International Comparative Jurisprudence 2024 Volume 10 Issue 1
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2024.06.004

JUDICIAL INDEPENDENCE *DE JURE* AND *DE FACTO*: LESSONS FOR UKRAINE FROM THE CASE LAW OF THE ECtHR

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Received: 12 April 2024; accepted: 15 May 2024
DOI: http://dx.doi.org/10.13165/j.icj.2023.12.004

Abstract. The principle of judicial independence is a fundamental tenet of the rule of law and fair trial standards. The European Court of Human Rights (ECtHR) identifies four criteria for evaluating judicial independence: (a) the manner of a judge's appointment; (b) the duration of such an appointment; (c) safeguards against external influence; and (d) the appearance of independence. The ECtHR also distinguishes several dimensions of judicial independence, including independence vis-à-vis the executive, parliament, other courts, and parties, as well as independence from judicial councils. Nevertheless, despite the existence of shared European principles on judicial independence, certain countries, particularly those undergoing transitions, encounter challenges such as political interference, corruption, and insufficient safeguards against dismissal. This results in a discernible disjunction between de jure and de facto judicial independence. This article poses the following research questions: What are the main approaches and common challenges for judicial independence in European countries based on the latest case law of the ECtHR? What lessons can be learned by Ukraine, as an EU candidate, from this case law in order to mitigate the gap between de jure and de facto judicial independence?

Keywords: judicial independence, de jure judicial independence, de facto judicial independence, right to a fair trial, ECtHR.

Introduction

In contemporary legal discourse, judicial independence is regarded as an inherent tenet of the rule of law. The Magna Carta of Judges (2010) stipulates that the mission of the judiciary is 'to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner'. The Consultative Council of European Judges (CCEJ) defines judicial independence as 'not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice' (CCEJ, 2001).

Given the complexity of the phenomenon of judicial independence, we can observe numerous approaches to its study in both academic literature and at the level of international institutions. In most sources, the following types of judicial independence are distinguished: a) *external and internal independence*, where the former is concerned with the judiciary's independence from the legislative and executive branches of power, while the latter pertains to the independence of judges within the judicial system (CCEJ, 2001; Committee of Ministers, 2010; European Commission for Democracy Through Law, 2008); b) *institutional and individual (personal) independence*, which reflects the independence of the court as an institution from other state bodies and the personal independence of each individual judge during the trial (The Bangalore Principles of Judicial Conduct, 2002; CCEJ, 2002; Huq, 2021; Jackson, 2012); and c) *functional and organizational independence*, which

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correlates with the guarantees of judicial independence in the administration of justice in a particular case and organizational guarantees of their independence in obtaining and terminating their status, disciplinary proceedings, their removal, etc. (Bureau of the CCJE, 2020). The dual nature of judicial independence was also highlighted by the Venice Commission, which noted that the independence of the judiciary includes an 'objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge' (European Commission for Democracy Through Law, 2010). In this context, judicial independence becomes an instrumental value.

International documents on the issue of judicial independence emphasize the necessity of enshrining its guarantees in the constitution and other legislative acts. Conversely, academic sources have indicated that the existence of legally enshrined guarantees of judicial independence does not necessarily lead to real judicial independence (Voigt, 2020; Linzer & Staton, 2015; Ginsburg & Melton, 2014) due to the influence of political pressure, unlawful interference in the administration of justice, the biases of individual judges, and other negative trends which have been repeatedly highlighted by international institutions (Secretary General of the Council of Europe, 2017; CCEJ, 2001). It appears that there is a growing consensus that new methodologies must be developed that not only examine the formal guarantees of judicial independence enshrined in legislation, but also assess the implementation of standards of judicial independence in real life. Thus, there are studies aimed at examining the perception of judicial independence among various stakeholder groups, which should be taken into account in terms of judicial reforms (Eurobarometer, 2023, 2024).

