Arta Bilalli Zendeli[1], PhD
Shpresa Alimi[2], PhD

JUDICIAL INDEPENDENCE AND JUDICIAL IMPARTIALITY: TWO SIDES OF A COIN

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Abstract

An independent and impartial judiciary remains a goal which must be achieved in the Republic of Northern Macedonia. In this paper we will focus in detailed and deep meaning of judicial independence and judicial impartiality, their elements that must be respected for an independent and impartial judiciary as well as the main elements of independent and impartial judiciary according to the Bangalore Principles of Judicial Conduct (2002), The International Bar Association Minimum Standards of Judicial Independence, the European Convention on Human Rights and the Assessment and Recommendations of the Senior Experts' Group on systemic Rule of Law issues for Macedonia (2017). Few cases from the practice will be presented in the paper too.

Key words: Judiciary, independence, impartiality, criminal procedure, public confidence.

1. Introduction

The trial process in both adversarial and inquisitorial system is very much like a stage presentation in which all of the participants have pre-assigned roles, which they act out according to prescribed rules governing the presentation of evidence[3].

The Court commits the function of judging in the criminal procedure. Different national systems have different rules about the appointment of judges, their term, safeguards, and so on, but all of them looks for an independent and impartial court. The right to a trial by an independent and impartial tribunal is a core element of international human rights norms and standards, first articulated in 1948. According to the Bangalore Principles of Judicial Conduct, the right to judicial independence is essential in upholding the rule of law in a state (Preamble), while the Suva Statement on the Principles of Judicial Independence and Access to Justice declares that it is essential for the protection of all human rights (Preamble). The right to an independent and impartial tribunal is set out in a variety of other treaties including the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 14[1]), the African Charter on Human and Peoples` Rights (Article 7[1]), the American Declaration of the Rights and Duties of Man (Article XXVI[2]), the American Convention on Human Rights (Article 8[1]), the European Convention on Human Rights (Article 6[1]), and the

[1] Associate Professor, Faculty of Law, University of Tetova, arta.bilalli@unite.edu.mk
[2] Assistant Professor, Faculty of Law, University of Tetova, shpresa.alimi@unite.edu.mk
[3] Raneta Lawson Mack, Comparative Criminal Procedure: History, Processes and Case Studies, William S. Hein & Co., Inc. Buffalo, New York, 2008, pp.387

United Nations Convention on the Rights of the Child (Article 37[d]). In addition, the right to judicial independence and impartiality is generally enshrined in the constitutions of most states[4].

The Article 14[1] of the International Covenant on Civil and Political Rights, states that: "…everyone shall be entitled to a…hearing by a competent, independent and impartial tribunal established by law…"; The Article 6[1] of the European Convention on Human Rights states as follows: "…everyone is entitled to a …hearing…by an independent and impartial tribunal established by law", while the American Convention on Human Rights foresees (Article 8[1]): "Every person has the right to a hearing…by a competent, independent and impartial tribunal, previously established by law".

These texts shows a great similarity. The essential elements are common to all and are set out in the same terms: "tribunal", "independent", "impartial" and "established by law". In addition, the ICCPR and the ACHR also require that the tribunal be "competent", a requirement which under the ECHR, can be interpreted as being included in the term "established by law".[5] In many countries, courts have a significant and long tradition in protecting human rights from the states` interference in their personal rights. At this point, in the systems where "the rule of law" puts the decisions on individual rights and freedoms on the hands of an independent court, their role is quiet significant and important[6]. Judiciary independence and impartiality, formally is a part of the legislation of the Republic of North Macedonia, but there is still a lot to be done to set out a system with independent and impartial judicial. This was stressed out in the latest Progress Report of the European Commission, which emphasized*: "There was no progress in ensuring the functional independence of the justice system. Reports of* ***selective justice*** *in certain high-profile or politically sensitive court cases continued. Public demonstrations illustrated the climate of political tension surrounding the work of the judiciary, especially in relation to the wiretapping scandal. Although the President of the Judicial Council and the President of the Supreme Court have pointed publicly to the need to respect the independence of the judiciary, there is no framework in place to protect judges against external pressure. Concerns about judges'* ***security of tenure****, including in the light of 2015 Venice Commission recommendations, have not been addressed".*[7] Similar remarks are done by the *Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017*, *which emphasizes: "(26) Only one of the twelve recommendations from 2015 in the area of judiciary and prosecution has been implemented. That was the recommendation to maintain the Academy for Judges and Prosecutors as the sole point of entry to the judiciary, which necessitated no more than continuance of the status quo. (27) Many of the practices denounced in the 2015 report have continued. The control and misuse of the judicial system by a small number of judges in powerful positions to serve and promote political interests has not diminished in any significant respect. These judges have continued to bring pressure on their more junior colleagues through their control over the systems of appointment, evaluation, promotion, discipline, and dismissal which have been used to reward the compliant and punish those who do not conform. This has been described as a type of "state capture" but is perhaps more precisely characterized as the capture of the judiciary and prosecution by the executive power. (28) It remains to be seen*

