



Effective Court Administration and Professionalism of Judges as Necessary Factors Safeguarding the Mother of Justice – The Right to a Fair Trial

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Abstract

One of the fundamental human rights and the rights of nations is the Right to a fair trial. A legal paradox is that immense violations of this right have been declared worldwide for many years despite the significance of this right and the fact that it is executed by the courts and judges themselves. Professionalism of a judge and a court as an institution is a prerequisite for effective execution of this right and at the same time the level of protection of the Right to a fair trial could be taken as a criterion for evaluation of the judicial systems. The modern concept of this right and thoughtful identification of its elements show not just the development of the legal systems but are indicators of legal culture of western civilization in administering of justice.

The author raises the hypothesis that court administration and high professional standards of judges are the main prerequisites to preserve the Right to a fair trial. Court administration and judicial professional standards should preserve the main elements of the Right to a fair trial, and first of all “fairness” and “the independence and impartiality of the court”. The ability to ensure the proper implementation of the right to a fair trial in practice is one of the key qualitative criteria for assessing court performance.

The scope of this article is to systemize the main original establishments of the Right to a fair trial and its elements, particularly the essential requirements for “fairness” and “the independence and impartiality of the court (judge)” from the point of view of court administration and professional standard of a judge. It is important to determine main requirements for the high judicial professional standard of a judge as a prerequisite for proper execution of the Right to a fair trial. The legal and ethical values that the Right to a fair trial grant internationally is best represented by the jurisprudence of the European Court of Human Rights (“ECtHR”). Therefore, the article is based on the main legal thoughts that are developed by the jurisprudence of this international court, using the systematic material on jurisprudence of ECtHR, comparative analyses and doctrinal support.

Keywords: Court administration, the Right to a fair trial; fairness; judicial independence and impartiality; professional judicial standards.

Introduction

The Right to a fair trial is one of the fundamental and at the same time most complex rights which encompasses main principles of the courts’ activity, trial proceedings and the judiciary itself. The complexity of this right could be revealed even from the different approaches to its definition. The term ‘Right to a fair trial’² most often found is sometimes presented as the Right to an effective remedy and to a fair trial³, or the Right to effective judicial protection in competent national courts⁴, or the Right to a fair and public hearing by a competent, independent and impartial tribunal established by law⁵, or even simply the Access to Justice.⁶

It enshrines the principle of the rule of law, upon which a democratic society is built, and the paramount role of the judiciary in the administration of justice, reflecting the common heritage of the states’ legal systems.⁷ The concept of the Right to a fair trial has

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2 European Convention of Human Rights, 1950 // http://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 19 March 2018]

3 The Charter of Fundamental Rights of the European Union, 2000, Article 47 // http://www.europarl.europa.eu/charter/pdf/text_en.pdf [accessed 19 March 2018]

4 Universal Declaration of Human Rights, UN, 1948, Article 8 // http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [accessed 19 March 2018]

5 United Nations, The International Covenant on Civil and Political Rights. Adopted by General Assembly Resolution 1966. Article 14 // <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 19 March 2018]

6 United Nation Convention on the Rights of Persons with Disabilities, 3 November 2008, New York and Geneva, 2008. Article 13. <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [accessed 19 March 2018]

7 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights. Council of Europe A handbook for legal practitioners. Council of Europe, 2nd edition September 2017, p.11 <https://edoc.coe.int/en/european-convention-on-human-rights/7492-protecting-the-right-to-a-fair-trial-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners-2nd-edition.html> [accessed 19 March 2018]

some differences in the civil law and common law traditions. In civil law tradition it is mostly influenced by the interpretation given by the ECtHR, which recognizes this right as the basic principle of the Rule of Law in a democratic society that aims at securing the right to proper administration of justice. ECtHR emphasizes practical purpose of the provision of this right, with a view to protecting rights that are practical and effective (the principle of effectiveness) rather than theoretical and illusory.⁸

However, the scope of this right is more 'procedural' than a 'substantive' one, because it establishes guarantees for the right to a court, to an effective access to justice, to the equality of arms, to a public hearing, to a public judgement, trial within a reasonable time, to an independent and impartial court. Nevertheless, attention should be paid to the jurisprudence of ECtHR in cases *Moreira de Azevedo v. Portugal*, Judgment of 23 October 1990, *Perez v. France*, *Delcourt v. Belgium*, specify, which states that the Right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 of the Convention restrictively.⁹

Therefore, the substantive elements of the Right to a fair trial are very important, especially taking into consideration that two of the most significant elements are fairness and justice which are very significant part of this right. Lijana Štarienė emphasizes that the Right to a fair trial is a multi-layered concept which encompasses many fundamental elements of the judicial process and the list of its elements is not exhaustive. It means that there is a possibility to supplement this definition by new elements, taking into account new realities and individual circumstances of each case, thereby ensuring fair trial of the whole process.¹⁰

The Right to a fair trial retains great importance in judgements of both national and international courts. The significance of this right is confirmed by the single fact that the case-law of ECtHR on Article 6 (Right to a fair trial) of the European Convention of Human Rights has a very extensive body of rules and has had constant supplementation even in the last years.¹¹ The cases where ECtHR finds the violations of this right by different states shows the need to pay more thoughtful attention to this right and to continue analyzing its developments foreseeing its new evolution.

