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THE FUNDAMENTAL RIGHT TO AN INDEPENDENT AND IMPARTIAL JUDGE (CHALLENGING A JUDGE)

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Introduction

The principle of independence and impartiality of judiciary (judges and courts) seems to enjoy universal allegiance on the level of national and international legal instruments. *The Universal Declaration of Human Rights* (Art. 10*), The Covenant on Civil and Political Rights* (Art. 14-1) and *The European Convention of Human Rights and Fundamental Freedoms* (Art. 6) recognise the guarantee of an independent and impartial court as a human right to a fair trial.

It is understandable that requirements of independence and impartiality are closely linked and influence each other. However, the principles of independence and impartiality are sometimes divided in two. According to the concept of impartiality it is supposed that the judge should personally not have a pre-conceived view on the merits of the case. Impartiality seems to be the earlier and the most important principle in comparison with the principle of independence with respect to fairness and objectivity of judicial decisions. By contrast, independence of a judge or a court is grounded on the basic principle of separation of powers where different types of powers are entitled, with some specific and exclusive competencies.1

The procedural difference is that impartiality concerns directly the judge. On the contrary, judicial independence is mostly the obligation of a State: the objection is based in this case on elements of dependence as concerns the interrelationship of the judiciary with other powers of the State system.

Both principles are guaranteed by a possibility to challenge the judge in judicial systems of the States in question. The fundamental right to an independent and impartial judge will be examined here, therefore, from the prospective of challenging a judge (or a court) in the light of European legal practice. The topic will be considered as a fundamental right of a petitioner or his/her attorney to challenge a judge on the ground of non-respect of the principle of the impartiality (the objectivity and fairness) and the independence.

This topic is examined often not only in terms of properly doctrine of an independent and impartial judge, but also in terms of a doctrine which could be referred to as the right to a „competent judge" or „legally determined judge" *(„gesetzlicher Richter*").2 It is substantially close to the principle of independent and impartial judge and has been developed especially in Germany.

1. The Basics of the Conception of the Right to an Independent and Impartial Judge

It is possible to sum up international experience with respect to several functional and organisational preconditions and consequences of the concept of the right to an independent and impartial judge in a set of following elements as follows.

1. The independence of judges and courts means firstly that they shall decide cases on the basis of the laws and under conditions that will make it impossible to exert outside pressure on the judge. Under Art. 6. 1 of the *European Convention of Human Rights and Fundamental Freedoms* (ECHR), an independent and impartial court must hear cases established by law.

State or government agencies, members of the legislative and other officials, political parties, political and public organisations or natural persons are prohibited from interfering with the

activities of judges and courts, and anyone violating this rule will incur the penalty prescribed by law. The tools of influence on the part of mass media, human rights organisations, rallies, pickets and other actions merit normally a special, but heterogeneous regulation within national and international legal systems.

The provisions, which prevent judges from taking part in the activities of political parties and other political organisations, are of certain importance in a series of countries. However, the principle of equality implies that members of the judiciary have a right to freedom of expression, belief, association and association as any other citizen. According to *Basic Principles on the Independence of Jurisdiction,*3 adopted by the United Nations General Assembly, judges nevertheless shall conduct themselves in such a manner as to preserve the dignity of their office, as well as the impartiality and independence of the judiciary.

It is commonly recognised that when the activities of a judge or a court administrating justice are being interfered with, the court or the judge must react in accordance with procedure established by law.

2. The incompatibilities of the status of a judge with other functions are another guarantee of independence and impartiality of the judiciary. There were several cases in the ECHR with respect to the impartiality and independence of judges, for example, when the role of the prosecutor gave some arguments to challenge the independence and impartiality of a court or a judge in the criminal and civil procedures in a number of countries.

The European Court of Human Rights has had to give its opinion on a violation of the principle of impartiality if a person, who has acted in a case as a prosecutor, later sits in the same case as a judge (*Piersack v. Belgium*, 1982). A similar breach is also committed if a judge, who during the preliminary investigation of the case has exercised the functions of an examining judge, later sits in the same case during the court hearing (*De Cubber v. Belgium*, 1984).

