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Research Article

UNCONDITIONAL GROUNDS FOR CHALLENGES TO JUDGES IN CRIMINAL PROCEEDINGS OF UKRAINE AND ECTHR STANDARDS

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Summary: 1. Introduction. – 2. The Concept and Types of Grounds for Challenge (Self-Challenge) of the Court, Investigating Judge, Judge. – 3. Correlation between the National Classification of Grounds for Challenge and the Criteria for Determining the Impartiality of the Court in the Case Law of the ECtHR. – 4. Characteristics of Unconditional Grounds for Challenge of an Investigating Judge, Judge, Court. – *4.1. Participation of a judge in different procedural statuses within one criminal proceeding. - 4.2. Family ties. – 4.3. Violation of the established art. 35 of the CrPC, the procedure for distribution of cases between judges by an automated document management system, the procedure for determining jurors to participate in court proceedings. – 4.4. Participation of a judge in the preliminary stages of criminal proceedings. – 4.5 Preventing the decision of the 'unlawful composition of the court'.* – 5. Conclusions.

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ABSTRACT

Background: *The proper resolution of applications for challenge (self-challenge) of a judge (investigative judge, court) is important for further criminal proceedings, as a judicial error in this matter may result in the violation of a person's right to 'lawful composition of the court' or the right to defence, which is grounds for the cancellation of the court decision in the case and its referral to a new trial (Art. 412 of the CrPC), the violation of the principles of reasonable time terms, and the legal certainty (finality) of court decisions as part of the rule of law.*

In judicial practice, proceedings on challenges belong to separate common proceedings, which usually end with a refusal to satisfy the challenge. Lawyers assess the institute of criminal proceedings of Ukraine as ineffective.

Methods: *The purpose of the present study is to examine the grounds for challenge using the comparative method, so that views on their understanding are consistent in the professional environment and in judicial practice.*

The article outlines the list of grounds for challenge of a judge (investigative judge, court) under the CrPC of Ukraine and presents their classification as unconditional and evaluative, which is crucial for the selection of methods of proof. The correlation between the national classification of grounds for challenge and the criteria for determining the impartiality of the court in the case law of the European Court of Human Rights (ECtHR) is shown. The main focus is on the analysis of unconditional grounds for challenge according to the national classification, and their content is revealed in relation to the positions of the ECtHR.

Results and Conclusions: *It is substantiated that the grounds for challenge are not only circumstances that cast doubt on the impartiality of a judge (investigating judge, court) found in para. 6 of Chapter 3 of the CrPC of Ukraine 'Challenge', but also circumstances that indicate that the judge does not meet the requirements of 'legal composition of the court' (Part 2 of Art. 412 of the CrPC) or 'Court established by law' (in the wording of part 1 of Art. 6 of the ECHR) found in various structural parts of the CrPC and in the Law 'On the Judiciary and the Status of Judges'. It is substantiated that the wording of Part 1 of Art. 76 of the CrPC of 14 January 2021 is not consistent with the principle of access to justice by an impartial court (Art. 21 of the CrPC) since the right to an impartial tribunal (part 1 of Art. 6 of the ECHR) creates a conflict with Chapter 18 of the CrPC on the procedure for election, change of precautionary measures, does not meet the requirements of legal certainty, and may be grounds for complaints to the ECtHR.*

Keywords: *impartiality of the court; objective and subjective criteria of impartiality of the court in the case law of the European Court of Human Rights; unconditional grounds for challenge of the court in the criminal proceedings of Ukraine.*

1 INTRODUCTION

A fair trial is possible only if it is conducted by an impartial and independent court.

The institute of challenge in criminal proceedings is aimed at:

a) implementation of the principle of equality of all before the law and the courts;

b) the adversarial nature of the parties and their freedom to present their evidence to the court and to prove their persuasiveness before the court;

c) ensuring the principle of the presumption of innocence;

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d) ensuring a comprehensive, complete, and impartial investigation of the circumstances of criminal proceedings;

e) making a lawful, reasonable, and fair decision in each proceeding;

e) proper performance of the tasks of criminal proceedings.

In the universal dimension, the institution of challenge is aimed at implementing the legal maxim:[3] ***'no one can be a judge in his own cause'*** (Nemo judex in re sua).

According to para. 12 of the Opinion of the Consultative Council of European Judges (hereinafter – CCEJ) No. 1 (2001),

> This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined.[4]

From an even more remote perspective, the institution of challenge is aimed at **ensuring public confidence in the judiciary, its authority**, and public conviction in the morality, honesty, and integrity of the judiciary, which are absolutely necessary for a modern democratic society. According to the ECtHR, 'even appearances may be important or, in other words, justice must not only be done: it must also be seen to be done'.5 'What is at stake is the confidence which the courts in a democratic society must inspire in the public'.[6]

The social sense of trust in the judicIary is achieved to a large extent by the actual implementation of the principles of **independence and impartiality** of the court. *Impartiality* of the court is a lack of bias and personal interest in the participants of the proceedings, and

> judicial *independence* is the means by which judges' impartiality is ensured. It is therefore the pre-condition for the guarantee that all citizens (and the other powers of the state) will have equality before the courts. Judicial independence is an intrinsic element of its duty to decide cases impartially. Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular.[7]

Sociological data is also informative about the state of affairs in the implementation of the principles of impartiality and independence of the judiciary. Thus, in 2017, 2019, 2020, opinion polls were conducted in all regions of Ukraine of respondents aged 18 and older who came to court in connection with the trial (plaintiffs, defendants, accused, victims, family members, participants in the proceedings, witnesses or a person who is a third

3 Legal maxim: a general legal principle, which is perceived as self-evident truth, does not require proof, and reflects the universal meaning of law.

4 Opinion No 1 (2001) of the Consultative Council of European Judges for the Committee of Ministers of the Council of Europe on Standards of Judicial Independence and Permanence of Judges 1 January 2001, para 12 <https://zakon.rada.gov.ua/laws/show/994_a52#Text> accessed 18 November 2021.

5 *De Cubber v Belgium*, 26 October 1984, para 26 <https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-57465%22]}> accessed 18 November 2021; Morice v France [GC], 29369/10, Judgment 23 April 2015 [GC] para 78 <http://hudoc.echr.coe.int/fre?i=002-10657> accessed 18 November 2021.

6 *Castillo Algar v Spain* 28 October 1998 para 45 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58256&filename=001-58256.pdf> accessed 18 November 2021.

7 CCJE Opinion no 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy, 16 October 2015 <https://rm.coe.int/16807481a1> accessed 18 November 2021.

party to the trial) – in 2017, there were 2,018 people, in 2019, 2,016 people, and in 2020, 2,018 people. When answering questions about what judges are most often guided when making a court decision according to the opinion, most often the respondents thought that they were guided by their own benefit, including the illegal remuneration received for the decision – 39.5%, 33.2%, and 34%, respectively.[8] Much less often, the opinion was expressed that judges are most often guided by the property status and/or position of the parties (14.6%, 12.8%, 14.2%), and even less often, by law (8.9%, 11.4%, 13.3%), the circumstances of the case (8.3%, 12.8%, 11.7%), the instructions of the chairman of the court (7.9%, 8.1%, 7.6%), and the political situation in the state (6.8%, 7.0%, 5.1%).[9] Against this background, it is interesting that among those respondents in whose case a court decision was made, in 2020, 66.1% answered that the court decision was legal and fair, 14.3% did not consider it legal and fair (another 5.3 % did not know of the decision, and 14.3% said they found it difficult to answer this question).[10]

It is also important to know whether judges are considered independent in Ukraine today. Among the participants in court hearings, 35% (2019) and 33% (2020) considered judges to be completely or generally independent. And among the all-Ukrainian sample (regardless of the experience of communication with the courts), 60.0% (2019) and 69.1% (2020) considered judges to be completely or mostly dependent.[11]

It is also noteworthy that in a dispute between citizens with different income levels, 81-78% believe that high-income citizens have higher chances of winning; in a dispute between an employer and an employee, 74.7-69% think that the employer has higher chances of winning; and in a dispute between a citizen and a representative of the government, 78-74% think that a representative of the authority has higher chances of winning.[12]

According to another sociological survey of June 2021, while the majority of respondents consider Ukraine a sovereign state (67%) and independent (56%), only 36% consider it a state with the rule of law (with 52% of negative answers). Respondents also assessed the observance of human and civil rights in Ukraine over the past year on a 5-point scale, with a score of '1' meaning that rights were very poorly respected and '5' which meant the opposite. Respect for the right to a fair, open, and independent court and the presumption of innocence were assessed at the lowest rate.[13] According to regular research by the Razumkov Center of 'trust-distrust' in state and public institutions, the judiciary has negative indicators – in July-August 2021, 74% did not trust the courts, 68% did not trust the Supreme Anti-Corruption Court, and 63% did not trust the Supreme Court.[14]

8 The data are given in the order of 2017, 2019, 2020, respectively.

9 Council of Judges of Ukraine, Attitudes of Ukrainian citizens to the judicial system (conclusions from the results of polls), 15 November 2017, 21 <http://rsu.gov.ua/ua/news/stavlenna-gromadan-ukraini-do-sudovoi-sistemi-visnovki-za-rezultatami-opituvan> accessed 18 November 2021; Razumkov Center, Report on the results of the study 'Attitudes of Ukrainian citizens to the judiciary', 2020, 40 <https://rm.coe.int/zvitsud2020/1680a0c2d7> accessed 18 November 2021.

10 Razumkov Center (n 11) 17.

11 Ibid. 29.

12 Ibid. 39.

13 Razumkov Center, Implementation of the basic principles of the Constitution of Ukraine and the constitutional rights of citizens (June 2021) < https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/realizatsiia-osnovnykh-pryntsypiv-konstytutsii-ukrainy-i-konstytutsiinykh-prav-gromadian-cherven-2021r> accessed 18 November 2021.

14 Razumkov Center, Trust in the institutions of society and politicians, electoral orientations of the citizens of Ukraine (July-August 2021) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/dovira-do-instytutiv-suspilstva-ta-politykiv-elektoralni-oriientatsii-gromadian-ukrainy> accessed 18 November 2021.

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Of course, this sociology cannot be taken literally as a consequence of only the dysfunction of the principle of impartiality and independence of the judiciary because the credibility of the judiciary is influenced by a number of other factors, but to ignore it would be a big mistake.

In modern Ukrainian science, a number of articles and several dissertations (E.O. Semenkov,[15] 2012, which is based on the CrPC of Ukraine of 1960, O.V. Anufrieva,[16] and T.A. Tsuvina[17]) are devoted to the issue of challenge in all types of litigation. Researchers on the subject of challenge noted the imperfection of the application of this institution,[18] its ineffectiveness and the need for radical changes,[19] incompleteness at the legislative level of a number of issues regarding the procedure and consequences of challenges, insufficient theoretical development of delimitation of individual grounds for challenges and, accordingly, the difficulty of choosing the basis to be used in a particular situation, the unresolved process of establishing these grounds,[20] and that the absolute implementation of the standards of impartiality of the court from the practice of the ECtHR in the national legal system is not on the agenda.[21]

These estimates are true today. A study of the case law on challenge of judges and investigating judges leads to the conclusion that the superficial understanding of the grounds for challenge often leads to the erroneous application of law and the violation of the right to a fair trial (Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; hereinafter – ECHR). Another problematic point is the formal motivation of decisions based on the consequences of consideration of branches.

In interpreting the content of grounds for challenge and their application to specific situations, the positions of the ECtHR, in which it develops a legal understanding of the impartiality of the court, can and should be useful. Today, the decisions of the ECtHR are generously used in substantiating applications for challenge and court decisions based on the results of their consideration. It is safe to say that the challenge proceedings have become one of those where the 'brand fashion' for ECtHR quotations prevails. However, the delicacy is that these citations are not always relevant – that is, the positions of the ECtHR were formulated in other circumstances or justify completely different legal conclusions. There are fragmentary quotations – references to ECtHR decisions without the fact and context of the decision, as well as arbitrary interpretation or distortion of

15 Y Semenkov, 'Institute of challenge in the criminal procedure of Ukraine' (Candidate of Law Science, Classic. private un. Zaporozhye 2012).

16 O Anufrieva, 'Challenge in the criminal procedure of Ukraine' (Candidate of Law Science, Kyiv 2013).

17 T Tsuvina, 'The principle of the rule of law in the civil proceedings: theoretical and applied research' (Candidate of Law Science, Kharkiv 2021).

18 O Anufrieva, 'Institute of removal of a judge in procedural law of Ukraine (comparative aspect)' (2011) 4(8) *Bulletin of the High Council of Justice* 41 <http://www.vru.gov.ua/content/article/visnik08_04.pdf> accessed 18 November 2021.

19 L Drobchak, 'The bias of the investigating judge, the court as a ground for challenge in the context of the case law of the European Court of Human Rights' (2018) 2(2) Law and Society 210 <http://pravoisuspilstvo.org.ua/archive/2018/2_2018/part_2/37.pdf> accessed 18 November 2021.

20 Y Semenkov (n 17) 5.

21 O Khotynska-Nor, '"Impartiality of the court" as a standard of fair justice: the case law of the European Court of Human Rights and prospects for Ukraine's development' (2021) 3(118) *Bulletin of the Taras Shevchenko National University of Kyiv. Legal sciences* 123 <http://visnyk.law.knu.ua/images/articles/118.pdf?fbclid=IwAR3yP-xUjpEP9tgGBlYTkT4Y-fk2FcLx42uwO7Ka_fE7Ag4pYamu0UyOzF0> accessed 18 November 2021.

quotations from ECtHR decisions.[22] The problem of incorrect and excessive citation of the ECtHR is recognised by the courts themselves.[23] You can often find three to five 'trend' decisions of the ECtHR for all or most specific situations.