Despite of the variability of the Right to a fair trial, a certain fact is that the independence and impartiality of the court is a precondition of a fair trial. It should be noted that new challenges for the courts' independence in the world arise in every new period. In the last decade, the judiciary role in safeguarding democracy, human rights and freedoms has become more and more significant. The rising of populism in the heart of Europe, and of nationalism and populism in the United States show that the concept of the rule of law is not inviolable even in old democracies. Therefore, the Right to a fair trial becomes a premise of preserving democracies and human rights. It is the judiciary as a separate state power that stands in protection of the main values that modern societies have developed over the centuries. It should be also noted that the Right to a fair trial faces new challenges in times of terrorism because the war against terror has been declared globally, and additional restrictions on human rights would be justified by the international law ensuring public safety and state security. Nevertheless, "One of the core principles of the law, the Right to a fair trial can never be derogated from and must be respected in peace as well as in times of an armed conflict. Thus, given its application even in extraordinary situations, it amounts to a general principle of transnational criminal law."¹²

I believe that legal systems and judiciaries must secure the Right to a fair trial timely and comprehensively. Violation of this right means violation of fundamental human rights and is not in compliance with the constitutional principle of the rule of law. Disclosing the main establishments of the Right to a fair trial, compiling a list of the main elements of this right and revealing the concept of fairness, the importance of the independence and impartiality of the court as one of the main element of this right helps to clarify and foresee possible new developments and prevent future violations. Moreover, defining the rule of court administration and the standard of the professionalism of a judge in safeguarding the Right to a fair trial allows us to answer the question how this right can be protected in practical court performance.

1. Establishments of the Right to a fair trial in main international documents

The Right to a fair trial reaches back to the Law of the Twelve Tables (The *Lex Duodecim Tabularum*) around 455 B.C., and is a fundamental right recognized universally in many countries throughout the world. However, the concept of this right is rather dynamic than stable. The Law of the Twelve Tables established the right to have all parties present at a hearing, the principle of equality amongst citizens, and the prohibition of bribery for judicial officials.¹³ Over the centuries the Right to a fair trial has evolved

8 Ibid.

9 Piero, Leanza, and Pridal, Ondrej. "The Right to a Fair Trial", 2014, p. 6.

10 Lijana, Štarienė, "The Right to a fair trial under article 6 (1) of the convention for the protection of human rights and fundamental freedoms", summary of the Doctoral Dissertation. Mykolas Romeris University, Vilnius, 2010, P. 25.

11 In the judgments delivered by the ECHR in 2016, 176 violations which is nearly a quarter of all violations were concerned right to a fair hearing, whether on account of the fairness or the length of the proceedings. It should be emphasized that during the period of 1959-2016 more than 40% of the violations found by the Court have concerned Article 6 of the Convention (4505 violations), whether on account of the fairness (17.35%) or the length (21.34%) of the proceedings. //http://www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf [accessed 19 March 2018]

12 Kai Ambos, Annika Maleen Poschadel. Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorists Detained in Guantanamo Bay. *The Utrecht Law Review*. Volume 9, Issue 4 (September) 2013. <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.245/> [accessed 19 March 2018]

13 Patrick, Robinson. The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY, p.p. 1-2 // <http://bjil.typepad.com/publicist/2010/01/the-right-to-a-fair-trial-in-international-law-with-specific-reference-to-the-work-of-the-icty.html> [accessed 19 March 2018]

widely and today this right has been established in many international conventions, declarations and other documents, as well as in Constitutions and laws of many national legal systems.

In the United States the Right to a fair trial is established in the Fifth and the Fourteenth amendments to the United States Constitution (in 1789 and in 1868) and is known as a substantive due process, i. e. that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. Furthermore, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.¹⁴

The Right to a fair trial is embedded in articles 8 and 10 of the Universal Declaration of Human Rights, established by the United Nations General Assembly in 1948. It states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law (article 8); everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him (article 10).¹⁵

Considering the Universal declaration of human rights, the governments of European countries being members of the Council of Europe, in 1950 established the Right to a fair trial in the article 6 of European Convention of Human Rights. In this article, the Right to a fair trial was described more explicitly and proclaimed that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. These legal requirements have a scope in the determination of civil rights and obligations, as well as in any criminal charge against human.¹⁶ The variety and dynamic jurisprudence of ECtHR throughout more than sixty years of interpreting article 6 of the European Convention of Human Rights makes this international document the most significant for the developing of the Right to a fair trial. The jurisprudence of ECtHR on the Right to a fair trial is traditionally classified to civil and criminal categories,¹⁷ extracted core principles from prominent cases at the European Court of Human Rights could be found in the consistent manual created by Dovydas Vitkauskas and Grigoriy Dikov "Protecting the Right to a fair trial under the European convention on human rights".¹⁸

In addition to the specified international documents, it should also be noted that there are many other international documents where the principal provisions of the Right to a fair trial are elaborated. The International Covenant on Civil and Political Rights¹⁹ is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966. The Article 14 of the Covenant affords the full panoply of minimum rights to a criminally accused person. Title VI of the Charter of Fundamental Rights of the European Union is dedicated to "Justice" for Europeans. Article 47, on the "Right to an effective remedy and to a fair trial" establishes three main rights: first, the right to an effective remedy before a tribunal; second, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; and thirdly, the right to be advised, defended and represented. Legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.²⁰