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[4] Vivienne O`Connor and Colette Rausch, Model Codes for Post-Conflict Criminal Justice, Volume II, United States Institute of Peace, 2008, pp. 59

[5] Stefan Treschel, Human Rights in Criminal Proceedings, Academy of European Law, European University Institute, Oxford University Press, New York, 2005, pp.45

[6] Gordan Kalajdziev, Pravicna Postapka, Doktorska Disertacija, Faculty of law "Iustinianus primus"- Skopje, 2004, pp. 273

[7] COMMISSION STAFF WORKING DOCUMENT The former Yugoslav Republic of Macedonia 2016 Report, Brussels, 9.11.2016 SWD(2016) 362 final, pp.13

how the situation will develop following the formation of the new government. Although there is a need to reform certain procedures, notably the systems for disciplining and evaluating judges, the problem is not generated primarily by bad laws and legal structures, The laws and structures in place are such that the judicial system could function properly if all the judges acted properly. On a more positive note, despite the misbehavior of a minority, many of the judges do their best to administer justice honestly and fairly. (29) While the new authorities would be entitled and are indeed duty-bound to take action against those who are proven to have abused their position, a general vetting of all judges is not recommended as judicial misbehavior is by no means universal. This minority of politically-influenced judges should be subject to effective professional and ethical rules and, where evidence is available to prove criminal responsibility, should be made criminally liable for their misconduct. Any judges dismissed for proven misbehavior should be barred from practicing law at any level. (30) There is a danger that some in the new government may be tempted, under the excuse of acting against wrongdoers, to replace judges who have misbehaved with others willing to act for them in a similarly unacceptable manner. Suggestions that the judiciary needs to be "cleaned" are therefore unhelpful. It is essential that the new authorities stand back, respect the separation of powers and allow the judiciary to function as an independent arm of government administering justice fairly and impartially and operating fair and effective systems of judicial self-government unencumbered by any outside interference.[8]

2. The importance of the Independent and Impartial Judiciary

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects[9]. At the other side, impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.[10]

By far the most important guarantee enshrined in Article 6 of ECHR is that to an independent and impartial tribunal established by law. It is also probably one of the most important guarantees of the whole Convention. In fact, there are two aspects of this guarantee. On the one hand it is an individual human right which ensures that disputes in which the individual is involved are decided by a neutral authority. On the other hand, however, it has also an institutional aspect of constitutional importance: it lays the foundation for what has been labeled, since Montesquieu, the third power in a state after the legislative and the executive.[11] It does not seem necessary to enter into a long argument in order to establish that without independent courts there can be no rule of law. One may even wonder whether the law itself can have any real existence in the absence of judiciary. In fact, an examination of the development of Roman law, leads to the conclusion that the judges (in particular the *praetor)* contributed more to the development of the law than the legislature.[12]

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[8] The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, Brussels, 14 September 2017, pp.4-5

[9] THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 2002
(The Bangalore Draft Code of Judicial Conduct 2001
adopted by the Judicial Group on Strengthening Judicial Integrity,
as revised at the Round Table Meeting of Chief Justices
held at the Peace Palace, The Hague, November 25-26, 2002), value 1

[10] Ibid, value 2

[11] Treschel, pp. 46

[12] Ibid, pp.46

Judicial independence and impartiality include a number of different aspects that may be clustered as follows (this taxonomy is taken from Grimheden, *Assessing Judicial Independence in the People`s Republic of China under International Human Rights Law, p.51):*

1. Independence
   -Collective Independence
      a). Structural
      b). Resources
   -Individual
      a). occupational
      b). Internal Structure
      c). Rights of Judges
2. Impartiality
      -Recusal
      -Non-conflicting Assignment
3. Public Confidence
      -Transparency
      -Representativity.[13]

It is worth noting that these twin principles are related and therefore overlap conceptually to some degree. Generally speaking, independence relates to insulation from pressure at an institutional level, while impartiality relates to the neutrality and lack of bias of individual judge.[14]

The fact that the guarantee of an independent and impartial tribunal is the essential Eelement in Article 6 of the ECHR is not just a theoretical aspect. It can also be seen reflected in the case-law. In particular, it is always the first element to be examined in a case brought under Article 6. If it turns out that a tribunal does not conform to the requirements of Article 6, there will be no further examination of the proceedings- proceedings before a tribunal which does not satisfy the criteria of independence and impartiality can never be fair and there is thus no reason either to examine whether e hearing before such e tribunal was held in public or reasonable time.[15]

