INDEPENDENCE OF THE JUDICIARY VS. ENSURING THE RIGHT TO A FAIR TRIAL IN COUNTRIES IN TRANSITION

Olha V. KOSHOVA[1], Svitlana Ya. RABOVSKA[2], Olha V. SALENKO[3], Andrii V. POTAPENKO[4]

[1]Scientific Laboratory for Combating Crime, Educational and Scientific Institute No. 1, National Academy of Internal Affairs, Kyiv, Ukraine

[2]Department of Notarial, Enforcement Process and the Bar, Prosecutor's Office, Judicial System, Institute of Law, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine

[3]Department of Systematization of the Case Law of the European Court of Human Rights and Preparation of Inquiries to the European Court of Human Rights, Supreme Court of Ukraine, Kyiv, Ukraine

[4]Department of Jurisdictional Forms of Legal Protection of Private Law Subjects, Judicial System and Legal Proceedings, Academician F.H. Burchak Scientific and Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, Kyiv, Ukraine

Abstract: *This study investigates the importance of ensuring the real independence of the judiciary in the administration of justice as a basis for promoting the unity of judicial enforcement. It is stated that currently the reform of the judiciary has entered a new cross and hasty phase, during which there is a significant excessive intervention of any bodies and individuals in the organisation of the activities and functioning of the judiciary. It is substantiated that numerous reforms in the justice system have expanded the competence of the court, in particular, the highest court in Ukraine has been given the power to officially interpret laws. At the same time, it has been proven that this has not effectively improved the protection of the subjective rights of individuals, as well as the constitutional rights and freedoms of human and citizen. It is stated that other branches of government continue to systematically interfere in the judiciary with efforts to contain various media publications, various levels of propaganda, etc. Conclusions are drawn regarding the attempt to pass the process of interference of other branches of government in the judicial activity as an objective factor of "normality" of building a judicial system of a democratic state. It was proved that the countries in transition: 1) lack the programme document on the development of the judiciary; 2) have a factor of incomplete system construction and development of the judicial system; 3) lack the judicial segment in the reform of the judiciary (lack of introduction of new procedural tools to protect the rights of persons). It was concluded that justice can be fair under a set of conditions: 1) the relationship and interaction of the internal independence of the judge with the external independence of the judiciary; 2) a system of clear and transparent legislation that has the qualities of systematicity, unity, and consistency, i.e. the absence of the transit factor; 3) the unity of judicial law enforcement, which in practical terms lies in the rule of law, as a result of which convincing precedents are developed, supported by the entire legal community of Ukraine as a country of continental law.*

Keywords: judicial independence, judicial reform, judicial protection, administration of justice, separation of powers.

Many European countries in transition are striving to become countries of sustainable democracy. Distinctive features of the latter from the standpoint of legal analysis can be called: the presence of constitutional control, effective protection of human rights and the implementation of the rule of law in all

spheres of public life.[1] In countries in transition, the problem of the introduction and natural spread of the rule of law is complicated both by constant (sometimes contradictory) reforms and by the fact that the essence of this principle also changes over time. The rule of law is a universally recognised principle, inseparable from the constitution as such[2]. The fundamental principle of democracy is the division of power into legislative, executive, and judicial. It provides a so-called mechanism of checks and balances, in which the judiciary plays a crucial role of arbitrator in any dispute, including in the conflict of a citizen with the state. The development of a democratic and socially oriented state is impossible without a strong independent judiciary[3]. In this regard, it should be axiomatic that the judiciary should be apolitical in both form and organisation. Therefore, any state that professes democratic principles shall be obliged to guarantee the independence and autonomy of the judiciary, courts, and judges, as this is an essential feature of a civilized state that recognises the rule of law, respects and protects its citizens[4].

For young constitutional democracies in general, the issue of transitional justice is acute, which must overcome post-totalitarian legal practice, which is permeated with dogmatism, formalism, and contempt for human rights. The problems of establishing an independent and impartial court in young democracies are reduced to solving three key issues: 1) ensuring the institutional and functional independence of the courts; 2) the establishment of a high-quality judiciary that would share the values of constitutional democracy; 3) ensuring the proper administration of justice, in particular, through adequate regulation of procedural legislation based on adversarial and public litigation[5]. In the difficult conditions of transitional economic relations and modernisation of public power, the development of an independent and effective judiciary in Ukraine cannot take place without the direct and active participation of society[6]. The effectiveness of the judicial system depends, among other things, on the level of activity of citizens, on their desire to go to

---

[1] B. Ostrovska, "Chance to survive: The human right to life and health in the covid-19 pandemic", in *Medicine and Law*, 2021, vol. 40, no. 1, p. 3-14.

[2] P. Gowder, *Rule of Law in the Real World*, Cambridge University Press, Cambridge, 2016.

[3] R.R. Salymzianova, "Problems of the implementation of the guarantee of the independence of the judiciary in the implementation of criminal justice (theoretical aspect)", in *Bulletin of Economics, Law and Sociology*, 2007, no. 3, p. 69–74; A. Patyk, "Roles and Responsibilities of Specialists and Experts in Investigating and Prosecuting Crimes", in *Scientific Journal of the National Academy of Internal Affairs*, 2021, vol. 104, no. 3, p. 133–143.