This article is an invitation to a broader international discussion initiated by one of its authors in previous publications on judicial independence in the context of fair trial guarantees (Tsuvina, 2015, 2021). The research methodology is based on a combination of general scientific methods (analysis, synthesis, abstraction, etc.), the system-structural and comparative law methods, as well as the methods of evaluative and autonomous interpretation developed in the practice of the European Court of Human Rights (ECtHR). This article employs a scholarly perspective to examine the dichotomy of *de jure* and *de facto* judicial independence, with particular attention paid to the challenges for both concepts in terms of the ECtHR case law. It also focuses on Ukraine's perspective as an EU candidate state. The article poses the following research questions: What are the main approaches and common challenges for *de jure* and *de facto* judicial independence in European countries based on the latest case law of the ECtHR? What lessons can be learned by Ukraine, as an EU candidate, from such case law in order to mitigate the gap between *de jure* and *de facto* judicial independence?

1. Judicial independence as a multifaced concept: *De jure* and *de facto*

One of the most productive approaches to researching judicial independence is to distinguish between its *de jure* and *de facto* dimensions (Gutmann & Voigt, 2018; Hayo & Voigt, 2007, 2014; Feld & Voigt, 2003; Ginsburg & Melton, 2014; van Dijk, 2021). *De jure* judicial independence refers to the legislative guarantees of court independence, whereas *de facto* judicial independence reflects the actual situation with respect to such guarantees, as well as the perception of courts as independent institutions among the public. This approach was first presented in a study by Feld and Voight (2003) on the independence of constitutional courts, and over time was extended to the judiciary in general. Although this approach was later criticized (Ríos-Figueroa & Staton, 2009), the dichotomy *de jure/de facto* judicial independence became a basis for other researchers.

Explaining the distinction between the two concepts, Voight et al. (2014) noted that *de jure* independence reflects the legal framework regarding judicial autonomy, whereas *de facto* independence represents the actual autonomy enjoyed by judges in practice. Ríos-Figueroa and Staton (2009) define *de jure* independence as the intention of judges to behave in a certain way, and *de facto* independence as their actual behaviour. In some sources, these types of independence are referred to as formal and perceived independence (van Dijk, 2021). For instance, the European Network of Councils of Justice (ENCJ) presented a comprehensive study on measuring judicial independence based on the distinction between formal and perceived judicial independence (ENCJ, 2023). Among the indicators of judicial independence, the ENCJ identified the following: 1) *indicators of formal independence of the judiciary as a whole* – a) the legal basis of independence, b) the organizational autonomy of the judiciary, c) financial independence, d) and the management of the court system; 2) *indicators of the formal independence of an individual judge* – a) human resource decisions regarding judges, b) disciplinary

measures, c) the non-transferability of judges, d) the allocation of cases, e) and the internal independence of judges; and 3) *indicators of the perceived independence of the judiciary and the individual judge*, which are carried out through surveys on the perception of judicial independence by the public, litigants, lawyers and judges, as well as by measuring corruption and the level of trust in the court compared to other institutions (ENCJ, 2023). In this study, judicial independence is analysed in connection with formal and perceived judicial accountability, which also have the same dimensions – the formal accountability of the judiciary as a whole, the formal accountability of the individual judge and their staff, and the perceived accountability of the judiciary and the individual judge. Each dimension also has particular indicators (ENCJ, 2023). Such an approach to studying the issues of the independence and accountability of judges together is widespread (Burbank, 2007; Geyh, 2003; Andenas, 2007; Keilitz, 2018; Shetreet & Turenne, 2013).

It should be mentioned that studies and international documents focus primarily on highlighting the set of guarantees of *de jure* judicial independence and its types. For instance, Ginsburg and Melton (2014) identified such guarantees as: the constitutional enshrinement of the requirement of judicial independence; the term of office of judges; guarantees of the selection and removal procedures, including limited grounds for removal from office; and salary insulation. Different levels of *de jure* judicial independence can also be distinguished: a) *the institutional independence of the judiciary*, which reflects the external independence of the judiciary from other branches of power; b) *the internal independence of courts*, which reflects the independence of courts and judges within the judicial system, i.e., between higher and lower courts, judges of such courts, and judges holding administrative positions in the court; and c) *the personal independence of a judge*, which is reflected in the independence of judges during the trial in a particular case (Tsuvina, 2021).