I.Judicial Independence

Independence of judiciary is of a core importance since it excludes any kind of pressure toward the function of judges as well as it contributes in both, increasing the prestige of judges and increasing the citizen`s trust in judges` work.[16] Independence means that a court shall not be subordinated to any other state organ. This is not to say that a lack of independence from non-state entities, such as, for example, a warlord in Afghanistan or Somalia, or from a generous sponsor such as Coca-Cola or Shell, could be tolerated. It would, however, be the responsibility of the state to intervene if that were the case.[17]

According to the Bangalore Principles of Judicial Conduct, judicial independence shall mean that: a judge shall exercise the judicial function independently on the basis of the judge`s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or of any reason. A judge shall be independent in relation to society in general and in

[13] O`Connor-Rausch, pp. 60
[14] Ibid, pp.60
[15] Treschel, pp. 46-47
[16] Ejup Sahiti- Rexhep Murati, E drejta e procedurës penale, Botim i plotësuar dhe ndryshuar, Prishtinë, 2016, pp. 121
[17] Treschel, pp.53

relation to the particular parties to a dispute which the judge has to adjudicate. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence. A detailed analyze of these paragraphs, shall reflect that the judiciary (the courts and the judges) must be independent, while independence entails: judge must be independent and assess the facts according to his/her best knowledge and practice and should not be biased in making decisions in a case; judge`s independence means independence toward particular parties involved in the case but also means independence from the society; judiciary must be independent not only from other state institutions, but also from judiciary itself *(see above: In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently)* and that procedures must instill public confidence. These aspects are sometimes termed institutional independence and functional independence. The International Bar Association Minimum Standards of Judicial Independence use the terms personal independence and substantive independence[18]. According to the paragraph 1(b) of the International Bar Association Minimum Standards of Judicial Independence[19], the personal independence *means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control* and the substantive independence means *that in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.* Those rules envisages the internal independence as very important element of judiciary independence. In the paragraph 46, states that: "*in the decision making-process, a judge must be independent vis-à-vis his judicial colleagues and supporters".* The Senior Group Report for Macedonia done in 2017, envisages in some way the absence of this kind of internal independence (see above pp. 2-3) and focuses in criticizing few judges in higher positions who have been pressuring and influencing the work of younger judges!

The external independence will mean the independence from the legislative and from the executive branch.

The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive (Principle 5 of IBA Minimum Standards for Judicial Independence). The Executive shall not have control over judicial functions (Principle 5) and the ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole (Principle 16).

There are few elements that reflects on the judicial independence. Usually, as main important are encountered: the manner in which the judges are appointed; the qualifications for appointment, the term of office of the judges, their remuneration and qualifications for appointment, the existence of safeguards against insulation, and the appearance of independence.

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[18] According to paragraph 1 (a) of the International Bar Association Minimum Standards of Judicial Independence: " Individual judges should enjoy personal independence and substantive independence."

[19] Article 1(b) and 1(c) of the International Bar Association Minimum Standards of Judicial Independence, 1982

a. The Manner of Appointment

There exists a variety of manner throughout the world, in which the judges are appointed and that does not cause a problem, since every state has adopted a particular and appropriate system of appointment which is in coherence with other parts of the system and well-accepted by the people. Judges, in different states, are appointed by the judicial council, by the parliament, by the President of the State, etc.

Some might criticize the appointment of judges from political bodies or individuals (Executive, Parliament, the President, etc.). It would be illusory to imagine that judges and tribunals are totally removed from political life and from the political currents prevailing in a specific society at a certain time. Within certain limits it is acceptable and perhaps even desirable that judges share the kind of values which predominate in society as a whole. However, there must be some limits: even though a judge cannot simply be viewed as *"la bouche de la loi"*, he or she is still obliged to decide cases essentially in accordance with the law. This means, in particular, that the tribunals ought to keep in mind the universally accepted values of human rights in their day-to-day activity.[20]

According to IBA Minimum Standards of Judicial Independence, the participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority (Principle 3(a)) and the appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily (principle 3(b)).