[4] I.E. Marochkin, N.V. Sibilova, Yu.O. Remeskova, Yu.I. Kryuchko, V.V. Gorodovenko, *Judiciary*, Pravo, Kharkiv, 2015.

[5] M. Savchyn, "Moral integrity (moral integrity, integrity) of judges as a component of the rule of law", in *Word of the National School of Judges of Ukraine*, 2019, vol. 2, no. 2, p. 6–22.

[6] S.V. Prylutsky, *Introduction to the theory of judicial power (Society. Justice. State*), V.M. Koretsky Institute of State and Law of National Academy of Sciences of Ukraine, Kyiv, 2012.

court to protect their rights, on their trust in legal forms of protection[7]. In turn, the stability of the judiciary, the scientist continues, is one of the components of its stability. Stability as a characteristic of any system is considered in different meanings: 1) as the ability of the system to maintain its current state regardless of the influence of environmental factors; 2) as a property of the system to return to the previous state after the end of the influence that brought it out of this state; 3) as a property of the system to adhere to the specified mode of operation, despite the influence of bifurcation on it[8].

This study justifies and emphasises the need for appropriate reforms to create a modern democratic judicial system that can deal effectively, quickly, and fully with litigation and protect the rights and freedoms of individuals.[9] However, one must not forget that it is the countries in transition that periodically change the vector and direction of their development. This usually happens after the next elections of the President, the State Parliament, etc. Modern Ukraine is a clear example of numerous reforms of the judiciary and justice. The beginning of the wave of reforms was caused by the demand of society after the "Revolution of Dignity" in 2014. This request was stated as a "request of civil society", although the mechanics of legislative and related changes in the judiciary demonstrated that the issue of public participation did not always coincide with the participation of "civil society" in reforming the judiciary and justice. Public participation played an especially active role during 2014–2018, and continues as such to this day. Thus, in 2019-2020, the reform of the judiciary entered a new cross-cutting and hasty phase, during which there was a significant excessive intervention of other branches of government, government agencies and individuals in the organisation of the activities and functioning of the judiciary. All this weakens the independence of the judiciary as an independent branch of government. This is most dangerous during the transit of power.

Therefore, the necessity of judicial reform in transition countries is undeniable. On the contrary, reforms are required to democratically implement effective mechanisms that would enable the protection of human and civil

---

[7] O.M. Omelchuk, S.D. Hrynko, A.M. Ivanovska, A.L. Misinkevych, V.V. Antoniuk, "Protection of human rights in the context of the development of the rule of law principle: The international aspect", in *Journal of the National Academy of Legal Sciences of Ukraine*, 2021, vol. 28, no, 1, p. 32–42.

[8] O.Z. Khotynska-Nor*, Theoretical and legal and praxeological principles of judicial reform in Ukraine: thesis of the Doctor of Laws*, Taras Shevchenko National University of Kyiv, Kyiv, 2017; K.S. Lakbayev, G.M. Rysmagambetova, A.U. Umetov, A.K. Sysoyev, "The crimes in the field of high technology: Concept, problems and methods of counteraction in Kazakhstan", in *International Journal of Electronic Security and Digital Forensics*, 2020, vol. 12, no. 4, p. 386-396.

[9] L.B. Nyssanbekova, E. Kurzynsky-Singer, Z.T. Sairambaeva, S.M. Sharipov, I.K. Kuderin, "The role of the individual in the protection of their rights and interests in international courts", in *Rivista Di Studi Sulla Sostenibilita*, 2020, no. 1, p. 403-422.

rights and freedoms by independent and impartial justice.[10] However, it must be emphasised that the basis for these reforms should be compliance with the Constitution in terms of ensuring the independence of judges and the balance between society's expectations and the protection of constitutional rights of citizens, including the guaranteed right to judicial protection[11]. With regard to Ukraine, it can be stated that the permanent judicial reforms initiated since its independence (since 1991 – 7 full stages so far, and 3 stages in the process of legislative implementation) should finally be completed by implementing the above mechanisms.

Materials and methods

The methodology of studying the principles of independence of the judiciary and the disclosure of the essential content of these components are inextricably linked with the understanding of law, principles of law, and the legal doctrine. The rule of law principle has led to the selection of several leading research methods. The analysis of the methodology of legal research of the judiciary and the transit of legislation is primarily associated with the ideas of positivism, anthropology, sociology, axiology of law, etc., which are inherent in the current state of legal methodology[12].

The priority methods used in the study include dialectical, comparative law, modelling and correlation method. The study forms a holistic vision of the countries in transition and the problems of ensuring the independence of the judiciary and the independence of judges in the administration of justice in such a period. Systematic and structural research methods have become the basis for identifying common mistakes in the organisation of the judiciary, as well as the establishment of a section of transit legislation in such states. The application of the modelling method in the study of the nature of the rule of law, democratic state and consolidation within these phenomena of the independence of judges as a central component of justice helped conclude that the independence of the judiciary constitutes a universal context for its functioning. Transitional democracies (transit societies, transit justice societies) are in the process of gaining their judicial independence.

