

## IMPARTIALITY OF THE COURT IN CRIMINAL PROCEEDINGS – CURRENT ISSUES<sup>1</sup>

Ivan ILIC

Associate professor, University in Niš, Faculty of Law  
ivan@prafak.ni.ac.rs

### Abstract:

The right to an independent and impartial tribunal is one of the most important guarantees of the right to a fair trial, according to the most important international documents belonging to European human rights law, but also according to the practice of the European Court of Human Rights. It is precisely from the jurisprudence of the unofficial, but de facto highest judicial institution in Europe that the impartiality of the court is "acting without prejudice and bias." The impartiality of the court in criminal proceedings is particularly important, given the seriousness of the consequences that the outcome may have for the defendant. It is therefore crucial that the national normative framework offers adequate preventive and protective mechanisms, which ensure that the accused has the right to a defense, which will be opposed not only to the public prosecutor, but also to the court. The author will present the achieved European standards regarding the impartiality of the criminal court, as well as as well as a critical analysis of one of the judgments against the Republic of Serbia, with the aim of finding an adequate formula for achieving this important segment of fair criminal proceedings.

**Keywords:** *the right to an independent and impartial court, the right to a fair trial, criminal proceedings;*

### Introduction

Respect for fundamental human rights is a reflection of a democratic society. It is particularly important to ensure their respect during judicial proceedings, that is, when an individual interacts with the state, embodied in the form of its bodies, responsible for ensuring compliance with the requirements by which it regulates the behavior of individuals. The treatment of the accused during criminal proceedings carries additional weight. It is then necessary to balance the *ius puniendi* with the rights of the potential perpetrator of the criminal offense. If we add to this the requirement for an efficient conclusion of the criminal proceedings, in order to remove the state of uncertainty for the accused, it is clear that what constitutes the phrase "fair trial" is not an easy task. This requirement undeniably contributes to the rule of law, legal certainty and, above all, justice. All of this is reflected in citizens' trust in the judiciary, and for the state it means greater credibility before the international community. The set of the most important standards in judicial proceedings constitutes the right (principle) of a fair and just trial, which is gradually growing into the central (supra)principle of modern legal proceedings (KRAPAC, D, 2000, p. 83).

The primary role in establishing the legal standard of "fair procedure" belongs to the legislation. It is necessary that the relevant regulations incorporate such solutions that enable the assembly of the puzzle that creates a standard of procedure that, taken as a whole, is fair. However, this is only a foundation on which it is necessary to build on the proper implementation of those same regulations, so that their provisions do not remain "dead letters on paper." "It is precisely in this secondary phase that

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problems arise in transition countries (including Serbia). The impression is that our country has made major strides in recent years in aligning its legislation with European standards. However, a more difficult task remains - to enable effective implementation of regulations in a manner that would result in and enable the right to a fair trial for the individual. There are still many problems in this area, the roots of which lie in traditionalism and outdated working methods of the state apparatus, insufficient professional training, corruption, an inefficient control system, and the politicization of the entire society. This is evidenced by unjustifiably long court proceedings, due to the abuse of the rights of the participants, which is aided by the lack of promptness of the judicial authorities. We often encounter decisions being made under public pressure, often as a result of political pressure. There is also a pervasive factual inequality in the right to access justice, due to the existence of "untouchables". There is an increasing number of applications before the European Court of Human Rights, in which individuals seek justice and material compensation from the state of Serbia, due to violations of the right to a fair trial.

The above facts support the claim that there is a continuing urgency for further progress in the direction of striving to achieve the standard of "fair trial" for all, under equal conditions, in the same environment, with equal opportunities.

## 1. Normative basis

The set of rights that constitute a fair trial is enshrined in the most important international human rights documents<sup>2</sup>. It is first contained in Article 10 of the Universal Declaration of Human Rights, then in the International Covenant on Civil and Political Rights and finally, in the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *which provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"* (Article 6).

The right to a fair and just trial is explicitly provided for in the Constitution of the Republic of Serbia, in Article 32, entitled "Right to a fair trial". It establishes the right of everyone to be tried by an independent, impartial and legally established court, which should decide publicly, fairly and within a reasonable time on his rights and obligations, the validity of the suspicion and the accusations against him.

From the above relevant provisions of international and national legal documents, it follows that the principle of fair trial consists of a series of rights (elements), which could be divided into general and specific ones (ŠKULIĆ, M, 2010, p.587-611). The general elements relate to judicial proceedings in general, while the specific elements relate exclusively to criminal proceedings. The right of access to justice, equality of arms and trial within a reasonable time are general elements of this principle, while the presumption of innocence and special guarantees of the defence constitute specific elements (ĐURĐIĆ, V, 2006, p. 67-93).