De facto judicial independence reflects the actual situation with the fulfilment of *de jure* guarantees, and reflects the perception of the public regarding the courts as independent institutions. The academic literature offers a variety of perspectives on this type of independence and different approaches to its measurement (Crabtree & Fariss, 2015; Ríos-Figueroa & Staton, 2014). Some scholars understand this type of judicial independence as *de facto* autonomy or the capacity of a judge to render a decision in a particular case without undue influence (Kornhauser, 2002). Others also associate it with the confidence that court decisions will be properly executed by all branches of government, i.e., this understanding reflects judicial independence as 'power', according to which a judge is not only autonomous in making a decision, but their decisions must be executed regardless of the will of other branches of government (Cameron, 2002). In many sources, this type of independence is identified in terms of the perception of court independence by various stakeholder groups (judges, jurors, lawyers, companies, and both ordinary citizens who have had interactions with the judicial system and those who have not) (van Dijk, 2021).

The disparate conceptualisations of *de facto* judicial impartiality give rise to two approaches to its measurement. The first approach is related to the fact that the measurement of *de facto* independence is carried out by studying the real situation with the actual implementation of *de jure* independence indicators. This approach was exemplified by Voight et al. (2014). Conversely, scholars who study the perceived independence of the court employ surveys of various stakeholder groups, including the public, lawyers, and judges, to assess this phenomenon. This approach to measuring the state of the perception of *de facto* judicial independence is represented by empirical studies by Eurobarometer (2023, 2024), the ENCJ (2023), and the EU Justice Scoreboard (2023) project.

For example, the annual measurement of judicial independence in EU countries among the general public and companies is conducted by Eurobarometer. In 2023 and 2024, among the indicators of judicial independence, respondents were offered the following for evaluation: a) the status and position of judges; b) the absence of interference or pressure from economic or other interests; and c) the absence of interference and influence from the executive and legislative branches of power (Eurobarometer, 2023, 2024).

The survey of the perception of the independence of national courts in the EU among ordinary citizens (involving 25,876 respondents in total) revealed the following: 11% assessed the state of judicial independence in their country as 'very good', 42% as 'fairly good', 24% as 'fairly bad', 12% as 'very bad', and 11% could not answer the question. At the same time, indicators were quite different by country. In general, judicial independence was evaluated as 'good' in Finland (86%), Denmark (86%, of which 40% assessed it as 'very good') and Austria

(82%), while in Hungary and Poland judicial independence was evaluated as 'good' by only 23% of respondents, and in Bulgaria by only 31% of respondents. At the same time, a significant proportion of respondents in Hungary (35%), Poland (30%) and Bulgaria (27%) assessed the state of judicial independence as 'very bad' (Eurobarometer, 2023).

It is noteworthy that, of the respondents from the general public who assessed the independence of the judiciary as 'very good' or 'fairly good': 79% attributed this primarily to the guarantees of the status of a judge; 63% did so due to the absence of interference or pressure from economic or other specific interests; and 62% held this view as a result of the absence of external influence from the executive and legislative branches of power. At the same time, the majority of respondents who rated the state of national judicial systems as 'bad' attributed this to similar factors – in particular, the existence of external pressure on the courts from the executive and legislative branches of government (77%) or from economic or other specific interests (60%) (Eurobarometer, 2023).

In 2024, Eurobarometer carried out the same survey among companies (14,621 respondents in total). The results of this survey were not vastly different from those of the general public survey. In particular, one in two companies in the EU rated the independence of courts and judges in their country as 'fairly good' (40%) or 'very good' (10%). At the same time, more than one in three companies rated the independence of their courts and judges as 'fairly bad' (22%) or 'very bad' (13%). In general, judicial independence was evaluated by companies as 'good' in Finland (91%, of which 38% assessed it as 'very good'), Denmark (88%, of which 49% assessed it as 'very good') and Ireland (78%, of which 39% assessed it as 'very good'), while judicial independence was evaluated as 'good' by only 22% of respondents in Poland, 25% in Bulgaria, and 28% in Hungary. At the same time, a significant number of companies in Bulgaria (30%), Poland (23%), and Hungary (26%) assessed judicial independence as 'very bad' (Eurobarometer, 2024).

