

THE RIGHT TO AN IMPARTIAL JUDGE

Abstract

The author analyses the institute of impartiality of judge in criminal proceedings. First, the paper points to norms of Article 6 of European Convention on Human Rights and guarantees of the fundamental rights in criminal procedure in Hungarian Constitution. Afterwards, the author establishes material elements that constitute the requirement of impartiality, how it is possible to set aside partiality and what are the results of this requirement within the concrete regulations of the Hungarian Act on the Criminal Procedure.

Key words: *impartiality, criminal proceedings, Hungary.*

1. Preamble

The impartiality is a human virtue that has to characterize the decision-maker and also means that the impartial person arrives at the decision in a given case without any bias, regarding solely regulations applicable to him and based on his convictions.

According to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) – ratified by the Hungarian Parliament with the Act XXXI. of 1993 – based on the requirements of the right to a fair trial everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him.

The right to an impartial judge is a fundamental requirement of both the civil and criminal procedures, though this writing shall focus on the criminal cases alone.

The Article 6 of the Convention thus guarantees the right to all persons against whom criminal proceedings were initiated to have an independent and impartial tribunal established by law to act in his criminal

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case. This triple condition constitutes an interdependent and superimposed requirement, considering the fact that “it is hardly possible to speak about independence and impartiality if the judicial system can be altered at the executive power’s own pleasure, and no court can be impartial which is not independent in its’ organisation and working conditions.”² There is no doubt that the aforementioned requirements apply to the courts of law, and is destined for achieving the objectivity of the judiciary.

Article XXVIII. Section (1) of the Fundamental Law of Hungary also warrants the fundamental right that in the determination of any criminal charge against him or her, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. The text of the Fundamental Law complies with the relevant disposition of the Convention, and both of these fundamental norms attach a determinate significance to impartiality.

Now the question remains, what material elements constitute the requirement of impartiality, how it is possible to set aside partiality and what are the results of this requirement within the concrete regulations of the Act on the Criminal Procedure.

2. The substantial characteristics of impartiality

The main substantial characteristic of the requirement for impartiality is that the person entitled to decide on the merits of a case should base his judgement solely on objective facts, or differently put, his decision should not be affected by other circumstances than facts.

2.1. Dispositions on conflict of interest

The impartiality within the field of administration of justice means that the judge must be independent from the parties, namely from the prosecutor (accuser), victim, defendant and the counsel for the defence. In view of impartiality the relationship of the members of the court with the parties involved should always be analyzed in the concrete case. The judge must stand above the parties, he can be neither a relative of them or stand in any other relationship with them; he also cannot be affected by the case, that means he cannot be the victim either.

The requirement of impartiality is obviously violated if there is kinship between the judge and the defence counsel, and it is also clear that no one can be a judge in his own case.

² K. Bárd, *Human rights and criminal justice system in Europe*, Hungarian Official Journal Publisher, Budapest 2007, 105.

The judge cannot be concerned in the case in any ways, because when a person's interests match or are similar to those of the one or the other party, that person is not able to judge impartially. The requirement of impartiality is also violated when the judge is member of an association or organisation, whose interests are affected by the criminal procedure. For this reason several authors question the impartiality of military courts, as the military criminal procedure typically adjudicates behaviours that violate the norms of the military organisation, to which both the judge and the defendant belong.

Therefore the main requirement to assert impartiality is essentially that the judge must not be in any ways concerned in the criminal case.

In the Hungarian legal system the regulations concerning the criminal procedure are enacted in the Act XIX. of 1998 on the Criminal Procedure (Code on the Criminal Procedure, hereinafter CCP). The CCP has very detailed rules on the exclusion of judges, keeping in view the aforementioned expectations. "The institution of exclusion serves the impartial and unbiased management of the cases, it is its safeguard. Its rules are defined by the procedural law concerning the members of the authorities."³

Accordingly, no one may act as a judge:

- who has acted in the case as a prosecutor or a member of the investigating authority, or who is a relative of the prosecutor or a member of the investigating authority having acted or acting in the case,
- who is or has been involved in the case as a defendant or a counsel for the defence, or a victim, a private accuser, a substitute private accuser, private party, denouncer or the representatives thereof, further, the relatives of the above,
- who is or has been involved in the case as a witness, expert or advisor,
- who has made a decision, under the relevant legal regulation on gathering secret intelligence in the case.⁴

Upon the study of these rules of exclusion it can be established that in order to create the requirement of impartiality the CCP disposes regarding the other parties of the procedure so, that they are the ones who cannot act as judge in the case.

