

JUDGE IMPARTIALITY IN COMPREHENSIVE JUDICIAL DEVELOPMENT

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Abstract

General human rights instruments guarantee the right to a fair trial before independent and impartial court. International and national legislation explicitly provides that the court should be impartial. But how can we understand that the court is impartial? Should there be an objective decision or should there be impartial decision-making process?

Nowadays we often think about how it is possible to ensure judicial impartiality. How an impartial court may exist in democratic society, and whether a society should have any criteria of judicial impartiality to ensure that the public trusts the courts and judges.

The aim of the court's decision is not only to achieve an equitable settlement of the case, but the decision shall be understandable for the society, and the decision shall be made in way that the society can say that the court is impartial. Through the court decision the court obtains the public confidence to the whole legal system and to the idea of the judicial state. Impartial court is the base of an independent and democratic society.

Namely, an impartial court is the fundamental of people basic rights, which also makes important that the *casa law* has the most important public role, and the court decision shall be comprehended and accepted by the society.

Undoubtedly, political and economic changes affect the right, but the basic values of society remain. Even in ancient Egypt and in ancient Greece the judicial impartiality was the foundation of the fair trial. But that time concept meaning of 'judicial impartiality' has changed and is not equal to the modern understanding. That is happening due to the continuing changes in the society. Thus, it would have to say that the judge impartiality as a precondition for justice is derived from the values of society. Over the time public vision of how the judicial objectivity is attainable is changing, public perception of a fair decision and reasoning also is changing, but it does not affect the concept of 'judicial impartiality'. The concept of judicial impartiality has been changing within the changes in the society and it reveals in each of the societies life period.

Today in the democratic European countries with the term 'judicial impartiality' we understand the court's ability to treat the parties equally (rather than judicial behavior must always be equal); the court's ability to make a ruling in such way that if a particular case will be ruled by another judge the ruling would be similar and with the same result. Today in all national legislation we are implementing the court's duty to be impartial because the public demands for judicial impartiality increases.

Keywords: Judge Impartiality, Judgment, Judicial Ethics, Court, Criteria of Judicial Impartiality.

Introduction

All the human rights remedies and the instruments shall be guaranteed by judge impartiality. The research of subjective category of judicial impartiality has the theoretical and practical importance. In theory, the study of subjective category of judicial impartiality makes it possible to make evidentiary considerations as to whether a judicial impartiality has to be defined as written legal rule. Clarification of criteria of judicial impartiality can define the importance of judicial impartiality and its influence on the judicial system and judges.

The object of the research is the subjective category of judicial impartiality and its development during the centuries.

The report contains an element of scientific novelty provisions - the lack of trust of judicial system appears not because of judges less professional or bias but because the society become more democratic, express its view and understands its basic rights. The research shows the tendency of groundless exaggeration of judicial bias that is based on

society's attempt to define the category of judicial impartiality too wide.

This shows that the problem of research of the concept of judicial impartiality takes one of the main role in the legal theory.

The aim of the research is to analyse the concept of judicial impartiality. The most important requirements for 'judicial impartiality' will be discussed researching basically the democratic developed countries in the historical view.

The research methods are:

With the analytic method the concept of judicial impartiality is research in the historical sources and other legal sources. The comparison and evaluation is the base of the analysis.

The comparison method is used to establish the base of development of judicial impartiality. With the comparison method the concept of judicial impartiality is valued.

The definition of judicial impartiality

„Every person in life has to deal in one form or another, often very severe, with civil or criminal court. Therefore a correct understanding of the court tasks and the ways to achieve them, [...] seems is an urgent need of each developed man.”¹ Quite simple concept of 1915 didn't lose its urgency even today.