If the judges don`t share the same values with the rest of the people in a country, it would mean that their decisions will not be well-accepted and might be quite different from the public opinion about a particular case. And, the acceptance of a court-decision from the public opinion is as important as the procedure in which that decision is made. Thus, judges, must work in accordance with the law, valuate the facts and evidences and bring a decision that will be both: fair and that will satisfy the public judgment for a specific case! Otherwise, the decision might be executed by law, but will not reflect justice. Judges, in doing their work, beside others, must act as intermediates between the crime and the society. Their decisions are not simply "their decisions", but are also "*vox populi"* for the case. Their decision must also reflect the public opinion for that particular case!

b). The Term of Office, their Remuneration and Qualifications for Appointment

In a number of states it is considered mandatory that judges be nominated for life. Some states have accepted terms of three, four, five, six, etc. years. There are also states that have accepted appointment of judges for a life-term. According to IBA Minimum Standards of Judicial Independence, (paragraph 22): "Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment".

Security of tenure is, however, not enough. Other elements such as the salary of judges are also important. In fact, in order to be fully independent, it is essential that judges are paid at the very least a salary which allows them to maintain a certain standard of living. When two so-called "eminent lawyers" prepared a report on the question of whether Georgia fulfilled the prerequisites for joining the Council of Europe, they had heard that it was common for members of judiciary to accept bribes. Faced with this allegation, President Shevarnandze openly admitted that there were

[20] Treschel, pp. 54-55

perhaps two or three judges in Georgia who were not corrupted. This was not surprising because their salary amounted to a mere twenty dollars a month which made it impossible to meet the basic costs of living.[21]

The requirement of adequate remuneration is also found in the IBA Minimum Standard of Judicial Independence (paragraph14[22] and paragraph 15[23]).

The United Nations Procedures for the Effective Implementation of the Basic Principles on the Independency of the Judiciary also require that: "States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to caseloads, providing the courts with necessary support staff and equipment, and offering judges personal security and remuneration and emoluments" (Procedure 5). Some experts argue that and without these resources, judiciary independence could be jeopardized because judges might seek to augment their income by accepting gifts or money from interested parties, as has occurred in a number of post-conflict states and territories such as Cambodia, Kosovo, Liberia, the Democratic Republic of the Congo, and Sierra Leone[24].
Bearing in mind, that the corruption in judiciary is one of the most danger features, states must be very careful when enumerate conditions for judges` appointment. Beside formal pre-requisites, a very important element is the dignity[25] and the integrity[26] of the person who is going to be appointed as a judge and bring decisions that will influent in people`s life!

c). The existence of safeguards against insulation

Judges must perform their duties in accordance with law and without any pressure from any side. This means that judges must be independent from different public or private, national or international bodies or organizations, as well as from other courts or judges.

Republic of Northern Macedonia in many international annual reports have been criticized for non-satisfying the principle of judiciary independence. In the Report of Senior Group of Experts, among other kind of influence toward the work of judiciary, in a explicit way is mentioned the insulation of younger judges from older ones. This insulations has been done through the system of appointment, evaluation, promotion, discipline, and dismissal which has been used to reward the compliant and punish those who do not conform. This minority of politically-influenced judges should be subject to effective professional and ethical rules and, where evidence is available

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[21] Ibid, pp. 55

[22] Paragraph 14 of IBA Minimum Standards of Judicial Independence states: "judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control".

[23] Paragraph 15 of IBA Minimum Standards of Judicial Independence states: a). "The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law" and b). Judicial salaries cannot be decreased during the judges` services except as a coherent part of an overall public economic measure".

[24] O`Connor-Rausch, pp. 62

[25] According to American Bar Association, Criminal Justice Standards, Special Functions of the Fair Trial Judge (Part III, Maintaining the Decorum at the Courtroom: "a. The trial judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, jurors, witnesses, victims, lawyers, and others with whom the judge deals in an official capacity. The judge should not permit any person in courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom".

[26] According to Bangalore Principles, *Value (3):* INTEGRITY is essential to the proper discharge of the judicial office. (3.1) A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer and (3.2) The behavior and conduct of a judge must reaffirm the people`s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

to prove criminal responsibility, should be made criminally liable for their misconduct. Any judges dismissed for proven misbehavior should be barred from practicing law at any level!

The Values 1.3 and 1.4 of Bangalore Principles of Judicial Conduct, also deals with the necessity to insulate the courts and judges. (Principle 1.3: *"A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom*" and Principle 1.4: "*In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently*".). Also, paragraphs 16[27] and 46[28] of IBA Minimum Standards of Judicial Independence, deals with independence from outside and inside the court.

