

# THE INDEPENDENCE OF JUDGES AS A CRITERION FOR ASSESSING THE EFFICIENCY OF COURT ACTIVITIES IN THE CONDITIONS OF THE REFORM OF THE JUDICIAL SYSTEM OF UKRAINE

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## ABSTRACT

*The independence of judges as a criterion for assessing the effectiveness of judges in the conditions of reforming the judicial system of Ukraine is considered in the article. It is established that the principle of independence of judges from any interference in the process of adjudication is enshrined in international and Ukrainian normative legal acts,. The principle of independence is multifaceted and involves the adoption of various means for its implementation.*

*It is established that the formation of an adequate level of independence of judges is important for sending fair proceedings and creating the conditions for citizens to restore confidence in the judicial system. After all, the Ukrainian courts generally maintain a negative balance of trust and mistrust in society: 14% of the population trust the courts while 75% do not trust (balance - 61%). That is why it is important for the state to take measures that could simultaneously create the desire of judges to act independently, to develop mechanisms and guarantees for such independence, as well as to adjust the level of confidence in the judicial system in the minds of citizens.*

*It is concluded that the existence of real but not declarative independence of the court is a litmus test for effective reform of the judicial system in Ukraine. Therefore, the practical maintenance of the independence of judges should be a priority for judicial reform.*

**Keyword:** Independence, Judicial Reform, Corruption, Bribery, Interference, The Activities of the Judicial Authorities.

## INTRODUCTION

According to the Basic Law (Article 1), Ukraine is a rule-of-law state (Constitution of Ukraine, 1996). An inherent attribute of every rule-of-law state is the existence of a perfect and independent judicial system. The desire to form and improve the activities of the judicial system has led to several stages of legislative, institutional, and personnel changes. In particular, changes in the structural nature provided for the transition to a three-tier system of courts: local

courts, courts of appeal, and the Supreme Court, as well as the formation of new higher specialized courts in the judicial system: the Supreme Court on Intellectual Property and the Supreme Anticorruption Court, which will act as courts of first instance for the consideration of categories of cases defined by law. Organizational changes were represented, for example, by narrowing the boundaries of the judge's immunity from absolute to functional one and raising the age and professional qualifications of judicial candidates.

### **Problem Statement**

It should be pointed out that according to the Strategy for the Reform of the Judicial System, Judiciary, and Related Legal Institutions for 2015-2020, ensuring independence, fairness, and impartiality of judges, in particular by reducing external interference in the administration of justice, is a top priority in judicial reform (Strategy for the Reform of the Judicial System, Judiciary, and Related Legal Institutions for 2015-2020, 2015). Considering this, the issue of studying the independence of judges as a criterion for the effectiveness of assessing the work of the courts in the context of reforming the judicial system of Ukraine and finding ways to improve this principle of justice is relevant.

### **LITERATURE REVIEW**

There are various interpretations of the concept of "*independence of judges*" in scientific sources. Thus, Rachynskii & Ohilko clearly note that the independence of judges is a basic prerequisite for the functioning of an independent and authoritative judiciary, capable of providing objective and impartial justice, effectively protecting the rights and freedoms of man and citizen. The principle of the independence of judges means independent procedural activity in the administration of justice, that is, in the process of considering and resolving disputes about the right on the basis of substantive and procedural, guided by the professional jurisprudence of judges, and in conditions that exclude the influence of third parties on them (Rachynskii & Ohilko, 2016).

Kichmarenko emphasizes that the independence of the court is an integral part of objective justice under the law. The independence of the court means that individual judges are free from the influence and interference of other branches of government, as well as from the influence of private and political interests (Kichmarenko, 2017).

Askerov points out that the independence of judges means the independence of a professional judge - an official of a public authority, which determines the rights and duties of judges both during the course of the proceedings and their relationship with the subjects of the proceedings, other authorities, their officials, citizens, etc. (Askerov, 2008).

Horinov believes that the independence of a judge lies in its relative autonomy as an official in the judicial system and as a subject of procedural relations in the course of judicial proceedings (Horinov, 2018).

### **METHODOLOGY**

The general scientific and special scientific methods of cognition are used in the article, which provided an objective analysis of the purpose of the research. Taking into account the specifics of the topic, purpose, and objectives of the research, the dialectical method was used,

by which the methodological bases of this research were identified and the essence of the analyzed concepts was clarified; the method of scientific analysis and generalization was used to elucidate and systematize theoretical foundations regarding the essence of the independence of judges as the basis of legal proceedings; the formal-legal method was used to clarify the structure and relationship of concepts under investigation, and also to study the relevant provisions of the legislation of Ukraine on criminal liability for interfering with the activities of the judicial authorities; systemic-structural method was used for in-depth study of the normative provisions of international and national state legislation on the place of independence of judges in the administration of justice in general and in the structure of judicial reform activities in particular. These and other methods of research were used in the article in interconnection and interdependence, which ensured the comprehensiveness and completeness of the research, the truth of the scientific results obtained.

