been formed (Ažubalytė, 2014, p. 152-153): *"The constitutional concept of administering justice also implies that courts must deal with cases strictly in accordance with procedural and other requirements established by law and within the limits of their jurisdiction, and other powers (Rulings of the Constitutional Court of 16 January 2006 and 24 October 2007). The duty to examine cases in a fair and objective way, and take motivated and reasoned decisions arises for the courts out of Part 1 of Article 109 of the Constitutions (inter alia Rulings of the Constitutional Court of 15 May 2007, 17 September 2008, 31 January 2011 and 25 September 2012). The principle of justice consolidated in the Constitution, as well as the provision that courts administer justice, means that the constitutional value is not decision-making in court, but the adoption of a fair decision by the court; the constitutional concept of justice implies not only the formal, nominal justice administered by the court or the external appearance of justice administered by the court, but – most importantly – such judicial decisions (other final court acts) that are not incorrect from the point of view of their content"* (Ruling of the Constitutional Court of the Republic of Lithuania of 15 November 2013). The convergence and concord of material and procedural justice is therefore necessary, because the impartiality of judges is required for the proper safeguarding of procedural justice. Procedural justice in this case can be described as the conformity of dispute resolution techniques or procedures and the behaviour of the person performing it to certain standards, factors that determine whether the parties to the dispute will perceive both consideration and final settlement of the dispute to be fair (Justickis and Valickas, 2006, p. 96).

The prevailing doctrine on constitutional criminal procedure and the Constitutional Court's jurisprudence separating the procedural functions (a feature of the adversarial model) therefore oblige the judge to attempt to ascertain the real truth (a feature of the inquisitorial model) by providing him/her with a procedural tool – namely, the duty to be active (inquisitorial model) and implement his/her duty impartially (adversarial model).

2. The duty of the court in ensuring impartial proceedings

The importance of the judge's impartiality is highlighted in international law. As stated in Article 10 of the Universal Declaration of Human Rights, everyone, on the basis of complete equality, has the right to have his/her case publicly and fairly examined by an independent and impartial tribunal, thus establishing his/her rights and obligations and the reasonableness of the accusation against him/her. Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right of everyone to have his/her case properly examined within the shortest possible time under conditions of equality and in public by an independent and impartial tribunal constituted in accordance with law. Resolution No. 40/32 of the United Nations General Assembly of 29 November 1985 and Resolution No. 40/146 of 13 December of the same year, together comprising the "Basic Principles on the Independence of the Judiciary", should also be mentioned.

Paragraph 2 of Article 31 of the Constitution of the Republic of Lithuania and Paragraph 5 of Article 44 of the CCP also establish the right of an individual charged with a criminal offence to have his/her case publicly and fairly examined by an independent and impartial tribunal. However, when interpreting the content of the principle of impartiality, it should be noted that the case law is not limited only to guaranteeing this right for an individual, but that the court must be impartial to *all* participants in the proceedings (Supreme Court of Lithuania in criminal cases No. 2K-16-489/2017 and No. 2K-96-489/2018). This principle is therefore perceived in the broadest sense as a guarantee for the participants in the proceedings that the criminal case will be tried in a court that does not have or express any prejudices with regard to the participants (Supreme Court of Lithuania in criminal cases No. 2K-243/2009 and No. 2K-16-489/2017). Such a position is also confirmed by Article 47 of the Charter of Fundamental Rights of the European Union, which states that "*Everyone* is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law"

(Charter of Fundamental Rights of the European Union, 2016/C 202/02). This principle means that when a criminal case is being investigated and examined, the parties to the proceedings must be equally treated so that those conducting the process are not liable to make a decision that is unfairly favourable to one of the parties, nor would otherwise make any assumptions that call into question the objectivity of their activities (Jurka, 2009, p. 78). At the same time, it is important to keep in mind that the court has a duty to use all opportunities during criminal proceedings to establish the truth in a case and make a fair judgment about a person's guilt (or guiltlessness) in committing an offence (Jurka, 2009, p. 100), as well as about other issues being examined in the case. To help establish the truth, the court must actively participate in criminal proceedings, including defining the limits of the hearing, carrying out certain procedural steps, preventing individuals from abusing their rights, and resolving other issues important in hearing the case (Jurka, 2009, p. 103). This is necessary because, as already mentioned, the court is the "host" of the trial. This gives rise to the question: how can the impartiality of the court be ensured when implementing the tasks assigned to it?

A separate chapter titled "Removal" is devoted to the CCP impartiality assurance institute. As pointed out in the doctrine, the Institute of Removal is a procedural institute tasked with ensuring that during the examination of a case, participants in the proceedings with an interest in the outcome are unable to influence the decision-making process (Commentary on the Code of Criminal Procedure of the Republic of Lithuania, Parts I-IV (Articles 1-220), 2003, p. 158). The system of provisions of the institute of Removal established in Articles 57-61 of the CCP leads to the dual implementation of the principle of impartiality in criminal proceedings. This principle is implemented firstly by ensuring the rights of the participants in the proceedings, defending their legitimate material interests and challenging the removal of relevant subjects in the proceedings under consideration by the court (or judge); and secondly, with respect to relevant subjects, including the duty of the court (judge) to abolish them (Articles 59-61 of the CCP) provided for by law (Jurka, 2009, p. 78). The purpose of the principle of impartiality, as stated in the doctrine, is therefore to not only prevent further involvement of the relevant subjects in the criminal case who are interested in its outcome, but also to foresee in advance *a priori* that such an interest may sooner or later arise (Jurka, 2009).

The requirement for the court to maintain impartiality, as consolidated in Part 1 of Article 6 of the ECHR, gives an individual charged with a criminal accusation the right to express any doubts that he/she might have about the court's impartiality and to demand that these are properly assessed – and implies an obligation for the judge, *ex officio*, to be proactive. [...] The Convention establishes a certain obligation for the court *in corpore* and for each judge individually to control itself/himself/herself to ensure that the public and the accused trust them and ultimately the procedural decision they arrive at (Merkevičius, 2010, 76, p. 71). It is interesting that, according to Robert Esser, the ECHR relates the obligation to remove oneself from a hearing to the requirement of objective impartiality. This duty is not an integral part of subjective impartiality (Esser, 2002, p. 554).