Persons acting during the phase of accusation or preparation of indictment, such as the prosecutor, members of the law enforcement authorities or persons making decision on gathering secret intelligence, cannot

³ Á. Erdei, *Doctrines and false doctrines in the science of criminal procedure*, Eötvös Loránd University of Sciences, Eötvös Publishing House, Budapest 2011, 256.

⁴ CCP Article 21. Section (1).

participate in sentencing. In this last case it is of no consequence whatsoever whether the information thus collected has been actually used in the course of the criminal proceedings or not.

In absence of the aforementioned regulation the requirement of impartiality would be severely breached, as both the accusation and the decision on the accusation would meet in one hand. According to Erik Heller: “to be able to decide justly on the conflict between the litigant parties in both regards, namely regarding the facts and the law, the court needs to be able to deliberate the evidence unbiased, and should not be partial when drawing the legal consequences either. If the same person who investigated the commitment of the crime and its details should also pass a judgement in the case, the objectivity of the judge would already not be guaranteed, as the investigation of the case can easily make him biased. Therefore to safeguard the impartiality it is necessary in criminal procedures that the function of the accusation and judiciary should be in different hands. For these same reasons it is also necessary to detach the function of the judiciary from that of the defence.”⁵

As the European Court of Human Rights points out, “if a judge, after holding in the public prosecutor’s department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.”⁶

Mention must be made though, that the ECHR also pointed out in the judgement that it would be unacceptable if former judicial officers in the public prosecutor’s department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. Such a radical solution would erect a virtually impenetrable barrier between the public prosecutor’s department and the bench. This is the reason why the aforementioned judgement of the ECHR is to be applied in the concrete given case.

The victim or the defendant, the witness or the expert cannot act as judge due to their personal involvement.

The hitherto mentioned causes of exclusion are of an absolute nature, i.e. only the existence of the fact must be proven. Attached to these causes of exclusion of an absolute nature is the conclusive presumption that the person concerned is unable to proceed without prejudice.

The CCP also contains a general clause of a rather relative nature: in a given case no one may act as a judge who cannot be expected to

⁵ E. Heller, *Textbook on the Law of Hungarian Criminal Jurisdiction*, Publishing House of Károly Grill, Budapest 1947, 15.

⁶ *Piersack v Belgium* 8692/79 (1/10/1982).

form an unbiased opinion for other reasons⁷. Several personal reasons can form the factual base of this clause, such as a previous hostile relation between the judge and the defendant, or on the contrary, a close friendship between the judge and the defence attorney.

Apart the heretofore mentioned exclusion clauses the CCP defines further, more special causes for exclusion, for instance

- the person having acted as a investigating judge in the case shall be excluded from subsequent court procedures,
- the judge having participated in the judgement of the case in the first instance shall be excluded from the procedure of the court of second instance; the judge having participated in the judgement of the case in the first or second instance shall be excluded from the procedure of the court of third instance
- when proceedings are re-instituted due to repeal, the judge who has participated in adopting either the repealing decision or the decision repealed owing to lack of grounds shall be excluded from the re-instituted proceedings.⁸

It turns out from the aforementioned regulations that these causes concern those judges, who in any form previously participated in the adjudication of the concrete case or have decided during the pre-trial phase on questions – e.g. pre-trial detention – that according to the CCP belong to the competence of the court. In the Hungarian criminal procedure it is the investigating judge who has such a role and competence.

The investigating judge acts as a judge protecting fundamental rights prior to the indictment. It belongs to the competence of the investigating judge to decide – before the indictment is filed – on the order and extension of pre-trial detention, home curfew, house arrest or temporary involuntary treatment in a mental institution. The investigating judge is entitled to decide on the search and seizure conducted in the office of a notary public, a law firm or a health institution; on the authorisation of covert data gathering or declaring a witness specially protected. Prior to such decisions the investigating judge obviously has to familiarise himself with the evidence gathered till then, i.e. “he is relying not only on the data provided by the law enforcement authorities, but acquaints himself thoroughly with the investigation files, reckons with the arguments both pro and contra, and this is hardly compatible with the expectations that the continental approach demand of the exercise of the judicial vocati-

⁷ CCP Article 21. Section (1) e).

⁸ CCP Article 21. Section (3) a)-c).

on.”⁹ This is the obvious reason why the CCP excludes the investigating judge from the possibility of judging a case on the merits.