Violations of the right to fair trial was found in some other cases under the ECHR, when, for instance, one of the members of the court or the jury was subordinated to one party of the dispute (*Sramek v. Austria*, 1984).

3. The provisions of the laws on the procedures of appointments of judges should be considered to be one of basic conditions guaranteeing the independence of judges. National legal systems represent very different models of appointment of judges (by parliaments, by the government with consent of the parliaments, election by the population, by the head of State and some others). The main defect of the judicial systems of newly independent states is the absence of the eligibility of courts and judges which is often ignored especially on the grass-roots level under the pretext of possibility of dependence upon local or regional authorities. In reality, the eligibility should serve as a principle of maintaining of fundamental responsibility before the population and not the executive or legislative authorities.

The timing terms of appointments are another aspect of this problem. As concerns as international practice, judges do not necessarily hold positions for life for the sake of independence and impartiality. It is reasonable that, for example, there are some flexible solutions: as provided in the Constitution of Kyrghyzstan, terms for judges range from 15 years for Constitutional Court judges to 3 years for first term local judges.

The representative character of courts with respect to the ethnic, colour, racial, sex, professional, social, birth, status origin or age composition of the population shall be reflected by the

appointment of persons to the court. Persons of one ethnic origin may be appointed, for example, disproportionately to the key positions in the judicial system. It can lead to charges by representatives of other ethnic groups that the system is arbitrary and unfair and that the courts treat representatives of one ethnic group more leniently than members of other groups. 4

4. The transfer of judges from the office or the removal of judges implies a possibility of influence to a decision and questions the independence of a judge. Several Constitutions and statutory provisions prohibit the removal of judges. Moreover, several rules established by provisions of laws, pursuant to which criminal proceedings may not be instituted against judges (who may not be arrested or restricted in their personal freedom without the consent of a special agency), also helps to secure independence of judges.

Basic Principles of the Independence of the Jurisdiction provides additionally for personal immunity from civil suits for damages for improper acts and omissions, for suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties, for the rule that disciplinary suspension or removal should be the subject of independent review.

5. Normally, the Constitutions often guarantee financial independence by means of financing through the central budget. It is considered that adequate financial situation of the judiciary is an additional guarantee of independence. The delay of payments or very low judges' salaries may lead to a well-grounded view among lawyers and citizens that all but a very few scrupulously honest judges are open to bribes.

6. *Basic Principles of the Independence of the Jurisdiction*, which has an advisory legal nature, tries to codify a few principles and terms of promotion of judges, respect for professional secrecy and several a number of other elements.5

2. Several Procedural Reasons of Challenging the Impartiality or Independence of a Judge under the European Convention of Human Rights

The defence attorney may challenge the court and the judge on the ground of a series of principles, which are close to the principle of an independent and impartial judge.

1. As it is universally recognised (Art. 6.1 of the ECHR), everyone is entitled to a public hearing of his/her case and the judgment of the court shall be pronounced publicly. Without doubt, the principle of a public hearing is of great importance in every democratic State and exceptions may be made only when during the public hearing of a case, an interest of special importance may be prejudiced.

However, in some cases the ECHR provides for the possibility of excluding the press from a trial or a part of the trial. This may be done in the interests of morals, public order or national security in a democratic society or where the interests of juveniles or the protection of the private life of the parties require it, or in other special circumstances where publicity would prejudice the interests of justice. The example of denial of publicity is represented by the case X v. UK (1998) before the ECHR, when the public hearing at national level was considered as an inhuman and degrading treatment of minors.

It is recognised, public hearing of the case must be held only at the court of the first instance. At the appeal stage, the proceedings may be conducted in writing. The ECHR voiced this opinion in the case of *Sutter, Axen and Pretto v. Italy* (1983). In the case of *Fredin v. Sweden* (1994) the Court decided that the courts which deal with a case at first and last instance may also meet the requirement of an oral hearing by allowing a public hearing of the case.

2. The principle of the presumption of innocence is laid down in Art. 6.2 of the ECHR, to which special importance is attached by every State subject to the rule of law. The cases of the ECHR are connected very often with unequal or inequitable distribution of expenses between the parties to litigation. Such facts are interpreted often as a violation of impartiality of judges.