In this respect, the ECHR singles out the court's obligation to be proactive by making public the grounds known to it for which it may be regarded as biased and to remove itself at its own initiative so as not to participate in the proceedings. Another important element in this proactivity is the court’s duty to actively investigate with due consistency and care, and reasonably evaluate those circumstances raised in relation to objectively justified doubt by the accused or his/her defender, unless the doubts expressed by the participants in the proceedings are clearly unjustified (Remli v. France, 1996). The ECHR interprets the concept of court impartiality not only autonomously, but also in a fairly broad way (Merkevičius, *op. cit.* p. 69, with reference to Esser, 2002, p. 539; Villiger, 1993, p. 243). It devotes particularly close attention to the judge's appearances and does not evade the wording: *"Justice must not only be done; it must also be seen to be done"* (Campbell and Fell v. the United Kingdom, 1984; Castillo Algar v. Spain, 1998; Padovani v. Italy, 1993; Piersack v. Belgium, 1982; Thorgeir Thorgeirson v. Iceland, 1992). Emphasising the importance of impartiality, the ECHR has noted that the right to an independent and impartial trial is so prominent that it cannot be sacrificed for expediency (Teixeira de Castro v. Portugal, 1998).

As already mentioned, court bias refers to a prejudicial attitude or disposition in favour of one of the parties and, conversely, to the detriment of the other party involved in proceedings – something that is predetermined by definite factual circumstances or a definite situation (Merkevičius, 2010; Villiger, 1993, p. 245). As clarified in the case law of both the European Court of Human Rights and the national courts, the requirement for impartiality involves two aspects: firstly, the court's duty to be subjectively impartial means that when it comes to court proceedings and exercising the obligation to be proactive and establish the strict truth, the judge cannot personally, for any reason, have a predetermined approach or be tendentious towards one of the parties in the case; and secondly, the court must be impartial in an objective sense – in other words, it must ensure at any stage of the proceedings that the parties involved are treated equally and fairly without being given any additional guarantees, privileges or "legal" favours, and the court must provide sufficient guarantees to eliminate any doubt arising about possible bias, especially when it takes active steps (Orders of the Supreme Court of Lithuania in criminal cases No. 2K-414/2010, No. 2K-306-895/2016, No. 2K-340/2008, No. 2K-176/2010, No. 2K-193/2010, No. 2K-187/2011, No. 2K-132/2015, No. 2K-7-124-648/2015, No. 2K-102-222/2016, No. 2K-162-697/2016; Daktaras v. Lithuania, 2000; Micallef v. Malta, 2009). According to the CCP, the court is always recognised as biased when a case has been examined by at least one judge who should not have participated in the proceedings for the reasons listed in Article 58 of the CCP, which can be divided into factors leading to subjective and objective bias: family or kinship relations (*intuitu personae*) between the judge and participants in the proceedings (par. 1 of part 1 of Art. 58 of the CCP); the interest of the judge himself/herself or his/her family members or relatives in the case's outcome (par. 3 of part 1); participation of the judge in performing different functions in the same case (par. 2 of part 1 and par. 1 of part 2); the solution of issues related to the application of a coercive procedural measure (par. 2 of part 2); and examination of the same case for the second time (par. 3 to 6 of part 2) – for the sake of interest, it is worth mentioning (but without going into details due to the scope of this work) that in this final case the norm does not refer to the prohibition of the judge from examining the same case several times in the court of cassation, but as was noted by the SCL: "A complete list of circumstances in which the judge should not participate in the examination of a case is provided in part 2 of Article 58 of the CCP" (Orders of the Supreme Court of Lithuania in criminal case No. 2K-27/2006). It is evident that the regulation is not exhaustive or consistent and it is difficult to discern the procedural basis by which the cassation instance is singled out from other instances. In the event that such a situation occurs, nothing remains in light of such imperfect regulation but to use paragraph 4 of part 1 of Article 58 of the CCP, which provides that the judge should not participate in the proceedings if those involved cite other circumstances that raise reasonable doubts as to the impartiality of the judge. Unfortunately, this case does not solve the problem of the imperative or specific obligation of the judge to dismiss himself/herself in the event of the situation cited. In such a case, the judge should not ignore the duty to take a proactive approach as foreseen by the ECHR and should implement this – in other words, disclose any grounds known to him/her on which he/she may be considered biased and, if necessary, on his/her own initiative withdraw himself/herself to not take part in the proceedings. At the same time, the duty arises for the other participants in the proceedings (officials) to take all measures required under law (in this case, to withdraw themselves if deemed necessary) so that the hearing process is fair and honest. ECHR case law should also be mentioned in this context (despite the fact that this is largely related to the actions of the judge at the pretrial stage), under which the provision is respected that a judge presiding over a case who has previously taken decisions related to the same offence cannot in itself be regarded as a circumstance that justifies fear of a lack of impartiality. In this case, the nature of the earlier decisions is important (Marguš v. Croatia, 2014), but the issue of lack of impartiality does not arise if the judge previously made only formal procedural decisions in criminal proceedings and neither the evidence was assessed nor the position on the fault of the accused (the essence of the case) expressed when making them (Gómez de Liaño y Botella v. Spain, 2008; Bulut v. Austria, 1996). However, the most important thing to keep in mind is that the prohibition on double examination of the same case is intended to ensure that the composition of each court in any instance is completely impartial and will not have any prejudice or preformed opinion before the case is examined.

The court's duty to take a proactive approach is not directly related to any grounds for bias in proceedings, but such action may make one of the parties view the court as biased and appearing to lean towards support of the other party. When assessing whether the court is impartial in fulfilling its constitutional obligation to establish

strict truth in a criminal case, the problem therefore arises of discerning when the court is only carrying out its duty to be proactive and when certain court actions must be regarded as going beyond the impartiality threshold. This type of situation often arises in judicial practice, whereby violations of procedural requirements made by the court are also viewed by participants in the proceedings as court bias.