Although the CCP refers the exclusion only to the investigating judge and not to the judges who judge the appeals lodged against his decision, the Constitutional Court ruled, that according to the Article XXVIII. Section (1) of the Fundamental Law of Hungary it is a constitutional requirement that no judge should further participate in the course of the criminal procedure who has already proceeded in its previous stage, for instance as an investigating judge.¹⁰

According to the reasoning of the Constitutional Court, the requirement of impartiality necessitates that the judge deciding on the pre-trial arrest should not participate in judging a case on the merits, due to the fact that the judicial deprivation of the defendant’s – who can be reasonably suspected of committing a crime – freedom prior to the indictment is the most severe coercive measure during the investigation phase of the criminal procedure; and as during his decision on the pre-trial detention the judge has to take a stand concerning the reasonable suspicion, his impartiality might be called into question. The reasoning of the Hungarian Constitutional Court is essentially similar to the dissenting opinion in a case of the European Court of Human Rights: “ Ordinarily the function of a judge hearing a pre-trial application for provisional liberty is to decide, on appropriate evidence, whether he is satisfied that the accused, if at liberty, will abscond or seek to defeat justice by tampering with or destroying evidence or intimidating witnesses. If the judge is not so satisfied he should grant the application subject to such reasonable guarantees or restrictive conditions as he thinks necessary and prudent. That applies equally to the innocent and the guilty. If liberty is refused simply because of the strong suspicion of guilt it violates the concept of the presumption of innocence enshrined in Article 6. If however the national legal system requires, or permits, consideration of the probability of guilt as a factor in the decision on provisional liberty, the judge who so decides clearly disqualifies himself from participation as a judge at the trial of the substantive issue of guilt or innocence.”¹¹

2.2. The subjective test

The presumptive impartial attitude requires the judge not to be in any ways emotionally related to the parties of the concrete case even if

⁹ K. Bárd, 123.

¹⁰ Decision 21/2016 (XI. 30.) of the Constitutional Court.

¹¹ *Sainte-Marie v France* 12981/87 (16/12/1992) dissenting opinion of judge Walsh.

none of the above mentioned conditions (family ties, hostile relations etc.) exist. This way the judge cannot feel any kind of antagonism even against the perpetrators of the most severe crimes, likewise his decision cannot be influenced by his sympathy towards the defendant. The judge's personal procedure, his behaviour cannot raise any doubts on the impartiality of his decisions. The ECHR considered, that the judge who publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, clearly appears incompatible with the impartiality required of any court, because the words were such as to objectively justify the applicant's fears as to the judge's impartiality.¹² Thus the judges must abstain from statements to the press, because it is a violation of impartiality when a judge in an ongoing case publicly alludes to the outcome of the trial with a distinct preference for a guilty verdict against the accused.¹³

It is relatively frequent that during a concrete criminal case the defendant or the defence counsel feels that the judge is biased; thence they may file an objection. It is also possible that the judge himself announces his bias, but in case this doesn't happen, then the person announcing it shall have to prove the judge's partiality. Concerning judges the impartiality is presumed, and this presumption has to be overturned by the one questioning it.

2.3. The objective test

In absence of impartial sentencing the legality of the enforcement of personal rights would suffer, this is the reason why the impartiality – as part of fair trial – is an absolute constitutional requirement in the democratic rule of law. According to the decisions of ECHR the existence of impartiality should be tested in various ways. It has to be cleared in accordance with the objective test whether there are circumstances other than the judge's personal manifestations which could cast a doubt on his impartiality. In the course of this examination account must also be taken of considerations relating to the functions exercised by the judge within the internal organisation of the justice system.¹⁴ The objective approach gives opportunity to ascertain whether “if examined from the outside the system and the structure of the procedure carries the danger of casting doubt on the impartiality;”¹⁵ but on the other hand how the judge proceeded in the concrete case and what the defendant perceived has no conclusive relevance.

¹² *Buscemi v Italy*, 29569/95 (16/09/1999).

¹³ *Lavents v Latvia*, 58442/00 (28/11/2002).

¹⁴ *De Cubber v Belgium*, 9186/80 (26/11/1984) A86 par. 24.

¹⁵ K. Bárd, 112.

The requirement of impartiality is particularly damaged by the accumulation of functions, for example when the judge is allowed to act as an accuser. The CCP is unambiguous in its wording of the division of tasks related to the procedure when it says, that in criminal proceedings prosecution, defence and sentencing are separate functions.¹⁶ This principle is “practically the result of a strict division of labour prevailing in the criminal procedure, according to which the functions of the accuser, the defence and sentencing cannot mingle (...) and not only the court’s privilege of sentencing, but also the prosecutor’s monopoly of accusing”¹⁷ is substantive element of the criminal procedure. The abovementioned requirement can be problematic especially concerning the taking of evidence, when the procedural law reserves an active role to the judge. In such a case, namely when the judge is not only an onlooker, but also an actor of taking of evidence, i.e. when the judge *ex officio* orders production of evidence in order to clarify the facts of the case, this can strengthen or even weaken the accusation or the position of the defendant.