Although in the criminal proceedings (Part 1 of Art. 81 of the CrPC)[24] of Ukraine, as opposed to the civil (Parts 2, 3 of Art. 40 of the CPC),[25] commercial (Parts 2, 3 of Art. 39 of the ComPC),[26] and administrative (Part 3 of Art. 40 of the CAP)[27] applications for a challenge of a judge (single-person court)[28] are always considered by another judge designated by the automated court document management system, which is certainly a positive approach of the legislator aimed at ensuring impartiality in resolving challenges, it is common practice for courts to recognise challenge of a judge as though it is psychologically uncomfortable. This is apparently due to corporate mutual support, and as a result of consideration of challenge, 'diplomatic', 'half-hearted', and, at the same time, heated decisions are made, which, on the one hand, state no grounds for challenge and their failure to prove, and on the other hand, the challenges are still satisfied with the motivation of trying to avoid any doubts about the impartiality of the judge. Such decisions are a kind of coercion of the participant to submit in the proceedings because, in the opinion of the court, they failed to prove the grounds for challenge, but the court recognises that there are doubts about the impartiality of judges. There is also a practice when, after a court decision refusing to satisfy a challenge on the grounds that it is unfounded, the judge to whom the challenge was filed submits an application for challenge, which is subsequently granted by the courts. Both situations testify to the efforts of judges who decide to challenge to maintain a perfect judicial reputation and their perception of challenge situations in terms of professional honour, corporate

22 V Frankiv, 'How to ensure the correctness of citations of ECtHR decisions' (2020) 18(1472) *Law and Business* <https://zib.com.ua/ua/142573-yak_zabezpechiti_korektnist_cituvan_rishen_espl.html> accessed 18 November 2021; A Bushchenko, 'Carefully precedent. Adventures of ECtHR decisions in national courts' (2017) 21(1319) Law and Business <https://webcache.googleusercontent.com/search?q=cache:dcxM8bEcvYYJ:https://zib.com.ua/ua/pda/128887.html+&cd=1&hl=uk&ct=clnk&gl=ua> accessed 18 November 2021.

23 Kharkiv Court of Appeal, Analysis of the application of the decisions of the European Court of Human Rights by the Kharkiv Court of Appeal and the courts of first instance in 2019 <https://hra.court.gov.ua/sud4818/inshe/inf_court/uzag20c12> accessed 18 November 2021.

24 Criminal Procedure Code of Ukraine, current version from 25 November 2021 <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 18 November 2021.

25 Civil Procedure Code of Ukraine, current version from 5 August 2021 <https://zakon.rada.gov.ua/laws/show/1618-15#n6328> accessed 18 November 2021.

26 Economic Procedural Code of Ukraine, current version 5 August 2021 <https://zakon.rada.gov.ua/laws/show/1798-12#n1805> accessed 18 November 2021.

27 Code of Administrative Procedure of Ukraine, current version from 5 August 2021 <https://zakon.rada.gov.ua/laws/show/2747-15#n9860> accessed 18 November 2021.

28 It should be pointed out that in the civil, commercial, and administrative proceedings, such a procedure for consideration of challenges, when a single-person court considered challenges/self- challenges against itself (contrary to the principle of ***nemo judex in re sua***) existed until 8 February 2020. In February 2020, the Law No 460-IX came into force, establishing a variable procedure for consideration of challenges in the types of the proceedings mentioned. For the time being, pursuant to Part 3 of Art 40 of the CrPC, Part 3 of Art 39 of the CPC and Part 3 of Art 40 CAP: 'If the court concludes that the challenge is unjustified and the application for such challenge was received by the court three working days (or earlier) before the next hearing, the issue on challenge shall be resolved by a judge who is not a member of the court that considers a case, and shall be defined by the automated court document management system. A challenge of such a judge shall not be declared. If the application for challenge of a judge is received by the court later than three working days before the next hearing, such an application shall not be referred for consideration to another judge, and the issue of challenge of a judge shall be resolved by the court that considers a case' (see Law of Ukraine 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine on improving the procedure for consideration of court cases' from 15 January 2020 https://zakon.rada.gov.ua/laws/show/460-20# n99 accessed 18 November 2021).

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loyalty, personal understanding of the situation, i.e., the inability to distance themselves sufficiently. By the way, the latter is perceived by the ECtHR as a reason to doubt the impartiality of the court according to an objective criterion.[29] For the confidence in the court of participants in the proceedings, such decisions have the opposite psychological effect. Especially if the application for challenge is accompanied by appropriate and credible evidence to substantiate it, the applicant has the impression that their arguments were not heard, but the court tried to 'save face' and find a virtuous tactical solution to prevent possible future reversal of the decision in the case, as approved by the unlawful composition of the court.

It is important to add that the problem of challenge is extremely delicate and complicated, as it is closely related to the abuse of procedural rights of participants in the proceedings by filing unjustified challenges in order to delay the case and use up the time terms of criminal liability or to exclude from the composition of the court of principled judges and search for loyal and agreeable ones, which in turn is a violation of the right to a fair and impartial trial of *bona fide* participants in the proceedings. This issue is at the intersection of several diversified interests – the right to an impartial trial of all participants in the proceedings, the interests of justice, and the effective implementation of criminal justice (Art. 2 of the CrPC) so that everyone who commits a crime is punished, no innocent is prosecuted, and everyone is subject to due process of law.

Given the outlined context, the **aim** of this article is to help legal practitioners establish a stable system of ideas about the grounds for challenge of a judge (investigating judge), the content of each, their relationship, and the criteria of impartiality in the case law. Conflict and discussion issues should be analysed in the context of the principles of criminal justice and the comparative law method. We hope that this study will contribute to the meaningfulness of the decision to challenge and help us to reach a consensus in the professional environment on issues of debate and proper law enforcement in general.

To this end, in Section 2, we outline the list of grounds for challenge of a judge, investigating judge, or court under the national criminal procedure law and present their classification, which is crucial for selecting ways to prove and substantiate them. Section 3 will show the relationship and correlation between the national classification of grounds for challenge and the criteria for diagnosing the impartiality of the ECtHR. This section is of methodological value for the independent search for and selection of correct precedents of the ECtHR for similar situations, their adequate understanding, and, accordingly, their application. The largest is Section 4, which contains a detailed analysis of the ***unconditional grounds*** for challenge according to the national classification, reveals their content, including on the basis of the positions of the ECtHR, and highlights approaches to regulating similar issues abroad.

2 THE CONCEPT AND TYPES OF GROUNDS FOR CHALLENGE (SELF-CHALLENGE) OF THE COURT, INVESTIGATING JUDGE, JUDGE

Traditionally, in the procedural literature, grounds for challenge (self-challenge) are defined as factual circumstances provided in the criminal procedure law, which indicate

29 *Chmelíř v Czech Republic*, App no 64935/01, Judgment of 7 June 2005 <https://hudoc.echr.coe.int/eng?i=001-185757> accessed 18 November 2021.

or may indicate the impartiality[30] of a judge, investigating judge, juror, prosecutor, investigator, coroner, defence counsel, representative, expert, specialist, translator, secretary of the court session, or representative of the staff of the probation body.

Such factual circumstances may be social and legal relations to which a judge, prosecutor, investigator, coroner, defence counsel, representative, expert, specialist, translator, or court clerk was or still is a participant. The grounds for challenge (self-challenge) do not necessarily indicate the presence of factual bias of the person to whom challenge (self-challenge) is claimed, as these are circumstances that raise only doubts about its objectivity, even in the case of good faith and lack of desire to show partiality. The grounds for challenge may be not only legal relations governed by the rules of law in which the initiator of self-challenge was or is a participant, but also other social relations governed by other social norms (traditions, customs, morals, religious, corporate, etc.).

In most sources, the range of grounds for challenge of a judge (investigating judge) is considered and interpreted narrowly – only as grounds contained in para. 6 'Challenges' of Chapter 3 of the CrPC (Arts. 75 and 76) and may indicate bias of the judge.[31] Such a narrow (or literal) interpretation is dangerous and harmful to law enforcement practice, as it gives lawyers a truncated, incomplete idea of all possible grounds for challenge of a judge (investigating judge), which often leads to miscarriages of justice. In our opinion, the tool of 'challenge' should also be used in all cases of violation of the judicial independence principle and/or possible adoption of a court decision by an unlawful court to anticipate its annulment. This is required by the principles of observance of reasonable time limits, rule of law and legal certainty (finality of a court decision), and consideration of a case by a court established by law. In particular, the ECtHR has repeatedly stated that an important element of the rule of law is that 'the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness'.[32] Consequently, it is always important to ensure that the court decisions are not overturned by a higher court on the grounds of its inconsistency with the law or injustice.

Cases of unlawful court decisions are scattered throughout the CrPC outside of para. 6 'Challenges'. So, let us outline an approximate list of all grounds for challenge of a judge, investigating judge, or court:

1) if the judge is an applicant, victim, civil plaintiff, civil defendant, close relative, or family member of the investigator, prosecutor, suspect, accused, applicant, victim, civil plaintiff, or civil defendant (para. 1, part 1 of Art. 75 CrPC);

2) if the judge participated in these proceedings as a witness, expert, specialist, translator, investigator, prosecutor, defence counsel, or representative (para. 2, part 1 of Art. 75 of the CrPC);

30 O Anufrieva (n 18) 11, 14, 18, 203; S S.Vasyliev, Civil procedure (Kyiv 2019) 62; O Banchuk, R Kuybida, M Havronyuk (eds), Scientific and practical commentary to the Criminal Procedure Code of Ukraine of April 13, 2012 (Kharkiv 2013) 208; N Kucheruk, 'Challenge of a judge in the commercial procedure: the issues of theory and practice' (2016) 2(15) The Slovo of the National School of Judges of Ukraine 108; G Denisova, Differentiation between challenge and substitution of officials from participation in the criminal proceedings' (2014) 64 State and Law. Legal and Political Sciences 324-330; I Zozulia, 'Challenge (self- challenge) in the legislation of Ukraine. Theoretical issues of jurisprudence and problems of law enforcement: challenges of the 21st century', abstracts of participants' reports of the 3rd All-Ukrainian scientific and practical conference, Kharkiv, 19 June 2020, (Kharkiv 2020) 91; Y Kukharuk, 'Challenge in the criminal procedure and removal of the defense counsel from participation in the case' (2011) 4/5 Legal Science: scientific legal magazine 171; Y Shemshuchenko et al., Legal encyclopedia, vol 4 (6 volumes, Kyiv 2002) 45; O Kuchynska, 'Issues of consideration of applications for challenge in the criminal procedure of Ukraine' (2010) 3(19) Bulletin of the Bar Academy of Ukraine 104.

31 Ibid.

32 *Kyprianou v Cyprus,* App no 73797/01, ECHR 873 (15 December 2005) Grand Chamber, para 119 <http://www.bailii.org/eu/cases/ECHR/2005/873.html> accessed 19 October 2021.

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3) if the judge personally, their close relatives, or members of their family are interested in the results of the proceedings (para. 3, part 1 of Art. 75 of the CrPC);

4) in the presence of other circumstances that cast doubt on the impartiality of the judge (para. 4 of Part 1 of Art. 75 of the CrPC) (the definition of 'other' indicates their inexhaustible list);

5) violation of Part 3 of Art. 35 of the CrPC of the procedure for determining the investigating judge or judge for criminal proceedings (para. 5 of Part 1 of Art. 75 of the CrPC);

6) persons who are relatives of each other may not be a member of the court conducting court proceedings (Part 2 of Art. 75 of the CrPC);

7) the existence of circumstances that preclude the possibility of repeated participation of a judge in criminal proceedings (Art. 76 of the CrPC);

8) violation of the institutional, competent, and procedural components of the right of a person to the 'lawful composition of the court', which lead to the adoption of a court decision by the lawful composition of the court (para. 2, part 2 of Art. 412 of the CrPC):

8.1) criminal proceedings on a judge's application of committing a criminal offence may not be conducted by the court in which the accused holds or has held the position of a judge but must be transferred to the most territorially approximate court (Part 2 of Art. 32 of the CrPC);

8.2) criminal proceedings are transferred to another court if the accused or victim works or has worked in the court under whose jurisdiction the criminal proceedings fall (para. 3, part 1 of Art. 34 of the CrPC);

8.3) violation of the rule on the number of judges (Art. 31 of the CrPC),

8.4) violation of the rules of formation of the jury in accordance with Arts. 63-67 of the Law 'On the Judiciary and the Status of Judges',

8.5) violation of the rules on special professional requirements for a judge in certain categories of proceedings – five years of judicial experience for at least one member of the SAC (Supreme Anticorruption Court) (Part 12 of Art. 31 of the CrPC), experience of at least ten years, experience in criminal proceedings in court and high moral and business and professional qualities for consideration of cases concerning the accusation of a minor (Part 14 of Art. 31 of the CrPC and Part 6 of Art. 18 of the Law 'On the Judiciary and the Status of Judges'). If there are no judges with the required term of service in the court, a judge from among the judges with the longest term of service as a judge shall be elected to consider cases concerning minors;

8.6) violation of the rules of territorial, substantive, and instance jurisdiction (Art. 32 of the CrPC);

8.7) a judge whose term of office has expired took part in the consideration of the case,

8.8) at least one of the judges has not been appointed by the President of Ukraine in the manner prescribed by law (Section 4 of the Law 'On the Judiciary and the Status of Judges')

8.9) violation of the rules on the invariability of the court (Art. 319 of the CrPC);

8.10) if the court has not considered the application for challenge of a judge or jury in accordance with the procedure established by law;

9) violation by the court of other provisions of the CrPC that guarantee its independence and impartiality (for example, Part 1 of Art. 10, Art. 17, Part 2, Art. 3 of Art. 22, Art. 23, Art. 27, Part 1 of Art. 88, Art. 94, paras. 4, 5, part 2 of Art. 386 of the CrPC).

In order to avoid repetition and return to the consideration of the issues at the end of the general theoretical section, we can clarify the concept of grounds for challenge, the validity of which the reader will establish in the course of this study. Thus, **the grounds for challenge (self-challenge) of a judge, investigating judge, or court are the factual circumstances provided for in the criminal procedure law, which indicate or may indicate their bias or non-compliance with the requirements of the law.**

Depending on the nature of the obviousness of their influence on the impartiality of the judge, all grounds for challenge (self-challenge) are divided into ***'defined'*** (unconditional) and ***'those subject to assessment at the discretion of the court'*** (evaluative).

The unconditional grounds for challenge of a judge are clearly defined by law. They are objective in nature. **Their formal presence is already sufficient for the application of self-challenge (challenge) by a judge or a jury.** Circumstances that unconditionally prevent the participation of a judge or jury are provided for in paras 1, 2, 5 of Part 1 of Art. 75, part 2 of Art. 75, Art. 76 of the CrPC of Ukraine, as well as all cases of non-compliance with the rule of 'legal composition of the court'.