As stated in the doctrine, in acting proactively or refraining from certain actions, a court can demonstrate bias via any procedural or even non-procedural action or decision, regardless of whether the action was performed in the courtroom or outside it (in the broadest sense). Court bias can, for example, be detected in the verdict of an accusatory court, an order to reject an accused person's request for the collection of factual data (such as by questioning a certain person as a witness, assigning an expert examination or requesting a document), questions addressed by the judge to the accused or witnesses, the court's conduct when hearing the defendant's lawyer (for example, if remarks are addressed to the defendant "not to adhere to the theory or to the copybook maxims") and in the court's organisational actions (for example, not allowing the accused to make an audio recording of a hearing) (Merkevičius, 2010, p. 94). A court's conduct can also lead to objectively justified doubt with regard to bias if, for example, a judge undertakes to carry out not only the administration of justice or the management of a court hearing (and maintenance of order in the court), but also a prosecutor's function (Thorgeir Thorgeirson v. Iceland, 1992) – thus violating the adversarial principle (Kansal v. UK, 2004; Vermeulen v. Belgium, 1996). Under this, the parties must have the opportunity to not only provide evidence to help substantiate their claims, but also the right to be made aware of and comment on all the evidence and observations submitted to influence the judgment (attention should be drawn to the fact that judges themselves are obliged to respect a trial's adversarial principle, especially when they reject a complaint or settle a dispute on the basis of their own reason (Vermeulen v. Belgium, 1996; Skondrianos v. Greece, 2003; Clinique Des Acacias Et Autres v. France, 2006).

It should also be noted, however, that the principle of impartiality cannot be understood too broadly. When analysing the case law, it was observed that as the role of an active judge (as a process entity) grows stronger, cases occur in which highly unjustified doubts arise about the court's (non) bias when acting.

Taking into account that any bias of the judge (of the court) that relates to an internal state of mind or moral and ethical standpoint is difficult to prove from both a positive and negative point of view (a presumption of the court's impartiality exists), the ECHR analyses certain objectively expressed circumstances deemed sufficient to assess the court's impartiality (Padovani v. Italy, 1993). It draws the conclusion that the basis for talking about court affiliation or bias only relates to objectively justified doubt, whereas the subjective fear, distrust or concern on the part of the accused cannot be considered to be that (Fey v. Austria, 1993; Vera Fernandez-Huidobro v. Spain, 2010; Order of the Supreme Court of Lithuania in criminal case No. 2K-74-976/2017; Merkevičius, 2010, p. 69, with references to Villiger, 1993, p. 245; 19; 26; 37; 43). The SCL maintains an analogous position, indicating that: *"The parties' opinion is insufficient for stating that there is an infringement of the requirement of impartiality, and it must be determined whether there are any circumstances demonstrating that the court has an interest in making a judgment that is favourable to one of the parties in the proceedings. A convicted (accused) person's opinion about whether there is a justifiable basis in a particular case for doubting that the specific judge is lacking in impartiality is important, but not decisive. The most important factor is whether such a doubt can be considered justified"* (Order of the Supreme Court of Lithuania in criminal case No. 2K-74-976/2017). In the absence of specific indications of court bias in a particular case, a statement of bias must not be based solely on the fact that the court was active – as reflected in the following quote from a case: *"The court of first instance, having reasonably found that there are grounds to believe that the deed specified in the charge can be requalified (Part 2 of Article 256 of the CCP), when renewing the investigation of the evidence in court (Part 2 of Article 300 of the CCP) and informing the participants in the hearing of this possibility, did not show its bias, as the aim of renewing the investigation of evidence was to ensure compliance of the process with the provisions of Article 31 of the Constitution, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 7, 10 and 44 of the CCP, not to violate the procedure for changing the qualification of the deed specified in Article 256 of the CCP in court and to ascertain the position of the victim E. P. regarding the possibility to reconcile with D. J. The panel of judges of the court of cassation instance,*

*having not found other data on bias or prejudice on the part of judge D. Domeikienė and having not specified any such data to the cassator, has no reason to draw the opposite conclusion" (*Orders of the Supreme Court of Lithuania in criminal case 2K-77-942/2017 of 21 March 2017; Zand v. Austria, 1978; Crociani and others v. Italy, 1980; Cooper v. UK, 2003; Dupuis v. Belgium, 1988).

The actions or inaction of the court, both active and passive, identified by participants in proceedings as raising doubts about impartiality can be fairly well divided into two groups[13]: the first comprises actions of the judge directly related to organisational and structural decisions, as well as decisions and/or actions that determine the course of the process; and the second consists of court actions directly related to participants in the process (such as satisfaction of their requests).

Examples of a judge's actions that can give rise to accusations of bias directly relating to organisational, structural and procedural decisions and/or actions include errors made by the court when interpreting and applying the law (Supreme Court of Lithuania in criminal cases No. 2K-122/2010, No. 2K-243/2009), an incomplete and inappropriate layout of some of the evidence relating to the verdict, a laconic analysis of the evidence submitted in the verdict, the violation of requirements raised with regard to the descriptive part of a guilty verdict (Supreme Court of Lithuania in criminal cases No. 2K-177-942/2017, 2K-468/2014, No. 2K-316/2006), a demand by the chairman of the court addressed to the accused persons to maintain appropriate discipline and respect the court during a hearing (Supreme Court of Lithuania in criminal case No. 2K-361/2006), the admission of a guilty verdict (Supreme Court of Lithuania in criminal cases No. 2K-144/2007, No. 2K-168/2003, No. 2K-708/2003, No. 2K-361/2006, No. 2K-142/2007, No. 2K-314/2007), and examination of the case of a co-accused person (Khodorkovskiy and Lebedev v. Russia, 2013). Such cases, however, do not in themselves provide sufficient grounds for stating that a court examining a case is biased, and the circumstances must be carefully evaluated. The ECHR has noted that *"the mere fact that a judge has already dealt with a co-accused person's case is not in itself sufficient to cause doubt about the impartiality of this judge in the applicant's case, but in such a case it is necessary to verify whether anything was actually spoken about in advance in relation to the possible guilt of the defendant in the previous judgments. It is also taken into account whether an independent assessment of the circumstances of the case is provided in the second conviction, including whether it contains references to the previous conviction, whether the applicant is mentioned in the first conviction, and in what form and context. The ECHR states that a professional judge is more likely to be dissociated from his/her previous experience in the related case than an unprofessional judge or jury is"* (Khodorkovskiy and Lebedev v. Russia, 2013).