Regarding the fact that the basic requirement of the continental legal systems is the establishment of material truth, the pressure to meet the exigencies of this requirement compels the judges to take an active part in the process of taking evidence. According to the CCP evidence has to cover the facts which are relevant to the application of criminal statutes and legal regulations on criminal proceedings. The objective of gathering evidence has to be the thorough and complete elucidation of the true facts.¹⁸ In order for the judge not to take over the role of the accuser, the CCP orders, that in case the prosecutor does not motion it, the court is not obliged to obtain and examine the means of evidence that support the indictment. Following the text of the act, in absence of a motion the judge is not obliged to order the production of evidence, but he is given the possibility of doing so.

3. Procedure concerning the estimation of impartiality

Pursuant to the regulations of the CCP the judge affected by a ground for exclusion shall immediately notify the president of the court. Upon gaining cognisance of a ground for exclusion, the president of the court has to initiate the exclusion of the judge *ex officio*. In case the ground for exclusion is announced by the judge himself, from the time of the announcement the judge concerned may not be involved in the case.

¹⁶ CCP Article 1.

¹⁷ E. Belovics, M. Tóth, *Criminal Procedure*, HVG-ORAC Publishing House Ltd., 2015, 51.

¹⁸ CCP Art. 75. (1).

The CCP enables the prosecutor, the defendant, the defence attorney and the victim to report the ground for exclusion. If it is one of the aforementioned parties to report the grounds for exclusion, the judge may remain involved in the case until the motion is settled; however, the judge may not participate in the adoption of the conclusive decision.

The arrangement of the motion for exclusion depends on the person of the announcer and also of the fact, whether the judge has consented to his exclusion from participating the case. The president of the court shall ensure the designation of another judge if the ground for exclusion has been notified by the judge himself or the judge has consented to the exclusion. In such a case the problem is resolved through administrative channels, and no separate decision is required thereon. Insofar as the motion for exclusion cannot be thus settled, it is adjudged by another panel of the court. The decision on the exclusion shall be adopted by the court at a panel meeting. If the motion for the exclusion was made by a party other than the judge or if the judge has not accepted his exclusion, a declaration must be obtained from the judge. *Nota bene*, according to the CCP the decision on the exclusion may not be appealed, whereas the denial of the exclusion may be contested in the form of an appeal against the conclusive decision.¹⁹

4. Synopsis

It can be ascertained that the requirement of impartiality is an essential element of a fair trial in the criminal procedure. The provisions of the Hungarian Code on the Criminal Procedure are appropriate to enforce this requirement. On the one part there are the exclusion rules of an absolute and relative nature governing the impartiality; on the other part it declares the prohibition of accumulation of functions. It must be admitted though, that in the continental procedural regulations the legal obligation of taking evidence and establishing the material truth is weighing on the court, and this can be contradictory to the expectations of the objective test on impartiality. Namely in case when the court – even in absence of a motion by the prosecutor – takes evidence and eventually this results in the establishment of the defendant's guilt, the court does not take over the role of the accuser, but exercises his constitutional function of administering justice. Naturally it is equally the same when the taking of evidence is in favour of the defendant and results in the acquittal of the defendant. Therefore when taking evidence *ex officio* the court does not accuse and does not defend, but administers justice.

¹⁹ CCP Art. 23-24/A.

The codification of a new code on the criminal procedure has been taking place in Hungary for almost two years. The doctrinal base of the new code is also the intention to establish the material truth, and among the concrete dispositions the norms destined to guarantee the impartiality of judges take invariably a considerable role. The adoption of the bill is expected to take place in spring 2017. As to the actually presented issues no significant changes are to be expected in the draft.

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PRAVO NA NEPRISTRASNOG SUDIJU

Apstrakt

Autor analizira institut nepristrasnosti sudije u krivičnom postupku. Prvo, rad ukazuje na odredbe člana 6 Evropske konvencije o zaštiti ljudskih prava i na garantije osnovnih sloboda u krivičnom postupku u Ustavu Mađarske. Potom, autor ustanovljava osnovne elemente nepristrasnosti, kako je moguće prevazići pristrasnost i koja je konkretna primena instituta u okviru regulative mađarskog Zakonika o krivičnom postupku.

Ključne reči: nepristrasnost, krivični postupak, Mađarska.