Another interesting point is the correlation between the *de facto* and *de jure* independence of the court. For example, Hayo and Voight (2005) noted that indicators of *de facto* independence partly depend on indicators of *de jure* independence, and that *de jure* independence is one of the most influential factors in determining *de facto* independence, along with such factors as public confidence in the courts, the degree of democratization, freedom of the press, other cultural factors, etc. In the literature, the level of respect for human rights at the national level (Keith, 2002; Crabtree & Nelson, 2017; Abouharb et al., 2013) and the economic growth of the state (Feld & Voigt, 2003; Voigt et al., 2014) are also mentioned as crucial factors of *de facto* judicial independence. Consequently, increasing the *de jure* level of judicial independence should also lead to an improvement in *de facto* judicial independence. Other authors are sceptical about this (Ginsburg & Melton, 2014). For example, Ríos-Figueroa and Staton (2014) pointed out that the correlation between the two types of judicial independence is weak, and sometimes even negative. They stressed the weak correlation between different indicators of *de jure* independence and the strong correlation between different indicators of *de facto* independence.

In practice, some dissonance can be seen between legislative guarantees of judicial independence and the actual practice of ensuring of such guarantees, i.e., between *de jure* and *de facto* judicial independence. This observation caused a shift in research on judicial independence from studying its legal guarantees to examining the actual state of their implementation and fulfilment, which has been emphasised by the Council of Europe.

The report of the Secretary General of the Council of Europe (2018) on the state of democracy, human rights and the rule of law states that 'the judiciary is not immune from the environment in which it operates', and that 'in recent years, creeping populism and attempts to limit political freedoms among some member states have resulted in challenges to the judiciary's independence at home – and at the international level too'.

In particular, some States have drafted laws allowing political interference in the appointment of judges and in disciplinary proceedings against them, introduced politically motivated changes in the composition of judicial self-governing bodies, and made proposals to empower the executive to replace court presidents at its discretion (Secretary General of the Council of Europe, 2018). These and other challenges have become the subject of attention from the ECtHR and the Court of Justice of the European Union (CJEU), whose case law is of great

importance within the European region. It is essential to understand the challenges facing judicial independence and, consequently, the rule of law in order to ensure the continued stability and integrity of the European legal order. Assessing the real situation with judicial independence at the national level, measuring the gap between proclaimed guarantees of *de jure* judicial independence and *de facto* judicial independence, and taking steps towards minimizing this gap can all help in this regard.

2. Judicial independence in ECtHR case law

In terms of the European Convention on Human Rights (ECHR), judicial independence is interpreted through the prism of the guarantees of the right to a fair trial, according to which every person in the determination of their civil rights and obligations or of any criminal charge against them is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6(1) of the ECHR). This provision correlates with Article 47 of the EU Charter of Fundamental Rights, which enshrines the right to an effective remedy and a fair trial.

While international documents and scholars place greater emphasis on judicial independence at the institutional level, the ECtHR focuses on the observance of guarantees of the independence of judges in particular cases, evaluating the State's positive obligation to ensure the fairness of trials. In this context, it is possible to discuss the personal dimension of judicial independence. The ECtHR has repeatedly emphasized that 'the notion of the separation of powers between the political organs or government and the judiciary has assumed growing importance in its case law. At the same time, neither Article 6 nor any other provision of the Convention requires the States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction' (*Oleksandr Volkov v. Ukraine*, 2013; *Stafford v. the United Kingdom* [GC], 2002). The ECtHR assesses the independence of the court in each particular case by considering a number of criteria: a) the manner of appointment of its members; b) their term of office; c) the existence of safeguards against external pressure; and d) the existence of external guarantees of the court's independence (or the appearance of independence) (*Findlay v. the United Kingdom*, 1997; *Brudnicka and Others v. Poland*, 2005). Four further dimensions of judicial independence can be distinguished: a) judicial independence vis-à-vis legislative and executive authorities; b) judicial independence vis-à-vis the judicial council; c) judicial independence vis-à-vis other courts (internal judicial independence); and d) judicial independence vis-à-vis the parties of the case (ECtHR, 2017; Tsuvina 2021).

Although the main approaches to judicial independence were shaped by earlier practice, a number of so-called new ECtHR judgments have recently been identified which are driven by modern challenges in the field of judicial reform, and which thus deserve special attention.