The specificity of the Right to a fair trial could be found in special international documents dedicated to protect the rights of individual groups of people, for example, the rights of persons with disabilities or children rights. Article 13 of the UN Convention on the Rights of Persons with Disabilities determines access to justice and obliges the states' parties to ensure effective access to justice for persons with disabilities on an equal basis with others. The UN Convention on the Rights of the Child states that the best interests of the child shall be a primary consideration in all actions concerning children undertaken by courts of law (article 3). That is to say that by implementing provisions on the Right to a fair trial interests of the child should be carefully safeguarded that other rights and interests of a child would not face violations during court's and other judicial proceedings, for example children's privacy rights, right to safety, humanity and respect for the inherent dignity of the human person. The Right to a fair trial also gives to every child who is deprived of his or her liberty the right to prompt access to legal and other appropriate assistance, as well as the right to challenge

14 Amendment V and XIV of U.S. constitution. // <http://finduslaw.com/us-constitution-5th-14th-amendments> [accessed 19 March 2018]

15 United Nations, Universal declaration of human rights. Adopted by General Assembly Resolution 217 A(III) of 10 December 1948 // <http://www.un.org/en/universal-declaration-human-rights/> [accessed 19 March 2018]

16 European Convention of Human Rights, 1950 // http://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 19 March 2018]

17 Guides on Article 6 of the European Convention on Human Rights are prepared separately in civil and criminal limbs but the content shows that there are common areas. // http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [accessed 19 March 2018]
http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf [accessed 19 March 2018]

18 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights. Council of Europe A handbook for legal practitioners. Council of Europe, 2nd edition September 2017.

<https://edoc.coe.int/en/european-convention-on-human-rights/7492-protecting-the-right-to-a-fair-trial-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners-2nd-edition.html>

19 United Nations, The International Covenant on Civil and Political Rights. Adopted by General Assembly Resolution 1966. // <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

20 Official Journal of the European Communities. Charter of fundamental rights of the European Union. 2000, (2000/C 364/01). // <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012P%2FTXT>

the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action (article 37).²¹

Specified establishments of the Right to a fair trial and elaboration of this right in the main historical international documents testify a long history of the development of this right. The gigantic expansions of the provisions of the Right to a fair trial and even bigger expansion of the implementation of this right shows its practical actuality and importance in the general institute of human rights for centuries. Therefore, it is very important to clarify the main elements of the Right to a fair trial in order to disclose the main institutional and procedural instruments to safeguard it and to research the requirements for court administration and a professional standard of a judge.

2. “Fairness” as essential element of the Right to a fair trial

The originality and universality of the Right to a fair trial determine the diversity and extreme complexity of elements of this right and make the unique concept of this right difficult to define. Some authors think that it is almost impossible to define because of the way it appeared between the constants of rights and the fundamental rights in the contemporary legal systems.²² Others say that the Right to a fair trial is, in a way, an intuitive concept: each party is aware that it is entitled to a fair trial, and is subjectively convinced of his knowledge of his rights.²³ Despite the fact that it would be unreasonable to speak of the permissibility of an unfair trial, the boundary between fair and unfair trial is sometimes very narrow and in some cases it is just a matter of the legal tradition and the level of guarantees of procedural rights in the different legal systems.

“A fair trial” is a category which from its linguistic structure point of view seems simple enough. However, the term “fairness” enables us to look for the criteria to dissociate it from unfairness of the trial, to set the rules and criteria to identify it. Judicial professional standards require to distinguish a fairness from unfairness because it is the essential element for proper implementation and preservation of the Right to a fair trial.

A fair trial in procedural justice first of all is understood as a public hearing done in a reasonable time by an independent and impartial court established by law. Whereas, in material justice, a fair trial is often accompanied with a concept of equity and fair or fairness is directed to the final result of a trial, the court judgment. However, ECtHR says that the “fairness” is not “substantive” fairness (a concept which is partly legal, partly ethical and can only be applied by the trial court), but “procedural” fairness. Article 6 of European Convention of Human Rights only guarantees “procedural” fairness which translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (*Star Cate Epilekta Gevmata and Others v. Greece*). The court emphasized that the fairness of proceedings is always assessed by examining them in their entirety, so that an isolated irregularity may not be sufficient to render the proceedings as a whole unfair (*Miroļubovs and Others v. Latvia*).²⁴ The requirement of „fairness“ covers the proceedings as a whole, and the question whether a person has had a “fair” trial is assessed in the process of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (*Monnell and Morris v. the United Kingdom*).²⁵ In regard to domestic laws and regulations, the ECtHR states that the notion of “fairness” is also autonomous from the way the domestic procedure construes a breach of the relevant rules and codes with the result that a procedural defect amounting to a violation of the domestic procedure – even a flagrant one – may not in itself result in an “unfair” trial (*Gafgen v. Germany*); and, vice versa, a violation under Article 6 can be found even where the domestic law was complied with. Fairness as it is implemented by the ECtHR first of all in civil cases sets the requirements of the adversarial proceedings, equality of arms, presence and publicity, in criminal matters – entrapment defence, right to silence and not to incriminate oneself, and right not to be expelled or extradited to a country where one may face a “flagrant denial of justice”.²⁶ From a general procedural perspective, the principle of fairness refers to the guarantee that none of the litigants in the judicial process is placed in the situation of a disadvantage to each other.