## FINDINGS AND DISCUSSIONS

The independence of judges as a primary basis of justice is enshrined in the Basic Principles of the Independence of the Judiciary (Resolution 40/32 and 40/146 dated 29 November and 13 December 1985 approved by the UN General Assembly). Thus, according to these principles: there should be no unlawful or unauthorized interference with the justice process and judicial decisions rendered by courts are not subject to review. This principle does not interfere with the judicial review or mitigation of judgments made by judicial authorities in accordance with the law (UN Human Rights, 1985). At the same time, Recommendation CM/Rec (European Council, 2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency, and responsibilities (adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 at the 1098 meeting of the Ministers Deputies) states that the independence of judges and the judiciary must be guaranteed by the Constitution or be enshrined at the highest legal level of the member states. More specific rules should be set at the legislative level (Recommendation CM/Rec 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities). According to the Constitution of Ukraine (Article 129), the judge, in the administration of justice, is independent and is governed by the rule of law (Constitution of Ukraine, 1996). The concept of independence is specified in the Profile Law of Ukraine “*On Judiciary and Status of Judges*” (Article 48) and stipulates that a judge is independent of any unlawful influence, pressure, or interference in his or her judicial activity (Law of Ukraine, 2016).

Sillen notes that the need for an independent court is especially felt in the former communist countries, where there is increasing awareness of the importance of the independence of an individual judge (Sillen, 2019). That is why, one of the main tasks of judicial reform in Ukraine and at the same time the criterion for assessing the effectiveness of its implementation is the existing state of implementation of the principle of independence of judges.

In 2019, 335 reports of interference with the activity of a judge were registered in the Unified Register of Pre-Trial Investigations (Horets'kyy, 2019). These factors indicate a negative trend of growth in the number of such cases. Moreover, the violation of the judge's independence is characterized by high latency. The Ukrainian courts generally maintain a negative balance of trust and mistrust in society: 14% of the population trust the courts while 75% (balance-61%) do

not trust the courts. At the same time, compared to 2015, the balance of trust and mistrust has shifted somewhat in the positive direction (at that time it was equal to 72%). This is evidenced by the results of a poll conducted by the sociological service of the Razumkov Center together with the Democratic Initiatives Foundation named after Ilka Kucheriv at the request of the Center for Political and Legal Reforms (Judicial Reform, 2019).

That is why it is important for the state to take measures that could simultaneously create a desire for judges to act independently, to develop mechanisms and guarantees for such independence, as well as to adjust the level of trust in the judicial system in the minds of citizens. In particular, it is appropriate to provide adequate legal support, coordination of activities and to eradicate the formal attitude towards observance of the beginning of independence when adjudicating (Burbyka et al., 2016). Measures aimed at eliminating unlawful influence on the court include improving the procedural order for adjudication; strengthening of legal responsibility for contempt of court and interfering with judicial activities; prohibition of unlawful pressure on judges in the administration of justice for all state bodies and officials, as well as ordinary citizens (Ovcharenko, 2013).

Improving the procedural order for adjudication can be achieved by updating legislation and aligning it with international standards, in particular with respect to reasonable time limits for judicial proceedings. In addition, the humanization should be noted, which, at the level of enforcement, necessitates the achievement of an optimal (reasonable) balance of personal and public interests in solving various tasks of the trial with the maximum possible protection of the rights of participants in the process (refusal to use harsh measures whenever there is a possibility to solve the problem of litigation with minimal restriction of the rights of the person); special attention paid to the existence of high-quality procedural mechanisms in the rule-of-law country, including detailed normative algorithmization of the decision-making procedure and requirements for its content and form; competitiveness as a key element in the new ideology of litigation (increasing the value of compliance when deciding whether it is justified and motivated) (Hlynska, 2016).

One of the biggest problems in modern Ukraine is a contempt of court entrenched in the minds of citizens. To overcome this problem, it is important to adopt both moral and educational measures and reformatting the level of legal culture of citizens, as well as adopting coercive measures that will correspond to the degree of encroachment and the importance of justice for the state. Therefore, there is a need to criminalize certain forms of contempt of court. Criminal punishment for contempt of court should be recognition of acts that potentially constitute a significant public danger to the court because they are accompanied by exceptional cynicism, leading to systematic disruption of court decisions that violate the court order (Shmarin, 2017).

The importance of the independence of the court is so great that the Ukrainian legislator provides for criminal prosecution for any interference with the activities of the judicial authorities (Article 376 of the Criminal Code of Ukraine). Interference with the activities of the judicial authorities is an influence on the judge in any form: request, requirement, instruction, threat, bribery, violence, criticism of the judge in the media before the solution of the case in connection with its consideration and the like on the part of any person for the purpose of interfering with the performance of their official duties or achieving an unjust decision.

