

## **Dissertation Abstract**

TYMOFEYEVA, A. *Access to an independent and impartial court as a fair trial guarantee under the European Convention on Human Rights*. Prague 2010. Dissertation thesis. Charles University in Prague. Law Faculty. International Law Department. Supervisor Doc. PhDr. Stanislava Hýbnerová, CSc.

The paper discusses the right of access to an independent and impartial tribunal under the European Convention on Human Rights with a focus on compliance of legislation and judicial practice in Ukraine with the standards developed by the European Court of Human Rights in its case-law.

In order to address this issue the first part contains an analysis of the term "right of access to a court" and its components. An analysis of the term "right of access to a court" in a sense of the European Convention shows, that it includes the following elements: 1) the right to institute the legal proceedings and, in certain cases, the right to appeal against a decision of an administrative body or a court; 2) the right to legal aid, including free legal assistance and exemption from the court's costs; 3) the right to hearing by an independent and impartial tribunal with full jurisdiction established by law; 4) the right to hearing and delivery of the court's decision within a reasonable time and 5) the right to enforcement of the final and binding judicial decision within a reasonable period of time.

The second part presents a description of the standards of independence and impartiality of a court, derived from international agreements and opinions of experts from America, Asia, Australia, Africa and Europe. A comparison of the international standards with the principles applied in the case-law of the European Court of Human Rights is a subject of the further examination. In addition, the paper includes a comprehensive explanation of the issues examined by the European Court in assessing whether judicial body provides sufficient guarantees of independence and impartiality.

Respecting independence and impartiality, as indispensable qualities of a judicial body under Article 6 of the European Convention, after a thorough examination of these concepts in international binding and non-binding documents and their comparison with the standards applied by the European Court in interpreting of the European Convention, the author of the paper concluded that the European Court's standards do not differ from the international standards in this sphere. However, the case-law of the

European Court does not contain the interpretation of each and every element of judicial independence. Such a situation is conditioned by the fact that the European Court has the competence to rule only under the applications lodged with it, not under its own preferences. If the issue has not previously arisen in a case before it, the European Court may not provide its interpretation of it.

With regard to the standards of independence and impartiality of the judiciary, it is possible to conclude that in the assessment of each case the European Court examines all the guarantees of independence of the judiciary together. The Court does not set forth exact strict requirements, such as, that the term of office of the judges should be at least five years, or that if the president may not appoint the judges, because this demonstrates executive power interference in the process of adjudication. Under a general rule, the Member States to the European Convention enjoy a margin of appreciation, which means that the state is free to choose the method to ensure its legislation is in compliance with the European Convention standards. However, it is not possible to claim that this margin is too wide, because in the assessment of all elements of the test of independence it should show that the judicial authority provides appropriate guarantees of independence and impartiality that meet the requirements of the European Convention.

Analysis of the Ukrainian legislation and practice of Ukrainian courts concerning the right of access to an independent and impartial court is the subject of the last chapter. The judgments of the European Court where it found violations of Article 6 of the European Convention by Ukraine are the basis for the analysis. In August 2010 the legislative reform on the state of the judiciary took place in Ukraine. The judgments and decisions of the European Court served as an inducement for reform to a substantial extent in virtue of the need to bring the Ukrainian legislation in compliance with the requirements of the European Convention. Comparison of the old and new legislation is analysed throughout the entire third chapter.

Study of the European Court's case-law regarding the right of access to a court in Ukraine shows that the main problems, that lead to a violation of the ECHR in Ukraine, are the refusal to deal with complaints and to deliver a final decision on the merits, as well as a pressure of police and prosecution in respect of the suspects aiming to force them to waive the right to legal aid. Nevertheless, the most frequent violation of the European Convention is an inability to enforce judicial decisions, leading to a large

number of applications to the European Court. Regarding judicial independence in Ukraine, judges are usually faced with various aspects of dependence on the executive and to a lesser extent on the legislative power. The material dependence is affected by low wages and how judicial money is allocated. Furthermore, administrative dependency of judges is influenced by the traditional “respect” to the opinions of executive power and the direct subordination of the judges of military courts to the command of the armed forces, which has been resolved by the liquidation of military courts in September 2010. Lack of judicial impartiality was shown for example in the situation when a judge was inclined to one party to the proceedings - a company that supplied the court with the computers or when a judge ignored the law in refusing to hear an individual as a witness.

The main conclusion, that emerges from the analysis on the compliance of the judicial practice in Ukraine with the case-law of the European Court of Human Rights, is that a breach of the European Convention was mostly due to the failure of individual judges to apply the law appropriately, not because of inconsistency of certain Ukrainian laws with the European Convention. However, this situation stems from the inexactness of the legal provisions, which permits judges to interpret legal acts in their own way. Economic and political conditions in the country in general are also contributing factors, where the absence of a democratic legal tradition results in undue pressure on judges from both the other branches of power and parties to the proceedings.

In conclusion, the paper refers to the possibilities of a future follow up study, aimed at exploring whether the judicial reform of 2010 is in compliance with the European Convention, given that there are not any judgments of the European Court dealing with this issue.