---

[10] O. Kalinnikov, "International and legal safeguards for rights of suspect and accused in trials in absentia", in *Law Journal of the National Academy of Internal Affairs*, 2021, vol. 19, no. 1, p. 133–142.

[11] Constitutional submission of the Supreme Court of Ukraine on the compliance of certain provisions of items 4, 7, 8, 9, 11, 13, 14, 17, 20, 22, 23, 25 of Section XII "Final and Transitional Provisions" of the Law of Ukraine "On the Judiciary and status of judges" dated June 2, 2016 No. 1402 – VIII, 2020. Available at: http://www.ccu.gov.ua/docs/3033.

[12] M. Bratasyuk, "Value approach to law in the context of modern legal methodology. Entrepreneurship", in *Economy and Law*, 2005, no. 11, p. 3–7.

The historiographical method of research allowed to single out the stages of reforming the judiciary in Ukraine. The teleological, comparative law and interdisciplinary methods used in parallel allowed to clearly define the goals of each particular reform. A study of the historiography of judicial reform during the period of independent Ukraine concluded that Ukraine has already gone through six stages of such reform, and only three of them concerned the development of the legal system and the actual alignment of legislation and justice with European standards. Factually, the method of synthesis and modelling was useful for another conclusion – the next three stages of reforming the judicial system of Ukraine did not affect the latest and modern procedural mechanisms for the protection of human rights and freedoms, optimisation of court proceedings. They were aimed at clarifying various aspects of a judge's personality, their legal and related characteristics and elements of status. The permanence of the seventh stage of reforming the judiciary is illustrated and, with the help of a prognostic method of research, the prospects of further, almost annual reforms are formulated.

The independence of the judiciary as a universal context of its functioning is considered as scientifically intensive through the study of such legal phenomena and categories as the external and internal independence of the judge through the dialectical method of scientific knowledge. After all, in general, the legal consciousness of both the individual (including judges) and society as a whole constantly experiences the influence of law, which is fully consistent with the theory of reflection. The disclosure of these categories also took place through the relationship of all elements of the constitutional status of a judge with their professional legal awareness, which can be traced in each of them. Its structure distinguishes legal psychology and legal ideology, as well as types (or levels) of legal awareness: everyday, professional (practical), and scientific-theoretical. Comparison and juxtaposition of these features demonstrates that the professional legal awareness of a judge constitutes an integral basis, an ideal, internal determinant of any legal activity, including the judicial one. The professional legal consciousness has significant orientation and regulatory resources that allow judges to orient themselves in the process of considering a case and making a decision (sentence) in cases. The study of these legal and related phenomena has identified one of the main factors hampering the unity of judicial practice – the transit of legislation and cross-permanent reforms of the judiciary, which is objectively an attack on the independence of the judge.

Results and discussion

Independence of the judiciary as a universal context of its functioning

The authors of this study adhere to the position of O.Z. Khotynska-Nor, who emphasises that "upon reforming the judicial system, as well as political, economic, social systems, the most effective are homeostatic principles and management mechanisms. Homeostasis involves the preservation and development of the most important parameters of the system, violation of which leads to the loss of its stability and viability. For the judiciary, such are, in particular, autonomy and independence, which in the doctrine are studied as the fundamental principles of the judiciary, its inalienable attributes, as well as legitimacy. The latter indicates the degree of public confidence in the judiciary, and hence the justification of its existence. It is these features that support the viability of the judiciary. Therefore, the development of the judicial system should take place not only in the context of their observance, but also in the context of the progress of these parameters[13].

The independence of the judiciary is the independence of the judicial system as a whole from the executive and the legislative power, which includes both the human right to an independent judiciary and the right and duty of a judge to be independent in the decision-making process. There are external and internal independence of the judiciary. External independence should include separation of the judiciary from the legislative and the executive power; recognition of the independence (autonomy) of the judiciary by all other branches of government; independence (autonomy) of the judiciary as its main and obligatory feature, which lies in the impossibility of the existence in the state of any forms of outside influence, political parties, and other associations of citizens, as well as citizens themselves; legislative consolidation of the independence of the court and judges as its bearers; stable nature of the development of the judicial system; indefinite term of office of judges; their immutability; completeness of the judiciary in the field of justice; execution of court decisions by all state officials without exception[14].

The internal independence of the judiciary is ensured by impeccable personal qualities of judges; high professionalism, exclusion of unjust decisions from the practice; social and living conditions, material living conditions of judges, the authority of each judge as a subject of judicial power. The independence of the judiciary as an attributive and at the same time principle of this branch of government means that the judge administers justice impartially, and any bodies, officials, and citizens are prohibited from influencing the judge and the court as a whole. Courts administer justice based

[13] O.Z. Khotynska-Nor, *Theoretical and legal and praxeological principles of judicial reform in Ukraine: thesis of the Doctor of Laws*, Taras Shevchenko National University of Kyiv, Kyiv, 2017.