The judicial impartiality as the important element of the society originates in ancients, for example in the Old Testament we can see the defined principles on the judicial impartiality: *Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to decline after many to wrest judgment: Neither shalt thou countenance a poor man in his cause. Thou shalt not wrest the judgment of thy poor in his cause. Keep thee far from a false matter; and the innocent and righteous slay thou not: for I will not justify the wicked. And thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous.* (Ex. 23:2-8)²

The concept of judicial impartiality, as today we understand it, is defined in most international and national laws and these laws emphasizes the principle of judicial impartiality as each person's guaranteed minimum rights. For example *The International Covenant on Civil and Political Rights Article 14* defines that all persons shall be equal before the courts and tribunals, furthermore in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Human Rights Committee has unambiguously held that the right to be tried by an independent and impartial tribunal is an *absolute right that may suffer no exception*.³ Thereby there are the rights that shall be applied in any circumstances and in any court.

The most important judicial impartiality modern definition comes since 1982, where the concept of impartiality appears in the decision of European Court of Human Rights, that is, *impartiality* normally denotes lack of prejudice or bias. But the Court has repeatedly held that what is at stake in maintaining the impartiality of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large.⁴

The same definition is included in the opinion of the Lord of Appeal for Judgment in 2001 in *Magill v. Porter* case that states that the question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias.⁵

The most important international laws and court judgments unanimity recognizes that judicial impartiality normally denotes absence of prejudice or bias, and a distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.⁶

For example, the United States Code of Judicial Conduct requires a judge to be disqualified from presiding over any proceeding in which the judge's impartiality might reasonably be questioned. This means that judges are disqualified from

presiding over cases not only when they are in fact biased to one side or the other, but also when there is an appearance of bias to the reasonable observer. Hence, judges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system.⁷

Therefore there are grounds to admit that judicial impartiality is ensured when the society recognizes it. That is the judicial impartiality is guaranteed not only by the implementing the law, but the society shall be assured that the impartiality is ensured and the court implements the law fairly and accurately.

Today's the concept of the judge impartiality is in possession of the social characteristic.

Latvian lawyer of the arbitration court Leons Modris Lula-Frankēvics (*Leons Modris Lūla-Frankēvics*) once remarked that the definition of judicial impartiality is very simple – people can make mistake, but this can't be made intentionally.⁸

The development of concept of judicial impartiality

There is a reason to assert that the concept of judicial impartiality as a part of a society didn't dominate in all history periods. Previously the judge impartiality was understood only as the judge duty to implement the law fairly and accurately.

The concept of judicial impartiality as a research topic or the topic of the discussion was known even since 13 century in all developed countries.

Later, since *15 century*, the judicial impartiality as the legal principle in different societies wasn't emphasized a lot. The concept as itself was known but not dominated in the court system – from the time when the Holy Roman Empire adopted (ancient) Roman law as the national law – circa *1494*, protesting judicial incompetence, and having nothing whatever to do with *judicial impartiality*.⁹ Namely it is possible to come to a conclusion that judicial impartiality as the compulsory criteria of judging existed but this principle wasn't uppermost in the legal system. The judicial impartiality had society importance that times and this concept wasn't called into question. There was no need to define the judicial impartiality in the law because the principle was a symbol of a fair court.

Of course there were precedents when judicial impartiality was doubted, and such doubts were the reason of developing modern legal system. For example, in 1557 during the French monarchy the Privy Council (also known as “*Conseil privé*” or “*Conseil d'État privé*”, or “*Conseil des parties*”¹⁰) was established. The need of establishing such legal authority (a completely autonomous court of justice) was the doubts of the King's council, the doubts of its impartiality.

The history shows that the court as the representative of the society was the authority that should undoubtedly ensure judicial impartiality.

In *17 century* the concept of judicial impartiality increases in the society but it is valued as the clearly understood concept that does not need any additional interpretations.¹¹

However, that time, although the clear criteria of judicial impartiality and specific requirements for the court were not inquired, it can be seen the first modern interpretation of the concept of judicial impartiality, that is, the interpretation

of judicial impartiality that we accept today. For example, describing the court procedure and its impartiality, one important feature was underlined to the judged “direct proceedings with scrupulous fairness toward prisoners”.¹² It was said that the court not just impartial and fair, but it is impartial and fair to the prisoner, to the accused person in criminal cases or any other party of the process. So the social criteria get its higher value – the judicial impartiality is valued not only by the court, but also by the society.