Fairness is a qualitative category; therefore, judges must not only deeply understand the diversity in the manifestations of fairness, but also be very sensitive in the preservation of fairness in every element of the proceeding and in the proceeding as a whole. The importance of fairness in any step of procedure could be partly represented by a very well-known phrase of Martin Luther King, Jr. that “injustice anywhere is a threat to justice everywhere.”²⁷ The confidence and trust in the judicial procedure and in the judicial system comes by establishing fairness in every step of the procedure. Therefore, a strong attitude towards fairness must be included in the professional standards of judges. The abilities to balance rights of litigants, to react fearlessly on the procedural and

21 United Nations, Convention on the Rights of the Child, 2 September 1990 // <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

22 Alexandru, Boroi. “Aspects Regarding the Right to a Fair Trial According to Article 6 of the European Convention on Human Rights in the Case of Undercover Investigators.” *Law Annals Titu Maiorescu U.*, (2011): p.p. 9-22.

23 Piero, Leanza, and Pridal, Ondrej. “The Right to a Fair Trial” (2014), p. 6.

24 Council of Europe, European Court of Human Rights. Guides on Article 6 of the European Convention on Human Rights (Civil limb). 2013 // http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [accessed 19 March 2018]

25 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights. Council of Europe A handbook for legal practitioners. Council of Europe, 2nd edition September 2017. P. 59.

26 Ibidem 24.

27 Martin Luther King, Jr., Letter from a Birmingham Jail [King, Jr.], Birmingham. 1963 // https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [accessed 9 March 2018].

organizational requests, even if the litigants act improperly, and to show “fair trial” to all court users are the cornerstones for proper administration of justice and court administration.

By executing rights and obligations in the court procedure, judges must preserve fairness not only in every step of the court trial but in the entire procedure as well. Therefore, every procedural act must be weighed and at the end of a trial the possible deficiencies of the Right to a fair trial should be compensated by additional actions of judges. For example, if the court finds it doubtful that the right to present evidences before the court or the right to be heard by a court directly was ensured for every litigant the court must take additional measures in preserving these rights. It is suggested that a specific verification test of “procedural fairness” could be indoctrinated in the legal practice of a court proceeding in order to ensure the protection of the Right to a fair trial.

Besides the qualitative requirement of “fairness”, an integral part of the Right to a fair trial is the right to a trial proceeded by the independent and impartial courts. This requirement could be recognized as one of the main requirements of this right which concerns institutional demands of the courts as the governmental institutions. However, it is only a part of the Right to a fair trial. The wide scope of guarantees of the procedural rights of the parties to civil proceedings are not less important for this fundamental right. In the civil category, there could be recognized such separate rights which in doctrine and jurisprudence of courts are recognized as parts of the Right to a fair trial: Right to a court: access to a court (independent, impartial and competent); Right to be treated equally before the courts and the principle of adversarial; Right to present evidences before the court and evaluate them; Right to a reasoned decision and reliable evidence; Right to a trial within a reasonable time; Right to be heard by a court directly; Right to a public hearing; Right to appeal; Right to counsel; Right to interpretation and finality of court decisions; Timely execution of final judgments; Practical and effective protection of human rights in the court; The right to an effective remedy. Though in a criminal category mostly dealing with the rights of the defendant in criminal proceedings these separate elements which are parts of the Right to a fair trial could be recognized: Right to be presumed innocent (Presumption of innocent); Right to be informed of the charge; Right to prepare defence and to communicate with counsel; Right to “equality of arms”; Right to be tried without undue delay; Right to be present during trial, to defend and to legal assistance; Right to call and examine witnesses; Right to the free assistance of an interpreter; Right to appeal; Right to compensation for wrongful conviction; Right against second trial for the same offence; Right not to be held guilty for an act or omission not constituting a criminal offence; Privilege against self-incrimination.

The above listed variety of the rights shows the scope of the Right to a fair trial. At the same time, it determines many challenges for the judicial implementation of this right. All these elements of the Right to a fair trial are significant because violation of any of them determines violation of the Right to a fair trial as a whole. Classification of these rights can be established by dividing them into those whose deficiencies and violations could be compensated during the procedure or at the end of it, but some of them are of the highest importance, therefore, could be restored only by repeating the trial, because their violations make the absolute grounds for invalidity of a trial and a decision. Independence and impartiality of the court and a judge as a precondition of a fair trial is the most important element of the discussed right. Therefore, court administration and court performance on high judicial professional standard of a judge should ensure that independence and impartiality of the court and a judge would be ensured at the maximum level.

3. The concept of court administration

Court administration, as generally understood in European legal tradition is a very broad term that encompasses administration of judiciary and administration of courts' units. Court administration is the set of measures, legal regulations and legal powers in court performance which are based on constitutional principles that determine main organizational provisions of courts' system and performance of courts activity. International and national practices, measures and tools, which are mostly implemented by the judiciaries themselves managing courts' organizational activity, comprise the practical-functional content of court administration. Institutional part of court administration is a system of different offices that have lawful mandate to act by influencing courts' activity. A very important part of court administration is procedural because court administration is very sensitive to *ultra vires doctrine*, independence and autonomy of a judge and a court.