[14] I.E. Marochkin, N.V. Sibilova, Yu.O. Remeskova, Yu.I. Kryuchko, V.V. Gorodovenko, *Judiciary*, Pravo, Kharkiv, 2015.

on the Constitution and laws of Ukraine, while ensuring the rule of law[15]. Guarantees of the independence of the judiciary are also divided into general (political and economic) and special (legal and procedural). Special guarantees of independence, especially procedural ones, are organically linked to a judge's internal independence, which in turn corresponds to their duty to be impartial in the decision-making process. In this context, the permanence of the reforms of the judiciary, the judicial system and justice since Ukraine's independence, and especially after 2010, should be emphasised. This internal aspect of the independence of a judge after 2015-2016 (due to several legislative changes) was subjected to indirect pressure, resulting in a lack of proper unity of judicial practice in the law enforcement sphere.

The internal personal aspect of the independence of judges – the moral integrity, which is revealed in the legislation of Ukraine through the concept of integrity, is a very important issue. Going from the abstract to the concrete, the basis of the modern substantive concept of the rule of law is respect for human rights and separation of powers. From a functional and structural standpoint, the separation of powers is ensured through an independent court. The independence of the judiciary presupposes a high-quality composition of the judiciary, which would be capable of institutionally and functionally providing resistance and fair decisions in conditions of pressure and confrontation"[16].

Thus, the external and internal criteria of judicial independence significantly affect the unity of judicial law enforcement, both in the applied aspect and in the study and development of praxeological principles of ensuring the rule of law in the judiciary. It is also necessary to single out common long-term problems that hinder the unity under study, as a result of which this study will attempt to develop original directions to ensure effective constitutional guarantees of judges' independence in the administration of justice, which in this case comes down to the ruling of fair judgements that equally apply the provisions of law[17]. External criteria for ensuring the independence of judges include, admittedly, constitutional guarantees and stability of legislation that determines the judicial system and the status of judges, as well as the concept of gradual development of the judiciary in parallel with the development of Ukrainian society as a whole.[18] In this regard, there is currently no policy document for such development. The absence of

---

[15] *Ibidem.*

[16] M. Savchyn, "Moral integrity (moral integrity, integrity) of judges as a component of the rule of law", in *Word of the National School of Judges of Ukraine*, 2019, vol. 2, no. 2, p. 6–22.

[17] N.V. Hlushchenko, "Modern issues of administrative law", in *Legal Horizons*, 2021, vol. 14, no. 2, p. 124-129.

[18] F. Calderon-Valencia, J.J. Perez-Montoya, F.S. De Morais, "AI systems in Brazilian supreme federal court and the Colombian constitutional court experiences: Prospective analysis", in *Revista De Direito, Estado e Telecomunicacoes*, 2021, vol. 13, no. 1, p. 143-169.

such a document is one of the external factors that objectively complicate the ensuring of the unity of law enforcement by the courts[19].

Interference of the legislature and the executive in the judiciary as an attack on its independence

Admittedly, each country in transition must have a document that contains a certain roadmap for the development of the judiciary, its interaction with other authorities and its role in the development of legal culture and legal education of the population. For example, formally a programme document is available in Ukraine, but it expires in 2020. In particular, on May 20, 2015, the Decree of the President of Ukraine No. 276/2015 approved the "Strategy for reforming the judiciary, the judicial procedure and related legal institutions for 2015-2020". However, this Strategy was created by the fifth President of Ukraine. According to the well-known experience of independent Ukraine, almost every five years political changes create the basis for multi-vector changes in both the judicial and procedural spheres. As of mid-summer, 2020, a new programme document on behalf of the sixth President of Ukraine has not yet been adopted; it is not available on the official website of the President of Ukraine. Only certain pages of the Internet contain information about M.N. Saakashvili being instructed to develop a new judicial reform[20]. This certainly has a negative impact not only on the development of the judiciary in the context of its institutional independence, but also creates a basis for violating the internal independence of the judge. The study will briefly present the main stages of reforming the judicial system during the existence of Ukraine below.

The haste and significant number of multi-vector reforms in the judiciary in transition countries inevitably lead to a weakening of the judiciary. This refers to those reforms that are carried out purely for the sake of reforms, the hidden purpose of which is the development of a loyal judicature. That is, reforms without the need to modernise the judicial system within the European vector of legal policy in order to create a constitutional and legislative framework for the effective protection of human and civil rights and freedoms and others and to abandon the legacy of the Soviet court.[21] For example, with regard to Ukraine, the almost annual reform (starting in 2014) of special laws concerning the status of judges and the organisation of the judiciary, the selection of judges, and other changes during their tenure as

[19] M.I. Kleandrov, *Judge status: Legal and related components*, Norma, Moscow, 2011.

[20] M. Saakashvili, "In July, President Zelensky instructed to discuss the fundamental concept of revolutionary judicial reform at the National Council of Reforms", 2020. Available at: https://ua.interfax.com.ua/news/political/672007.html.

[21] A. van Vark, "Under pressure: Security and stability related challenges for liberal democracy in north-western Europe", in *Democracy and Security,* 2021. Available at doi:10.1080/17419166.2021.1920930

judges is aimed at achieving hidden goals – namely to consolidate the perception and habit of interference of the executive power and Parliament in the judiciary.