The right of access to justice requires that all persons have equal access to court and equal treatment before the court, without discrimination. The prerequisite for the realization of this standard is the existence of impartial, independent, competent and legally established courts. This right is contained in Article 14 of the International Covenant, Article 6 of the European Convention and other international legal documents, as well as in Article 32 of the Constitution of Serbia.

## 2. The Right to independent Court

The European Court of Human Rights (hereinafter: the Court) has in its case law crystallized the criteria for assessing the independence of courts. These are the manner in which court members are elected, the duration of judges' terms of office, the existence of guarantees against external pressure in the exercise of judicial functions, and whether the court gives the impression of independence (LEACH, P, 2007, p. 264). It is clear that the key criterion for assessing the independence of the courts is the

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<sup>2</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (1998), p. 117;

existence of influence of other branches of government, primarily the executive branch, on the selection and work of judges (MERON, T, 2005, p. 359). In addition, an important guarantee of judicial independence is the impossibility of dismissing judges by the executive branch (Campbell and Fell § 80). Courts in a democratic society should enjoy public confidence (Micallef v. Malta [GC], § 98). When assessing independence, not only the independence of the court, as a state body, is taken into account, but also that of judges and other civil servants who exercise judicial power (McKay v. the United Kingdom [GC], §35). According to the Court's case law, the appointment of judges by the executive branch is permitted, but judges must be free from pressure or influence in the performance of their judicial duties (Flux v. Moldova (no. 2), §27). The authority of a representative of the executive branch to dismiss a judicial officer, without adequate substantive and procedural guarantees against the discretionary exercise of that authority, is contrary to the postulate of judicial independence. Therefore, the Court in the case of *Henryk Urban and Ryszard Urban v. Poland* concluded that there had been a violation of the right to a trial by an independent tribunal, due to the power of the Minister to dismiss a judicial officer without specifying the factual grounds for that decision. Due to such a normative basis, it is possible for a judicial officer to be dismissed on the basis of the content of his own decisions (Henryk Urban and Ryszard Urban v. Poland, §49-53).

When it comes to a decision of a body that cannot be considered a "court or tribunal" within the meaning of the Convention, which means that it is not independent of the executive branch, then the decisions of that body should be subject to subsequent review by a judicial authority. For example, in the case of *Crisan v Romania*, the Court concluded that the Commission that had decided on the applicant's rights, which was composed of representatives of the Department of Labour and Social Welfare, a representative of the Ministry and a representative of the Department for the Execution of Criminal Sanctions, could not be considered a "court or tribunal", and that the Commission did not meet the requirement of independence. Therefore, it is necessary that there be a possibility for the decisions of the commission to be reviewed by a judicial body with full jurisdiction (that is competent to review the factual and legal basis of the contested decision). Since this was not possible in the specific case, the Court found a violation of Article 6 paragraph 1 of the Convention, i.e. that there had been a violation of the right to a hearing before an independent and impartial tribunal (Crisan v Romania, §23-30).

The decisive influence of a representative of the executive on the outcome of the proceedings before a judicial authority will be a key factor for the Court to assess whether there is a lack of guarantees of independence. In the case of *Beaumartin v France*, the Court took the fact that the Administrative Court had to accept the interpretation of the disputed provision of an international treaty given by the Minister for Foreign Affairs as decisive in finding that the standard of independence of the Council of State had not been met (Beaumartin v France, §38).

The legal framework that guarantees the right to an independent court in Serbia, established in line with international standards, exists, but its implementation in practice is questionable. The assessment of the number of judges, during the general election of judges, which was held long ago in 2009, was not done adequately. The abolition of individual courts and their transformation into judicial units has complicated the entire system, since only civil departments remain in the newly formed units. The long-awaited and pompously announced information system, through which all courts will be connected, and through which it will be possible to view court files, is still not fully functional (ILIC, I, 2012, pp. 211-227).

On the normative level, the composition of the High Judicial Council, which proposes judicial office holders, remains somewhat controversial. According to Article 7 of the Law on the High Judicial Council, this body has 11 members. Of these, six members are elected by the judges, one member is the President of the Supreme Court, ex officio, and four members are elected by the National Assembly, from among "prominent jurists". It is precisely this legal standard, during elections, which is entrusted to the legislative body of power, where decisions are made by the ruling majority, that can be controversial and subject to subjectivism and broad interpretation, that is, interpretation in a way that suits the prevailing majority. The mitigating circumstance is that only four members of the High Judicial Council are elected in this way, out of a total of 11 members, but it would be good to amend the Law on the High Judicial Council to specify and objectify the criteria that constitute a "prominent lawyer".