Court administration has direct influence on the quality of court performance and on the quality of justice as an essential outcome of this performance. The quality work in courts is measured by performance of courts, public services and the quality of justice. It can be further elaborated that “court administration should make it possible for courts and judges to actually fulfill their tasks – guaranteeing the protection of legal rights, applying the law in uniform manner, developing the law – while at the same time taking account of the procedural guarantees such as the requirement that justice be dispensed speedily, correctly and efficiently.”²⁸ In some respect, the court administration primarily should guarantee that court proceedings themselves be in compliance with the highest standards of human rights and especially those which fall under the umbrella of the Right to a fair trial. Therefore, it is important to identify how court administration and professional standards of judges could ensure the independence and impartiality of courts and judges.

28 Andreas Lienhard, Daniel Kettiger, „Between Management and the Rule of Law: on the move towards a management model for the judiciary - Results from the project “Basic research into Court Management in Switzerland”, International Journal for Court Administration, (2017), p. 9. // <https://www.iacajournal.org/articles/abstract/10.18352/ijca.219/>

4. How court administration and professional standard of a judge could ensure the independence and impartiality of a court and judges

Besides the substantial qualitative requirement of fairness, an integral part of the Right to a fair trial is the right to a trial proceeded by an independent and impartial court. Independence and impartiality of the court are the most important institutional characteristics and fundamental parts of the Right to a fair trial. These imperative requirements could be recognized as one of the main requirements of this right which concerns institutional demands of the courts as the governmental institutions and requirement to personalities of the judges, the so-called autonomy of a judge. High professional standard of a judge and effective activity of court administration require preservation of both types of independence because judges and courts' officers are those representatives of judiciary who stand in the first line when the independence and impartiality of courts and judges is being assaulted.

In spite of the fact that the independence and impartiality of courts and judges have a long history and are established in many historical legal documents and international standards, they constantly face attempts to violations. These violations are revealed in various ways, from adopting legal acts which contradict constitutional principles, reforming the judicial systems, up to essential shortages of administering justice in concrete cases.

Ongoing judicial reforms in Poland lead to big tensions between the European Commission and the government of Poland. In Poland, the judiciary itself, academics, practitioners and civil society call "judicial reforms" "an attack" on independent judiciary.²⁹ The European Commission issued three recommendations (27 July 2016, 21 December 2016, 26 July 2017) for Poland and threatened to launch a sanction procedure against Poland.³⁰ Polish government presented a White Paper³¹ explaining why specific judicial reforms are needed in Poland, and why content of reforms is proportionate and justified. In this White Paper the Government of Poland emphasized that European standards are met and along with already existing very strong guarantees of independence, new provisions are introduced that further strengthen judges' position towards the court administration, and thus the authority of the Minister of Justice as well. According to the White Paper, another change that has made judges more immune to the pressure exerted by court administration is the prohibition on transferring judges between court divisions without their consent, introduced by the Law on the Organization of Common Courts.

It is widely overlooked that the Venice Commission and other international bodies that were critical of Polish reform did not take into account certain arguments that justify it. The Venice Commission repeatedly urged various countries in the past to assure that the judiciary councils would not be overly dominated by judges – as it may lead to cronyism, self-interest, illegitimate self-protection and the public perception of judicial corporatism.³² Government gave arguments that the Polish reform of the National Council of the Judiciary is carried out in the spirit of these suggestions. However, the Polish Judges Association "Iustitia", together with a team of experts, in order to present a realistic picture of the reforms of the Polish justice system, gave the Response to the White Paper compendium on the reforms of the Polish justice system, presented by the Government of the Republic of Poland to the European Commission.³³ In this response official arguments of the government were named as untrue, overtly manipulated and cynical breaching the guarantees of judicial independence and in place of the checks and balances, the governing authorities are introducing the principle of a uniform State of authority with subordinated and politicized courts.

Finally, this judicial reform in Poland in terms of a fair trial was a subject of the case in Court of Justice of the European Union, which on 25 July 2018 issued a judgement in Case C-216/18 PPU.³⁴ In this case a Polish national was the subject of three European arrest warrants, issued by Polish courts for the purpose of prosecuting him for drug trafficking, who, after being arrested in Ireland in 2017, did not consent to his surrender to the Polish authorities on the ground that, on account of the reforms of the Polish system of justice, he runs a real risk of not receiving a fair trial in Poland. In the present case, the High Court of Ireland asked the Court of Justice of the European Union whether the executing judicial authority, when dealing with an application for surrender liable to lead to a breach of the requested person's fundamental right to a fair trial, must, in accordance with the judgment in Aranyosi and Căldăraru,³⁵ find, firstly, that there is a real risk of breach of that fundamental right on account of deficiencies in the Polish system of justice and, secondly, that the person concerned is exposed to such a risk, or whether it is sufficient for it to find that there are deficiencies in the Polish system of justice, without having to assess whether the individual concerned is actually exposed to them. In its judgement, the Court of Justice of the European Union stated that a judicial authority called upon to execute a European arrest

29 Lukasc Bojarski, Filip Wejman. Legal think tanks and governments capacity building. Report, INPRIS, Warsaw, 2017. P. 118. [http://pravo.org.ua/img/books/files/1522053806lts-and-gov_2017_inpris-comparative-report-printed-ivf\(1\).pdf](http://pravo.org.ua/img/books/files/1522053806lts-and-gov_2017_inpris-comparative-report-printed-ivf(1).pdf) [accessed 2 April 2018]

30 http://europa.eu/rapid/press-release_IP-17-2161_en.htm [accessed 19 March 2018]