The political situation of transit societies is described by a considerable number of competing political entities (parties)[22]. Intense political competition, according to M. Popova's theory of strategic pressure, hinders the independence of the judiciary. The bottom line is that in electoral democracies, which include most post-communist countries, the political elite has significant incentives and benefits to maintain the dependence of the courts on government and politics. The arguments are as follows: 1) in countries with "weak" democracies, the newly elected political elite is very tempted to use pressure on the court to stay in power in the future. The court becomes an instrument of political elections, providing the desired result to the authorities through its decisions; 2) pressure on the court does not require additional costs. The political elite can effectively influence the judiciary by reducing its funding, abolishing the guarantees provided for judges by law and other similar measures; 3) in electoral democracies, political competition produces the effect of "politicisation of justice." The courts are increasingly involved in politics, and the results of their activities depend on the priorities of the current government. During the election period, the number of lawsuits is increasing, which may affect the chances of politicians staying in power. Increased attention to re-election lawsuits leads to the politicisation of a much larger number of court cases, as the "weak" government intervenes in other disputes, such as economic disputes between entities that may be funding the opposition[23]. The more court cases are politicised, the more judges come under pressure[24].

As for Ukraine, an individual opinion of the judge of the Constitutional Court of Ukraine V.V. Lemak deserves attention. He expressed his opinion in the case on the independence of the judiciary after the adoption of the decision on the compliance of the Constitution of Ukraine (constitutionality) of certain provisions of the laws of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges" of June 2, 2016, No. 193-IX "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine on the activities of judicial authorities" of October 16, 2019, No. 1798-VIII

[22] O. Khotynska-Nor, L. Moskvych, "Role of confidence and supply chain strategy during legitimization of justice in countries of transitional period", in *International Journal of Supply Chain Management*, 2019, vol. 8, no. 6, p. 533-534.

[23] I. Dunayev, "Modernization logics and principles of designing a new generation of regional economic policies: Findings for recent Ukraine and Eastern European countries in transition", in: A. Tavidze (Ed.), *Progress in Economics Research*, Nova Science Publishers, New York, 2018.

[24] M. Popova, "Political competition as an obstacle to judicial independence: Evidence from Russia and Ukraine", in *Comparative Political Studies*, 2010, vol. 43, no. 10, p. 1202–1229.

"On the High Council of Justice" of December 21, 2016[25]. The constitutional petition was filed by the Supreme Court, which emphasised the Parliament's attack on the independence of judges in connection with amendments to judicial laws.

Thus, V.V. Lemak emphasises that the founding fathers of the United States, for the first time in the world establishing a constitutional system of "checks and balances", were most afraid of the "tyranny of the majority" as opposed to the individual tyrant (suffice it to read J. Madison in The Federalist Papers). In Ukraine, the elected parliament carries out legislative regulation at its discretion, unless there is a violation of the Constitution of Ukraine. Its activities are limited by the boundaries established by the Fundamental Law of Ukraine – this is the approach embodied in the Constitution of Ukraine, in particular in its principles such as separation of powers (Article 6) and independence of judges (Articles 125, 126). Relationships of mutual "checks and balances" are developed between the highest bodies of state power. Admittedly, the separation of powers does not make sense if one branch of government can arbitrarily interfere in the activities of another, trying to gain control over it. The experience of many European states demonstrates serious dangers to constitutional democracy in cases where the elected parliament or head of state, based on the prevailing mood in society, gradually dismantled the principle of separation of powers, and then – democratic institutions, without encountering appropriate restraints from the judiciary. On the other hand, the rule of law also depends most on the state of independence of the judiciary. Needless to say, the encroachment on the independence of the judiciary means a blow to the institutional core not only of the rule of law, but also of the state of Ukraine itself. The independence of the courts is a component of the constitutional order and the subject of this case testified, among other things, to the insufficiency of the system of protection of the constitutional order of Ukraine[26].

In this context, the study once again refers to the position of O.Z. Khotynska-Nor, who refers to the opinion of Stefan Gass: "there are many ways for the actual intervention of the legislative and the executive powers, therefore it seems that the independence of judges is threatened. Some of these interventions may seem commonplace or inevitable because they are

[25] A dissenting opinion of the judge of the Constitutional Court of Ukraine Lemak V.V. "On concerning the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Supreme Court on the constitutionality of certain provisions of the laws of Ukraine "On the Judiciary and the Status of Judges" of June 2, 2016 No. 1402-VIII, "On Amendments to the Law of Ukraine and the status of judges and some laws of Ukraine on the activities of judicial authorities" of October 16, 2019 No. 193-IX, "On the High Council of Justice" of December 21, 2016 No. 1798-VIII", 2020. Available at: https://zakon.rada.gov.ua/laws/show/nd04d710-20#Text.

[26] *Ibidem.*

deeply rooted in conventional ways of organising the state. Furthermore, it is often said that the independence of the judiciary should exist not only based on a constitutionally defined provision or principle, but should also be based in practice on the good faith of those involved in the legislative and the executive powers. Admittedly, relying solely on the good faith of other branches of government is very noble, but will eventually lead to the subordination of the judiciary. Judges will have to, as noted in the IAS Study Group's general report, "please the hand that feeds them"[27].