The new era in the judicial independence-related case law of the ECtHR began with the judgement in *Guðmundur Andri Ástráðsson v. Iceland* (2020). In this case, the applicant alleged a violation of Article 6(1) of the ECHR on the grounds that one of the judges of the newly established Court of Appeal of Iceland, which heard the case, was appointed in violation of the applicable law. The selection process in this case, conducted by the Evaluation Committee, yielded a roster of the 15 most qualified candidates, which was subsequently forwarded to the Minister of Justice. Remarkably, the judge presiding over the petitioner's case held 18th place on this list, and was thus excluded from it. Nevertheless, the Minister of Justice elected to appoint only 11 candidates from the list, proposing the inclusion of the candidates ranked 17th, 18th, 23rd, and 30th (including the judge who presided over the petitioner's case), without providing justification for these replacements. Subsequently, the list of candidates was approved by Parliament as a general list, contrary to the applicable legislation which provided for a roll-call vote for each candidate. The individuals were then appointed by the president. This case is notable for its implications regarding the establishment of a three-part test to determine whether the procedure for appointing a judge meets the requirements of Article 6 of the ECHR in terms of judicial independence and the standard of a 'court, established by law'. In particular, the ECtHR emphasised that in such situations, it should ascertain: (a) 'whether there was a manifest breach of the domestic law'; (b) 'whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges'; and (c) 'whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts'. In evaluating the circumstances of the case under this test, the ECtHR observed that the applicant had consistently highlighted that the judge who had presided over their case

had been unlawfully appointed as a consequence of the unlawful actions of the Minister of Justice and the procedurally flawed vote of the Parliament. Furthermore, the Supreme Court has repeatedly acknowledged, including in the applicant's case, the illegality of the appointment of judges to the Court of Appeal due to violations of the appointment procedure by the minister of justice and Parliament. Concurrently, the Supreme Court, having acknowledged these violations, did not assess them in accordance with the case law of the ECtHR. Instead, they were deemed to be inconsequential and did not impact the fairness of the applicant's trial, despite the arguments presented. The ECtHR identified a 'flagrant breach of domestic law' by all three branches of power, which is contrary to the right to a fair trial (*Guðmundur Andri Ástráðsson v. Iceland*, 2020). As evidenced by this case, there is a clear correlation between the institutional independence of the judiciary, as defined by the necessity of adhering to the established procedure for the appointment of a judge, and the individual independence of a judge in the context of a specific case.

At the same time, the most notable example in this regard is the rule of law crisis caused by the violation of the guarantees of judicial independence in Poland through a series of political decisions which were in fact an attempt to bring the judiciary under the control of the government (Moliterno et al., 2018; Pech et al., 2021; Matczak, 2020; Mokrá & Juchniewicz, 2019; Gómez, 2021). In numerous cases, the ECtHR concluded regarding the violation of Article 6(1) of the ECHR due to violations of the procedure of appointment of judges, including judges of the Constitutional Court of Poland, and the National Council of the Judiciary.

The first case in this context was the judgement in *Xero Flor w Polsce Sp. z o.o. v. Poland* (2021), where the ECtHR found a violation of the right to a fair trial because the decision to close the proceeding under the Constitutional Court was rendered with the participation of a judge of the Constitutional Court appointed to their position via a breach of the law. In particular, the ECtHR was requested to assess the implications of appointing Constitutional Court judges in lieu of judges who had been elected by the previous Parliament, but whose appointment had been rejected by the president. This judgement was the first in which the ECtHR ruled that such actions of the Polish Parliament and president contravene international law.