31 Chancellery of the Prime Minister of Poland. White paper on the Reform of the Polish Judiciary. Warsaw, 7 March 2018 // https://www.premier.gov.pl/files/files/white_paper_en_full.pdf [accessed 19 March 2018]

32 Chancellery of the Prime Minister of Poland. White paper on the Reform of the Polish Judiciary. Warsaw, 7 March 2018 // https://www.premier.gov.pl/files/files/white_paper_en_full.pdf [accessed 19 March 2018]

33 The Polish Judges Association "Iustitia". The Response to the White Paper compendium on the reforms of the Polish justice system, presented by the Government of the Republic of Poland to the European Commission, 2018. <https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission> [accessed 2 April 2018]

34 Court of Justice of the European Union, 25 July 2018 Judgment in Case C-216/18 PPU [accessed 4 November 2018] <http://curia.europa.eu/juris/document/document.jsf?docid=204384&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=1665364>

35 Court of Justice of the European Union, 5 April 2016 Judgement in Case Aranyosi and Căldăraru (C 404/15 and C 659/15 PPU, EU:C:2016:198) // <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=613006>

warrant must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial on account of deficiencies liable to affect the independence of the judiciary in the issuing Member State.³⁶ This narrative is a good example how judicial reforms on court administration might have direct influence on judicial procedures, even in case of an international application for surrender liable persons to the state.

The significance and seriousness of a problem confirms the independence of courts being repeatedly supported by different type international organizations.³⁷ Moreover, the Committee of Ministers of the Council of Europe adopted the Plan of Action on Strengthening Judicial Independence and Impartiality at the meeting of the Ministers' Deputies on 13 April 2016.³⁸ It indicates that action needs to be taken, firstly, to improve, or establish where these are lacking, formal legal guarantees of judicial independence and impartiality and, second, to put in place or introduce the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to proper functioning of the judicial branch in a democratic society based on human rights and the rule of law. All these facts and legal circumstances emphasize the fact that judicial independence is very important in legal reality. Therefore, it is necessary to look for additional measures to safeguard these international and national constitutional values.

4.1. Duty to preserve judicial independence

The international standards set the requirements of independence, impartiality and establishment by law to a "tribunal", not merely to a court. Article 6 of the European Convention of Human Rights states that "<...> everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"³⁹. It is recognized by the court that this right includes three main characteristics required from a judicial body, some of them at times overlapping: (a) tribunal "established by law", (b) "independent" tribunal and (c) "impartial" tribunal. In this manner, it is striving to separate the judicial bodies from other executive bodies, police or prosecution authorities which don't have these requirements at this level. The European Court of Human Rights emphasizes that for the purposes of article 6 a "tribunal" does not need to be a court of law integrated within the standard judicial machinery of the country concerned. It may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system. Analysis of violations and their reasons which were recently recognized by ECtHR led us to the question how (if yes) court administration and professional standard of a judge could ensure the independence and impartiality of a court and prevent its violations. It is obvious that courts' obligations to the legal system oblige courts, court administration and judges to the constant *ex ante* preservation of the human right to the independent and impartial tribunal established by law. It is the concern of the every-day professional activity of judges and court administration; therefore, serious violations must not be justified.

D. Vitkauskas and G. Dikov point out that the ECtHR found the violations of independent tribunal in the case *Luka v. Romania* because mixed court involved lay judges ("judicial assistants") with no sufficient guarantees of independence – for instance,

36 Court of Justice of the European Union Luxembourg, 25 July 2018 Press release No 113/18 // <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180113en.pdf>

37 The General Assembly of the European Network of Councils for the Judiciary, The Warsaw declaration on the Future Justice in Europe (June 2016) // https://www.encj.eu/images/stories/pdf/GA/Warsaw/encj_warsaw_declaration_final.pdf [accessed 12 March 2018]

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<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [accessed 12 March 2018]

38 The Council of Europe, the Committee of Ministers, "The Plan of Action on Strengthening Judicial Independence and Impartiality" (April 2016) //

<https://rm.coe.int/1680700285>

39 *Supra* note 16.

protection against premature termination of duties or restrictions in deciding cases involving parties on whose behalf they had been appointed. Therefore, the conclusion should be made that court administration appointing judicial panels and composing mixed courts should evade these infringements of the Right to a fair trial by appointing the proper persons in the court. The preservation of the Right to an independent tribunal could have been done in the cases *Miroshnik v. Ukraine* where the court found violation because military tribunal was comprised of judges appointed by and financially dependent on the defendant (Ministry of Defence), in view in particular of the Ministry's role in distributing housing among officers. In the case *Dubus S.A. v. France* the violation was determined because a special commission combining investigative and adjudicative functions, conducted disciplinary proceedings against a financial company. The infringement of the right to an independent tribunal was recognized in Polish case *Henryk Urban and Ryszard Urban* because assessors in Polish courts who could be removed from office by decision of the Ministry of Justice, were given no adequate guarantees protecting them against arbitrary exercise of that power by the minister. The handbook emphasizes that the ECtHR often stressed the importance of the appearance of independence – that is, whether an independent observer perceives the body as an “independent tribunal”. Questions of appearance in a specific case are usually dealt with under the objective “impartiality” test, but with some rare exceptions these issues have been looked at from the angle of “independence” – especially where the matters were not decided by courts of ordinary jurisdiction but by specialized tribunals. The procedure of appointing judges to sit on the bench in a particular case may also cast doubt on their independence. In the case *Moiseyev*, ECtHR found a breach of “independence” and “impartiality” requirements because the composition of the court was modified (by decision of the court president) eleven times, while only on two occasions there were reasons given for such modification.⁴⁰

The violations described above reveal that all of them were predictable and could not be justified by the fact that the Right to a fair trial is prone to a constant development. Therefore, these violations could have been prevented. Legal systems, court administrations could execute their powers to appoint judges to the tribunal that do not face the conflict of independence or insufficient guarantees of independence. The principle of stability of the court panel is easily implemented; however, in the presented situations it was not ensured by actions of the court administration.