### 3. The right to an impartial trial

The impartiality of the court is one of the essential elements of the fairness of the procedure. Unlike independence, which represents the relationship between the judiciary and the legislative and executive branches of government, impartiality expresses the judge's relationship with the parties in the procedure, in which the judge has equality with them. In other words, the judge has an obligation not to be biased towards any of the parties in the proceedings. The judge is obliged to hear both sides, even when one of them is clearly not telling the truth. Impartiality of the court is most often defined as acting without prejudice and bias (*Micallef v Malta*, §93).

The European Court of Human Rights' judgment in *Piersac v. Belgium* for the first time formulated the criteria for determining the impartiality of a judicial body in national law. Impartiality is examined by applying an objective and/or subjective criterion. The subjective approach to the concept of judicial impartiality seeks to determine the existence of a personal conviction of a particular judge in a particular case (SAHIN, K, 2008, pp. 17-18), while the objective approach determines whether there are sufficient guarantees that that court is perceived as impartial, as well as whether the guarantees are sufficient to exclude any possibility of doubt in the proceedings in question.

In the *Wettstein v. Switzerland* judgment, the Court took the position that with regard to the subjective criterion, there is a presumption of the judge's personal impartiality, until the contrary is proven (*Wettstein v. Switzerland*, § 43). When it comes to the type of evidence, the Court in the *De Coubert v. Belgium* judgment sought to determine whether the judge had shown intolerance or disinterest for any personal motives (*De Coubert v. Belgium*).

The Court in the case of *Kyprianou v. Cyprus* held that there was subjective bias on the part of the domestic court, due to statements made by the judges regarding the applicant's conduct, making them in a manner that expressed a sense of indignation (*Kyprianou v Cyprus*, § 129). This case is indicative because of the explication of the concept of impartiality of the court, which was given in a separate opinion by Judge Boštjan Zupančič. He first speaks of subjective bias, which represents personal involvement, which is expressed in a feeling of indignation as well as a state of shock, which is in contradiction with the principle of separation, in relation to the verdict. The impartiality of a judge is clearly a mental attitude, which must be free from prejudice and bias. Rational interpretation of the law and decision-making require objectivity on the part of the judge. Impartiality is also derived from the adversarial principle of criminal procedure, which rests on opposing parties. This postulate, in principle, implies that the judge must have both channels of communication open, towards both parties, like stereo sound on a music device, until all the evidence is presented, that is, until the verdict is reached. The opposite of impartiality is the existence of prejudice. This means that the judge has a decision in mind before all available evidence has been presented. Bias in the judge's decision-making is based on an external, legally irrelevant and impermissible criterion (for example, racial prejudice). For the impartiality of a judge, experience in performing the function is also important. There is an understanding that the impartiality of the court is more conducive to a true jury trial, which is characteristic of common law systems. However, in this sense, one should not mechanically renounce establishing the truth in criminal proceedings, but rather move towards the fact that the judge should impartially establish the truth about the event that caused the criminal proceedings to be conducted in a specific case.

In the case of *Castillo Algar v. Spain*, the Court found that there was bias on the part of the trial panel because the national court, in the reasoning of the judgment, referring to a judgment of another court in which the applicant's criminal liability had not been established by a final conviction, clearly stated that there were elements indicating that a criminal offence had been committed (*Castillo Algar v Spain*, § 48, 49).

In the *Micallef v. Malta* judgment, the Court provided for an objective criterion that it must be determined whether, completely independent of the judge's conduct, there are sufficiently clear facts that may call into question the impartiality of the judge (*Micallef v. Malta*, § 96). When deciding whether, in a given case, there is a legitimate reason for fear in that a particular judge is biased, the

applicant's position is important, but not decisive. The decisive factor is whether that fear is objectively justified.

In the case of *Dimitrov and Others v. Bulgaria*, the Court examined whether public statements by state officials could affect the impartiality of a national court. The court assessed that the fact indicating that there was a political campaign at the time of the trial, in which the Prime Minister and the Minister of Foreign Affairs participated, could not be assessed as an influence and an obstacle to the impartiality of the judges in the proceedings (*Dimitrov and others v. Bulgaria*, § 159).

In the case of *Pauilkas v. Lithuania*, the Court noted that in certain situations a media campaign may negatively affect the impartiality of judges and thus engage the responsibility of the State. Some of the factors that the Court considers when deciding on the impartiality of the court are the time that elapsed between the media campaign and the start of the trial, whether the publications can be attributed to the authorities, and whether the judges were influenced by the publications (*Pauilkas v Lithuania*, § 57, 58, 59).