This has already led to an almost complete levelling of the independence of the judiciary in Ukraine as such. Permanent legislative changes of judicial laws without parallel creation and adoption of clear and transparent laws (acts of substantive and procedural law) and consolidation of new procedural instruments that optimise judicial protection of the rights and freedoms of individuals. Naturally, this results in the risk of absolute levelling of the judge's internal independence during the administration of justice in a particular case – when making a decision in favour of a particular party, which depends as much as possible on judicial interpretation in the motivating part of a particular decision. This situation, in turn, creates a negative foundation for the impossibility of ensuring the unity of judicial enforcement.

Problems of protection of human rights and freedoms in the conditions of transit legislation (evidence from Ukraine)

As noted above, the transition period of the country's development has a negative impact on the social content of the state, making it increasingly colourful, fragmented, and polarised. This is nothing more than an exacerbation of the transitional processes that lead to the abandonment of conservative democratic transit, which has exhausted itself at the stage of establishing a "facade" democracy[28]. During this period, the "transit of power" is clearly visible, and what is especially dangerous (however, it is a natural feature of such a society) is the "transit of legislation". In particular, the UN defines[29] post-conflict societies, societies that have been repressed and need to restore the rule of law, reconciliation due to large-scale human rights violations in the context of institutional crisis and depletion of resources, reduced

[27] S. Gass, "Some observations on the independence of the judiciary, as presented in international documents and experiences", in *Bulletin of the Center for Judicial Studies*, 2007, no. 10, p. 25–32.

[28] D.M. Moiseienko, *Form of post-socialist state: concepts, classification, development trends: thesis of the Candidate of Law,* Classic Private University, Zaporizhzhia, 2017.

[29] Yu. Klymenko, "Ukraine in the UN Human Rights Council: achievements, challenges, prospects", in *Foreign Affairs*, 2021, no. 1-2, p. 5–9.

security and problems of division of the population on various grounds[30]. Transitional justice countries, such as modern Ukraine, need to establish fair rules of the game and effective government. Therefore, the proper functioning of public institutions is considered as an important factor in ensuring human rights. This is possible if the constitutional system is based on the continuity of rules, procedures and institutions. Without continuity, that is, the continuity of the constitutional tradition, a nation may simply find itself on the brink of survival. Continuity is achieved through the development and maintenance of rules based on respect for human rights and the restriction of power to prevent arbitrariness and tyranny. Such rules should be reproduced and multiplied in the constant practice of public authorities and individuals[31].

Thus, additional problems of transition countries (countries of "transit society") are the instability and unpredictability of legislation, the constant variability of society's demand, the diametrical goals of society and government[32]. Therefore, when going to court, the plaintiff cannot always obtain effective protection of their subjective right within a single type of proceedings[33]. This process is especially inherent in the spheres of guaranteeing and ensuring basic (fundamental) human rights, including in the sphere of various private law relations. The constant complication of the system and structure of legal relations in the protection of the rights and freedoms of individuals by the courts should also be noted. The problem is exacerbated when certain branch rights are also fundamental and at the same time subject to constitutional protection and defence.

The particular complexity of modern realities of the exercise of the right to judicial protection and its effective protection is that the rules of law, as the basis for resolving the case, receive periodic changes or are usually expected. For example, numerous registered bills of the Parliament of diametrically

---

[30] O. Khotynska-Nor, L. Moskvych, "Role of confidence and supply chain strategy during legitimization of justice in countries of transitional period", in *International Journal of Supply Chain Management*, 2019, vol. 8, no. 6, p. 533-534; Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice, 2010. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; B.M. Nurgaliyev, G.M. Rysmagambetova, K.S. Lackbayev, A.A. Shulanbayev, "Problems and conflicts of the intelligence and criminal procedure legislation of the Republic of Kazakhstan", in *Rivista di Studi sulla Sostenibilita*, 2020, vol. 2020, no. 1, p. 391-402.

[31] M. Savchyn, "Moral integrity (moral integrity, integrity) of judges as a component of the rule of law", in *Word of the National School of Judges of Ukraine*, 2019, vol. 2, no. 2, p. 6–22.

[32] T. Gumenyuk, M. Palchynska, P. Herchanivska, Y. Kozak, N. Kobyzhcha, "Overcoming the modern socio-cultural crisis - From postmodern to post-postmodern: Theoretical aspects", in *International Journal of Criminology and Sociology*, 2021, vol. 10, p. 745-752.

[33] I. Berestova, O. Khotynska-Nor, O. Kopytova, O. Bratel, S. Dronov, "Subordinate relationship between civiland constitutional legal proceedings in the countries with an autonomous body of constitutional control", in *Journal of Legal, Ethical and Regulatory Issues*, 2020, no. 23, article number 1.

opposite content, etc. The law on which the court decides a case and applies its rules often changes not according to the needs of the time, but depending on political expediency or permanent reforms, sometimes for the sake of reforms. And sometimes due to minimal semantic changes, the rules of law can be transformed in a deep understanding.