4.2 Duty to preserve impartiality

Court administration has to act not only in order to protect the independence but also the impartiality of the court to the maximum. Procedural fulfillment of the Right to a fair trial is inevitable without impartiality of a court and of an individual judge. Lack of impartiality that violates the Right to a fair trial is such an activity of a judicial body or of an individual judge that supports or opposes a particular party of a case in an unfair way, because of allowing subjective circumstances or personal opinions to influence the trial process or the final judgement. The violation of equality or tendentious procedural decisions could be recognized as the activity of biased courts. To identify these violations is not an easy task because the court acts by independent discretion and many procedural principles and duties overlap during the process (for example, the duty to disclose essential facts and principle of trials expedition; the right to present the evidences before the court and the duty to remove everything that is not related to the case, etc.).

In well-known jurisprudence, ECtHR clarifies that impartiality normally denotes the absence of prejudice or bias and its existence can be tested in various ways. The court established the test which is based on two criteria for assessing impartiality: 1) *a subjective test*, which is based on the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case, whether the judge has displayed hostility or other improper act; 2) *an objective test*, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. Court administration should encourage introduction of these tests in everyday judicial practice striving to prevent violations of impartiality. Methods that can be used in accomplishing the effectiveness of introduction of these tests in court performance are court consumer mirror, peer review and collegial knowledge sharing. Impartiality as one of the main values of judicial conduct appears in every step of a judge's activity both in and out of court. Impartiality is applied not only to the decision itself but also to the process by which the decision is made. Impartiality is one of the criteria of the appreciation of quality of judicial performance.

The ECtHR emphasized that there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee.⁴¹

The complexity of protection of the impartiality of a court for court administration is due to the fact that “impartiality” entails inquiry into the court's independence vis-a-vis the parties of a particular case and the presence of even one biased judge on the bench may lead to violation of the impartiality requirement, even if there are no reasons to doubt the impartiality of other (or a majority

40 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights. A handbook for legal practitioners. Council of Europe, 2nd edition September 2017, p.p. 48-50.

<https://edoc.coe.int/en/european-convention-on-human-rights/7492-protecting-the-right-to-a-fair-trial-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners-2nd-edition.html>

41 Council of Europe, European Court of Human Rights. Guides on Article 6 of the European Convention on Human Rights (Civil limb). 2013, p. 29// http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [accessed 19 March 2018]

of other) judges.⁴² Court administration (presidents, vice-presidents, chairmen of a courts' or divisions) is empowered to withdraw a judge from the case if the judge lacks impartiality and the request for the judge withdrawal is being submitted. But withdrawal of a judge should be the last measure to protect the impartiality of a court because it usually comes *ex post* after it is being broken. Court administration should execute systematic measures to build the culture of lawfulness and impartiality because it's not only the element of the Right to a fair trial but together with principles of independence, integrity and others is one of the main principles of worldwide recognized judicial ethics adopted in Bangalore Principles of Judicial Conduct.⁴³ Judicial ethics, as a system of professional values, is based on the principle of self-regulation, "by judges of judges". An effective court administration requires a scientific approach to its elements, including the methods of enforcement of judicial ethics.

In the new developments, the ECtHR jurisprudence stipulated that there is a lack of subjective impartiality, firstly, in public statements of a trial judge assessing the quality of the defence and the prospects of the outcome of the criminal case or giving negative characteristics of the applicant. There is also a lack of subjective impartiality in statements by judges that they were "deeply insulted" in the courtroom while finding the applicant lawyer guilty of disrespect towards the court. Subjective impartiality is also missing in the situation where an investigative judge made a decision to commit the applicant for trial on the basis that there was sufficient evidence of the applicant's guilt, and that judge subsequently tried the same applicant's case and found him guilty.⁴⁴ In order to evade the violation of a similar type of impartiality, it is necessary to increase the understanding of subjective impartiality, the communicational skills of judges, general skills for proper impartial behavior and motivation of intermediate (and final) decisions that it would not lead on doubts of impartiality at the later stages of process. The court administration and management should ensure support on collegial knowledge sharing.⁴⁵ Moreover, each individual judge should take care of this required professional standard.