The prime referents that judges must have in carrying out their duties are the applicable law and the solemn declaration that they make upon being appointed a judge. Judges must be insulated from two type of pressure: external and internal. External pressure means pressure from external actors, for example, the executive, the legislature, an international organization, or a private person. Nor must pressure be brought by international actors. For example, judges in Kosovo complained of undue political pressure by international actors requesting that certain suspects not be released from detention, although evidence was not sufficient to hold them.[29]

d). The appearance of independence

The independence of a court must be decided exclusively on the basis of objective criteria. If one looks at the case-law more closely, one will find that whenever the Court refers to "appearances" in connection with independence, what is in fact at issue is not independence but impartiality. An example is *Belislos v. Switzerland.* Mr. Belilos complained of having been sentenced to a fine by a police board. The judge of this police board was a lawyer from the police force. He was truly independent for his term of office (four years) but was free after his tenure to return to the police. In the words of the Court: "The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society."[30]In *Incal* the Court seemed to require that two distinct groups have confidence in the courts when it stated that: "What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all…in the accused".[31]

II. Judicial Impartiality

While independence of judiciary means a judiciary that is free from internal and external pressures and making decision only by application of law and in line with the solemn declaration, impartiality sounds as close, but it is not same with that. Impartiality means that in a particular case, while judging and decision-making process, the judge will not be biased by any of the parts

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[27] The paragraph 16 foresees: "The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole".

[28] The paragraph 46 foresees: "In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters".

[29] O`Connor- Rausch, pp.63

[30] Treschel, pp. 56

[31] Ibid, pp.56

and thus, will be able to bring a right decision through a due process. Impartiality does not exclude only pressures and influences from different entities, but excludes pressures and influences for any reason. This means that judges might not be influenced only by different actors, but maybe they might have, sometimes a reason to bring a decision in favor of a part. The etymology of the word "impartiality" suggests that the judge will be free of both parties within a case. If we see the general picture, this sends to the decision-making process that is done through application of law and in accordance with their solemn declaration- that we mentioned in the part of independence, but the elements that ensure impartiality are different and will be elaborated in addition of this text.

The term "impartiality" describes a state of mind in which the subject is balanced in a perfect equilibrium between parties- it is synonymous with "non-partisan" or "neutral". It is generally defined-quite logically- in negative terms as "the absence of prejudice or bias".[32] The concept of impartiality requires that a judge act without favor, bias, or prejudice in the adjudication of a case. A judge who hold an actual bias or prejudice against a person who is party to the proceedings (e.g., the accused) or who has personal knowledge of the disputed facts of the case cannot be considered to be impartial. Moreover, a judge must not have a vested interest in a case. A vested interest occurs where a judge has an economic or other interest in the outcome of the case or where he or she has a spousal, parental, or other close family, personal or professional relationship or a subordinate relationship with any of the parties[33].

According to the Bangalore Principles for Judicial Conduct (Value 2), Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A judge shall perform his or her judicial duties without favor, bias or prejudice and shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary. Impartiality is a part of IBA Minimum Standards for Judicial Independence (Section G- Securing Impartiality and Independence). Paragraph (44) foresees that a judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias and (Paragraph 45), a judge shall avoid any course of conduct which might give rise to an appearance of partiality.

A very interesting elaboration of judicial impartiality in the view of European Court of Human Right`s, has done the author Stephan Treschel. Namely, since the very first judgements addressing the issue of the right to an independent and impartial tribunal, the Court has made a distinction between two different aspects of impartiality which it has labeled as the "subjective" and the "objective" test. To quote a rather recent passage: "As to the condition of "impartiality" within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

This separation between two tests- in some judgments the Court speaks of "approaches" – is quite convincing although the labels are not. It would be preferable to distinguish between an "objective" test- is the judge objectively biased? – and a "subjective" test- does the judge appear to be biased in the eyes of the accused?

The essential element is the one which the Court calls the subjective aspect: the requirement that the judge have an impartial state of mind. However, it is obviously practically impossible to determine whether or not this condition is fulfilled. It is even very doubtful whether

[32] Ibid, pp. 61
[33] O`Connor- Rausch, pp. 64

it is possible in theory, particularly if one has regard to the psychoanalytical school of psychology. There can hardly be any doubt that no human being will be entirely without bias. Mostly, however, we are not aware of our hidden tendencies. Lawyers in particular have a tendency grossly to overestimate their own objectivity. In practice, a judge who is aware of his or her tendency to be biased and is capable of sufficient self-criticism and self-control will be more neutral than a judge who is entirely unaware of his or her predispositions.

In view of this difficulty the so-called objective test asks whether the judge could be regarded as biased in the eyes of a reasonable person or an "ordinary citizen". It is not sufficient, of course, that the applicant be apprehensive with regard to the impartiality of a tribunal; his individual feelings cannot be more decisive that the actual bias of the judge, because they cannot be proven either. There would also and primarily be a considerable danger of abuse if individuals could decide whether they want to accept a tribunal or not, particularly in civil proceedings where the plaintiff and the defendant are likely to disagree in every respect, to the extent that the confidence of any party can be enough to arouse the suspicion of the other party. The applicant must give reason for his or her fears and the Court will say whether they are sufficient to justify them or not.