Just one century away, when the establishment of the court was considered as the method that will ensure the judicial impartiality, the 17 century society again doubts its own promoted method and tries to invent new method to ensure the judicial impartiality of the courts.

The judicial impartiality as one of the main court principle is discussed also in the later time period, and its value increases. On *September 17, 1787*, in Philadelphia, citizens gathered outside Independence Hall as word spread that the deliberations of the Constitutional Convention had concluded. [...] This assault upon *judicial impartiality* is a growing cancer upon our constitutional republic.¹³

In 19 century the first criteria of judicial impartiality are developing: the personal interest of the case and cognate¹⁴.

Simultaneously, the society is invited to agree to an undistorted understanding of judicial impartiality, not interpreting this concept extended, and to admit that the symbol of judiciary always will be impartiality and fairness. The history shows that the state as the representative of the democratic society invites the society not to doubt the court impartiality – *we shall never call in question the probity and judicial impartiality of a French jury. I believe that it would be unjust to do so; there are not materials for a packet panel; the spirit of a French jurors is too versatile and independent of the system*¹⁵.

The judicial impartiality in the democratic countries always was a fundamental component of the justice.

At the *end of 19 century*, not only the judicial impartiality is researched as the main court principle, but the strict criteria of judicial impartiality are set. For instance, one of such criteria was political bias or personal prejudice.¹⁶

The political non-intervention as the treat of judicial impartiality is discussed in different countries, and the clear position on the court independence and its separation from other state powers is detected. The court can't intervene into political work, and its intervention makes reasonable doubts of the judicial impartiality.¹⁷

Beginning with *20 century* the society starts to discuss the concept of judicial impartiality and the discussion is about ensuring the judicial impartiality in the court system. The society and political process requires not only fairness judgment, but it requires fairness judgment for the society; the society requires its own fairness and therefore the society each time examines the court decision whether the principles of fair trial are ensured.

Public lack of trust in the court system becomes higher, and therefore it becomes necessary to develop legislation to such an important principle as judicial impartiality. For example it is said in the legal publication that it had the public effect of shaking confidence in the judicial impartiality¹⁸.

Why this trust to the court system decreases? We shall say that the role of the person and the state changed during

this time period, and therefore the role of the court changed. The lack of trust appear not because the judged become less professional or bias, but because the society become more democratic, express its view and understands its basic rights.

The society lack of trust contributed to a number of international legislation, as well as to the court's duty to be impartial.

The whole society facilitates implementation of the various tools that focus on the public mind of its own, namely, with these instruments the public is ready to believe in judicial impartiality.

On the one hand the public says that it doesn't believe in judicial impartiality, but on the other hand the society allows certain measures, which, however, will satisfy the needs of preservation. Thus, international law is incorporated the general legal principle that the court must be impartial, and therefore the national legislation, case law and doctrine are found in a variety of criteria that define either the impartiality of the court, either possible judicial bias criteria.

Public pressure and the loss of trust determine the consequences of Second World War, after which the people felt the need for greater protection and stability.

*International Covenant on Civil and Political Rights*¹⁹ article 14.1 says that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Here it is seen that the international laws emphasizes the value of the concept of judicial impartiality. Professor Christian Tomuschat (Berlin) says that after the horrors of World War II, a broad consensus emerged at the worldwide level demanding that the individual human being be placed under the protection of the international community.²⁰

Another one important international document that took into force on 1985 is *United Nations Basic Principles on the Independence of the Judiciary*²¹. The article 2 says that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The society need to get more confidence in the fair trial facilitating another international act that shows the reasonable doubt of the society that trust of a fair trial had been diminished.

On November 1, 1998 the *European Convention on Human Rights*²² came into force. Article 6 provides a detailed description of right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, and today judicial impartiality as a justice basic value is analysed in the *European Court of Human Rights*. One of the first judgments that define the concept of judicial impartiality and the possible violation of the Article 6 was made in 1982. The definition *judicial impartiality* had been defined in the judgment of the Court of Human rights in the case *Piersack v. Belgium*: “Impartiality” normally denotes lack of prejudice or bias²³.