Some problems relating to the presumption of innocence arise owing to the practice of the preliminary investigating bodies in some Central and Eastern European States. In the case of documents, such as the indictment, it is sometimes stated that "the guilt of the accused has been proven" or "has been proven by this evidence". Thus, judicial officers declare a person guilty of an offence before a court has passed a final judgment, and this violates the principle of the presumption of innocence. Recently, however experts of the Council of Europe noticed that such indictment acts have been presented in criminal cases less frequently in judicial practice of Central and Eastern European States.

3. The non-respect of several procedural norms could give grounds to challenge a judge. Art. 6.3 of the ECHR provides for a series of procedural rights of the accused persons charged with a criminal offence. The same Article states that everyone has the following minimum rights:

- to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- to have adequate time and facilities for the preparation of his defence;

- to defend himself in person or trough legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given if free when the interests of justice so require;

- to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Protocol 7 of the ECHR provides additionally for the right to an appeal instance, the right to compensation in the case of a judicial mistake, the prohibition of the second prosecution for the same act within the jurisdiction of one state. The first point could be very often absent in the specialised jurisdictions (for instance, courts on mass media or patent court).

4. The principle of "equality of arms" is one of the tools of the attorneys to challenge the decisions of the courts. As Article 6.1 of the ECHR provides that "everyone is entitled to a fair trial, both parties to the trial must be treated equally and must be entitled to the same opportunities to prove their case."

The judgment delivered by the European Court of Human Rights on 27 October 1993 in the case of *Dombo GmbH v. Holland* may serve as an example of a breach of this provision of the

Convention. It was established in this case that Holland had violated the principle of equality of the parties in a civil case, as the parties had not been provided with equal opportunities to call witnesses. In the civil dispute between the company *Dombo* and its bank, concerning the freezing of accounts, the court refused to question as a witness a former manager of the company, who was one of the parties to the dispute. However, the manager of the bank branch, which had *Dombo*'s account was questioned as a witness even though *Dombo* objected to this.6

5. The guarantee of judicial protection of rights and freedoms of a petitioner is the right to address not only infra-State judicial systems, but also inter-State systems of protection of human rights and fundamental freedoms (Russian Constitution, Art. 46.2).

The system of the ECHR in Strasbourg is currently the most authoritative tool of regional human rights protection. *The Convention* and *the Commission on Human Rights* of the Commonwealth of Independent States established a similar system.7

3. The Concept of a Competent Judge and the Principle of the Impartiality and Independence

The term of right to a "competent judge" is interpreted in the West, for example in German legal teaching, more as the fundamental right of a party to a dispute to deal with a judge who is determined in accordance with a stable and concrete law in order to avoid so called fluent or mobile competence cases ("*bewegliche Zuständigkeit*" is prohibited, for example, in Germany).8 Initially, the right was directed against the interference of the executive in the judicial branch. Later, the interpretation and the application of this principle was extended to some guarantees of independence of a judge or a court within the judiciary itself.

The provisions of many Constitutions institutes the obligation of the court to be bound by the law and justice (German Basic Law Art. 20.3), but also the obligation of a State to insure "the competent judge" ("*gesetzlicher Richter*" or "legally determined judge"). Art. 47.1 of the Russian Constitution provides for the "competent judge" in terms which are very close to the German interpretation of this doctrine.

The consequence of this norm is the impossibility to transfer the case or the competence of a court to trial a case. Under the principle of "competent judge" the legislative is obliged to establish such laws to define as precise as possible such a judge in order to avoid the possibility of a multiple jurisdiction for one case and to provide, thus, conditions for "competent judge".

Special organisational tools include the following techniques for securing this principle within the judiciary itself : formation of schedule of cases (*Geschäftsverteilung*), stability of composition of the court, stable application of legal regulations with respect to the internal competencies and functions, clearly defined rights and duties of Presidium of a court.

It is recognised in the Western legal doctrine that the protected persons under the provisions of a "competent judge" are every party to the dispute - public plaintiff, the State representative, other public law entities and even stateless and foreign public law entities which are parties to the dispute.