Compliance with the principle of court impartiality requires the process to be organised in such a way that no impression is created that greater favour is manifested to one of the parties during its course (Supreme Court of Lithuania cases No. 2K-122/2010, No. 2K-198/2009). Judges must listen to persons involved in a process and respond to their arguments in a way required by law, being equally attentive to each of the participants. It is common for cassators to point out that the court has been demonstrating its bias when unfavourably solving issues raised by one of the parties. However, an analysis of case law allows it to be stated that there is also not sufficient basis alone for stating that the court is biased in circumstances such as the adoption of a judgment unfavourable to a party in the proceedings (Supreme Court of Lithuania case No. 2K-144/2007), the assessment of evidence in a manner not desired by a party involved in the process, the opinion of a person that evidence has been assessed inappropriately or they disagree with the court's conclusions (Supreme Court of Lithuania cases No. 2K-495/2014, No. 2K-248-895/2015, No. 2K-401/2012, No. 2K-491-303/2015, No. 2K-477-746/2015, No. 2K-162-697/2016), the rejection of requests submitted by participants in the process (Supreme Court of

[13] It should be noted that with regard to impartiality, it is only a matter of the court's deliberate action / inaction, as impartiality is perceived as a kind of inner state that is linked to the prejudice or preconception of the court in favour of one of the parties to the proceedings, or vice versa. Any court bias found is therefore absolute grounds for the nullity of a verdict, as an essential infringement of criminal procedure and one that cannot be remedied by a court of higher instance. Unconscious court actions or inaction should be otherwise assessed in the context of criminal proceedings (for more information, see (Rimšelis, 2008; Rimšelis, 2006).

Lithuania case No. 2K-409/2006), or decision-making considered unfavourable to the defence (multiple and even in violation of the provisions of the ECHR) (Khodorkovskiy and Lebedev v. Russia, 2013).

Meanwhile, a panel of judges should not discuss any issues with the participants in proceedings, nor moralise or express indignation at a court session or when passing a judgment or ruling, as this may create preconditions to reasonably doubt the court's impartiality (Supreme Court of Lithuania cases No. 2K-751/2007, No. 2K-202/2005, No. 2K-16-489/2017). It is also important that there is nothing in the judgments that reveals a particular attitude of the court towards the participants in the process. Here, it is appropriate to mention an SCL ruling that detailed how critical remarks by the appellate court on the evaluative nature of requests expressed by the prosecutor in the court of appeal instance, as well as his access to the case and other deficiencies in the work of the prosecutor's office – including court and prosecutor actions relating to the omission and renewal of the time limit for filing an appeal that, in general, did not fall within the limits of the court of appeal's jurisdiction – went beyond the objective criteria of court impartiality. The court of appeal instance, which was found to be biased, stated in its order that: *"The panel does not discern any objective reasons, only subjective ones, such as inaction by the prosecutor. The initiation of the official inspection, 'established' vague procedure, bad organisation of work or irresponsibility cannot be attributed to objective reasons that prevented timely lodging of the appeal"; "the pretrial investigation into the individual, who did not commit any crime, went on for more than three years because of unlawful and unfounded procedural decisions made by prosecutors, the pretrial investigation judge and subsequent courts. As a result of this, J. K. was found to be a suspect and coercive procedural measures were applied to him later on without J. K's right to a fair trial having been ensured after the accusation was made, and he then acquired the procedural status of the accused and was tried; even when filing an appeal, the prosecutor's office was not able to avoid violating the Criminal Procedure Law, which proves the prosecutors' biased approach towards this case, with an inability to properly perform the functions assigned to them by the Constitution and laws"* (Supreme Court of Lithuania in criminal case No. 2K-16-489/2017).

It is appropriate to note the opinion that the primary and most important purpose of the court should be the aspiration to protect the accused and thereby provide him/her with the possibility of rehabilitating himself/herself into society. Only after having recognised such a role for the judge can the parties in the proceedings be equal (Merkevičius, 2009, p. 149, with reference to Mizulina, 1992, p. 59-61). However, it needs to be held that there is no big difference in whether the court takes the prosecutor's or defence's side, because in both of these situations an interest in the outcome of the case does not allow the final decision-maker (the court) to properly implement the objective of criminal procedure – namely, establishing the strict truth.

Analysis of the case law makes it possible to draw a cautious conclusion that it is hard to imagine it is feasible to create a model that would help assess any bias on the part of the judge (or court) that may arise from the court's duty to be proactive and establish the strict truth in a case. This is particularly evident when taking into account that the powers of the judge to act proactively are wide, from the possibility of changing the qualification of the criminal offence to the right to stop the final speech. It is assumed that the requirement for judicial impartiality will not be violated if the court is active as long as is necessary to ensure the rights and requirements of the parties in the proceedings (such as the adversarial principle) – in particular, if the parties are unable to defend these requirements – as well as the purpose of the criminal proceedings. It is therefore necessary to accept that the impartiality of the court can be recognised without discussing or asking what the judge thinks or wants at a specific time or stage of the proceedings, but instead by assessing the direction and intention of the judge's procedural behaviour defined by their externally (objectively) expressed actions and decisions (Merkevičius, 2010, p. 94).

3. Guarantees to help ensure the impartiality of judges in fulfilling their duty to act actively

It is not denied in the doctrine that there may be abuses of judicial power, as with any other type of power. A judge needs to acknowledge that this power is intended only for the proper performance of court function – and with their knowledge of law and what powers are granted to him/her, must also understand the limitations set for him/her as a judge (Barak, 2006, p. 299). A judge needs to maintain a balance between change and the requirement for stability, given that stability without change signifies degeneration, whereas changes without stability signify anarchy. The judge's role is to aid the convergence of the needs of the legal system and society, and prevent the system from degrading or descending into anarchy. In other words, he/she needs to ensure stability in the course of changes and changes at stability (Barak, 2006, p. 299). In this case, it is necessary to accept the statement that "The duty of the judge to be an arbitrator does not allow him/her to be a fighter. [...] Nevertheless, there are cases – and, of course, there should be – in which the judge properly performs his/her functions, ignoring the prevailing consensus of the public and becomes a "standard bearer" for a new consensus in society." (Barak, 2006, p. 297).