According to the several judgments made by the European Court of Human rights the society can define the list of the indication that determines the judicial impartiality.

Also during the development of the justice system the criteria of judicial impartiality were defined. The huge input into developing the concept of judicial impartiality is made by prof. Touchie J.C.W, who defines three criteria under which the impartiality of decision can be assessed: *replicability of decision, commonality of criteria of validity and similarity of rank-order over such criteria.*²⁴

For instance, proceeding the implementation of the general principles into national laws, the United States of America in 1974 amended the federal recusal law, that specifically removed any so-called “duty to sit” in favour of a general standard requiring recusal if there is a reasonable basis for doubting the judge’s impartiality. The purpose of that change was to enhance public confidence in the impartiality and fairness of the judicial system.²⁵

Namely, researching the principle of judicial impartiality in the historical development there was a need for legislative action to regulate the observance of the principle. A clear understanding of judicial impartiality being undermined because of the society’s expressed doubt, and at the same time the society begins to develop different measures to ensure the judicial impartiality.

Further steps on developing the judicial impartiality

During the research it was shown that if the judicial impartiality was doubtless till 17 century, then the first doubts arise in the late 18 century and in the beginning of 19 century.

Different historical process encouraged the need for society to define their basic rights into legal acts. Also today we see the tendency towards the weakening the society sureness of the judicial impartiality. On the edge of 18 and 19 century there was the start of the process were the society’s distrustfulness prevail over the judicial system and determined its. Such tendency is continuing and today the legal system has to make the researches not only on the defining the necessary indications or criteria on how to ensure the judicial impartiality, but the most important today is to develop the instrument on how to make society to trust on fair trail, and here not only legal instruments, but social, politics, psychological etc. instrument become more important.

The exaggerating the doubts of judicial impartiality will lay the judicial system and all society to irreversible frustration.

The problem of unreasonable society doubt on lack of judicial impartiality and on judge unreasonable refuses to recuse already is started to be researched, but still the future of judicial impartiality looks bleak²⁶.

In the democratic states the judicial impartiality is ensured and the state has to control the society on its requirements on more impartial courts. The democracy means the power of the people, but the court system is also the part of this society. We can’t look on the court and the society separately – the court is represented by the professional society. Therefore it is shall be critically valued that the society doubt the judicial impartiality because in such way the society doubts its own principles. Society is unimaginably more complex now, several centuries on, and of course the needs of society grow, but these needs can’t disrupt the society. The aim of the state is not to allow the society self-disruption.

Different philosophical concepts of impartiality exist. According to Bernard Gert, “A is impartial in respect R

with regard to group G if and only if A’s actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions.”²⁷ Impartiality does not require, however, that individuals are treated equally under all circumstances; therefore the concept that there shall be strict criteria of judicial impartiality is false. People should be treated differently if they merit different treatment according to external and objective morality. Impartiality requires is not that everyone receive equal treatment, but rather that everyone be treated as an equal.²⁸

According to the mentioned, if the society will follow the concept that the criteria of judicial impartiality shall be defined, the society will disrupt itself due to the fact that such criteria are against of the definition of the judicial impartiality.

Conclusions

1. The principle of court impartiality and independence is not only the prerequisite for democratic society but also requires the society’s progress to the rule of law;
2. The doubts about the judicial impartiality as the value appears on the edge of 18 and 19 century, that was determined by the social and political process;
3. The lack of trust of judicial system appears not because of judges less professional or bias but because the society become more democratic, express its view and understands its basic rights;
4. In the future the society has to realize the increasing of the doubts of the judicial impartiality, and the democratic society has to provide the limits of its doubts.
5. The definition of the criteria of judicial impartiality will disrupt the society.