In particular, the negative novelty of the legislative technique of the last five years in Ukraine was the presentation of laws in new wordings, instead of the adoption of a new legislative act. Thus, the legislator was not limited only to acts of the substantive law. In 2017, the Parliament of Ukraine adopted virtually new versions of all procedural codes. However, these codes were not adopted as separate laws, but as a new version: the procedural code in a new wording, which contradicts the general rules of legislative technique. Furthermore, several new laws have been adopted concerning the last stage of protection of human rights, including the Law of Ukraine "On Enforcement Proceedings"[34], the Law of Ukraine "On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies"[35], etc. These acts, apart from the rules of substantive law, contain a considerable number of rules of procedural importance.

Unfortunately, the mechanism of implementation of these procedural codes – two weeks after their entry into force – has created a basis of legal uncertainty. First of all, for the courts of first and appellate instance, which consider and review court cases in full in parallel with the existence of an extremely high workload. Next, lawyers, prosecutors, and other specialists in the field of law and in general any ordinary citizen as a participant in the upcoming court proceedings found themselves in a state of legal uncertainty since the entry into force of the new versions of the codes.

The above gives grounds to conclude that the legislator, having set out the new procedural codes in 2017 (and in fact these were new procedural acts, which the judges must be guided by in their activities), created all the conditions for the transitivity of modern procedural legislation. This is justified as follows. All procedural acts currently function as an amended law that creates significant inconvenience in the use of a particular code to study the dispute by litigants depending on the stage of appeal and the establishment of procedural rules in force during this period, the participation of these persons in the implementation rights to judicial protection, etc.

At the beginning, no less difficulty was caused by the rules for the application of innovations of procedural codes by courts. It should be

[34] Law of Ukraine No. 1404-VIII "About executive proceedings", 2016. Available at: https://zakon.rada.gov.ua/laws/show/1404-19#Text.

[35] Law of Ukraine No. 1403-VIII "About bodies and persons who carry out enforcement of court decisions and decisions of other bodies", 2016. Available at: https://zakon.rada.gov.ua/laws/show/1403-19#Text.

reminded that any legislative act usually comprises three components: 1) preamble (scope of the law, the circle of persons covered by the action, etc. – not in all laws); 2) basic provisions (rules for subjects of law to which the law applies); 3) and final and transitional provisions (responsible for the procedure and conditions of implementation of the basic provisions and cannot create new rules of conduct).

However, the wording of the procedural codes, first of all, created confusion with the effect of the rules of law in time, as Sub-paragraph 9 Paragraph 1 Section I "Transitional provisions" of the Commercial Procedural Code of Ukraine, Sub-paragraph 9 Paragraph 1 Section I "Transitional provisions" of the Code of Administrative Judicial Procedure of Ukraine, Sub-paragraph 9 Paragraph 1 Section I "Transitional Provisions" of the Civil Procedural Code of Ukraine created conflicts with the general principles of judicial proceedings and the effect of legislation on commercial/administrative/civil proceedings (Part 3 Article 3 of the Civil Procedural Code of Ukraine, Part 3 Article 3 of the Code of Administrative Judicial Procedure of Ukraine, Part 3 Article 3 of the Civil Procedural Code of Ukraine): "Proceedings in civil cases are carried out in accordance with the laws" in force at the time of certain procedural actions, consideration and resolution of the case.

That is, there was an internal conflict between the basic and transitional prescriptions of procedural acts, the resolution of which initially became dualistic. Thus, certain courts (judges) completed the consideration of certain procedural actions in the case under the old versions of the codes, and some – immediately considered under the new rules, which sometimes led to the return of the case to the previous stage (for example in litigation) meetings, etc.). Thus, the courts of first and appellate instances at the end of the calendar year 2017, apart from a significant burden on each judge of the first and appellate instances, faced the problem of proper application of procedural law in order to prevent their violation. After all, the logical consequence of a violation of procedural law may be to appeal such a decision to the courts of higher instances with probable simultaneous initiation and disciplinary proceedings against the judge.[36] Important is the fact that a judge is de facto in the wrong legislative policy of the state and must apply the existing law. However, the situation is complicated when the rules of law develop the legislative plurality of procedural actions of a judge, which also violates the legal certainty. And this is does not refer to the judicial discretion of the judge regarding the variability of the application of substantive law based on which the dispute is resolved.

[36] I. Sichkovska, "Use of special knowledge at the initial stage of the pre-trial investigation", in *Social and Legal Studios*, 2021, vol. 13, p. 132-138.

Predictability not only of substantive but also of procedural legislation, specificity and clarity of procedural provisions of law is a component of legal definitiveness as a constitutional element of a judge's legal certainty regarding one's judicial independence in performing certain procedural actions. Because otherwise, as Hans Peter Graver fairly points out, "a judge is under pressure when the legislature attacks the law"[37]. Our current state of transit legislation illustrates the day-to-day conditions for the administration of justice by courts, as almost every day the court "as the custodian of legal provisions" is forced to solve "equations with many unknowns" when "unknowns" are "ever-changing provisions of law". Unfortunately, the modern development of Ukraine illustrates the usual attitude towards such a state as a conditional "constant", which, admittedly, does not contribute to the unity of judicial practice. This once again emphasises the importance of both ensuring the unity of judicial enforcement in the context of transit legislation in Ukraine and ensuring the independence of the judge in the administration of justice. After all, the independence of the judiciary is a common and important tool for achieving the rule of law[38].