The activity of the court in proceedings is connected not only with the broad discretion granted by the legislator of the court for performing certain actions, but also with the proper regulation of the law[14]. This position is based on the fact that the legislator cannot create the rules or propose a variant solution for each definite case. The court is therefore granted the exclusive right to administer justice, whereby a certain freedom of manoeuvre and discretionary rights are necessary for it to fulfil this function (Jurka *et al.*, 2009, p. 104). However, discretion should not be perceived as necessarily leading to a legitimate choice – in other words, a decision that is made within the limits of existing restrictions (Richardson, 1983, p. 20-21). The essential advantage of discretion is negative with respect to the rules of court, being associated with the fact that the rules have drawbacks and do not always function properly (Gumbis, 2004, p. 42).

In the doctrine, attention is drawn to the fact that although judges tend to believe they decide cases by taking into account the specific circumstances of each case, social laws act objectively – meaning that similar cases are dealt with in a similar fashion in different jurisdictions at various stages of the judicial process. As Cardozo has pointed out: "There is never a complete, unrestricted and non-diverted freedom. We are surrounded and restricted by thousands of limitations, some of which are laws, some precedents, some the result of unclear traditions or methodology of immutable times, even when we imagine ourselves to be acting completely freely. The mysterious power of professional opinion suppresses with its atmosphere, though we do not feel its weight. Any freedom granted to us is, at best, narrow" (Gumbis, 2004, p. 42).

The nature of limitations is highly diverse, and these can emerge from rules, precedents, traditions and for other objective or subjective reasons (Gumbis, 2004, p. 47). Judges are, for example, restricted by the social environment – given that decision-makers do not live in isolation – and can be hindered by various personal factors such as laziness, unwillingness to assume responsibility or the desire to avoid repetitive reasoning. Of course, they are also restricted by their previous training because the education they receive ingrains them with certain thinking that provides the framework for guidelines or decisions, or even leads to a standard way of thinking (Gumbis, 2004, p. 48). As far as limitations are concerned, it is also important to keep in mind that an essential condition with respect to the judge's professionalism (particularly in processes of an inquisitorial type) is his/her inner conviction in the perception of his/her profession as a vocation for administering justice (Navickienė, 2015, p. 196). According to Weber, when performing their function (including the obligation to be active), judges must not only have certain qualities but also passion for their role. This helps provide them with intuition and a willingness to take responsibility for administering justice, both of which are necessary in their profession. Intuition is perceived as the ability to "calmly and having gathered one's thoughts allow reality to exert its influence and, thus, the distance in relation to things and people". Developing this quality, according to

[14] The activity involved in developing the law will not be considered in more detail in this article.

Weber, allows the infusion of "both a hot passion and a cold mother wit into the same soul" (Weber, 1990, p. 51). The principle of impartiality means that when passionately seeking justice and, as stated by Valančius, maintaining sensitivity to the problems of a particular individual, the judge must remain impartial in relation to the actual material and witnesses, and must depart from his or her own convictions, sympathies and anxieties, as well as feelings (Navickienė, 2015, p. 196). To maintain impartiality, a judge also needs to consider the parties to a dispute to be equal and give them equal opportunities to lead their cases, while the judge must not gain any personal benefit from the case. At the same time, impartiality signifies objectivity, meaning that judgments are made on the basis of circumstances external to the judge, and that may even be contrary to his/her personal convictions. The judge must respect the values recognised by society, even if they are not shared by him/her, and must express what is considered moral and just in the society in which they operate – even if they do not perceive it as such from their subjective point of view (Barak, 2006, p. 296). However, ideas raised by schools of legal theory on theological, naturalistic, realistic, sociological and other types of factor that help ensure the impartiality of judges while they carry out their obligation to be proactive will not be further discussed in this work. An attempt will be made to examine factors that limit the judge and ensure their impartiality through the prism of the current legal requirements of criminal procedure. Essential factors that, according to the author of this work, limit the discretion of the judge and ensure that his/her activity does not become biased, will therefore be further reviewed here.

Imperative procedural rules are the most obvious limitations on discretion and, at the same time, something that helps to ensure impartiality. In particular, these rules specify aspects such as the nature of the action to be taken and who should be notified of these actions. If in making a specific decision, the judge complies with all mandatory rules, the judgment is more likely to be fair. This means that any potential abuses are therefore limited by the setting of specific rules for the subject, such as the decision that is to be made in the presence of the aggregate of concrete facts (Gumbis, 2004, p. 50). For example, as provided in part 2 of Art. 301 of the CCP: "A guilty verdict *cannot be based solely* on the testimonies of victims or witnesses, who are subject to the right to anonymity. It is possible to justify a guilty verdict via testimonies by these persons only if these are supported by other evidence." However, when analysing the compliance of a judge's behaviour with procedural justice, attention has also been paid to the fact that this depends on how requirements are formulated in procedural law: judges' behaviour has been seen to be more in line with the requirements of the justice system in situations that incorporate detailed regulation compared with when these situations are unregulated (Petkevičiūtė-Barysienė and Valickas, 2016, p. 22). It must, however, be borne in mind that the growing positivisation of law has certain negative aspects, with the paradox that this makes it possible to gradually get closer to legal nihilism (Berkmanas, 2012, p. 47-48).

Another factor that limits the possibility for abuse of the discretion available and helps ensure the impartiality of judges is **the obligation to provide motivation for a judgment** because this means that when issuing a judgment in writing, the judge explains his/her position on a particular issue.