This is not only a practicable solution, it is also the correct one, because it gives proper weight to the situation of the applicant, and not only the applicant. Luhmann has quite rightly stressed the importance of the element of demonstration in the administration of law for the maintenance of general confidence in the state. In fact, it goes far beyond that very important principle, quoted first (although not very precisely) by the Court in *Delcourt (*Delcourt v. Belgium (31) and (32)) and repeated many times since, set out by Lord Heward in R. v. Sussex Justices, ex parte McCarthy: "It is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

In this context the Court often says that "appearances may be of a certain importance". A judge who in fact is perfectly impartial but does not seem so, is not impartial for the purposes of Article 6 (1) of the European Convention on Human Rights; on the other hand, if a judge appears to be impartial but is in fact not so, he or she still is impartial for the purpose of these proceedings- at least as long as the bias is not known; once it is known, the appearance, of course, disappears. "[34]

a). Lack of Impartiality because of personal bias[35]

The Court will only on very exceptional occasions seriously consider a judge- the "subjective test" can only apply to individuals, not to a collective organ- to be personally biased; in fact, it shows a general reluctance to address any blame to a specific individual. Therefore the Court approaches the issue with a presumption that the judge is impartial- very strong evidence is required to convince it that this is not the case.

The reluctance of the Court to admit that there was lack of impartiality under the subjective test was particularly striking in the case of *Remli.* The applicant, a man of Algerian origin, was the accused in a jury trial. One of the jurors seems to have said, during a break: "What`s more, I`m a racist". This was bought to the knowledge of the presiding judge by a written declaration but Mrs M.The presiding judge found that he could not take formal note of the event because it had not occurred in the court`s presence. In view, of such strong indications of bias which was not really in doubt, the Court could have been expected to say: "Here we must assume that we are in

[34] Treschel, pp. 61-63
[35] Ibid, pp.63

analogous situation to that of a (subjectively assessed) biased judge. A juror has stated that he hold racist opinions and the accused is of a different race. His words can only be interpreted as meaning that he is prejudices against the accused. Yet, the Court did not even refer to the subjective test. Instead, like the Commission, it found a violation of Article 6(1) on the basis that the Court had failed properly to examine the allegations made in Mrs M.`s handwritten note: "Article 6 (1) of the Convention imposes an obligation on every national court to check whether, as constituted, it is an "impartial tribunal" within the meaning of that provision where, as in the instant case, this is disputed on a ground that does not immendiately appear to be manifestly devoid of merit".[36]

A somewhat similar and equally sensitive situation arose in *Gregory v. United Kingdom*. After a bit more than a hundred minutes of deliberations, a note was passed to the judge from the jury which read: "JURY SHOWING RACIAL OVERTONES. 1 MEMBER TO BE EXCUSED". The judge convened both counsel. Counsel of the defense did not press strongly for dismissal of the jury. Thereupon the judge addressed a "firmly worded redirection" to the jury. The Court came to the conclusion that he had thereby done all that he could have been expected to do under circumstances and referred also to the "significant" (non) reaction of defense counsel. Thus, it found there to have been no violation. In fact, it was not possible in this case to establish personal bias.[37]

Nor was it possible in the similar case of *Sander*. Here an applicant who was of Asian origin, was accused together with another Asian of conspiracy to defraud. After the weekend following the judge`s summing up, a juror brought the following notice to the judge:

"I have decided I cannot remain silent any longer. For some time during the trial I have been concerned that fellow jurors are not taking their duty seriously. At least two have been making openly racist remarks and jokes and I fear are going to convict the defendants not on the evidence but because they are Asian. My concern is that the defendants will not therefore receive a fair verdict. Please could you advise me what I can do in this situation?"

The judge then admonished the jury, and the next day he has given a letter signed by all of them which said:

"We, the undersigned members of the jury, wish to put on record to the Court our response to yesterday`s note from a juror implying possible racial bias.

1. We utterly refute the allegation.
2. We are deeply offended by the allegation.
3. We assure the Court that we intend to reach a verdict solely according to the evidence and without racial bias.