Later, the ECtHR found violations contradictory to the guarantees of an independent court established by law in the appointment of almost all organs of the justice sector reformed or established as a result of judicial reform: the Disciplinary Chamber of the Supreme Court (*Reczkowichcz v. Poland*, 2021), the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (*Dolińska-Ficek and Ozimek v. Poland*, 2022; *Wałęsa v. Poland*, 2023), the Civil Chamber of the Supreme Court (*Advance Pharma v. Poland*, 2022), and the National Council of the Judiciary (*Reczkowichcz v. Poland*, 2021; *Grzęda v. Poland*, 2022; *Żurek v. Poland*, 2022). The CJEU also came to the same conclusions when considering cases against Poland on similar issues, finding rule of law violations in: attempts to lower the retirement age of judges of the Supreme Court of Poland, including the president of the Court, with the president of Poland being empowered to decide on the extension of their terms of office (*Commission v. Poland*, 2019a); lowering the retirement age for judges by setting different age thresholds for men and women, which had a discriminatory effect as it led to a different approach to the calculation of judicial remuneration after retirement, while at the same time empowering the minister of justice of Poland to decide on the extension of the term of office of judges (*Commission v. Poland*, 2019b); the illegal replacement of members of the National Council of the Judiciary (*Commission v. Poland*, 2020); the creation of a new Disciplinary Chamber of the Supreme Court, with the introduction of new grounds for the disciplinary liability of judges (*Commission v. Poland*, 2020), etc. All of these judgements of the ECtHR and CJEU show that national reforms of the judiciary should be performed carefully and in a balanced manner, otherwise they can violate the distribution of powers between the three branches of justice and enlarge the gap between *de jure* and *de facto* judicial independence.

In summary, the recent case law of the ECtHR creates the following approaches to judicial independence in terms of Article 6(1) of the ECHR:

i) the evaluation of judicial independence should be conducted within such criteria as the manner of appointment of judges, their term of office, safeguards against external pressure, and the appearance of independence (external guarantees of independence) (*Findlay v. the United Kingdom*, 1997; *Brudnicka and Others v. Poland*, 2005);
ii) several dimensions of judicial independence should be taken into account during such an evaluation – in particular: a) judicial independence vis-à-vis the legislative and executive authorities; b) judicial

independence vis-à-vis the judicial council; c) judicial independence vis-à-vis other courts (internal judicial independence); and d) judicial independence vis-à-vis the parties of the case (ECtHR, 2017; Tsuvina 2021);

iii) disciplinary proceedings should meet the following criteria: a) they must be conducted by a body which can be considered a 'court' within the meaning of Article 6(1) of the ECHR, i.e., which is independent, impartial and established by law, and which is composed of at least 50 percent judges; b) the legislation should provide clear grounds for the disciplinary liability of judges which meet the criteria of 'quality of law' in terms of legal certainty; c) judges should be guaranteed the right to a fair trial in disciplinary proceedings, i.e., compliance with the minimum guarantees of Article 6(1) of the ECHR; and d) the legislation should provide for the possibility of appealing against the decisions of the judicial council to an authority which can be considered a 'court' within the meaning of Article 6(1) of the ECHR (*Olujić v. Croatia*, 2009; *Reczkowichcz v. Poland*, 2021; *Grzęda v. Poland*, 2022; *Żurek v. Poland*, 2022);

iv) there is a correlation between the independence of the judiciary and the procedure for the appointment of judges: in assessing the procedure for the appointment of judges, it is necessary to consider whether there has been a breach of the domestic law governing the appointment procedure, whether the breaches of domestic law relate to a fundamental rule of the appointment procedure, and whether there was an effective remedy at the national level for a breach of the appointment procedure (*Guðmundur Andri Ástráðsson v. Iceland*, 2020).

3. De jure and de facto judicial independence in Ukraine

Recent ECtHR case law demonstrates that any reform of the judiciary at the national level should be based on international standards of judicial independence and the rule of law (Komarov & Tsuvina, 2021), especially when it comes to radical measures involving the replacement of a significant number of judges or the establishment of new organs in the justice sector. As can be observed, despite the legislative consolidation of guarantees of the independence of the judiciary in general and of judges in particular cases, the actual implementation of such guarantees may become extremely difficult at the national level. All reforms and innovations aimed at introducing new *de jure* regulation of judicial independence may *de facto* lead to violations of judicial independence.