The national normative basis for the impartiality of the court in criminal proceedings is contained in the provisions of the Code of Criminal Procedure. First of all, the realization of this right is contributed by the reasons for the exclusion and disqualification of a judge, in the narrow sense, which are prescribed in Article 37 of the CPC. The reasons for exclusion include traditional grounds that raise doubts about impartiality, such as trial in one's own case, family and adoptive relationships between judges and other participants in the proceedings, as well as the judge's actions in earlier stages of the criminal proceedings. A general clause is provided as a basis for disqualifying a judge, which covers other grounds that raise doubts about the judge's impartiality. A judge who learns of a reason that raises doubts about impartiality may initiate the procedure for his or her own disqualification. In addition, this procedure can be initiated by the parties and the defendant's defense attorney. Protection against abuse of the right to request the disqualification of a judge is provided by the provision of Article 39, paragraph 3 of the CPC, which stipulates that the request for disqualification may only relate to a specific judge, and not, for example, all judges of a particular court. The request for the disqualification of a judge is decided by the president of the court, or the president of the immediately higher court, in the case of a request for the disqualification of the president of the court, or the general session of the Supreme Court, when the disqualification of the president of that court is requested. The legislator has provided for the right to appeal in the event of a decision rejecting a request for the disqualification of a judge, but this right does not exist in the event of the rejection or approval of a request for disqualification. This legislative framework provides a solid normative basis for the materialization of the right to an impartial tribunal. What is, however, present in judicial practice is the subjective bias that we discussed through the analysis of the practice of the European Court of Human Rights. This type of unequal treatment of parties is most often manifested in the legacy of some past times, when judges often sided with the prosecution, guided by the results of the investigation by the investigating judge that preceded the indictment. Since the introduction of prosecutorial investigation, this phenomenon has been reduced in practice, but it is still present in reality, reinforced by the fact that courts and prosecutors' offices in many courts in Serbia are located in the same building, which establishes a kind of close cooperation when conducting criminal proceedings, which is not a desirable phenomenon.

The European Court of Human Rights has also addressed the exercise of the right to an impartial trial, in a case against Serbia, which deserves careful analysis.

#### **4. Paunovic v Serbia**

The applicant was prosecuted for a serious offence against the safety of public transport. He was sentenced to six months in prison by a first-instance judgment. The applicant lodged an appeal, which was decided by a three-judge panel of the District Court in Niš. That panel included a judge who, at the time of the first-instance criminal proceedings, was one of the deputy public prosecutors representing the prosecution. The applicant therefore filed an extraordinary legal remedy, a request to review the legality of the final judgment, which was rejected.

The applicant alleged in his submission that the right to an impartial trial had been violated for two reasons. Firstly, he alleged that this had occurred due to the participation in the second-instance

panel of a judge who, at the time of the first-instance proceedings, was the deputy public prosecutor representing the prosecution in the criminal proceedings against him. He also alleged that there was a reason for the disqualification of the same judge because, in his capacity as a tax inspector, he had ordered the initiation of misdemeanor proceedings against the company and the responsible person, who is the brother of that judge.

The Court first considered the applicant's argument that there had been a violation of the right to an impartial tribunal due to the family relationship. In this regard, the State raised the objection of abuse of rights, because the applicant had raised this argument only in his reply to the State's observations. The Court cited relevant case-law, which showed that it was permissible to further clarify the arguments in the application in the reply to the Government's observations (*Ringeisen v Austria*, §90, *Radomilja and others v Croatia*, [GC], §121-122). However, this was not the case here, but the applicant put forward a new argument regarding a violation of Article 6 of the Convention, on which a contradictory exchange of arguments between the parties could not be realized (*TsonyoTsonev v Bulgaria*, §24). However, the court did not proceed with a decision on this complaint, given that the applicant had not even exhausted legal remedies with regard to this argument, as he had not mentioned it when submitting an extraordinary remedy at the national level.

As regards the applicant's first argument, the State argued that there was no reason for disqualification, since the impugned judge, a member of the second-instance panel at the time of the first-instance proceedings, was only one of the deputy public prosecutors, who had not acted in the criminal proceedings against the applicant. Furthermore, the State pointed out that the second-instance judge was not at that time superior to the acting deputy public prosecutor, nor could he have influenced the filing of charges in the criminal proceedings against the applicant. Finally, the State submitted that the judge had taken up his duties before the first hearing for the main trial had been held, and that for that reason he had not been able to appear at any stage of the proceedings against the applicant as a prosecutor..The State referred to the case of *Piersack v. Belgium*, in which a similar position was taken, and the Court stated that it would be going to extremes not to allow former prosecutorial officials to sit on the trial panel if they had not personally acted in the criminal proceedings (*Persack v Belgium*, §52).