The vast majority of unconditional grounds for disqualification are obvious and unambiguous, so judges take the challenge, thus avoiding overturning the decision when it is reviewed by a higher court. However, there are still problems with some of them.

Evaluative grounds for challenge are considered to be those that require appropriate proof and evaluation, and the latter, to some extent, depends on the discretion of the court. The bases given in items 3 and 4 of part 1 of Art. 75 of the CrPC are:

- if the judge personally, their close relatives, or members of their family are interested in the results of the proceedings;
- other circumstances that cast *doubt on the judge's impartiality.*

This group of grounds is always problematic in law enforcement, as they are defined through evaluative concepts – 'self-interest' and 'doubts about impartiality' – which can be ambiguously interpreted by the participants in the process.

3 CORRELATION BETWEEN THE NATIONAL CLASSIFICATION OF GROUNDS FOR CHALLENGE AND THE CRITERIA FOR DETERMINING THE IMPARTIALITY OF THE COURT IN THE CASE LAW OF THE ECTHR

In the literature, **unconditional grounds** are sometimes called *objective* (as synonyms), and **evaluative** ones are called *subjective*.[33] The use of these alternative names is considered harmful from the point of view of the rule of unity of terminology: one term should denote the content of one concept. The terms 'objective' and 'subjective' have been established for four decades and are used by the ECtHR as criteria for determining

33 O Banchuk, R Kuybida, M Havronyuk (eds), *Scientific and practical commentary to the Criminal Procedure Code of Ukraine of April 13, 2012 (Kharkiv 2013) 208; V Kossak, Civil procedural law of Ukraine* (Kharkiv 2020) 63.

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(diagnosing) the impartiality of the court and have in its legal interpretation a slightly different meaning than the domestic doctrinal classification of grounds for 'unconditional and evaluative' under the national legislation of Ukraine. The use of these terms in parallel will inevitably result in a mixture of different, inconsistent concepts. Therefore, we encourage this dualism of terms in the domestic classification of grounds for challenge.

First of all, we note that in international legal acts (for example, Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms) the term **'impartiality'** is used, but instead, the term **'unbiasness'** is used in the national criminal procedure legislation of Ukraine (Arts 2, 75 of the CrPC). However, neither international law reveals the concept of 'impartiality', nor national, 'unbiasness'. These concepts are established by interpretation, and national courts often refer to the case law of the ECtHR for this purpose. 'Impartiality' and 'unbiasness' are identical concepts and are in fact used as synonyms in practice and even in national law. As here, in part 1 of Art. 57 of the Law 'On the Judiciary and the Status of Judges' in the oath of a judge: 'I solemnly swear to the Ukrainian people objectively, **impartially, unbiasedly, independently**, fairly and competently to administer justice'.[34]

Finally, the ECtHR itself defines ***impartiality*** as the *absence of prejudice* or preconceived notions, and this can be assessed in different ways.[35]

Impartiality and independence of the court are one of the main elements of a person's right to a fair trial, guaranteed by Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights, Art. 6 of the ECHR, according to which *everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall establish the merits of any criminal charge against him.*

In accordance with its stable and consistent case law, reflected in numerous decisions, the ECtHR has traditionally gone out to assess *impartiality* for the purposes of Part 1 of Art. 6 of the ECHR on ***objective and subjective criteria***.

It should be borne in mind that the objective and subjective criteria for determining the impartiality of the court in the case law of the ECtHR are ***framework criteria***, i.e., have an integrative nature, as the national procedural law of the member states of the Council of Europe is not identical (universal), and each state can have the features of both **kinds of the bases for challenge, and the order and practice of their decision**. Therefore, the ECtHR states in its decisions that the existence of national procedures aimed at ensuring the impartiality of the court, namely the rules of challenge, is an important factor. The ECtHR takes national rules into account when assessing whether the court was objectively impartial or whether there were legitimate grounds for doubting its impartiality. 'In each case, it must be decided whether the relationship

34 Law of Ukraine 'On the Judiciary and the Status of Judges' 401402-VIII, current version of 5 August 2021 <https://zakon.rada.gov.ua/laws/show/1402-19#n503> accessed 18 November 2021.

35 *Wettstein v Switzerland*, App no 33958/96, Judgment of 21 December 2000 [Section II] para 42 <http://hudoc.echr.coe.int/fre?i=001-59102 > accessed 18 November 2021; *Kyprianou v Cyprus,* App no 73797/01, ECHR 873, Judgment of 15 December 2005, Grand Chamber, para 119 <http://www.bailii.org/eu/cases/ECHR/2005/873.html> accessed 18 November 2021; Micallef v Malta, App no 17056/06, Judgment of 15 October 2009, Grand Chamber, para 93 <http://hudoc.echr.coe.int/fre?i=001-95031> accessed 18 November 2021.

in question is of a nature that demonstrates the impartiality of the court';[36] 'whether the court as such and its composition ensured the absence of any doubts about its impartiality'.[37]

Objective criterion. The court must be objectively impartial, i.e., it must provide sufficient guarantees to exclude any reasonable doubt in this regard.

The objective criterion of impartiality of the court (judges, panels) relates to the ***organisational and functional aspects of the court,*** namely:

1) the presence of family, official, financial, political, or other ties with the participants in criminal proceedings;

2) participation of a judge in different procedural statuses within one criminal proceeding;

3) performance by one person of various functions within one criminal proceeding.

In this case, we are talking about facts that can be verified. These facts do not depend on the behaviour of the judge, and their establishment may cast doubt on the impartiality of the court. The applicant's call for an objective criterion of impartiality creates a positive presumption of judicial bias, which the respondent state can and must refute. The ECtHR specified an objective criterion of impartiality in a number of decisions – the presence of a judge in direct or indirect official, financial, political, contractual, or other dependence on the party to the proceedings, implementation of non-judicial functions, etc.

The **subjective criterion** of impartiality of the court is personal and is a consequence of the judge's conduct in the case. It is formulated in the thesis that is prescribed from decision to decision: 'personal impartiality of the court is presumed until evidence to the contrary is provided'.[38] According to the **subjective criterion**, the personal conviction and behaviour of a particular judge are assessed, i.e., whether the judge (juror) showed intentional or negligent actions or statements that would indicate direct or indirect bias in deciding a particular case before or during the trial.

First of all, it is worth noting that ***the ECtHR does not consider it necessary to investigate the issue of subjective impartiality if it finds that the impartiality of the court according to objective criteria was breached.***

That is, in the cognitive algorithm in establishing the absence of court impartiality, the subjective criterion has become subsidiary-like in its application, and due to the difficulties in its establishment, the ECtHR uses it secondarily, after no signs of objective criteria of bias have been identified. 'The Court recognizes the difficulty of finding a violation of Art. 6 due to personal bias and therefore in the vast majority of cases applies an objective

36 *Pullar v the United Kingdom,* Judgment of 10 June 1996, Reports 1996-III, p. 793, para 38 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57995&filename=001-57995.pdf&TID=ihgdqbxnfi > accessed 18 November 2021; *Belukha v Ukraine*, App no 33949/02, Judgment 9.11.2006 [Section V] para 49 <http://hudoc.echr.coe.int/fre?i=002-3037> accessed 18 November 2021; *Mironenko and Martenko v Ukraine,* App no 4785/02, 10 December 2009, para 67 <http://hudoc.echr.coe.int/eng?i=001-96195> accessed 18 November 2021.

37 *Wettstein v Switzerland* (n 37) para 42; *Belukha v Ukraine* (n 40)para 49; *Mironenko and Martenko v Ukraine* (n 40) para 67 .

38 *Hauschildt v Denmark*, Judgment of 24 May 1989, Series A no. 154, p. 21, para 47 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-45388&filename=HAUSCHILDT%20v.%20DENMARK.pdf&logEvent=False> accessed 18 November 2021; *Kyprianou v Cyprus,* App no 73797/01, ECHR 873, Judgment of 15 December 2005, Grand Chamber, para 119 <http://www.bailii.org/eu/cases/ECHR/2005/873.html> accessed 18 November 2021; *Wettstein v Switzerland* (n 37) para 43; Belukha v Ukraine (n 40) para 50; *Mironenko and Martenko v Ukraine* (n 40) para 67.

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approach'.[39] 'The Court sought to verify the merits of the allegations that the judge showed any hostility or, on personal grounds, forced the case to be assigned to him, but in the vast majority of cases acknowledged that bias on the objective test was sufficient'.[40] 'In cases where it is difficult to obtain evidence to rebut the presumption of subjective impartiality of a judge, the requirement of objective impartiality provides an additional important guarantee'.[41]

In deciding ***whether to distinguish between objective or subjective criteria of impartiality,*** the ECtHR provides a guideline:

> there is no watertight division between the two notions 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) … therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.[42]

The final conclusion of the ECtHR is very important because as soon as a certain internal attitude is revealed from the outside – in comments, statements, implicit actions, decisions – it immediately becomes an objective criterion. Thus, the boundary between subjective and objective criteria is blurred.

In any event, the ECtHR has repeatedly stated that 1) 'the Court does not recognize that there are sufficient indications of a personal bias on the part of a judge if they have satisfied in whole or in part the various procedural requests of the participants'; 2) 'The court does not consider it necessary to decide on the existence of a subjective criterion of impartiality if there is evidence that the court was not impartial by an objective criterion'; 3) 'In determining the existence of legitimate grounds to doubt the impartiality of a particular judge, the position of the applicant (and the judge) is important but not crucial. It is crucial to be able to consider such doubts as objectively justified'.[43]

However, the latter position of the ECtHR was not formed immediately. In the beginning, the Court did not have a consistent position, *whose opinion is decisive during the objective test of impartiality*. In particular, in the above-mentioned case *De Cubber v. Belgium* (26 October 1984, para. 29), it considered whether the judge *'could in the eyes of the accused*' seem negative towards him; in the case of *Borgers v. Belgium* (30 October 1991, para. 26), it suggested that neutrality should be considered *'from the point of view of the parties*';[44] in the case of *Hauschildt v. Denmark* (24 May 1989, para. 48),

> for the conclusion that there is a legitimate reason to doubt the impartiality of a judge in a particular case, the opinion of the accused may be taken into account, but it is not decisive. What matters is whether such doubts can be considered as objectively justified.[45]

Since then, the ECtHR has reproduced this position in subsequent decisions.

39 *Kyprianou v Cyprus* (n 42) para 119.

40 *De Cubber v Belgium* (n 6) para 25; *Kyprianou v Cyprus* (n 42) para 119.

41 *Pullar v the United Kingdom* (n 40) para 32 ; *Morice v France*, no 29369/10 23 April 2015, Grand Chamber <http://hudoc.echr.coe.int/rus?i=001-154265> accessed 18 November 2021.

42 *Kyprianou v Cyprus* (n 42) paras 119 and 121

43 *Ferrantelli and Santangelo v Italy*, App no 19874/92, Judgment of 7 August 1996, para 58 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57997&filename=001-57997.pdf> accessed 18 November 2021; *Wettstein v Switzerland* (n 37) para 44 .

44 *Borgers v. Belgium,* Application no 12005/86, Judgment of 30 October 1991. https://hudoc.echr.coe.int/fre?i=002-10244 > accessed 18 November 2021.

45 *Hauschildt v Denmark,* Judgment of 24 May 1989, Series A no 154, para 48 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-45388&filename=HAUSCHILDT%20v.%20DENMARK.pdf&logEvent=False;> accessed 18 November 2021.

The key issue is the need to ensure the trust that the courts in a democratic society must instil in the public. Thus, any judge who has a well-founded fear that s/he may be biased must self-challenge or be challenged from the case.[46]

In *Micallef v. Malta*, in particular, under Maltese law at the time, there was no automatic obligation for a judge to self-challenge in cases where impartiality was in doubt.[47] In addition, a party to the proceedings could not challenge the judge on the basis of a family relationship, including an 'uncle-nephew' relationship, between the judge and a lawyer representing the other party. Since then, Maltese law has changed and now provides for family relations as a basis for dismissing a judge.

These legal conclusions are especially important for the judicial practice of Ukraine, because when deciding on challenge (self-challenge), even if the participant gives specific facts that fall under the objective criterion of impartiality, courts often refuse to challenge, referring to the fact internally and externally that nothing affects the will, convictions, and consciousness of the judge and nothing prevents them from being impartial in the case, for example, their neighbour, family members of their employees, colleagues on various projects, and so on. While the ECtHR guides the practice of the Council of Europe, it is not so much the judge's attitude to the case, their aspirations, efforts, and even the implementation of impartiality during the proceedings that is important, but 'even visible signs may have some significance or, in other words, only justice must be administered, it must be seen that it is administered'.[48] In other words, the court's **external demonstration of independence and impartiality** is also important.

Thus, as the ECtHR has established framework criteria and filled them with concrete content in hundreds of cases, and the member states of the Council of Europe that have ratified the Convention have undertaken to implement it (Art. 1 of the Convention), then, in similar situations, the judges of national courts must not only satisfy the applications for challenge but also, if these have not been submitted, take the challenge. After all, the duty to ensure the right to a fair trial rests with the state in the person of its authorised bodies – in this case, the courts that decide applications for challenge, and the duty of judges to self-challenge. Otherwise, the state will not implement the Convention.

Thus, the range of situations that the ECtHR classifies as an *objective criterion of impartiality* is much wider than the '*unconditional*' grounds for disqualification under the CrPC of Ukraine and also covers cases of 'personal interest of a judge or their family members' and/or biased conduct of a judge, which has an obvious manifestation on the outside (and was objectively justified), and a prudent observer would raise concerns about the bias of the court.

We believe that in order to promote the national practice of application and resolution of challenge (self-challenge), the specification of objective and subjective criteria of impartiality of the ECtHR should be considered not separately, in their pure form, but adapted to the national classification of grounds for challenge.

It should not be forgotten that the right to a fair trial (Art. 6 of the ECHR) includes about 10 elements, among which, in addition to the *impartiality of the court* (a), there is also the

46 *Castillo Algar v Spain,* App no 79/1997/863/1074, Judgment of 28 October 1998, para 45 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58256&filename=001-58256.pdf> accessed 18 November 2021; *Micallef v Malta* (n 37) para 98 .