As noted in the legal doctrine, proper, reliable and correct legal reasoning is a guarantee contained in the constitutional rights of an individual – comprising the principles of equality before the law, and the right to a fair and impartial trial and an appropriate legal process (Baltrimas and Lankauskas, 2014, p. 39). The requirement to motivate judgments helps to ensure that judgments made by the court, as a state authority, in the name of the Republic of Lithuania will be substantiated; it also helps ensure implementation of the principles of publicity of court hearings, the parties' right to be heard (*audiatur et altera pars*), and the expansion and development of law (Trumpulis, 2007). Furthermore, irrespective of whether a statement itself is admissible and valid, the correctness of a decision in a practical situation is determined by the correctness of arguments that serve as a basis for its application (Bernal, 2011). Proper motivation to strengthen the protection of human rights is an important and valuable legal objective that can justify changes in court practice (Trumpulis, 2007, with reference to Administrative case No. P17-44/2006 (S) V. T. v. General Prosecutor's Office of the Republic of Lithuania). Meanwhile, opinions appear in the legal doctrine of Lithuania that the way the verdict is written depends to a large extent on the judge's dexterity and ingenuity: under this thinking, for example, a clever judge who is

confident about a particular fact or decision will always find something to justify (motivate) the procedural documents (Merkevičius, 2009, p. 138, with reference to Schmitt, Die richterliche Beweiswürdigung im Strafprozess, S. 206-215, 217-228).

The importance of providing a motivation for judgments is also emphasised in the jurisprudence of the Constitutional Court of the Republic of Lithuania (Ruling of the Constitutional Court of the Republic of Lithuania of 21 September 2006), in which it is stated that the final court act must contain sufficient arguments to justify this act; it must also not contain unnamed arguments or unspecified circumstances that are important for the adoption of a fair final court act; and, furthermore, the final court act must be clear to the parties involved in the case and other persons. Attention has also been drawn to the fact that drawing up the final court act before it is formally adopted and publicly announced is one of the legal guarantees that justice will be enforced in the case – otherwise, a reasonable doubt about the fairness of the judgment may arise. To ensure the proper and qualitative implementation of the duty to state reasons, the Lithuanian Council of Judges stated in a ruling that: "It must be obvious from the motives for a judgment that the court has a position on all the accepted evidence and on all the issues arising in the case. However, this does not mean that it needs to be comprehensively and broadly spoken in every aspect. The duty of the court to give reasons for its judgments cannot be perceived as a requirement to give a detailed answer to every argument. Sometimes it is enough to give a very concise motivation. A detailed motivation is not necessary when responding to arguments that are manifestly irrelevant, unfounded, abusive or unacceptable for other reasons, in light of the clear provisions of the law or the established case law regarding arguments of an analogous nature. The reasons for a judgment cannot be mutually exclusive. Having sufficient reasons to make a judgment, first of all, means that the essential questions of the case must be clearly answered. It must be clear from the motives of the judgment which aspects of the case have been disputed and which ones have not been, and therefore, the motives for a judgment are usually drawn up taking into account the relevant issues" (Ruling No. 13P-65-(7.1.2) of the Judicial Council of 27 May 2016 "On the approval of recommended standards for the quality of procedural judicial decisions").

When assessing whether there have been any violations of the Convention, particularly in the context of the impartiality of the court, the ECHR also gives particular attention to the importance of motivation of judgments: *"The chairman of the panel of judges, after having announced the verdict of the court of first instance, publicly stated that the parliamentary investigation and the media campaign did not prevent the judges from remaining objective and impartial. […] the verdict in the case was made following a trial procedure based on the adversarial principle, during which the applicant had the possibility to submit his arguments, useful for the defence, to the courts, while the reasoning of the judgments does not give grounds for stating that the judges, when assessing the evidence, could have been influenced by speeches of the members of the commission"* (Blesa Rodriguez v. Spain, 2015).

The instance system of courts is considered no less important a guarantee in helping to avoid manifestations of judicial bias. The Constitutional Court has held that *"the purpose of the instance system of the courts of general jurisdiction is to create preconditions for the courts of higher instance to correct any errors in fact-finding (i.e. errors in ascertainment and assessment of legally significant facts) or any errors in law (i.e. in the application of law), which for some reason may be made by the court of lower instance, and to prevent the occurrence of injustice in any civil or criminal case, or case attributed to the other category that has been examined by the court of general jurisdiction; otherwise, it would deviate from the constitutional principle of the state under the rule of law, and an individual's constitutional right to due court proceedings would be violated; the aforementioned correction of errors of the courts of lower instance and stopping injustice related to it are a conditio sine qua non for the parties in the respective case and for society in general with regard to trusting not only in the court of general jurisdiction that examines the relevant case, but also in the whole court system of general jurisdiction (inter alia, rulings as of the 28 March 2006 and the 15 November 2013)"* (Ruling of the Constitutional Court of the Republic of Lithuania of 26 June 2017). The Constitutional Court has also noted: *"The law must establish such legal regulation that the final act of the court of general jurisdiction or of the specialised court of first instance established pursuant to Part 2 of Article 111 of the Constitution could be*

appealed against to at least one court of higher instance. [...] the legislator has the discretion, by keeping to the constitutional principle of the state under the rule of law, to determine to which court and under what procedure an individual can apply for the protection of his/her violated rights and freedoms. At the same time, it needs to be emphasised that, according to the Constitution, the legislator cannot establish such legal regulation according to which an individual, regardless of his/her legal status, cannot apply to a higher court with regard to his/her violated rights, otherwise his/her rights would be restricted" (Ruling of the Constitutional Court of the Republic of Lithuania of 27 November 2006).

The ECHR has also noted the importance of proper implementation of Article 2 of Protocol 7 to the ECHR, which provides for the right to review a judgment. The right to review a guilty verdict may be related to both factual circumstances and legal acts, or only to violations of law. Certain procedural limitations are also possible for reviewing a judgment, but this right must be directly accessible to the interested parties and must be independent from any discretionary actions of the authorities – and the right to review a judgment must not violate the essence of the law (Papon v. France, 2002; Pesti and Frodl v. Austria, 2000; Zaicevs v. Latvia, 2007; Galstyan v. Armenia, 2007; Gurepka v. Ukraine, 2005; Krombach v. France, 2001).