In addition, the judge received a letter from a juror who admitted to having made jokes which could have been (miss)understood as betraying a racist attitude which he, however strongly denied. The judge decides to proceed with the trial. The applicant was convicted and the other accused as acquitted. The Court distinguished this case from *Gregory*. It attached little credibility to the letter affirming the absence of bias and concluded that the applicant could well have had misgivings about the impartiality of the jury; consequently it found that there had been a violation.[38]

There are also strong indications of personal bias in the case of *Ferrantelli and Santangelo v. Italy*. In fact, the applicant appeared before a judge who had previously triad a co-accused. That judgment contained several references to the applicants` involvement in the crime: they were

[36] Ibid, pp.64
[37] Ibid, pp. 64
[38] Ibid, pp.65

described as "co-perpetrators" and the judgment said that Mr Santangelo had been responsible for carrying out the murders. However, as the applicants had not challenged the personal impartiality of the judge, the Court found a violation by applying the objective test.[39]

Kongsley v. United Kingdom is a good example of a civil case involving judicial bias. The applicant had been a director of a casino enterprise. After a raid involving several installations the gaming board decided that he was not a fit and proper person to exercise that function. The applicant wanted to challenge this decision before an independent tribunal, but had to submit to the jurisdiction of a panel composed of members of gaming board.[40]

The Court, finally accepted the presence of personal bias, i.e. lack of subjective impartiality, for the first time in *Kyprianou v. Cyprus.* The applicant was a lawyer who had been interrupted during his cross-examination of a witness. He was angry and he argued with the judges. The judges were than offended and the applicant was sentenced, on the spot, to five days in prison. The Court found a lack of objective impartiality established simply by the fact that the judges punished someone for having offended them. But it also accepted that some personal impartiality had indeed developed. This became apparent through the "intemperate reaction of the judges to the conduct of the applicant, given their haste to try him summarily for the criminal offence of contempt of court without availing themselves of other alternative, less drastic, measures such as an admonition, reporting the applicant to his professional body, refusing to hear the applicant unless he withdrew his statements, or asking him to leave the court room and in the wording they used.[41]

b). Lack of impartiality for objective reasons

While subjective reasons would mean personal prejudice or bias by a judge or the court, this second group of reasons that might cause lack of impartiality of a judge or a court, comes into consideration where there has been some previously involvements of a judge in the same case, but in different position. The position that might be hold by a judge and can make a judge doubtful and ineligible, thus partial, for further remaining as a judge in a specific case are: previously being a prosecutor of that case, member of the police, an investigator, member of a body responsible for preparing the indictment, having taken one or more decisions regarding the defendant`s detention, a judge on the merits, a defense counsel, etc.

According to paragraph 18 (Excusal of a Judge on Account of Lack of Impartiality) of the Model Code for Post-Conflict Criminal Justice, a judge must not participate in a case if he or she: a). is a victim of the criminal offense; b). Is a relative of a defense counsel, the victim, the counsel for the victim, or the accused; c). has taken part in the proceedings as a prosecutor, a defense counsel, or a counsel for the victim, or has been examined as an expert witness or witness; or d). In the same case, has taken part in rendering a decision of a lower court, or, if in the same court, has taken part in rendering a decision that is being challenged by appeal.

A judge must not participate in the confirmation of an indictment where he or she has ordered the detention of the suspect (paragraph 2). A judge must not participate in the trial; of an accused if he or she: a). has participated in pretrial proceedings, including proceedings to confirm an indictment in the same case; or b). has participated in pretrial proceedings, including proceedings to confirm an indictment in a different case against the same accused person. Beside

[39] Ibid, pp.65
[40] Ibid, pp.66
[41] Ibid, pp.66

this, a judge must not participate in a case where, apart from the above given situations, his or her impartiality might reasonably be doubted of any ground.

Where the impartiality of a judge is compromised or is in doubt, the judge must make a request to the president of the court to be excused from participating in a particular case (paragraph 5of MCCP). A judge seeking to be excused from his or her function must make a written request to the president of the court, setting out the grounds for the request. The president of the court must treat the request as confidential. The president of the courts must deliver a decision on whether the requesting judge will be excused from the particular case in question. Where a request for excusal is granted, the president of the courts must assign a new judge to the proceedings and ensure that the judge who is the subject of the request takes no further part in the proceedings. All the actions of the judge who has been excused are deemed valid until the time at which he or she is excused by the president of the courts. (paragraphs 6-10 of MCCP).