47 Ibid.

48 *De Cubber v Belgium* (n 6) .

independence of the court (c) and the *court established by law* (c). What unites these three elements of the right to a fair trial is that within national legal systems, they are provided by a challenge mechanism. The tool of challenge of these three components is a universal means of preventing violations of Art. 6 of the ECHR, and public authorities and officials should try to act ahead of time so that their state becomes the respondent to the ECtHR. In the Ukrainian system of grounds for challenge, the violation of the requirement of *independence of the court* and the *court established by law* belongs to the classification group of unconditional grounds for challenge and is covered by the concept of 'lawful composition of the court'.

4 CHARACTERISTICS OF UNCONDITIONAL GROUNDS FOR CHALLENGE OF AN INVESTIGATING JUDGE, JUDGE, COURT

4.1 Participation of a judge in different procedural statuses within one criminal proceeding (items 1, 2, part 1 of Art. 75 of the CrPC).

This ground is aimed at preventing a judge from participating in different procedural statuses within a single criminal proceeding, which is incompatible with the function of justice and is a classic embodiment of the principle 'no one can be a judge in his own cause'.

The legal understanding of this group of grounds is expanded by the ECtHR, such as:

- mixing the roles of plaintiff, witness, public prosecutor, and judge in itself instils objectively justified fears of court bias (*Kyprianou v. Cyprus*). In this case, the lawyer was convicted of insult in the courtroom by a court session, which considered the case of his client's murder. The ECtHR acknowledged that, in such circumstances, the judges were not free from being adversely affected by the fact that the lawyer had committed a criminal offence in the courtroom where they work and against their colleague. The ECtHR therefore concluded that the roles of the court and the prosecutor were mixed in the court's actions, as the lawyer had committed a criminal offence against a judge in the courtroom, whose judges later sentenced him.[49]
- the dual role of the judge, who was initially the plaintiffs' lawyer during the main proceedings and later, when he became a judge of the Constitutional Court, decided on the applicant's constitutional complaint. This dual role in one case was reinforced by his daughter's involvement as a plaintiff's lawyer, which created a situation that could raise legitimate doubts about the judge's impartiality (*Mežnarich v. Croatia*).[50]
- if the presiding judge before their appointment as a judge worked as a senior deputy prosecutor and was the head of the department to which the applicant's case was assigned (*Piersack v. Belgium*). The applicant complained about the judge's personal bias (*subjective criterion*). However, there was no evidence that Judge Van de Valle had information about the applicant's investigation during his service at the Royal Public Prosecutor's Office in Brussels. The ECtHR found a violation

49 *Kyprianou v Cyprus* (n 42) .

50 *Mežnarić v Croatia,* App no 71615/01, Judgment of 15 July 2005 <http://echr.pravo.unizg.hr/ECtHR_praksa/Meznaric.doc> accessed 18 November 2021.

of the requirement of impartiality on the basis of objective criteria. The ECtHR's decision was not based on specific facts about the judge's bias, but on the fact that it did not matter whether the judge personally participated in the preparation of the indictment, worked in the structural unit whose staff worked, or was the head of the prosecution. Van de Valle was the head of the section in the Brussels prosecutor's office that was investigating the Persak case, and as the superior head of the deputy prosecutors who conducted the case, he had the authority to make any changes to and discuss with them any documents he sent to court, discuss the position to be taken on the case, and give advice on legal issues. It did not matter if Persak knew about it. And there was no need to determine the exact details of the role that Van de Valle played in the case.[51]

- The ECtHR has developed and detailed a legal understanding of impartiality in the transition from prosecutorial to judicial work in the case of *Paunović v. Serbia*, in which the former Deputy Prosecutor of the City Prosecutor's Office of Aleksinac was appointed a judge of the Court of Appeal, and reviewed Dragoslav Paunovic's verdict on appeal and upheld it. The applicant alleged that the City Prosecutor's Office had prepared an indictment in his case, and that the judge of the Court of Appeal, V.K., at the time when the applicant was charged with the crime by the municipal prosecutor's office, worked as a deputy municipal prosecutor and later participated as a judge-rapporteur in the criminal proceedings against the applicant in the appellate court (para. 38). The ECtHR considers that in the case of *Paunović v. Serbia*, Judge V.K. did not in fact play a dual role in a single proceeding. The information provided by the Government confirms that Judge V.K. did not take an active or formal part in the preparatory stages of the criminal proceedings or in the drafting of the indictment by the prosecutor's office. In contrast to the Piercac case, in this case, Judge V.K. was in no way hierarchically superior to the Deputy Prosecutors acting in the applicant's case and did not give them any instructions on how to act in the present case. He had neither the power to review or correct the submissions of other alternates nor the power to influence the activities of alternates acting in the applicant's case.

> It would be too far-fetched to say that former prosecutors cannot be involved in every case originally investigated by this body, although they have never had to deal with it personally. Such a radical decision, based on an inflexible and formalistic notion of the unity and indivisibility of the prosecutor's office, would create a virtually impenetrable barrier between this body and the court. This would lead to turmoil in the judicial system of a number of Contracting States, when transfers from one of these agencies to another are common. First of all, the mere fact that a judge was once an employee of the prosecutor's office is not a cause for concern that he lacks impartiality (p. 41).

Although the Court emphasises the importance of 'apparent reasons' in this context, it considers that the judge's connection with the prosecution in this case was remote and is not convinced that the very fact that V.K. was an employee of the prosecutor's office at the time the applicant was charged is sufficient to cast doubt on the independence and impartiality of the court of second instance (para. 42). The ECtHR therefore considers that there has been no violation of Art. 6 of the Convention in this case (para. 43).[52]

- the absence of a prosecutor during the trial, which may place a judge in the position of the prosecutor's office during interrogation and evidence against the applicant,

51 *Piersack v Belgium,* App no 8692/79, Judgment of 1 October 1982, para 31 <http://hudoc.echr.coe.int/ukr?i=001-104050> accessed 18 November 2021.

52 *Paunović v Serbia,* App no 54574/07, Judgment of 3 December 2019 <https://hudoc.echr.coe.int/eng?i=001-198991> accessed 18 November 2021.

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is a confusion of two roles in the proceedings and therefore potentially violates the requirement of impartiality under Art. 6 of the Convention (*Karelin v. Russia*, paras. 51-85).[53] The ECtHR emphasised that the judge is the final guarantor of the proceedings, while the task of the public authority in the case of public prosecution is to present and substantiate criminal charges for adversarial discussion with the other party.[54]

- similarly, in the case of *Ozerov v. Russia*, it was declared inadmissible by the ECtHR when the court, considering the merits of the case and convicting the applicant in the absence of the prosecutor, assumed the duties that a prosecutor could have performed if he had been present. The district court read out the indictment issued by the prosecutor's office, then questioned the applicant and other witnesses, examined other evidence, and found some of the prosecution's written evidence inadmissible. The prosecutor did not have the opportunity to express his opinion on these actions. In the presence of the prosecutor, he could hypothetically refuse to uphold the charge. Therefore, the ECtHR recognised the mixing of the roles of prosecutor and judge, which became the basis for legitimate doubts about the impartiality of the court and the order of Part 1 of Art. 6 of the ECHR.[55] Similar circumstances appear in the case of *Krivoshapkin v. The Russian Federation*.[56]

For historical reference, before the 'minor judicial reform' (until June 2001) in Ukraine under the then-current CrPC of 1960, the court had the power to continue a criminal case if the prosecutor refused to prosecute, following all those actions that were referred to in the cited decisions of the ECtHR against Russia, and to pass a guilty verdict on its results. Certainly, this norm did not correspond to the principle of adversarial proceedings. The current CrPC of Ukraine in 2012 provides for the possibility of continuing the proceedings in case the prosecutor refuses to support the public prosecution, provided that the victim has agreed to support the prosecution in court. This approach is in line with the adversarial principle, as well as the functions of the court – the sole purpose of which is the administration of justice, and which should not be endowed with powers that indicate the performance of its unusual function of the prosecution.

4.2 Family ties

The decision of whether a judge, investigative judge, or juror belongs to the category of close relatives or family members of the investigator, prosecutor, suspect, accused, applicant, victim, civil plaintiff, or civil defendant should be guided by para. 1 part 1 of Art. 3 of the CrPC: **close relatives and family members** – husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, grandfather,

53 *Karelin v Russia,* App no 926/08 ECHR, Judgment of 20 September 2016 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-141418&filename=001-141418.pdf > accessed 18 November 2021.

54 Handbook on Article 6 of the Convention – The right to a fair trial (criminal procedure) as of 31 December 2019, 28 <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=> accessed 18 November 2021.

55 *Ozerov v Russia,* App no 64962/01 Judgment of 18 May 2010 <https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22867937%22],%22itemid%22:[%22001-98531%22]}> accessed 18 November 2021.

56 *Krivoshapkin v Russia,* App no 42224/02, Judgment of 27 January 2011 <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103078&filename=001-103078.pdf&TID=vwielzecqk> accessed 18 November 2021.

grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, adoptive parent or guardian, guardian or trustee, person under guardianship or custody, as well as persons living together, connected by common life and having mutual rights and obligations, including persons living together, but not married.

According to the case law of the ECtHR, family ties with one of the parties may raise concerns about the judge's bias, but these concerns must be objectively justified. With regard to the civil aspect of the right to a fair trial, the ECtHR found that objective justification depended on the circumstances of the case and could be determined by a number of factors, including whether a judge's relative was involved, the judge's relative's position in the firm, the internal organisational structure, the financial significance of the case for the law firm, and any possible financial interests or potential benefits (and their amount) to be provided to a relative (Nicholas v. Cyprus, para. 62). In small cases, where the issue of family affiliation often arises, this situation should be disclosed at the beginning of the proceedings and should be assessed in the light of various factors in order to determine whether challenge of a judge in the case is really necessary (para. 64).[57]

In the criminal aspect, the existence of objectively justified doubts about impartiality was confirmed by the facts:

- the husband of the chairman of the court hearing the case led the investigative team authorised to investigate the applicants' case (*Dorozhko and Pozharskiy v. Estonia*, paras. 56-58);[58]
- the opposing party's lawyer was a nephew of the presiding judge – the ECtHR acknowledged that the close family relationship between the opposing party's lawyer and the presiding judge was sufficient to objectively substantiate fears that the panel was not impartial (*Micallef v. Malta*);[59]
- most of the jurors belonged to a political party that owned a company that published false information about an applicant who had been prosecuted for defamation (*Holm v. Sweden*);[60]
- a member of the court *ex officio* was subordinate to one of the parties in the proceedings (*Sramek v. Austria*);[61]
- A member of the jury worked for a firm whose partner was a witness in the *Pullar v. The United Kingdom* indictment.[62]

For the purposes of Part 2 of Art. 75 of the CrPC, in deciding on the impossibility of joining the same panel of judges who are related to each other, one should apply the concept of relatives in family law and take into account not only close but also further degrees of family ties as for para. 1. part 1 art. 75 of the CrPC.

57 *Nicholas v Cyprus,* App no 63246/10, Judgment of 9 January 2018 <http://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-179878&filename=CASE%20OF%20NICHOLAS%20v.%20CYPRUS.docx&logEvent=False> accessed 18 November 2021.

58 Handbook of Article 6 of the Convention – The right to a fair trial (criminal procedure) as of 31 December 2019, 30 <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=> accessed 18 November 2021.

59 *Micallef v Malta* (n 37) para 98.

60 *Holm v Sweden,* App no 14191/88, Judgment 25 November 1993, paras 32-33 <https://hudoc.echr.coe.int/fre?i=002-9744> accessed 18 November 2021.

61 *Sramek v Austria,* App no 8790/79, Judgment 22 October 1984 <https://www.legal-tools.org/doc/de30a4/pdf> accessed 18 November 2021.

62 *Pullar v the United Kingdom* (n 40) para 32.

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For historical reference, we note that Art. 54 of the CrPC of Ukraine of 1960 used a broader category of 'relatives' rather than 'close relatives' both to outline the impossibility of a judge to participate in a case in one court, and in the cases currently provided for in paras. 1 and 3 of Part 1 of Art. 75 of the CrPC of Ukraine.

4.3 Violation of the established art. 35 of the CrPC, the procedure for distribution of cases between judges by an automated document management system, the procedure for determining jurors to participate in court proceedings (para. 5, part 1 of Art. 75 of the CrPC)

According to Recommendation No. (94) 12 of the Committee of Ministers of the Council of Europe, the distribution of court cases between judges can be done by lot, through an automatic distribution system, in alphabetical order, or through another similar system. The division of cases should not be influenced by the wishes of one of the parties to the case or of any person interested in the outcome of the case. A judge may not be dismissed from the proceedings without good reason, which is a serious illness or personal interest of the judge in the case. The reasons and procedure for exemption from the administration of justice must be determined by law and may not be influenced in any way by the interests of the government or administrative bodies. The decision to dismiss one of the judges from the proceedings must be taken by an authorised body with the same independence as the judges themselves.[63]

According to item 2.3.1 *Regulations on the automated court document management system* (hereinafter – ACDMS), in Ukraine, the distribution of court cases is carried out on the basis of information entered into the automated court system during the working day after registration of relevant documents. According to p. 2.3.3-2.3.7, the following information is used and taken into account in the automated distribution of court cases: specialisation (if any); load information; coefficients of the complexity of the judge's work; whether the judge has the authority to administer justice at the time of the division of court cases.[64]

Violations of the procedure for appointing a judge by an automated system, which may be grounds for challenge, include: entering false information into the system, entering information into the system by an unauthorised entity, violation of the registration deadline to influence the distribution of cases between judges, influence, and pressure on subordinate employees who maintain the automated system.

The ECtHR found a violation of the right to a 'lawful composition of the court' in connection with the violation of the order of distribution of cases between judges in the case of *Miracle Europe KFT v. Hungary*;[65] violation of the requirements of the law on drawing lots of two non-professional judges who were members of the panel along with professional judges (*Posokhov v. Russia*);[66] the chairman of the local court appointed

63 Recommendation No (94) 12 'Independence, effectiveness and role of judges' (adopted by the Committee of Ministers of the Council of Europe at the 518th meeting of the Ministers' Deputies on 13 October 1994) <https://zakon.rada.gov.ua/laws/show/994_323#Text> accessed 18 November 2021.