As noted in legal doctrine, pursuant to Part 5 of Article 14 of the International Covenant on Civil and Political Rights and Article 2 of Protocol 7 to the ECHR, a sentenced person has the right to insist that a higher-instance court reviews a judgment. However, the CCP provides much wider possibilities for appeal, with all parties concerned in proceedings able to file their appeals on any grounds and motives (Jurka et al., 2009, p. 49).

The instance system of courts – or, in other words, the system of forms for controlling judgments[15] – is an internal tool for court control aimed at ensuring the validity and legitimacy of a judgment and correcting any errors made. The judicial control function helps the constitutional functions of the judicial authority to be realised (Randakevičienė, 2009, p. 175-176). The instance system of courts is not characterised by hierarchical subordination. It is acknowledged that a court of higher instance is usually superior to a court of lower instance: firstly, it has more experienced judges with a longer record of service and cases are handled collectively; secondly, the workload of a court of higher instance is lower, allowing more attention to be devoted to the case; thirdly, courts of lower and higher instance are more restricted, and the checking of a case in the court of higher instance makes it possible to ensure the principle of impartiality to a higher degree; and fourthly, the function of interpretation of the law and unification of case law occurs in a court of higher instance (Randakevičienė, 2009, p. 180).

Although Part 4 of Article 33 of the Law on Courts establishes that the courts of lower instance, when making decisions on cases attributed to the relevant categories, are bound by the rules of the courts of higher instance for the interpretation of laws that have been formulated in analogous or substantially similar cases, and Article 386 of the CCP points out that a court of lower instance must follow the instructions of the cassation court when re-examining a case, the Constitutional Court has pointed out that the instance system of the courts of general jurisdiction cannot be interpreted as restricting the procedural autonomy of the courts of lower instance of general jurisdiction: the courts of higher instance of general jurisdiction (and judges of those courts) cannot, for instance, interfere with cases that are being examined by the courts of lower instance of general jurisdiction, and cannot give them any mandatory instructions or guidance on how to deal with the cases concerned. Meanwhile, such instructions (irrespective of their binding or recommendatory nature) are to be considered in the context of the Constitution as relating to the functioning of the respective courts (judges) *ultra vires* (Ruling of the Constitutional Court of 28 March 2006; Ruling of the Constitutional Court of 9 May 2006). The practical problems involved in harmonising these provisions are illustrated by a case in which the Judicial Court of Honour fined a judge on the basis that she constantly and deliberately ignored the instructions and practice of the

[15] Ordinary and extraordinary forms of control for judicial decision-making are distinguished in the science of criminal procedure law. For more information, see Randakevičienė, I. Forms of control of the judicial decision-making in the criminal proceedings. In Fair criminal proceedings: Problematic issues. Vilnius: Industrus, 2009.

court of higher instance, and dealt with cases without giving regard to one of the tenets of law – court precedent. But having examined the judge's complaint, the SCL adjudged that *"having assessed the fact that there was no uniform case law in the court of higher instance on this particular procedural issue, there is no legal basis for acknowledging that the judge, having failed to fulfil the order of the court of higher instance, has roughly and manifestly violated procedural law"* (Order of the Supreme Court of Lithuania of 19 November 2015 GT1-1/2015 (S)).

There are opinions in Lithuanian legal doctrine that "[...] the stage of the trial does not bear the role that determines the whole criminal process and its results – this has long been taken over by the pretrial investigation. The legislator in the criminal procedure forgot the purpose of the court as a neutral arbitrator and forced the court to take the stance of accusation" (Merkevičius, 2009, p. 137), while "[…] today's pretrial investigation not only determines the further trial, but even more so, the independent proving disappears in the trial: the court, after having read the written documents submitted to it at the trial hearing and examined the tangible evidence, and after having heard the speeches and arguments of the participants in the proceedings has no other method than simply to 'sanction' the factual data provided by the accuser and acknowledge the probative power of these data that the accuser assigned to them during the pretrial investigation. The court is incapable of either effectively filling in the gaps in the pretrial investigation or correcting the errors made in the initial stages" (Merkevičius, 2009, p. 144). However, it is difficult for the author of the current study to accept this position, as otherwise we would simply assume that all judges perform their duties freely and that the existing legal systems do not provide judges with the ability to properly fulfil their duties, which is something they try to rebut when analysing the system of guarantees.

One more important factor that helps to ensure the court's impartiality should therefore also be highlighted: **the system of guarantees that ensures the judge's independence (his/her obligation to remain independent)**. The Constitutional Court has held that when analysing the principle of independence of judges and courts, it must be noted that independence is not a privilege but one of the most important duties of the judge and of the court, arising from the right guaranteed by the Constitution for an individual to have an independent and impartial dispute arbitrator (Ruling of the Constitutional Court of the Republic of Lithuania of 12 July 2001; Ruling of the Constitutional Court of the Republic of Lithuania of 6 December 1995; Ruling of the Constitutional Court of the Republic of Lithuania of 18 April 1996; Ruling of the Constitutional Court of the Republic of Lithuania of 19 December 1996 On the compliance of Articles 5 and 10 of the Law of the Republic of Lithuania on State Secrets and Their Protection with the Constitution of the Republic of Lithuania as well as on the compliance of Rulings No. 309 and No. 310 of the Government of the Republic of Lithuania of 6 March 1996 with the Constitution of the Republic of Lithuania and with norms of the Code of Civil Procedure of the Republic of Lithuania; Ruling of the Constitutional Court of the Republic of Lithuania of 5 February 1999; Ruling of the Constitutional Court of the Republic of Lithuania of 21 December 1999; Decision of the Constitutional Court of the Republic of Lithuania of 12 January 2000 On the elucidation of the Ruling of the Constitutional Court of the Republic of Lithuania of 21 January 1999). Meanwhile, the principle of independence of the judge and courts set out in the Constitution implies that the legislator has the duty of establishing a body of guarantees ensuring such independence to ensure the court's impartiality in the decision-making process and prevent interference with the activities of the judge or the court in the course of administering justice (Ruling of the Constitutional Court of the Republic of Lithuania of 21 December 1999). The Constitutional Court has held that *"according to the way in which independence of the judge and the court established in Part 2 of Article 109 of the Constitution is elaborated in the laws, the guarantees of independence of judges can be conditionally divided into three groups: a) the guarantee of inviolability of the duration of the judge's mandate; b) the guarantee of immunity of the judge's personality; c) guarantees of a social (material) nature for the judge". These guarantees are closely interrelated, so it is therefore universally acknowledged that the breach of any of the guarantees of independence of the judge and the courts can be detrimental to the implementation of justice – in which case there would be a risk that human rights and freedoms would not be guaranteed* (Ruling of the Constitutional Court of 12 July 2001).