There are more complex situations in the new developments ECtHR jurisprudence establishing violations of objective impartiality. Violations were found when a judge was hearing a criminal case who had previously acted as an investigating judge in the same case; a trial judge who had previously taken orders extending detention on remand, by reference notably to strength of evidence against the applicant; judges acting both as accusers and adjudicators in summary proceedings of contempt of court; interference by the superior judge who appointed the chamber at cassation level and submitted a *sui generis* appeal in the case, albeit he did not sit in the case himself; participation at the "supervisory review" stage by a judge who had initiated the review; the lower court instructed by letters by the superior court as to what decision to adopt; a judge sitting in a criminal case who had formerly been the head of the section of the prosecution department involved in the case; pressure on judges by executive authorities to use discretionary powers to reopen proceedings; court adjudicating on legislation whose members had previously participated in drafting that statute; a judge at a higher level who had previously acted as a legal counsel for applicants' opponents in the lower court of the same proceedings; the same judge participating in the same set of factually and legally related civil proceedings between same parties; two judges – who had been excluded for lack of impartiality in earlier cases – examining a new case involving the same applicant; the same judge called upon to decide whether his interpretation of the substantive law made in the previous decision (in the same case) was to be upheld or not; the judge, previously involved in settling the applicant's husband's financial problems with a bank, examining a claim against the same bank; jury where certain members had previously made racist jokes concerning the applicant, despite fact that those damaging statements were subsequently rebutted by the jury itself; prosecutor speaking to jurors informally during trial break, coupled with presiding judge's failure to ask jurors about nature of conversation; close family ties (uncle–nephew) between judge and lawyer of opposite party; extremely virulent press campaign surrounding trial of two minor co-accused, coupled with lack of effective participation by these defendants. Also, the violation was established because higher court declined to quash lower decision on the ground that the first instance judge was biased.⁴⁶

The above-mentioned violations show that judges do not act sensitive enough preserving the independence and impartiality of courts and judges. Court administration should secure the judicial values, especially independence and impartiality of courts and judges. Failure to ensure these values means failure of the effective court performance because without upholding these values the society cannot have a confidence in the judiciary and in a legal state. The mission of court administration is to ensure the systematical functioning of independent and impartial court acting on a very high professional level. There is a great importance for courts' administration to take into consideration all new developments of ECtHR jurisprudence on the Right to a fair trial as described above.

Systematically, judiciary as independent state power should create and introduce into courts' administration a model of safeguards to ensure an effective protection of the fundamental human right to an independent and impartial court and the Right to a fair

42 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights. A handbook for legal practitioners. Council of Europe, 2nd edition September 2017, p.p. 52.

<https://edoc.coe.int/en/european-convention-on-human-rights/7492-protecting-the-right-to-a-fair-trial-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners-2nd-edition.html>

43 Bangalore Principles of Judicial Conduct (2002) // http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf [accessed 19 March 2018]

44 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights. A handbook for legal practitioners. Council of Europe, 2nd edition September 2017, p.p. 52.

45 Sandra Taal, Philip Langbroek, Mandy van der Velde, „Reducing Unwarranted Disparities: The Challenge of Managing Knowledge Sharing between Judges“, International Journal for Court Administration, (2014) // <https://www.icajournal.org/articles/abstract/10.18352/ijca.150/> [accessed 19 March 2018]

46 Dovydas Vitkauskas, Grigoriy Dikov. Protecting the Right to a fair trial under the European convention on human rights.

trial. Equally important is the sensitivity of judges exercising their rights and duties under a high professional standard, since the independence and impartiality of courts and judges in the largest scale appears in individual cases where judges have been granted by judicial autonomy.

Conclusions

Court administration and high professional standards of a judge are prerequisites in preserving the Right to a fair trial. The research confirms that violations of the Right to fair trial are largely due to the actions of the judiciary itself. Generally, in member states of European Council judges and court administration lack knowledge and attention to the imperative requirements that this right stipulates for the trial procedure. An individual stage of a trial procedure has particular features to consider it as a fair procedure, therefore judges should be perspicacious in every action by administering justice.

In the present article I showed that jurisprudence of the ECtHR has expanded the provisions of the Right to a fair trial and raised its significance in the general context of human rights. For the professional activity of a judge it is immanently required to recognize both procedural and substantive fairness. The question whether a person has had a “fair” trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect.

Unjustified restrictions to execute different procedural rights, such as bringing legal action on particular claims against the defendant, presenting evidence to the court, or limiting information on court proceeding, could be compensated by guaranteeing access to justice in later court proceedings at the same instance or at the higher instance court. However, the Right to a fair trial will be violated if no additional action was taken in order to ensure this human right. Therefore, the instrument of assessing the needs to compensate shortages of a fair trial at the end of the court process guarantees that a single defect would not make the whole process invalid. The ECtHR has noted that defects at one level of a trial might be corrected at a later stage.

Independence and impartiality of the court and a judge as a precondition of a fair trial faces attempts of violations in modern times. These violations occur in adopting legal acts which contradict constitutional principles up to essential shortages of administering justice in concrete cases or even reforming the whole judicial system that is best represented by the recent judicial crisis in Poland. Violations of the Right to a fair trial, independent and impartial court could be predicted by a professional judge and effective court administration. The fact that the right to a fair trial is developing rapidly does not justify the violations. There is still a question if judges are capable of ensuring the proper implementation of the Right to a fair trial.

Deficiencies of methodological measures in court procedures to safeguard the Right to a fair trial are issues that courts' administrations and judicial systems should consider. Judicial organizational plan, knowledge sharing, peer review, inspections and other measures should introduce activities to preserve the Right to a fair trial. The concept of fairness, content of independent and impartial tribunal established by law, subjective and objective tests of impartiality are those cornerstones on which judges and courts' administrations should build the system of protection of the Right to a fair trial.

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