64 Decision of the Council of Judges of Ukraine dated 2 April 2015 no 25 as amended and supplemented from 11 June 2021 on approval of the Regulations on the Regulations on the automated document management system of the court <https://court.gov.ua/sudova-vlada/969076/polozhenniapasds/#_Toc414726370_24> accessed 18 November 2021.

65 *Miracle Europe Kft v Hungary,* App no 57774/13, Judgment of 12 January 2016 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-159926&filename=CASE%20OF%20MIRACLE%20EUROPE%20KFT%20v.%20HUNGARY.pdf&logEvent=False> accessed 18 November 2021.

66 *Posokhov v Russia,* App no 63486/00, Judgment of 4 March 2003 <https://www.legislationline.org/documents/id/17185> accessed 18 November 2021.

himself presiding judge in the applicant's case instead of another judge and on the same day decided to close the proceedings in this case on unclear grounds and in a procedure devoid of procedural transparency (*DMD Group v. Slovakia*)[67] In the last case, the ECtHR drew attention to the following circumstances: a) the issue of transferring cases from one judge to another was not sufficiently clearly regulated by national law, which did not provide any guarantees against abuse; b) the only document that regulated the division of cases was the schedule of judges, which was changed uncontrollably by the chairman of the court.

4.4 Participation of a judge in the preliminary stages of criminal proceedings (Art. 76 of the CrPC of Ukraine)

This reason is related to concerns about the bias of the judge, which may arise every time a judge has previously decided on certain issues in the same case. The basis for such fears is the natural desire of the judge to defend in the subsequent stages of criminal proceedings the decisions s/he made in the previous stages, i.e., the conflict of interests of the judge.

The judge must be 'clean' of the arguments of both the prosecution and the defence during the trial. That is why the court's examination of evidence in criminal proceedings begins at the trial stage and should end there with a verdict of acquittal or indictment, depending on the results of the court's assessment of the evidence provided by the parties. The judge's conviction of the guilt of the accused before the trial can turn him/her into an 'instrument of the prosecution' and help him/her obtain the 'status' of the prosecution.

Therefore, the purpose of Art. 76 of the CrPC, which is called '*inadmissibility of re-participation of a judge in criminal proceedings*', is the anticipation of possible formation of the judge's own position on the merits and circumstances of the case and guilt or innocence in committing the criminal offence, which may form prejudice from the judge towards the case.

The Code of Criminal Procedure is based on the fact that a judge cannot be a member of a higher court that verifies the correctness of a court decision rendered with his participation. Conversely, a judge who was a member of a higher court who remitted a case for a review may not take part in a new trial of the same case in a lower court. A judge cannot simultaneously control their own actions, identify their own mistakes and follow their own instructions – this creates a conflict of interest for them. This is especially true in situations where the execution of the instructions of the higher court requires a decision contrary to the revoked one, which creates a real conflict of interest and, of course, will call into question the impartiality of the judge. And from the psychological point of view of the persons involved in the retrial, these rules are a guarantee of perception and their impartial attitude to the new composition of the court.

The ECtHR's classic position on the re-involvement of a judge in the case of *Oberschlik v. Austria*,[68] in which he found a violation of the impartiality of the court, when the Court of Appeal was presided over by the same judge as in the case in the first instance. The ECtHR ruled that it did not matter that no challenge had been announced and no objections had

67 DMD *Group, a.s. v Slovakia*, App no 19334/03, Judgment of 5 October 2010 <https://www.legal-tools.org/doc/6ab7cb/pdf/> accessed 18 November 2021.

68 *Oberschlick v Austria*, App no 11662/85, Judgment of 23 May 1991 <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-94181&filename=CASE%20OF%20OBERSCHLICK%20v.%20AUSTRIA%20-%20[Russian%20Translation].pdf> accessed 18 November 2021.

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been raised against the presiding judge's participation, as the presiding judge and two other members of the appellate court had to commit to self-challenge *ex officio*.

At the same time, the ECtHR's practice of re-participating in a judge's case as a reason to doubt his impartiality is complex and ambiguous; the ECtHR has tried to differentiate it but has failed to build consistent approaches to different states in similar situations.

First of all, let us consider what is meant by **the same criminal proceedings**. This is a case of the same criminal offence (under the same factual circumstances), and the number of proceedings may differ due to, for example, the allocation to a separate proceeding or merger with another.

The ECtHR ***does not apply a restrictive interpretation to the concept of 'same proceedings'***. Thus, in *Indra v. Slovakia*, Judge S. was a member of the Chamber of Judges of the City Court, which on 19 November 1985 rejected the applicant's appeal for his release in 1982. She subsequently considered the applicant's appeal for his rehabilitation regarding his release. Although the subject-matter of the original proceedings differed from the subject-matter of the rehabilitation proceedings, the ECtHR proceeded from the fact that both the original proceedings and the rehabilitation proceedings examined the same set of facts. Therefore, this circumstance raises reasonable doubts of the applicant in the objective impartiality of Judge S. Therefore, the ECtHR found a violation of para. 1 of Art. 6 of the ECHR on the Requirement of an Impartial Tribunal.[69] The ECtHR reached a similar conclusion in the case of *Stoimenovikj and Miloshevikj v. Northern Macedonia* in criminal and civil proceedings involving agreements of a very similar, if not identical nature, and, in civil cases, the court used evidence and materials from criminal proceedings. In this case, Judge M.S., as a member of the Board of the Court of Appeal of Skopje, first made a negative decision in the applicant's criminal case and later, as a member of the Supreme Court, heard the applicant's civil case. The ECtHR found the applicant's fears that the judge had already formed his opinion on the merits of the case well-founded.[70]

National courts have adopted these approaches of the ECtHR. Thus, the Frankivsk District Court of Lviv challenged two of the three judges of the panel that considered the criminal proceedings on the grounds that they had previously considered the civil cases to which the accused was a party. In the course of these civil cases, they assessed the evidence presented in the statements of claim, which will also be the subject of the court's assessment and criminal proceedings. The judges had already formed their opinion on the evidence on which the accusation is based, even before the trial.[71] The Criminal Court of Cassation of the Supreme Court (hereinafter – the CCC of the Supreme Court) found that the judge's participation in other proceedings related to the seizure of property recognised as the subject of a crime could have objectively due to doubts about the impartiality of the judge.[72]

At the same time, *the ECtHR does not have a single practice for cases where several defendants have been heard in different proceedings and tries to differentiate approaches depending on the degree of involvement of the judge in the examination of evidence in the first case against an accomplice the case against whom will be considered later in a*

69 *Indra v Slovakia,* App no 46845/99, Judgment of 1 February 2005, paras 51-55 <https://lovdata.no/static/EMDN/emd-1999-046845.pdf> accessed 18 November 2021.

70 *Stoimenovikj and Miloshevikj v North Macedonia,* App no 59842/14, Judgment 25 March 2021 [Section V], paras 37-42 <https://hudoc.echr.coe.int/eng-press?i=003-6977072-9393949> accessed 18 November 2021.

71 Decision of the preparatory court hearing in criminal proceedings no 465/1665/18 from 19 April 2021 <https://reyestr.court.gov.ua/Review/96442322> accessed 18 November 2021.

72 Resolution of the Supreme Court of Cassation of 10 September 2019 in case no 157/2932/17 <https://reyestr.court.gov.ua/Review/84229853> accessed 18 November 2021.

separate proceeding. In particular, in the case of *Ferrantelli and Santangelo v. Italy*, the ECtHR found the applicants' fears of bias against the presiding judge and the national rapporteur, who had a few years ago presided over the case of their accomplices, objective and well-founded, and in the judgment which ended the case against the accomplices, considerable attention was paid to the applicants.[73] Similarly, in the case of *Otegi Mondragon v. Spain*, the judge had previously presided and was found to be biased against the applicant in a previous trial in respect of such charges.[74] However, in *Kriegisch v. Germany*[75] and *Khodorkovskiy and Lebedev v. Russia*,[76] the ECtHR acknowledged that the fact that a judge made a decision on similar but unrelated criminal charges, or that he considered a case with one of the defendants in a separate proceeding, was insufficient to doubt the impartiality of such a judge.

Similarly, ***the ECtHR does not have a unified approach to situations where a judge was first an investigating judge and later involved in the same substantive criminal proceedings***. In particular, in the late 1980s–early 1990s, the ECtHR held that the prior performance of a member of the panel of judges as an investigating judge in the same proceeding was incompatible with Art. 6 para. 1 of the Convention. Thus, in *De Cubber v. Belgium*, the applicant complained about a violation of the principle of impartiality, given that one of the three judges hearing his case had previously acted as an investigating judge in this case. The state justified the lack of judges and the need to consider the case within a reasonable time. The ECtHR recalled that a state party to the Convention must organise its legal system in such a way as to ensure compliance with the requirements of Part 1 of Art. 6 of the Labour Code, and impartiality is one of them. As it was not complied with, the ECtHR found a violation of Part 1 of Art. 6 of the Convention.[77] A similar approach (arrest warrant and trial cannot be carried out by the same judge) can be seen in *Ben Yaacoub v. Belgium*.[78] In other words, when a judge, in deciding whether to detain a suspect in custody, assesses the validity of the suspicion and, in the trial stage, decides on the guilt and punishment of the person, according to the ECtHR, this is evidence that the judge is convinced of 'particularly high clarity (certainty) in the issue of guilt', i.e., the decision to detain was based on 'obvious' guilt, so the impartiality of the court is in doubt, and the applicant's concerns in this regard can be considered objectively justified (*Hauschildt v. Denmark*).[79]

However, in the early to mid-1990s, the ECtHR sought in a number of decisions to take a more differentiated approach to addressing the impact of a judge's 'pre-trial' activities on the court's impartiality. Thus, in the case of *Nortier v. the Netherlands*, the ECtHR noted that 'the mere fact that a judge had made a decision at the pre-trial stage... could not be considered a reason to doubt his impartiality; the scope and nature of these decisions

73 *Ferrantelli* and Santangelo v Italy (n 49) .

74 *Otegi Mondragon v Spain,* App no 4184/15, Judgment 6 November 2018, paras 58-69 <https://hudoc.echr.coe.int/fre?i=001-187510> accessed 18 November 2021.

75 *Kriegisch v Germany,* Decision of Court (Fifth Section) as to the admissibility of App no 21698/06, 23 November 2010 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-102203&filename=001-102203.pdf> accessed 18 November 2021.

76 *Khodorkovskiy and Lebedev v Russia,* App nos 11082/06 and 13772/05, Judgment 25 July 2013 [Section I] <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-7648&filename=002-7648.pdf&TID=ihgdqbxnfi > accessed 18 November 2021.

77 *De Cubber v. Belgium* (n 6) paras 32-33 .

78 *Ben Yaacoub v. Belgium,* Judgment of 27 November 1987 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-57437&filename=CASE%20OF%20BEN%20YAACOUB%20v.%20BELGIUM.pdf&logEvent=False> accessed 18 November 2021.

79 *Hauschildt v Denmark,* Judgment of 24 May 1989, Series A no 154 , paras 48-53 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-45388&filename=HAUSCHILDT%20v.%20DENMARK.pdf&logEvent=False> accessed 18 November 2021.

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are of paramount importance in the case'.[80] In the case of *Saint-Marie v. France*, two of the three members of the court had previously decided not to release the applicant from custody, which had not been found to be a violation of Art. 1 para. 1. 6 of the Convention, as the previous decision was limited to a brief assessment of the facts presented in order to establish whether the suspicions of the police were justified and whether they gave reason to fear that the accused would escape from custody.[81] A number of other cases are similar (*Thorgeir Thorgeirson v. Iceland*[82]; *Fey v. Austria*;[83] *Padovani v. Italy*[84]). In any case, it is always necessary to assess the individual circumstances of each case in order to determine the extent to which the investigating judge considered the case (*Borg v. Malta*[85]).

In the second half of the 1990s and 2020s, the ECtHR clarified that doubts about a judge's bias arise when, in other stages of the proceedings, the same judge has pleaded guilty, i.e., if previous decisions contain preliminary findings of guilt of the accused (*Ferrantelli and Santangelo v. Italy*;[86] *Schwarzenberger v. Germany*;[87] *Poppe v. the Netherlands*[88]) when there is a question of prejudice against the judge's prior participation in the proceedings, the period of almost two years between the previous and current participation and the same case, in the ECtHR's view, is not in itself a sufficient guarantee of the absence of bias (*Davidsons and Savins v. Latvia*).[89]

Such attention is paid to the case law of the ECtHR on the possibility of a judge who in the previous stages decided on the measure of restraint and therefore provided or did not assess the evidence of guilt due to changes in Ukrainian legislation on such situations.

Until 14 January 2021, Art. 76 of the CrPC of Ukraine imposed an unconditional prohibition on a professional judge participating in the same criminal proceedings twice (in the court of first, appellate, and cassation instances and in reviewing the case on newly discovered circumstances, as well as in new proceedings after reversal of a sentence or court decision). At the same time, the investigating judge has the right to participate in the proceedings throughout the pre-trial investigation.

On 14 January 2021, the amended version of Part 1 of Art. 76 of the CrPC came into force according to Law No. 1027-IX of 2 December 2020, which states:

> A judge who participated in criminal proceedings during the pre-trial investigation is not entitled to participate in the same proceedings in the court of first, appellate

80 *Nortier v the Netherlands,* App no 13924/88, Judgment 24 August 1993 , para 33 <https://hudoc.echr.coe.int/fre?i=002-9694> accessed 18 November 2021.

81 *Sainte-Marie v France,* App no 12981/87, Judgment of 16 December 1992, para 33 <https://jurinfo.jep.gov.co/normograma/compilacion/docs/pdf/CASE%20OF%20SAINTE-MARIE%20v.%20FRANCE.PDF> accessed 18 November 2021.

82 *Thorgeir Thorgeirson v. Iceland, App no 13778/88, judgment of 25 June 1992* https://hudoc.echr.coe.int/eng?i=001-57795 accessed 18 November 2021.

83 *Fey v Austria,* App no 14396/88, Judgment of 24 February 1993 , para 30 <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_14396-88> accessed 18 November 2021.

84 *Padovani v Italy,* App no 13396/87, Judgment of 26 February 1993 , para 28 <http://hudoc.echr.coe.int/webservices/content/pdf/001-57812> accessed 18 November 2021.