Many of the problems identified in foreign countries today are in line with those that are emerging in Ukraine. For example, the current unsatisfactory state of the independence of the judiciary in Ukraine is illustrated by a number of decisions of the Constitutional Court of Ukraine (CCU) concerning various aspects of judicial independence. For example, the principle of the irremovability of judges was emphasised by the CCU in a case on the constitutionality of the establishment of the new Supreme Court, introduced in 2017 (Constitutional Court of Ukraine, 2020a). In its judgement, the CCU noted that 'the removal of the word "Ukraine" – the name of the state – from the verbal construction "Supreme Court of Ukraine" did not affect the constitutional status of this public authority'; therefore, the relevant changes 'were not aimed at termination of activity and liquidation of the Supreme Court of Ukraine', and the highest judicial body after the relevant changes continues to operate under the name 'Supreme Court' (para. 7). On the basis of these provisions, the CCU further concluded that 'there are no differences between the legal status of a judge of the Supreme Court of Ukraine [the former highest judicial organ] and a judge of the Supreme Court [the new highest judicial organ]' (para. 13), and therefore the renaming of the highest judicial body could not be a ground for the dismissal of all Supreme Court of Ukraine judges or their transfer to lower courts (para. 13). On the basis of this, the CCU concluded that 'Supreme Court of Ukraine' (SCU) judges should continue to exercise their powers as 'Supreme Court' (SC) judges, and that the actual differentiation of the judges of these bodies was not in line with the principle of the irremovability of judges. The issue of these judges has not yet been resolved (Constitutional Court of Ukraine, 2020a).

Furthermore, eight former SCU judges also obtained ECtHR judgements in their favour in *Gumenyuk and Others v. Ukraine* (2023). In June 2016, amendments to the Constitution and the new Law 'On the Judiciary and Status of Judges' were adopted. They aimed to restructure the judiciary, including the establishment of a new SC, where judges would be appointed through competition. The former SCU contested the provisions of the new legislation before the CCU, arguing that its dissolution and the prevention of judges from exercising their functions were unconstitutional. Despite participating in a competition for the new SC, none of the applicants were successful, and the new SC began operating in December 2017. In February 2020, the CCU ruled that only

one supreme judicial body existed under the Constitution and affirmed the principle of irremovability, stating that judges of the old SCU should continue their functions in the new SC. However, a draft law proposing the enrolment of former SCU judges into the new SC were not adopted, and the applicants were not able to resume their duties as SC judges. The applicants raised two main questions before the ECtHR: 1) invoking Article 6(1) of the ECHR, they argued that they were unable to challenge the prevention of their judicial functions due to legislative amendments in 2016, thus violating their right of access to court; and 2) under Article 8 of the ECHR, they contended that their inability to exercise their judicial functions as SC judges constituted unlawful and groundless interference with their right to respect for private life. The ECtHR, taking into account the complex background and context of the judicial reform in Ukraine, stressed that the right of access to the courts was considered fundamental to the protection of members of the judiciary, and that the applicants should have been able to bring their claims before the courts on an individual basis. However, there was no mechanism for individual application to the CCU, the only body empowered to overturn legislation. Furthermore, the courts of general jurisdiction in Ukraine did not have the power to strike down laws as unconstitutional. The ECtHR thus concluded that by restricting the applicants' access to the courts, the objectives of the reorganisation of the high courts in Ukraine, including ensuring a fair national judiciary and speeding up proceedings, could not be achieved. Therefore, the ECtHR held that there had been a violation of the applicants' right of access to a court (*Gumenyuk and Others v. Ukraine*, 2023). At the same time, it should be mentioned that neither the judgement of the CCU nor the ECtHR judgement have been enforced at the national level as yet.

Other problems within Ukrainian judicial reforms can also be mentioned in this regard – for example, the attempt by the Verkhovna Rada of Ukraine to reduce the number of SC judges to 100, which was declared unconstitutional and indicates a certain politization of the appointment and tenure of judges and an attempt to put pressure on the judiciary (Constitutional Court of Ukraine, 2020a). It is also worth noting attempts to limit financial guarantees for the independence of the judiciary, which are linked to the general state of the underfunding of the judiciary and the challenges posed by the COVID-19 pandemic. For example, the provisions of the law limiting the salaries of SC judges during the COVID-19 pandemic were declared unconstitutional (Constitutional Court of Ukraine, 2020b). A further case saw a constitutional petition from the SCU regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine 'On the Judiciary and the Status of Judges' of 2016. In this case, the CCU acknowledged that 'the monthly life allowance of a retired judge should be equal to the judicial remuneration received by a full-time judge'. The decision of the CCU concluded that in case of an increase in such remuneration, the recalculation of the judge's life allowance should be carried out automatically, since 'the establishment of different approaches to the procedure for calculating the amount of the monthly life allowance of judges violates the status of judges and guarantees of their independence' (Constitutional Court of Ukraine, 2020c, para. 16).