References

- 1 Судебная реформа. Под ред. Н.В. Давыдова и Н.Н. Полянского. Москва: Книгоиздательство «Объединение», 1915, с. VII.
- 2 The Old Testimony, Exodus.
- 3 Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional Training Series No. 9, United Nations, New York and Geneva, 2003, p.118 (referring to *M. Gonzalez del Rio v. Peru*, 1987).
- 4 European Court of Human Rights, August 28, 1997, *Worm v. Austria*, No. 83/1996/702/894, §40; European Court of Human Rights, October 26, 1984, *Piersack v. Belgium*, No. 8692/79, §30.
- 5 House of Lords, December 13, 2001, *Magill v. Porter*, Nr.[2001] UKHL 67, §105.
- 6 European Court of Human Rights, October 26, 1984, *Piersack v. Belgium*, No. 8692/79.
- 7 Jeffrey M. Sharman Jeffrey M. Sharman Judicial Ethics: Independence, Impartiality and Integrity, Washington, D.C.: Inter-American Development Bank, May 19-22, 1996, p.15-17.
- 8 Ļūļa-Frankēvics L.M. Objektivitāte pāri visam Intervija. *Jurista Vārds*, 2008.gada 28.oktobris, Nr.41 (546).
- 9 Simmonds A. Amah and Eved and the origin of legal rights., *S.D. L. REV.* 2000 / 2001, No.516, p.46.

- 10 Article *Conseil du roi de France* from the French Wikipedia, retrieved on September 2, 2006.
- 11 Bellany A. The Politics of Court Scandal in Early Modern England, News Culture and the Overbury Affair, 1603-1660. Cambridge: Cambridge University Press, 2002, p. 232.
- 12 From *Sir MATTHEW HALE* (Nov 1 1609 - Dec 25 1676), UK lawyer, bibliography, Hostettler, John (2002). *The Red Gown: The Life and Works of Sir Matthew Hale*. Chichester: Barry Rose Law Publishers, p. 229.
- 13 Donald L. Burnett Jr. A CANCER ON THE REPUBLIC: THE ASSAULT UPON IMPARTIALITY OF STATE COURTS AND THE CHALLENGE TO JUDICIAL SELECTION, 2007, Fordham University School of Law Fordham Urban Law Journal, 34 Fordham Urb. L.J. 265.
- 14 From *Honorable Edward Frost* bibliography, Men of mark in South Carolina: ideals of American life: a collection of biographies of leading men of the state, Volume 3, James Calvin Hemphill, Men of mark publishing company, 1908, the New York Public Library, second edition 2007.
- 15 National Intelligence, Washington, April 26, 1842, No.6172.
- 16 The Nelson Examiner, Saturday, August 14, 1858. Nelson Examiner and New Zealand Chronicle, Volume XVII, Issue 65, 14 August 1858, Page 2.
- 17 The Green caldron (1931), University of Illinois (Urbana-Champaign campus), Volume: 14-16 (1944-1947), Digitized with permission of the University of Illinois Board of Trustees, Publisher: [Urbana, Ill. : University of Illinois].
- 18 Boston Evening Transcript, July 8, 1913, page 4.
- 19 International Covenant on Civil and Political Rights has been adopted on December 16, 1966, in force from March 23, 1976
- 20 Christian Tomuschat, the International Covenant on Civil and Political Rights, United Nations Audiovisual Library of International Law, United Nations, 2008.
- 21 United Nations Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- 22 European Convention on Human Rights, 01.11.1998.
- 23 European Court of Human Rights, October 26, 1984, Piersack v. Belgium, No. 8692/79.
- 24 Touchie J.CW. On the possibility of impartiality in decision making. Macquarie Law Journal, 2001, nr.2.: <http://search.informit.com.au/documentSummary;dn=344373982007218;res=IELHSS> [December 26, 2010].
- 25 Statement of Senator Russ Feingold On the Nomination of Judge Samuel Alito, Jr. to the United States Supreme Court, http://chuckcurrie.blogs.com/chuck_currie/the_courts/.
- 26 Monroe H. Freedman, Judicial Impartiality in the Supreme Court - The Troubling Case of Justice Stephen Breyer, Oklahoma City University Law Review, Forthcoming, Hofstra University School of Law, Legal Studies Research Paper Series, Research Paper No. 05-23, 2005.
- 27 Gert B Moral Impartiality. Midwest Studies in Philosophy XX.: 1995, p.104
- 28 Dworkin R Taking Rights Seriously. Harvard University Press, 1977, p.227

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