The Court first defined impartiality. According to extensive practice, impartiality implies the absence of prejudice and preconceptions. Subjective bias exists if the judge has a personal belief or interest in a particular case. Impartiality in the objective sense exists if the judge has provided sufficient guarantees that exclude any legitimate suspicion of bias. In this regard, any conduct of the judge is excluded and facts are established that could raise doubts about impartiality (*Micallef v Malta*, [GC], §96). When assessing impartiality, the court takes into account national regulations. They must include effective mechanisms for removing a judge if there is any reason to doubt his impartiality. The Court also refers to previous case-law, which shows that the conduct of a judge in different capacities in the same case may give rise to doubts as to impartiality. If a judge is the presiding judge of a chamber and has previously headed the public prosecutor's office during the proceedings, in a particular case this may give rise to doubts as to impartiality and lead to a violation of Article 6 § 1 of the Convention (*Piersack v Belgium*, §30-31). In other cases, the Court also found that there was doubt about impartiality if the judge in another proceeding was the representative of the opposing party (*Wettstein v Switzerland*, §47). Finally, the Court found a violation of this right if the third-instance judge, in the first-instance proceedings, was the lawyer of the opposing party in relation to the applicant (*Mežnarić v Croatia*, §28-37).

In the specific case, the Court first examined subjective impartiality and concluded that the disputed judge was not subjectively biased, nor did the applicant claim this during the criminal proceedings. With regard to objective impartiality, the Court states that the fact that a judge performed the function of public prosecutor at an earlier stage of the proceedings does not in itself mean that there was a violation of the right to an impartial tribunal (*Piersack v Belgium*, §30(b)). Also, if at an earlier stage of the proceedings the judge performed the function of public prosecutor, but was unable to act in a specific case, there will be no violation of the Convention (*Jerino v Italy*, (dec.)). In the present case, the judge did not participate in the prosecution of the applicant, nor in the drafting of the indictment. Unlike the *Piersack* case, the judge in the present case was not hierarchically superior to the acting deputy public prosecutor, nor could he issue him mandatory instructions. The Court therefore agreed with the Government on the *Piersack* case allegation that adopting the applicant's argument would go to extremes

and would lead to disruption in small justice systems where transfers from the public prosecution service to the courts were frequent. The Court concluded that the fact that the judge had once been part of the public prosecutor's office did not in itself raise doubts about impartiality and ruled that there had been no violation of Article 6(1) of the Convention in the particular case.

The case of *Paunović v. Serbia* is significant for pointing out the criteria that the Court applies with regard to the right to an impartial Court. Apart from the subjective assessment of bias, where the personal conduct of the judge is assessed. The court also applies an objective test of bias. In this particular case, the application of the objective test showed that the fact that someone held the position of public prosecutor in the previous stages of the proceedings does not necessarily mean objective bias, if they were a member of the trial panel in the main criminal proceedings. Objective bias will certainly not be established if the judge, and previously a deputy public prosecutor, was not hierarchically superior to the acting public prosecutor, that is, if he could not in any way influence the criminal prosecution in a specific case.

### Conclusion

The right to an independent and impartial court, as one of the most important guarantees of a fair trial, is also one of the major challenges in practical application. This is because often even a solid normative basis does not guarantee that courts will be truly independent and impartial in their decision-making. The executive branch of government, regardless of the principle of separation of powers, seeks to achieve its interests, among other things, by influencing the decision-making of courts. This pressure and influence do not always have to be direct and immediate, but often indirect through the media. Therefore, it is necessary to establish adequate corrective mechanisms that allow parties to the proceedings to react to perceived bias and obvious impacts on independence and autonomy in decision-making. In the past period, the Republic of Serbia has significantly improved the legislative basis that contains mechanisms for establishing the postulates of independence and impartiality. However, the problem has not been solved, and today we are faced with unprecedented pressures and threats from political actors, which are definitely affecting the threat to the judiciary. This is the main cause and reason for the lack of implementation of the rule of law. The path to recovery leads to the establishment and implementation of a strict punitive policy for political and other actors on the public stage for threatening the independence and impartiality of the judiciary. Strengthening citizens' trust in the judiciary is an almost crucial element in creating citizens' trust in the state, without which there is no progress in society in general.

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