This practice – together with other problems such as the lack of powers of the High Qualification Commission for Judges for 3.5 years (from 2019), which has led to a critical decline in the number of judges in the country, corruption scandals involving judges, and populist slogans such as 'the need for all judges to undergo polygraph tests' (Draft Law on Amendments, 2023) – significantly undermines the public perception of the independence of the judiciary, especially from the point of view of people who have no experience of court proceedings.

National surveys show worrying trends in public perceptions of courts and judicial independence. For example, according to the 2020 Razumkov Centre study 'Attitudes of Ukrainian Citizens towards the Judiciary', only 20.4% of respondents believe that today's courts in Ukraine are completely or mostly independent, while 67.8% of respondents hold the opposite view (judges are mostly or completely not independent). Among those who have attended court proceedings in the last 2 years, the share of those who believe that judges are independent is slightly higher than among those who have not had such experiences (32.2% and 18.6%, respectively), although in both groups the vast majority holds the opposite view (60.0% and 69.1%, respectively). Among respondents interviewed on their way out of court, 42.3% believe that judges in Ukraine are independent today, while 43.4% hold the opposite view (Razumkov Center, 2020). This perception of judicial independence is directly related to the level of trust in the judiciary. For example, 78.0% of respondents said they mistrusted the judicial system, while 13.0% said they trusted it; 71.3% of respondents mistrusted local courts, while 16.0% trusted them; and 65.7% of citizens mistrusted the SC, while 18.8% of respondents trusted it. Despite this, the balance of trust in the judicial system among respondents who had interacted personally with courts recently was generally positive, i.e., the number of respondents who trusted the courts (48.0%) was higher than the

number of those who did not trust the judicial system (41.6%). The level of trust in local courts was even higher among citizens who had had contact with the courts: the majority of respondents – 54.4% – expressed trust in local courts, while 34.9% did not trust them (Razumkov Center, 2020). During wartime, 58.9% of respondents do not trust the judiciary: 19.7% of respondents said they 'totally mistrust' the judicial system, while 39.2% said they 'rather mistrust' it. In contrast, 18.2% of respondents 'rather trust' the judicial system, while 6.6% 'totally trust' it (Razumkov Center, 2023).

Conclusion

In the complex global landscape of legal systems, the concepts of *de facto* and *de jure* judicial independence stand as pillars of justice, ensuring the fair and impartial application of the law. This exploration reveals that while *de jure* independence provides a sound legal framework, it is the manifestation of *de facto* independence that truly ensures judicial integrity in practice. *De facto* independence, rooted in a culture of respect for the rule of law, institutional autonomy and societal support, is the driving force behind judicial decisions free from undue influence or interference.

Ukraine's EU candidate status requires further reform of the judiciary, which should be carried out in accordance with international standards of judicial independence and the rule of law. One of the next steps on this path should be the establishment of a Rule of Law Roadmap, as has been accomplished in other countries that have gone through or are going through this process. In this respect, ECtHR case law is the common international standard of *de jure* judicial independence that should be taken as a basis for further reforms. Meanwhile, the recent case law of the ECtHR involving decisions against various European states shows that it also identifies failures in judicial reforms at the national level that nullify *de facto* judicial independence. From this perspective, further reforms in Ukraine should be carried out taking into account the relevant case law of the ECtHR and the experience of foreign countries. In particular, this case law emphasizes: the need to comply with the non-regression principle; the principle of legality during the appointment of judges; the principle of the irremovability of judges and the impossibility of their dismissal from office; as well as the need to ensure minimum guarantees of the right to a fair trial that must be provided in disciplinary proceedings against judges. At the same time, in order to implement the rule of law in practice, the emphasis should also be shifted towards ensuring the *de facto* independence of courts and increasing the level of perceived independence of courts in Ukrainian society.

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