When analysing the independence of the court within the jurisprudence of the Constitutional Court, much attention is devoted to the legal status and qualifications of the judge, as well as the situation with regard to prohibitions on influencing or interfering with the court's activities. It is namely these guarantees of independence that are necessary and directly related to the possibility for the court to remain impartial when performing its duty.

The specific function of the court entrenched in the Constitution, with the principle of independence of the judge and courts, also determines the judge's legal status. Judicial power is formed not on a political basis, but on a professional one: "The judge according to his/her duties performed cannot be attributed to public servants and he/she cannot be required to pursue any policy. The judicial practice is formed only by the courts themselves, applying the rules of law" (Ruling of the Constitutional Court of the Republic of Lithuania of 21 December 1999). The judge's duties are not compatible with other duties or other work. The established prohibition is aimed at ensuring the independence and impartiality of judges – necessary conditions for the implementation of justice (Ruling of the Constitutional Court of 12 July 2001).

Another aspect of independence relevant to the proper administering of justice by the courts is the qualifications of judges: only people with a high legal qualification and life experience can be appointed as judges, meaning that they are held to specific professional requirements. The proper preparation of judges, with a deepening of their knowledge and upgrading of their qualifications is an important precondition for ensuring the proper functioning of the courts. Aside from this, judges are expected to meet extremely high ethical and moral standards, with an impeccable reputation and a commitment to preserving the honour and prestige of their profession (Ruling of the Constitutional Court of 27 November 2006). The ECHR has also drawn attention to the fact that the judge's qualifications are an important factor with respect to his/her impartiality and helping to avoid external influences – for example, "professional judges deal with the issue of criminal charges because their vocational training and experience allow them to ignore any external influence" (Abdulla Ali v. the UK, 2015).

As stated in Part 1 of Article 114 of the Constitution, "interference of the state authorities and governing institutions, members of the Seimas and other officials, political parties, political and public organisations or citizens with the activities of the judge or court is prohibited and imposes a liability under the law". The prohibition of interference with the activities of the judge or court is intended to ensure their independence. The court can administer justice only if the judge is able to deal with the case impartially, taking into account the circumstances of the case and the requirements of the law (Ruling of the Constitutional Court of 12 July 2001). When administering justice, all judges have an equal legal status from the point of view that unequal guarantees of the judge's independence when administering justice (deciding cases) and his/her autonomy cannot be established. No administering judges can be subordinate to any other judge or chairman of any court (*inter alia* the court in which he/she works, as well as the court of higher chain or instance) (*inter alia*, Rulings of the Constitutional Court of 27 November 2006, 29 June 2010 and 14 February 2011). The judge must not detail the cases he/she is considering to any public authority or officials. The procedural independence of the judge is a compulsory prerequisite for the impartial and fair examination of a case (Ruling of the Constitutional Court of 21 December 1999).

As the Constitutional Court points out, the system for guaranteeing independence for judges and courts does not create any preconditions under which the judge is able to avoid properly carrying out his/her duties or would negligently handle cases, unethically treat people participating in a case, or violate human rights or dignity. Meanwhile, it has also been pointed out that the system of self-regulation and self-governance of the judicial authority must be suitable for ensuring that judges properly carry out their duties, with any unlawful or unethical behaviour by a judge being properly assessed (Ruling of the Constitutional Court of 12 July 2001).

These fundamental guarantees ensure the impartiality of the judge (of the court) when performing his/her (its) duty to act proactively, as well as reduce the risk of misuse of the court's discretion.

Conclusions

1. Although the legal system of Lithuania belongs to the Romano-Germanic system characterised by the inquisitorial model of criminal process, the prevailing constitutional doctrine of criminal procedure and the jurisprudence of the Constitutional Court that separates the procedural functions oblige the judge to seek to establish the strict truth by giving him/her a procedural tool – namely, an obligation to be proactive and, at the same time, act impartially.

2. Activity does not in itself imply bias, but upon specifying any circumstances that may cause reasonable doubt with regard to court bias, it is necessary for participants in proceedings to assess whether the court has not exceeded the threshold of bias in performing its duties. This is done on a case-by-case basis by individually examining the actions of the judge.

3. The discretion of the court and its power *ex officio* to act proactively (without the initiative of participants in proceedings) are necessary prerequisites for the implementation of not only procedural but also substantive justice, and for ensuring a fair decision. To reduce possible misuse of judicial discretion, the law establishes factors that limit it and ensure impartiality, including:

3.1. Imperative procedural rules that precisely specify the form, manner and timing of the court's (or judge's) actions, and ensure that procedural justice, at least, is implemented. These are considered to be the clearest examples of limitation on the the court's (judge's) discretion.

3.2. A properly fulfilled obligation to provide the motivation for a judgment is considered not only an explanation of the judge's (court's) position on a particular issue, but is one of the guarantees of an individual's constitutional rights – which consist of equality before the law, the right to a fair and impartial tribunal, and the right to appropriate proceedings.

3.3. The instance system of courts performs not only the functions of internal control of courts, ensuring the reasonableness and legitimacy of judgments, and helping correct errors, but also guarantees the right of a participant involved in proceedings to an impartial trial. The establishment of court bias, which serves as absolute grounds for invalidity of a verdict, is a violation of criminal proceedings that cannot be corrected by a court of higher instance.

3.4. Only an independent judge can be impartial. The system of guarantees that ensures the independence of a judge is thus directly related to also ensuring their impartiality. The elements of this system, such as the inviolability of the duration of the judge's mandate, the immunity of the judge's personality, the integrity of the judge's person, and guarantees of a social (material) nature for the judge, can be considered not only as guarantees of independence, but also of impartiality.

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