85 *Borg v. Malta,* app no 37537/13, judgment of 12 January 2016 <https://hudoc.echr.coe.int/eng?i=001-159924> accessed 18 November 2021.

86 *Ferrantelli* and Santangelo v Italy (n 49) .

87 *Schwarzenberger v Germany,* App no 75737/01, Judgment of 10 August 2006, para 42 <https://hudoc.echr.coe.int/eng?i=001-76708> accessed 18 November 2021.

88 *Poppe v the Netherlands,* App no 32271/04, Judgment of 24 March 2009, para 26 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-91880&filename=001-91880.pdf&TID=thkbhnilzk> accessed 18 November 2021.

89 *Dāvidsons and Savins v Latvia,* App nos 17574/07 and 25235/07, Judgment of 7 January 2016, para 57 <https://hudoc.echr.coe.int/eng?i=001-159768> accessed 18 November 2021.

> and cassation instances, *except in cases of review by appellate decision of the court of first instance on the choice of a measure of restraint in the form of detention, to change another measure of restraint to a measure of restraint in the form of detention or to extend the term of detention imposed during the trial proceedings in the court of first instance before a court decision on the merits.*[90]

This legislative change was adopted in pursuance of the decision of the Constitutional Court of Ukraine of 13 June 2019 No. 4-r/2019 on declaring Part 2 of Art. 392 of the CrPC, which prohibited a separate appeal against the court's decision to extend the period of detention imposed during the trial in the court of first instance until the court's decision on the merits.[91] The legislator's approach was due to the 'staff shortage' in the appellate courts and the intention to provide an opportunity to form an appellate court to review the decision on the merits on appeal, because after the appellate review of investigative judges' decisions, as well as decisions of the court of first instance, judges who did not previously take part in the proceedings may not remain in custody in the Court of Appeal, and it is impossible to form a panel of judges to review the decision on the merits.

However, this innovation is quite delicate and controversial and, we hope, will be temporary – until the vacancies in the courts of appeal are filled.

Firstly, the legislator's inconsistency is surprising: why is the participation of a judge of the appellate court in the pre-trial investigation stage in the appellate review of the investigative judge's decision to elect, change, or extend detention considered grounds for assuming his/her second participation in the case, while participation in the appellate review of the same issue at the stage of court proceedings before the court decision on the merits in the court of first instance is not?

Secondly, prior to this legislative innovation, a separate appeal and review of first instance court decisions on the election, change, or extension of detention at the stage of consideration of the case in the first instance was impossible and was carried out in a single (joint) appeal process during the appellate review of the case on the merits. Therefore, we can assume that the subjects of the legislative initiative were guided by the reasoning 'the amount does not change from the permutation of terms' and that there are no obstacles to the new version of Part 1 of Art. 76 of the CrPC of Ukraine. The appellate review of the case was carried out by the same panel of judges as the review of the decision of the court of first instance on the election, change, or extension of detention since these issues were considered by the same court. However, this logic is misleading because the appellate review of these decisions is prolonged, and the appellate proceedings will essentially be preceded by an appellate review of first instance court rulings extending, changing, or choosing a measure of restraint.

Thirdly, this legislative innovation is not fully consistent with the principle of access to justice and the impartial court (Part 1 of Art. 21 of the CrPC of Ukraine and Part 1 of Art. 6 of the Convention), but rather is a formal (mechanical) objectification in Part 1 of Art. 76 of the CrPC of Ukraine, which attempts to ensure the formation in the appellate court for appellate review of the decision on the merits.

90 Law of Ukraine of 2 December 2020 No 1027-IX 'On Amendments to the Criminal Procedure Code of Ukraine to Enforce the Decision of the Constitutional Court of Ukraine on Appealing the Court's Decision to Extend the Term of Detention ' <https://zakon.rada.gov.ua/laws/show/1027-20#n6> accessed 18 November 2021.

91 Decision of the Constitutional Court of Ukraine in the case of the constitutional complaint of Glushchenko Viktor Mykolayovych regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of the second part of Article 392 of the Criminal Procedure Code of Ukraine of 13 June 2019 No 4-p/2019 <https://zakon.rada.gov.ua/laws/show/v004p710-19#Text> accessed 18 November 2021.

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Fourthly, the factual nuance is that when considering both petitions for election, change, or extension of precautionary measures, and appeals for reconsideration of decisions on these issues, the court on the merits is forced by the law to assess not only the presence of risks (para. 1, part 1 of Art. 194 of the CrPC of Ukraine), but also to establish or prove the evidence provided by the parties to the criminal proceedings – *the circumstances that indicate a reasonable suspicion* of committing a criminal offence (para. 2, part 1 of Art. 194 of the CrPC of Ukraine). In accordance with para. 2 part 3 of Art. 407 of the CrPC of Ukraine ruling on the consequences of the appellate review of the appeal against the court decision on the election, change, or extension of detention, decided during the trial in the court of first instance before the decision on the merits*, the appellate court decides on precautionary measures, provided for in Chapter 18 of Section II of this Code,* i.e., subject to part 2. Art. 177, item 1 part 1 of Art. 178, item 3 part 1 of Art. 184, item 1 part 1 of Art. 194, item 1, 4 part 2 of Art. 196 of the CrPC of Ukraine. Therefore, in reviewing appeals against decisions of the court of first instance on the election, change, or extension of detention, the appellate court cannot help but form an opinion on the evidence on which the accusation is based and is unlikely to be objective and impartial in appellate verification of the decision of the court of first instance, which ended the criminal proceedings on the merits. Thus, this situation does not apply to cases where the appellate court makes purely formal and procedural decisions, which, in the case of the ECtHR, should not raise questions of lack of impartiality in the case of re-participation in the appellate review of the same judges. In any case, such situations in national law fall under para. 4 of Part 1 of Art. 75 of the CrPC of Ukraine – the presence of other circumstances that may indicate the bias of the judge – and can be justified as grounds for challenge.

Thus, the new version of Part 1 of Art. 76 of the CrPC of Ukraine awaits the trial and verification of the ECtHR (if there are such statements, and there will be). The legislator created a legal conflict in Part 1 of Art. 76 of the CrPC of Ukraine and para. 4 of Part 1 of Art. 75 of the CrPC of Ukraine; Part 2 of Art. 422-1 of the CrPC of Ukraine from Part 3 of Art. 407, part 2 of Art. 177, item 1 part 1 of Art. 178, item 3 part 1 of Art. 184, item 1 part 1 of Art. 194, item 1, 4 part 2 of Art. 196, part 1 of Art. 422 of the CrPC of Ukraine. In doing so, he made life difficult for Ukrainian law enforcement. After all, the new version of Part 1 of Art. 76 of the CrPC of Ukraine, together with the practice of the ECtHR, requires the panel for the review of judicial decisions on the merits to determine whether the judge who participated in the preliminary review of decisions on the election, change, or extension of detention understood and assessed the circumstances, substantiated the accusations, or limited him/herself to resolving procedural issues. In general, it is difficult to model situations where an appellate review of decisions to choose, change, or extend detention would not compel a judge of the appellate court to assess the prosecution's evidence and, accordingly, allow him/her to remain impartial during a future review of the merits.[92]

The gap in the law is the situation of inadmissibility of repeated participation of the investigating judge in the criminal proceedings, within which his/her previous decision was revoked. In practice, situations may arise that require the investigating judge to make a decision contrary to the revoked one, which creates a real conflict of interest. For example, this could occur when the investigating judge previously demonstrated his/her position on the criminal proceedings and recognised the investigator's decision to close the criminal proceedings as lawful and reasonable, but this position of the investigating judge did not coincide with the position of the higher court, which overturned the investigating judge's

92 OM Kaluzhna, MI Shevchuk, 'Light rain from a large cloud (or will there be a new procedure for appealing the decisions of the court of first instance on the election, change or extension of detention term an effective means of legal protection of the accused?' (2021) 1 Law and Society 219 <http://www.pravoisuspilstvo.org.ua/archive/2021/1_2021/35.pdf> accessed 18 November 2021.

decision on refusal to satisfy the complaint against the decision of the investigator to close the criminal proceedings. What is the chance that this investigating judge will make the opposite decision overturned in the same criminal proceedings if the investigator re-orders the closure of the criminal proceedings and it is appealed to the investigating judge? An interesting example in such situations can be the rulings of the investigating judge of the Shevchenkivsky District Court of Lviv from 3 September 2018 and 14 April 2021, which were issued within the same criminal proceeding. In his decision of 3 September 2018, the investigating judge concluded that the investigator's decision to close the criminal proceedings on the basis of para. 2 of Part 1 of Art. 284 of the Criminal Procedure Code of Ukraine was lawful. However, this decision of the investigating judge was overturned by the appellate court. A year later, the investigators re-issued a decision to close the criminal proceedings, which was also appealed by the victim to the investigating judge. However, this time, the investigating judge, by his decision of 14 April 2021, upheld the victim's complaint against the investigator's decision to close the criminal proceedings, stating that the investigator's procedural decision did not properly substantiate the conclusion that there was no *corpus delicti* (components of crime).[93]

4.5 Preventing the decision of the 'unlawful composition of the court'

The concept of 'legal composition of the court' is literally not defined in the law. It is derived (systematised) by doctrine and case law from the provisions of the law,[94] which enshrines the requirements (features) that must meet the legal composition of the court. The adoption of a court decision by the unlawful composition of the court is enshrined in para. 2 of Part 2 of Art. 412 of the CrPC as a ground for its unconditional repeal and significant violation of the requirements of the criminal procedure law. Therefore, in criminal cases where there are obvious circumstances that indicate that the court designated for criminal proceedings does not meet the requirements of the 'lawful composition of the court', the parties and other participants in criminal proceedings may challenge the judge/judges, all members of the panel, or the entire court. The mechanism for eliminating a defect in the composition of the court by challenge (self-challenge) is designed to prevent the annulment of a court decision in a timely manner and is determined by the principle of reasonable time and the right to a court established by law.

The composition of the court is considered unlawful if there are grounds that precluded the judge's participation in the case; the verdict (decision) was signed by a judge who did not participate in the proceedings; the judge violated the rules of collegial proceedings; the judge or judges who heard the case were elected to the court to which the case is not subject; a judge whose term of office has expired took part in the consideration of the case; at least one of the judges was not elected by the Verkhovna Rada of Ukraine or appointed by the President of Ukraine in the manner prescribed by law; if the court in the manner prescribed by law

93 Decision of the Investigating Judge of the Shevchenkivsky District Court of Lviv of 3 September 2018, Case No 466/6944/18 <https://reyestr.court.gov.ua/Review/76369924> accessed 18 November 2021; Decision of the Investigating Judge of the Shevchenkivsky District Court of Lviv of 14 April 2021, Case No 466/6944/18 <https://reyestr.court.gov.ua/Review/96353834> accessed 18 November 2021.

94 Supreme Specialized Court of Ukraine for Civil and Criminal Cases, Generalization of the practice of exercising procedural authority by the appellate court to appoint a new trial in the court of first instance (review from 1 January 2017) <https://ips.ligazakon.net/document/VRR00217> accessed 18 November 2021; N Siza, 'The composition of the court in criminal proceedings' (2012) 93 *Bulletin of the Taras Shevchenko National University of Kyiv. Legal sciences* 58-61 <http://irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/VKNU_Yur_2012_93_17.pdf> accessed 18 November 2021.

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has not considered the request to challenge a judge or jury;[95] the procedural requirements for criminal proceedings involving jurors have not been met; the criminal proceedings were heard by a judge while on leave or sick leave; the requirements of the CrPC regarding the implementation of exclusively automated distribution of materials of criminal proceedings between judges have not been met; the procedural requirements for the replacement of the court, established by Art. 319 of the CrPC.[96]

Since the concept of 'lawful composition of the court' is a compiled list of requirements for it, for an orderly and easy perception, we structure its elements into three conditional blocks – ***institutional, procedural, and jurisdictional***. In the outline (context) of Part 1 of Art. 6 of the ECHR, these three blocks were in different proportions scattered in the following three components of the right to a fair trial: a) the right to a fair trial, b) the right to a court established by law, and c) the right to an independent and impartial tribunal (Art. 6 of the ECHR). Each of the blocks has its own meaning, being closely tied to the others.

4.5.1) The first block of grounds is the compliance of the court with the ***institutional requirements*** (they are also called *organisational requirements* because they determine the principles of legitimate judicial power in the state), established by the Constitution of Ukraine and the Laws of Ukraine 'On the Judiciary and the Status of Judges' and 'On the Supreme Anti-Corruption Court', in particular: the requirements for professional judges (Part 2 of Art. 127 of the Constitution of Ukraine, Art. 69 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the special requirements for a judge who conducts criminal proceedings against a minor (Art. 18 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the special requirements for a judge of the Supreme Anti-Corruption Court (Art. 7 of the Law of Ukraine 'On the Supreme Anti-Corruption Court'); the requirement to divide cases taking into account the specialisation of judges (Part 5 of Art. 15 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the requirements for jurors (Arts. 65, 66 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the requirements for the appointment of a judge (Art. 128 of the Constitution of Ukraine, Section IV of the Law of Ukraine 'On the Judiciary and the Status of Judges', Art. 8 of the Law of Ukraine 'On the Supreme Anti-Corruption Court'); requirements for the term of office and the procedure for challenge and termination of a judge (Art. 126 of the Constitution of Ukraine, Section VII of the Law of Ukraine 'On the Judiciary and the Status of Judges'); requirements for the procedure for involving jurors in the performance of duties in court (Arts. 64, 67 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); requirements for the procedure for challenge of a juror (Art. 66 of the Law of Ukraine 'On the Judiciary and the Status of Judges').

Failure to comply with these and other requirements is reflected in the case law of the ECtHR through the prism of such an element of the right to a fair trial as a '*court established by law*' (Part 1, Art. 6 of the ECHR)

- The court, along with professional judges, included two non-professional judges selected to participate in proceedings in violation of the law on the maximum term of office, which should not exceed two weeks per year under Russian law (*Posokhov v. Russia*);[97]
- The court also included non-professional judges, who continued to rule on cases in accordance with established tradition, although the law on non-professional

95 SV Kivalov, SM Mishchenko, VY Zakharchenko (eds), *Criminal Procedure Code of Ukraine: Scientific and Practical Commentary* (Odyssey 2013) 743.