Transitional justice in Ukraine requires fair rules and the rule of law. Ukraine is not the only country that seeks to overcome its transition period and become a country of developed democracy. In particular, P. Gauder, while reflecting on the development of the rule of law in the real world, cites an interesting quote from Carlos Santino (which he later criticises as an interpretation of the rule of law in a purely instrumental approach)[39]. Carlos Santino noted the development of the rule of law in Latin America: "Market-oriented economic reforms will not be sustainable without restoring and strengthening confidence in the rule of law. As the reliability of legal and, in particular, judicial procedures increases, so does the credibility of the political decision-making process. At a more general level, management through the executive branch, which is considered as a valuable asset in the initial phase of economic reforms, becomes a burden in the second phase of reforms"[40].

The legal system of Ukraine is currently at the first level, when, despite the democratic slogans, other branches of government demand a flexible

---

[37] H.P. Graver, "The judicial role and the rule of law", in *Nordic Journal of Human Rights*, 2016, vol. 34, no. 3, p. 222-225. DOI 10.007/978-3-62-44293-7_1.

[38] P. Gowder, *Rule of Law in the Real World*, Cambridge University Press, Cambridge, 2016.

[39] *Ibidem.*

[40] C. Santiso, "The elusive quest for the rule of law: Promoting judicial reform in Latin America", in *Brazilian Journal of Political Economy*, 2003, vol. 23, no. 3, p. 112–134; D.S. Gusarev, *Legal activity: methodological and theoretical aspects*, in National Academy of Internal Affairs, Kyiv, 2006; M. Savchin, Continuity of the national constitutional tradition in the face of challenges and threats, or on the continuity, 2017. Available at: https://zn.ua/internal/nepreryvnost-nacionalnoy-konstitucionnoy-tradicii-v-usloviyah-vyzovov-i-ugroz-ili-o-kontinuitete-253029_.html.

judicial system. But at the same time ensuring the unity of judicial practice and predictability of judicial enforcement. The interference of other branches of government in the judiciary is evident and undisguised, which does not contribute to uniform approaches to judicial protection of human and civil rights and freedoms.

Conclusions

Within the framework of this study, regular legislative and, in part, unsystematic interference in the activities of the judiciary in countries with economies in transition was investigated. The study demonstrated that this situation can lead to the de facto blocking of the operation of courts of all levels and jurisdictions. The result is a catastrophic situation with the accumulation of cases and the suspension of their consideration and review by all courts of all instances and jurisdictions. It was concluded that such a picture of the real state of the judiciary in its status and dynamics can be recognised as a direct violation of the availability of justice for citizens to hear their case by a fair court within a reasonable time. In this context, the study points to the violation of the right of individuals to access to justice in general, which undermines the key means of ensuring the exercise of the right to judicial protection, as one of the most important guarantees of constitutional and other human and civil rights and freedoms. The de facto restriction of this right by the legislator may lead to numerous appeals by citizens both to national courts and to international judicial institutions, which will negatively affect the observance of international obligations under the Convention by countries of transitional justice, in particular with regard to guaranteeing human rights as provided by Articles 6, 13 of the Convention. As for the legal system of Ukraine, it was concluded that Ukraine is currently at the first level, when, despite democratic slogans, other branches of government require a flexible judicial system, but at the same time to ensure the unity of judicial practice and predictability of judicial enforcement. The interference of other branches of government in the judiciary is evident and undisguised, which does not contribute to the unity of judicial enforcement.

Considering the above, as well as the conditions of transit legislation, it was stated that the unity of judicial enforcement will be temporary, unstable and, unfortunately, situational. The study proved that in this context the most dramatic is that after so many reforms and the whole movement towards expanding the scope of jurisdiction of the court, the effective improvement of the protection of subjective rights of individuals, as well as constitutional human and civil rights and freedoms in transition countries is not demonstrated. Systematic interference of other branches of government in the judiciary continues with efforts in the content of various media publications,

different levels of propaganda, etc., to publish this process as an objective factor of "normality" of building the judicial system of a democratic state.

This situation is present due to: 1) the lack of a programme document on the development of the judicial system; 2) the existence of a factor of incomplete system construction and development of the judicial system; 3) insufficiency of the judicial segment in reforming the judiciary. For example, changes to procedural codes and important substantive legislation deferred in time from judicial reforms, lack of new procedural tools to protect the rights of individuals, which optimises their protection in a quality and time (class action, preliminary, advisory request, etc.).

Objective factors influencing the underestimation of the external independence of the judiciary constitute the basis for creating the grounds for the violation of the internal independence of the judge in the administration of justice. The study emphasises that justice can be fair under a set of conditions: 1) the interrelation and interaction of the internal independence of the judge and the external independence of the judiciary; 2) a system of clear and transparent legislation that has the qualities of systematicity, unity, and consistency, i.e. the absence of the transit factor; 3) the unity of judicial enforcement, which in practical terms constitutes the rule of law, resulting in convincing precedents, supported by the entire legal community.