Another consequence of the right of a "competent judge" is the prohibition of exceptional (extraordinary) courts ("special courts" in terms of the Art. 101.2 of the German Basic law9). German scholars apply the notion of "the competent judge" or "the competent court" not only in

a proper sense of this word to ordinary courts and specialised courts, but also to voluntary arbitration, investigating judge, Federal Constitutional Court and European Court of Human Rights in Strasbourg.

In guaranteeing the impartiality of the court, in particular, in several Central and Eastern European states and the former Soviet republics, certain problems may arise because no commonly recognised principles on schedules for the distribution of the workload are being drawn up at the international level. This is, nevertheless, necessary as a requirement for guarantee of objectivity and impartiality by means of avoiding eventual manipulations. The judiciary could follow the example of countries such as Germany, and introduce annual or half-yearly schedules for distribution of the workload in the courts. This is an organisational issue, which does not require the enactment of separate law, so experts recognise that the instructions of the Ministry of Justice would suffice.

Conclusion

Normally, contemporary Constitutions and the Laws on judiciary of newly independent States provide formally for an independent judiciary. The example of such a provision is given by the Constitution of the Russian Federation, which mentions in Art. 10 "autonomy" (*samostoyatelnost*), in particular of the judiciary . It provides for the binding of the courts by the laws (Art. 15.2). The Constitution of the Kyrghyz Republic (Art. 79. 3) stipulates the determination of the status of courts and judges by Constitutional laws. The same Article institutes: "Justice shall be administered only by the court". It provides for the subordination of judges only to the Constitution and the laws, for guarantees for the right of integrity and immunity, as well as for guarantees of social and material nature of their independence.

Many constitutional and statutory provisions of Central and Eastern European States, as well as of newly independent States are nominally adequate to the internationally recognised principles of independent and impartial justice including the right to a "competent judge." However, the promulgation of further legal norms and practical implementation of the principles contained thereinshould be decisively developed and improved in order to safeguard the objectivity and fairness of judicial procedures.

Independence and impartiality of courts represent a fundamental cornerstone of the judiciary in the rule of law State. These two principles form "an absolute right that may suffer no exception".10 The Special Rapporteur of the Commission on Human Rights called judicial independence and impartiality to form part of the "general principles of law recognised by civilised nations" in terms of Art. 38 of the Statute of the International Court of Justice.11

1 See *Final Report by the Special Rapporteur L. M. Singhvi, The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers,* UN Doc. E/CN.4/Sub.2/1985/18.
2 A close traditional Russian conception concerns the principles of strict observance of jurisdiction (*podvedomstvennst'* and *podsudnost'*)
3 *Milan (1985) GA Res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985*. See also *Draft Declaration o the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, Report of L. M. Singhri, E/CH. 4/Sub.2/1988/20/Add. 1, 20 July 1988.

4 It may be considered as a discrimination, which is one of the major violations under many international legal acts.
5 *Milan (1985) GA Res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985.*
6 The Court of Human Rights held that there had been a violation of the Convention, but only by five votes to four.
7 The Convention met some problems with ratification in Member-States.
8 Historically, the notion appeared in the Constitution of the French revolution of 1791. The German draft Constitution of 1848 (*Paulskirchenverfassung*) used the similar right in Art. 175. The Prussian Constitution of 1850 applied the same principle in Art. 7. Later, *Länder* constitutions and the Law on the Imperial Law on Justice of 1875 (§1*6). Weimar Constitution* provides for the same right in Art. 105 (1919) and the German basic law of 19*49* (*Grundgesetz*) - in Art. 101.1. Gradually this right was recognised as a fundamental right guaranteed by the Constitution.
9 Exceptions from the Art. 101.2 are the courts of special jurisdictions, which should be established by the laws, for example: family, peace, communal, professional and juvenile courts, professional courts (attorneys, medicines, engineers, patents courts), and political party or association jurisdictions.
10 *Human Rights Committee, Communication N° 263/1987 (Gonsales del Rio v. Peru) CCPR/C/46/263/1987,* para. 5.
11. See Final Report by the Special Rapporteur L. M. Singhvi, The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc. E/CN.4/Sub.2/1985/18.