96 Supreme Specialized Court of Ukraine for Civil and Criminal Cases (n 97).

97 *Posokhov v Russia,* App no 63486/00, Judgment of 4 March 2003 <https://www.legislationline.org/documents/id/17185> accessed 18 November 2021.

judges was repealed and a new law was not adopted (*Panjikidze and others v. Georgia*);[98]

- the term of office of the judge at the time of the case had expired (*Gurov v. Moldova*);[99]
- the court ruled a judgment in the first instance against the Minister of Government and four other persons who had never held ministerial posts, although under national law this court was empowered to rule only on ministers (*Coeme and others v. Belgium*);[100]
- the court passed a verdict with the participation of lay judges, the procedure for whose election was violated (*Ilatovsky v. Russia*);[101]
- the court was composed of a judge appointed to the position of judge in breach of procedure (*Guðmundur Andri Ástráðsson v. Iceland*).[102] A statutory evaluation committee submitted a list of the 15 highest-scoring candidates to the Ministry of Justice, but the Minister of Justice submitted another list to the parliament, including the first 11 candidates and four other candidates who also participated in the selection procedure, but took the 17th to 30th places in the final rating. It was these candidates who were supported by the parliament of Iceland, and the president approved their appointment to the office of a judge. Guðmundur Andri Ástráðsson, whose case was being considered by the appellate court, challenged one of the newly appointed judges for violating the appointment procedure. However, his appeal was rejected, and he appealed to the Supreme Court, arguing that his right to a 'court established by law' was violated, but the higher instance court did not accept this argument either. The ECtHR found that the executive had an unjustified and unforeseen discretion under national law to elect four judges to a new appellate court, combined with a failure by parliament to ensure a proper balance between the executive and the legislature in the appointment of judges. Thus, this process reduced the public's confidence in the judiciary, which is necessary in a democratic society, and therefore contradicted the very essence of the rule of law – the administration of justice by a court established by law.
- Thus, the ECtHR requires adherence to the procedure for appointing judges, as it is important not only for judges but also the judicial appointment process itself to be impartial and independent – otherwise, credibility in the judiciary and confidence in their independence and impartiality will be undermined.

4.5.2) The procedural component of the 'lawful composition of the court' (also called *jurisdictional*[103] or *functional component*) means that the court must act in the manner

98 *Pandjikidze and others v Georgia,* App no30323/02, Judgment of 27 October 2009 <http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-144308&filename=PANDJIKIDZE%20AND%20SIX%20OTHERS%20v.%20GEORGIA%20-%20%5BUkrainian%20Translation%5D.pdf> accessed 18 November 2021.

99 *Gurov v Moldova,* App no 36455/02, Judgment of 11 July 2006, paras 37-39 <https://hudoc.echr.coe.int/eng?i=001-76297> accessed 18 November 2021.

100 *Coëme and others v. Belgium,* App nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000 <https://hudoc.echr.coe.int/eng?i=001-59194> accessed 18 November 2021.

101 *Ilatovskiy v Russia,* App no 6945/04, Judgment of 9 July 2009 <https://hudoc.echr.coe.int/eng?i=001-93498> accessed 18 November 2021.

102 *Guðmundur Andri Ástráðsson v Iceland,* App no 26374/18, Judgment of 12 March 2019 <https://hudoc.echr.coe.int/eng?i=001-206582> accessed 18 November 2021.

103 OZ Khotynska-Nor, 'The right to a "court established by law" as a structural element of the right to a fair trial: the Ukrainian context' 2015 1 *Lawyer* <https://iadvocate.com.ua/pravo-na-sud-vstanovlenyj-zakonom-yak-strukturnyj-element-prava-na-spravedlyvyj-sud-ukrayinskyj-kontekst/> accessed 18 November 2021.

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and in accordance with the powers provided by law, within its competence. It covers compliance with the rules of jurisdiction (Arts. 32, 33, 33-1 of the CrPC), the principle of invariability of the composition of the court, which ensures that among professional judges and jurors who have signed a court decision, there are no persons who did not participate in the trial consideration (Arts. 319, 320, 390 of the CrPC), and the presumption of 'unlawful composition of the court', if the court in the manner prescribed by law has not considered the application for challenge of a judge (juror, the entire court).

The presumption of a court decision by an unlawful composition of the court, if the challenge of the court was declared but not decided, follows from para. 2 of Part 2 of Art. 412 of the CrPC, as further doubts about the bias or incompetence of the court remain undisputed. This presumption is not worded in the CrPC: it does not contain norms such as 'leaving applications for challenge without consideration is not allowed' or 'leaving of applications for challenge without consideration is grounds for revocation of a court decision'. It is derived from a systematic interpretation of the rules on the 'lawful composition of the court', which is well established in judicial practice and does not result in discussions or problems. For example, the Supreme Court of Cassation revoked the decision of the Court of Appeal, as ruled in substantial violation of the requirements of the Criminal Procedure Code due to the appellate court's disregard for the application for challenge, referring to para. 2 part 2 of Art. 412 of the CrPC.[104] In the circumstances of the case, Person 1 filed an appeal against the decision of the investigating judge of the Zavodsky District Court of Mykolayiv to refuse to recognise them as a victim, which contained an application to dismiss all judges of the Mykolayiv Court of Appeal and was registered by the court office. After determining the composition of the panel and the judge-rapporteur and submitting the appeal to it, the judge of the Mykolayiv Court of Appeal refused to open proceedings on the appeal. However, the judge did not consider the existence of a motion for challenge, in which Person 1 indicated the existence of distrust in the judges of the Court of Appeal. The issue of challenge was not resolved in the manner prescribed by procedural law.

The ECtHR found a violation of the right to a 'court established by law' (Art. 6 para. 1 of the ECHR) in the following situations:

- unreasonable change of territorial jurisdiction of the case (*Bochan v. Ukraine*);[105]
- unjustified replacement in the composition of the court hearing the case, without stating the reasons for the replacement (*Moiseyev v. Russia*).[106] There were 11 court substitutions in this case, and Russian law did not specify in which cases the presiding judge had the right to transfer the case to another judge, so they were given unlimited discretion without any procedural safeguards for the parties, such as the court's obligation to inform the parties, like giving reasons for changing the composition of the court or giving them the opportunity to express a position in this regard or to challenge the change in the composition of the court in a higher court. The same violation was established in the case of *Sutyagin v. the Russian Federation*.[107] Incidentally, the Committee of Ministers of the Council of Europe

104 Statute of the panel of judges of the Third Judicial Chamber of the CCC No 487/4598/19 of 26 February 2020 <https://reyestr.court.gov.ua/Review/87951214> accessed 18 November 2021.

105 *Bochan v Ukraine,* App no 7577/02, Fifth Section, Judgment of 3 August 2007, paras 67-72 <https://hudoc.echr.coe.int/eng?i=001-171916> accessed 18 November 2021.

106 *Moiseyev v Russia,* App no 62936/00, First Section, Judgment of 9 October 2008 <https://hudoc.echr.coe.int/eng?i=001-88780> accessed 18 November 2021.

107 *Sutyagin v Russia,* App no 30024/02, First Section, Judgment of 3 May 2011 <https://hudoc.echr.coe.int/eng?i=001-104651> accessed 18 November 2021.

stated in para. 9 of its Recommendation CM/Rec (2010) 12 of 17 November 2010 that no one has the right to withdraw a case from a judge without good reason, based on objective, pre-established criteria and a transparent procedure.[108]

4.5.3) *The competence* component of the concept of 'lawful composition of the court' is inextricably linked to the *institutional* and *procedural* components because the competence to hear cases belongs to the composition of the court appointed and determined to consider a case in accordance with the law. The competence component is a ***special professional level and requirements for a judge (court composition)***, which include special requirements for, e.g., a juvenile judge (Art. 18 of the Law 'On the Judiciary and the Status of Judges'), judges of the Supreme Anti-Corruption Court (Part 12 of Art. 31 CrPC), and the specialisation of judges in the distribution of cases (Part 5 of Art. 15 of the Law 'On the Judiciary and the Status of Judges'). ***Competence*** can be considered ***horizontally***, as 'empowerment, giving a range of powers' arising from the institutional and procedural component of the 'court established by law', and ***vertically***, as 'one who knows, knowledgeable, authoritative in a particular field or on certain issues', that is, the qualified and skilful use by a judge of their powers.

Insufficient vertical competence of a judge determines inevitable omissions in the process of proving – from failure to give certain circumstances of the case and evidence proper weight and evaluation or ignoring them to their non-investigation, non-detection, and non-establishment in general. Lack of knowledge results in random proving and a high probability of an incompetent judge 'drifting' in the accusatory or acquittal direction. In other words, the incompetence of a judge with a high probability causes incompleteness and one-sidedness of clarifying the circumstances of the case and confirming them with appropriate and admissible evidence, which in turn are grounds for challenging the court decision (paras. 1 and 2 of Part 1 of Art. 409 CrPC). Therefore, situations of possible incompetence of judges should be anticipated and prevented, including by way of challenge (self-challenge). Proper competence is the key to a judge's objectivity.

Therefore, at first glance, we can understand the approach of those lawyers who do not consider incompetence 'in its purest form' as a basis for challenge. *Secondly*, it should be borne in mind that the incompetence of a judge is not a static, a generalised, subjective characteristic, or a hypothetical, potential opportunity to conduct the proceedings incompetently. The competence of all judges of Ukraine is presumed and ensured by the system of selection, appointment, and qualification of judges. Incompetence is always specific and will be manifested in the dynamics of the judge in a particular case and expressed in specific consequences in the form of violation of the rights, freedoms, and interests of participants in the proceedings, unreasonable procedural decisions, or errors. It is these specific consequences (and not subjective impressions) that may be grounds for challenge, but they fall under the characteristics of the grounds for challenge, provided for in para. 4 of Part 1 of Art. 75 of the CrPC – the presence of other circumstances that cast doubt on impartiality.

Therefore, all situations of incompetence of a judge can be divided into two groups. 1) When incompetence stems from non-compliance with special institutional requirements of the law on qualifications and other features of the court (juvenile and investigative judges, high anti-corruption court boards, specialisations in general courts, etc.). In these cases, the presumption of incompetence must be applied. Incompetence of this kind is an independent and sufficient ground for challenge as non-compliance with

108 Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, 17 November 2010 <https://zakon.rada.gov.ua/laws/show/994_a38#Text> accessed 18 November 2021.

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the component of the concept of 'lawful composition of the court'. 2) When the court is appointed and determined to consider specific proceedings, taking into account the special requirements of the law on the qualification of judges, but allows unprofessionalism in the form of obviously erroneous interim procedural decisions, irrelevant to the law actions, statements, etc. In these cases, the jurisdiction of the court is presumed, the grounds for challenge must be proved, and it may be expressed as a violation of the principles of process, rights, and interests of the person and fall under para. 4 of Part 1 of Art. 75 of the CrPC.

Understanding the ***competent*** component of the 'lawful composition of the court' in law enforcement practice is problematic.

In particular, due to the lack of judges in the appellate courts (in some courts, the staff shortage rate is 87%), there is a problem with establishing panels for the appellate review of criminal proceedings after expulsion from the distribution of judges of the criminal chamber with a ban on re-participation. As a way of combating situations, some appellate courts have made it a practice to involve 'side' judges in the panel to consider criminal proceedings against judges from the Civil Chamber. Thus, the meeting of judges of the Rivne Court of Appeal on 13 July 2021 decided

> in case of impossibility to form a panel for criminal proceedings from among the judges of the Criminal Chamber: the presiding judge (judge-rapporteur) is determined from among the judges of this chamber, and other members are determined from among all judges of the court without taking into account their affiliation to the judicial chambers. If it is impossible to determine the presiding judge from among the judges of the Criminal Chamber, the case is transferred to determine jurisdiction in the manner prescribed by the CrPC.[109]

In most courts of appeal, judges of the Civil Chamber did not agree to participate in criminal proceedings.

Case No. 1828/2dp/15-20 of the High Council of Justice (hereinafter – HCJ) of 15 June 2020 on bringing two judges of the Kherson Court of Appeal to disciplinary responsibility for violating the rules of self-challenge is indicative. Due to the insufficient number of judges of the Criminal Chamber for the distribution of a specific criminal case, a meeting of judges was held on 10 May 2019, where three judges of the Civil Judicial Chamber – B., M., and P. – were appointed for the time of the automated distribution of these proceedings. By the protocol of a repeated automated distribution, a board was created: the speaker was K. (criminologist), and members of the board were P. and B. (civil judges).

Having started the case (on preparation for contract killing and attempted intentional destruction of property by arson, explosion, or other dangerous methods), civil judges B. and P. found a lack of experience and practice in hearing criminal cases during the examination of the defendant's motions and for these reasons declared self-challenge, which was satisfied. On 24 May 2019, the prosecutor filed a disciplinary complaint with the Supreme Council of Justice (SCJ) against this court ruling, arguing that the grounds for challenge were known to judges before 10 May 2019. The SCJ Disciplinary Chamber established a disciplinary misdemeanour – breaking the rules of self-challenge – in the actions of judges (subpara. d, para 1, part 1 of Art. 106 of the Law 'On the Judiciary and the Status of Judges'). The SCJ pointed out that judges B. and P. had not complied with the rules on self-challenge, that there was no objective criterion for impartiality

109 Рішення зборів суддів від 13 July 2021 року. Рівненський апеляційний суд <https://rva.court.gov.ua/sud4815/inshe/zboru_siddiv/1151662/ > accessed 18 November 2021.

in their reasons, and that references to insufficient qualifications were not a ground for impartiality.[110]

In our opinion, the decision of the SCJ disciplinary chamber is unconvincing.

Firstly, in accordance with Art. 34 of the CrPC, if after satisfying the challenges (self-challenges), it is impossible to form a court to consider the proceedings. The appellate court had to submit a proposal to the CCC of the Supreme Court to resolve the issue of referring proceedings from one court of appeal to another. The CrPC of Ukraine does not provide for the possibility of a lack of criminal judges in the judicial chamber of the appellate court by involving judges from the civil chamber of the same appellate court for consideration of criminal proceedings.