The first form of intervention is a request, that is, a polite appeal to a judge based on personal friendships, to encourage him or her to make a decision in the interests of the addressee or third parties. Corruption in all its manifestations is one of the most dangerous problems of

modern society (Bondarenko et al., 2018). Melnik stresses that corruption is rooted in centuries-old traditions of interaction in society, such as "*service for service*", "*do ut des*" (Melnik, 2000).

According to Ukrainian anti-corruption legislation developed in accordance with the UN Convention against Corruption and the Council of Europe Criminal and Civil Conventions on Corruption, the subject of corruption is an unlawful gain. It is important to note that the components of this concept are not only things of the material world (money & property) but also benefits, advantages, and services of intangible nature. Therefore, a request for a clearly unlawful decision or a decision to circumvent the law should be qualified as an unlawful service, even in the absence of payment for such a service.

The second form is a requirement. The requirement is essentially similar to request, however, expressed in a categorical, undoubted manner and aimed at satisfying selfish interests (both personal and group ones) (Reznik et al., 2019). The attempts of the highest officials of the state (people's deputies, politicians, representatives of the executive authorities, etc) to achieve taking decisions in court that are favorable to them are particularly aggressive today. Thus, in 2010, a case became known to the public when one of the people's deputies exerted pressure on the chairman of the Administrative Court of Appeal of Odessa, of which the latter made a public statement. The judge indicated that the deputy urged him to make an illegal decision on the mayoral election. After that, the deputy began to make allegations of corruption in the courts, tried to put pressure on a judge (Ovcharenko, 2013).

The instruction is a clear manifestation of political corruption because it permits the existence of a specific social connection that arises between the head of the court, its subordinates and a third stakeholder, who pursues its own private interests and can use various resources for their satisfaction (Kulish et al., 2018). In practice, there may be problems with delimiting the adjudicated judge's requirement from the instruction. It is suggested that the external source, that is, public servants, other officials should be considered as the subject of the announcement of the requirement but the internal source, for example, the chairman of the court, should be considered as the subject of the announcement of the instruction.

The threat of violence should be understood as the threat of beating, bodily harm, and other acts of violence to the victim. The threat addressed to the judge or its close relatives in connection with the activity of the judge related to the administration of justice is qualified under a special rule-Art. 377 of the Criminal Code of Ukraine. The threat of violence should be understood as the risk of causing beatings, bodily harm, and other acts of violence to the victim.

In general, bribery, as the main category of corruption, is characteristic of every society. The level of acceptability of bribery as a phenomenon in each state changes and depends on the economic, social, political, cultural, moral, and psychological development of both society as a whole and individual citizens (Bondarenko et al., 2019). According to the Ukrainian criminal law, if bribery involves the receipt of unlawful gain in material form, then the actions of a judge should be qualified as a set of crimes, that is, as an interference with the activities of judicial authorities and acceptance of an offer, promise or receipt of unlawful gain by an official.

As to the violence, it can be physical (causing bodily harm) and psychological (psychological pressure on the judge). Violence against a judge must be qualified by a special rule-Art. 377 of the Criminal Code of Ukraine.

As to the last form of unlawful interference with the activities of a judge, in practice, it is very difficult to find the boundary between press appearance and real influence. Thus, we believe that in the case of expressing in the media the calls for a fair and humane process, there are no

indications of the composition of the crime in its actions. At the same time, the open criticism of the judge, accusations of lack of objectivity, calls for a certain decision to be made, if they have actually put pressure on the judge, should be classified as interfering with the activities of judicial authorities.

## RECOMMENDATIONS

The analysis of the provisions of the scientific doctrine, the current normative acts of Ukraine, as well as the current stage of implementation of judicial reform, undoubtedly show that the independence of judges is really an important criterion for assessing the effectiveness of the courts in the conditions of judicial reform. That is why, in order to accomplish every task of judicial reform, it is necessary to improve not only the objective side of the courts but also to find new radical and operative ways of forming independence, as a basis for the administration of justice, in all applicants for the position of judge and to correct the representation of independence in existing judges. It is necessary to solve the problem of formulating real problems in the context of the independence of judges when making their decisions; development of effective means of realization of these tasks; defining the circle of persons responsible for the production of each tool in the implementation of a specific task of establishing independence in the minds of judges and specifying clear timelines for the implementation of each task and the introduction of funds.

## CONCLUSIONS

Thus, the existence of real rather than declarative independence of the court is the litmus test of effective reform of the judicial system in Ukraine. At the same time, the level and real state of implementation of this principle leaves much to be desired. That is why it is necessary to pay attention to the improvement of the system of measures aimed at eliminating unlawful influence on the court: to broaden their structure and to introduce effective mechanisms for preventing unlawful appearance in court. It is also necessary to formulate clearly the nature of the forms of intervention in the activities of judicial authorities.

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