Secondly, in accordance with Part 1 of Art. 52 of the Law 'On the Judiciary and the Status of Judges' a judge is a citizen of Ukraine who, in accordance with the Constitution of Ukraine and this Law, is appointed a judge, *holds a full-time judicial position in one of the courts of Ukraine* (our highlight - O.K., M.S.) and administers justice on a professional basis. Judges of the Appellate and Supreme Courts do not hold an abstract judicial position (see the Kherson Court of Appeals staff list),[111] but hold a position in the Civil or Criminal Judicial Chamber of the Court of Appeal or in the relevant Court of Cassation within the Supreme Court. In the analysed case, during the judicial reform of 2016-2019 and reorganisation of appellate courts, judges B. and P. were transferred from the Court of Appeal of the Kherson region to the Kherson Court of Appeal with confirmation of their ability to administer justice in civil cases. The power of the meeting of judges 'to determine the specialization of judges to consider specific categories of cases' (Part 2 of Art. 18 and para. 2 of Part 5 of Art. 128 of the Law 'On Judiciary and Status of Judges') in appellate and cassation courts can be implemented as a specific priority (narrower) profile of a judge within the chamber of the appellate court or within the court of cassation. For example, it could be simulated that specialisations (permanent boards) for reviewing official, violent crimes or appellate review of investigative judges' decisions could be established within the Criminal Court in appellate courts, which should be taken into account when determining the composition of the ASDC (Automated System of Document Control). However, due to the shortage of staff in courts of general jurisdiction, specialisation of judges on this principle, unfortunately, is not practiced.

'Specialisation of courts' and 'specialisation of judges' are not identical concepts. Part 1 of Art. 18 of the Law 'On the Judiciary and the Status of Judges' foresees ***five specialisations of courts***: 'Courts shall specialise in ***civil, criminal***, commercial, and administrative cases, as well as cases of administrative offences'. Consequently, the specialisation of courts relates to a type of proceedings – civil, criminal, commercial, and administrative, as well as for cases of administrative offences. Part 2 of Art. 18 stipulates that 'in cases prescribed by law, as well as by the decision of the conference of judges of the respective court, ***a system of judge specialisation in hearing specific categories of cases may be introduced***'. Thus, the specialisation of judges is a category narrower than the specialisation of courts and may take place within the specialisation of courts as a type of proceeding.

110 About attraction of judges of the Kherson appellate court Bugryk VV, Polikarpova OM to disciplinary responsibility and refusal to bring to disciplinary responsibility the judge of the Kherson Court of Appeal Kalinichenko IS Decision No 1828/2дп/15-20 of the Second Disciplinary Chamber of the High Council of Justice from 15 July 2020 <https://hcj.gov.ua/doc/doc/3415?fbclid=IwAR3rRjLsk1wYHg5-yQbA-l8A1sQGZjkPkDH4-9-P_y4EEAlxlR_bG8n94n0> accessed 18 November 2021.

111 Judges of the Kherson Court of Appeal <https://ksa.court.gov.ua/sud4819/info_sud/judges/> accessed 18 November 2021.

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The specialisation of judges was one of the new ideas of judicial reform in 2016[112] and was meant to promote the efficiency and optimisation of justice, reduce judicial errors, and ensure the unity of judicial practice on similar issues. The specialisation of judges of a narrower profile by the decision of the meeting of judges may remain constant for a certain period or change every certain period (two to three years). This procedure for determining and changing the specialisation of judges is a guarantee of predictability for judges of the main level of work in the near future and guides them to choose topics for training aimed at increasing the competence of judges within their narrower specialisations. Based on the teleological interpretation of para. 2 of Part 5 of Art. 128 of the Law 'On the Judiciary and the Status of Judges', the purpose of this rule is not the possibility of creating one-time multi-specialised boards to consider specific cases. Thus, the decision of the meeting of the Kherson Court of Appeal on ***one-time*** involvement in the appellate review of criminal proceedings of judges from the Civil Chamber is beyond the powers of the meeting of judges.

From the point of view of the judge's personality, his/her internal independence, capability to deal with all aspects of the prosecution, correct cognition of the facts, their assessment, criminal law qualification, and sufficient level of professional knowledge is important and necessary, i.e., a proper and sufficient competence as a subjective quality. *A sufficient competence of the judge is an important guarantee for their internal independence in their decision-making*. After all, the level of knowledge and professional training of a judge gives them confidence in their own abilities, makes them free to assess the evidence and facts of the case, and does not encourage them to focus on the position, statements, and actions of the presiding criminalist. 'Side' judges of the panel cannot be considered secondary, for *pro forma* or sham visibility of complying with the formal requirement of collegial review by three judges, as a person has the right to appeal their case by a competent collegial court, in which each judge has an equal vote. The status of a judge and the position of a judge are not a 'license' to administer justice in any and all types of proceedings, as persons seeking judicial protection have an expectation from the court that it will be professional in its case, delve into all important details and carefully justify the decision. Guarantees of the 'right to a court established by law' and to a 'fair trial' for its proper jurisdiction must be real and effective, not a formal farce. The case analysed here did not take into account the criterion of judges' specialisation in the division of the criminal case, as it is obvious to a moderate outside observer that civil jurisdiction (civil chamber) judges do not have enough competence to consider criminal cases (just as a gastroenterologist does not have the competence of a dentist).

Third, the approach taken by the Kherson Court of Appeals should be analysed in light of its compliance with the ECHR 'court established by law 'requirement, in particular, from the angle of such a criterion, taken by the ECtHR as the basis for the recognition of certain body as a 'court' within the meaning of Art. 6 of the Convention, as the ***mandatory legal regulation of the activities and functioning of the 'court'***. The ECtHR repeatedly emphasised in its decisions that the phrase 'established by law' applies not only to the legal basis of the very existence of a 'court', but also to the observance by such a court of certain rules (norms) governing its activities and determining the composition of the court in each case (*Bulut v. Austria*;[113] *Buscarini v. San Marino*;[114] *Posokhov v. Russia*;[115] *Fatullayev*

112 See Explanatory note dated 30 May 2016 to the Draft Law On the Judiciary and the Status of Judges ' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=4734&skl=9> accessed 18 November 2021.

113 *Bulut v Austria,* App no 17358/90, Judgment of 22 February 1996 <https://hudoc.echr.coe.int/eng?i=001-57971> accessed 18 November 2021.

114 *Buscarini v San Marino,* App no 24645/94, Grand Chamber, Judgment of 18 February 1999 <https://hudoc.echr.coe.int/eng?i=001-58915> accessed 18 November 2021.

115 *Posokhov v Russia,* App no 63486/00, Judgment of 4 March 2003 , para 39 <https://www.legislationline.org/documents/id/17185> accessed 18 November 2021.

v. Azerbaijan;[116] *Kontalexis v. Greece*[117]). 'Introduction of the expression "established by law" in Art. 6 of the ECHR is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament' (*Richert v. Poland,*[118] *Coeme and others v. Belgium*[119]). The 'established by law' principle in Article 6 § 1 is intended to prevent the organisation of the judicial system from being left to the discretion of the executive and ensure that this matter is governed by an Act of Parliament (*Savino and others v. Italy*).[120] In countries with codified law, the organisation of the judicial system cannot be left to the discretion of the judicial authorities either, which does not, however, excludes granting them a certain power of interpretation of the national legislation on the matter (ibid., *Gorgiladze v. Georgia*).[121] The ECtHR expresses the same opinion in both the criminal and civil aspects. 'Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation' (*Savino and others v. Italy*).[122] Moreover, the delegation of powers in matters relating to the organisation of the judiciary is acceptable insofar as this possibility falls within the framework of the domestic law of the state in question, including the relevant provisions of the Constitution (ibid.).[123] Consequently, the ECtHR's thesis that 'the organization of the functioning of the courts should not be left to the discretion of the executive branch and should be regulated by law passed by parliament' cannot be interpreted restrictively only in relation to the executive branch, but also as a takeover by judicial self-government of functions not assigned to it by law.

Therefore, *in terms of legislative regulation of the court functioning*, again, in deciding whether the statutory procedure for appointing a judge for the appellate review of a criminal case has been violated, it is necessary to be guided not only by the provisions of Part 3 of Art. 35 of the CrPC of Ukraine, but also by the provisions of Art. 34 of the CrPC and Part 5 of Art. 15 of the Law 'On the Judiciary and the Status of Judges'.

Let us sum up the results of the analysis of this case: 1) Failure to remove judges who self-challenged in the case would result in non-compliance with the institutional and jurisdictional component of the right to a lawful court, i.e., violation of the right to a court established by law (Part 6 of Art. 6 of the ECHR). 2) The statement of self-challenge by judges of civil specialisation in criminal proceedings was correct, as the mechanism of challenge in the described conditions remained the only way to correct the erroneous decision of the meeting of judges of the Kherson Court of Appeal. 3) Of course, it would be more expected and correct if judges raised and discussed the issue of lack of competence of civilian judges to consider a criminal case during a meeting of judges. It can be assumed that at the time of the meeting of judges that they, having 26 and 29 years of judicial experience, had good faith that extensive experience would help them to administer justice professionally and competently in criminal proceedings as well. However, such a calculation turned out to

116 *Fatullayev v Azerbaijan,* App no 40984/07, Judgment of 22 April 2010 , para 144 <https://hudoc.echr.coe.int/eng?i=001-179167> accessed 18 November 2021.

117 *Kontalexis v Greece,* App no 59000/08, Judgment of 31 May 2011 , para 42 <https://hudoc.echr.coe.int/eng?i=001-104951> accessed 18 November 2021.

118 *Richert v Poland,* App no 54809/07, Fourth Section, Judgment of 25 October 2011, para 42 <https://hudoc.echr.coe.int/eng?i=001-107165> accessed 18 November 2021.

119 Coëme and others v Belgium (n 104) para 98 .

120 *Savino and others v Italy,* App no 17214/05, Judgment 28 April 2009 [Section II], para 94 <https://hudoc.echr.coe.int/eng?i=002-1559> accessed 18 November 2021.

121 *Gorgiladze v Georgia,* App no 4313/04, Judgment 20 October 2009, para 69 <https://hudoc.echr.coe.int/eng?i=001-95161> accessed 18 November 2021.

122 *Savino and Others v Italy* (n 127) para 94.

123 Ibid.

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be reckless and was not confirmed at the stage of consideration by the panel of the first motions of the defence, which prompted the civil judges to self-challenge immediately. 4) The meeting of judges was guided, *prima facie*, by 'good intentions' to ensure the appellate review of criminal proceedings in the Kherson Court of Appeal in order to save costs of obtaining participants in the neighbouring nearest appellate court and the best possible access to court. But, as the saying goes, the road to hell is paved with good intentions. Access to court should not only be formal and optimised as the fastest access to any court and access to the proper composition of the court established by law. 5) As can be seen from the motivational part of the decision of the SCJ disciplinary board, SCJ members were guided by a 'narrow' understanding of the grounds for challenge – only as signs of partiality. According to the essence of the case, the latter is absent, as the judges did not show favour or prejudice to the parties, but they did not meet the requirement of 'lawful composition of the court' for the competence component. 6) Scholars and authors of textbooks and manuals should be as moderate as possible in formulating theoretical definitions, as they can guide law enforcement practice to make erroneous or controversial decisions. 6) The case considered here confirms the relevance of 'a broad understanding of the grounds for challenge' in the doctrine of criminal procedure.

5 CONCLUSIONS

For the effective and correct implementation of the institution of challenge of a judge, the necessary condition is the achievement by professional participants in criminal proceedings of three components: a) understanding of the essence of each of the grounds for challenge at the appropriate level; b) the ability to justify the existence of grounds for challenge and support them with evidence; c) thorough and convincing motivation of court decisions as a result of consideration of objections so that each party perceives it as motivated and fair.

The right to a fair trial (Art. 6 of the ECHR) includes, *inter alia*, three elements provided by the challenge mechanism: a) an *impartial court*, b) an *independent court*, and c) a *court established by law*. The tool of challenge for these three components is a universal means of preventing violations of Art. 6 of the ECHR, and public authorities and officials must act ahead of time so that their state becomes a defendant in the ECtHR (Art. 1 of the ECHR). In the Ukrainian system of grounds for challenge, violations of the requirement of *independence of the court* and the *court established by law* belong to the classification group of *unconditional* grounds for challenge and are covered by the concept of 'legal composition of the court'. Therefore, the grounds for disqualification of a judge (investigating judge, court) are not only circumstances that cast doubt on his/her impartiality and are localised in para. 6 of Chapter 3 of the CrPC of Ukraine, but also the grounds that indicate that the court does not meet the requirements of the 'lawful composition of the court' (Part 2 of Art. 412 of the CrPC), i.e., a 'court established by law' (Part 1 of Art. 6 of the ECHR), localised in various structural parts of the CrPC and the Law 'On the Judiciary and the Status of Judges'. The grounds for challenge (self-challenge) of a judge, investigating judge, or court are the factual circumstances provided by law, which indicate or may indicate their bias or non-compliance with the requirements imposed on them by law.

The current problem in the judicial practice of Ukraine is the understaffing of appellate courts. In some courts, the vacancy rate is up to 80%. As a result, Ukraine suffers, first of all, from the jurisdiction of the 'court established by law' at the stage of appellate proceedings in criminal cases, which courts try to resolve on their own, preferring the formal right to 'access to court' to the detriment of law to the consideration by a qualified

court, established by the provisions of the CrPC and the Law 'On the Judiciary and the Status of Judges', taking into account the criminal specialisation of judges. Secondly, the provision of Ukraine with the requirement of an impartial court at the stage of appellate review of court decisions is endangered by the new wording of Part 1 of Art. 76 of the CrPC, which entered into force in January 2021, which is not fully consistent with the principle of access to justice by an impartial court (Art. 21 of the CrPC), creates a conflict with the provisions of Part 2 of Art. 422-1 of Part 3 of Art. 407, part 2 of Art. 177, item 1 part 1 of Art. 178, item 3 part 1 of Art. 184, item 1 part 1 of Art. 194, item 1, 4 part 2 of Art. 196, part 1 of Art. 422 of the CrPC of Ukraine, does not meet the requirement of legal certainty, and may be the basis for complaints to the ECtHR.

The range of situations that the ECtHR considers *objective criteria of impartiality* is much wider than the *'unconditional'* grounds for challenge under the CrPC of Ukraine and also includes cases of 'personal interest of a judge or their family members', prejudiced behaviour of judges manifested from the outside (objectively justified), and circumstances that a prudent observer would raise concerns about regarding the bias of the court.

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