The Bangalore Principles for Judicial Conduct, also foresees situations for judges excusal from a particular case. Namely, according to value 2.5: "A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where a). the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; b). the judge previously served as a lawyer or was a material witness in the matter in controversy, or c). the judge, or a member of the judge`s family, has an economic interest in the outcome of the matter in controversy. Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Disqualification of a judge or juror is possible if there are specific circumstances or grounds which unable them to participate in the proceedings as judges or jurors. There are two categories of grounds which requests disqualification: a). absolute grounds for disqualification and b). relative grounds for disqualification.[42]

The absolute ground for disqualification are ground that don`t permit a judge to decide and participate in a case and simply make that judge or juror an ineligible judge or juror- *iudex inhabilis*. Those ground are enumerated in the Law on Criminal Procedure of Macedonia (article 33, paragraph 1 (1-5). These grounds by Macedonian Law on Criminal Procedure of Macedonia are: 1). if he or she is damaged or victim of that crime; 2). if the defendant, his counsel, the plaintiff, the damaged party, his legal representative or authorized representative is his or her spouse or a non-married spouse or relative by blood, in the straight line to any degree, in the sideline to the fourth degree and by affinity to second degree; 3). if, with the defendant, his counsel, the plaintiff, the damaged party, is in relation of guardian, person under guardianship, adoptive parent, adoptive child, …
4). if in the same criminal case has participated as a pre-trial judge, has participated in the examination of the indictment before the main hearing, or has participated in the procedure as plaintiff, defense counsel, legal representative or counsel of the victim, or has been examined as witness or as an expert and 5). in the same case participated in the decision of the lower court or if in the same court he participated in the adoption of a decision that has been challenged by appeal.

The above-mentioned absolute grounds might be divided in two groups: the first, (art. 33, paragraphs 1-3), are grounds that shows personal interest of the judge or the juror to bring a biased

[42] Nikola Matovski, Gordana Buzharovska Lazhetiq, Gordan Kalajxhiev, Kazneno procesno pravo, Vtoro Izmeneto i Dopolneto Izdanie, Skpje, 2011, pp. 106

decision and the second group, (art.33, paragraphs 4-5), are the grounds that shows about the ineligibility of being a judge or a juror with carrying out other functions or authorizations in the same court.[43]

There is also one more ground or reason more for disqualification of a judge, according to Law on Criminal Procedure. It has stated in the article 33, also that a judge or a juror may be disqualified from a trial, if there are any circumstances that causes suspicion of his or her impartiality. Here may come into consideration different situations, like i.e.: joint property interests, the relationship trustee- debtor, close relatives (outside mentioned in paragraphs 2 and 3), close friendship, etc[44].

The issue of impartiality can be initiated by the judge, but, if a judge does not voluntarily exclude himself or herself from a case, there must be mechanisms for his or her exclusion with the initiative of the parties. This kind of disqualification does not mean permanent remove of a judge, but only remove from the specific case. Usually, the decision is brought by the Court`s President. Such a solution has in the Law on Criminal Procedure of the Northern Macedonia.

III. Public confidence- a joint element of judicial independence and judicial impartiality

The judiciary must ensure that there are procedures in place to enhance public confidence, including: a). transparency of judiciary`s activities and b). representativity.[45]

According to the Bangalore Principles of Judicial Conduct, "public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society" (Preamble). Public confidence is an element of both judicial independence and judicial impartiality. There is an element of objective, public perception to both independence and impartiality. A perception of the absence of independence and impartiality is as relevant as their actual absence. References to public confidence are scattered through the various nonbinding sources on judicial independence and impartiality, although it is not specifically mentioned in any of the treaties that refer to judicial independence and judicial impartiality. Based on the case law from various international and regional human right bodies, and on nonbinding instruments on judicial independence and impartiality, many scholars maintain that the concept of public confidence is best protected by ensuring transparency of the judiciary`s actions and representativity in the composition of the judiciary. Procedural transparency may include measures to make rules, procedures, and practices of courts public and available for public reference. It may also include measures to ensure transparency of judgments and decisions of courts (excluding, of course, the internal deliberations of judicial panels and those decisions that are confidential for the purpose of protecting a victim or witness). The creation of designated points of contact with other agencies in the criminal justice system and beyond is an important transparency mechanism. Finally, the publication of court activities, including workload, budget, and staffing allocations, may also be an important element of transparency. Representativity relates to the compostition of the judiciary. The judiciary should as a whole reflect different branches of society and include male and female judges from different ethnic and linguistic group and different geographical locations[46].

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[43] Ibid, 107
[44] Nikola Matovski, Kazneno Procesno Pravo, Opsht del, Skopje, 2003, pp. 165
[45] O`Connor-rausch, pp. 68
[46] Ibid. pp. 68

IV. Conclusions

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. It is an individual human right which ensures that disputes in which the individual is involved are decided by a neutral authority and it has also an institutional aspect of constitutional importance: it lays the foundation since Montesquieu about the third power in a state after the legislative and the executive.

Independence relates to insulation from pressure and impartiality relates to the neutrality and lack of bias of an individual judge.

Independence of judiciary is of a core importance since it excludes any kind of pressure toward the function of judges as well as it contributes in both, increasing the prestige of judges and increasing the citizen`s trust in judges` work. It might be external independence and internal independence.

According to the Bangalore Principles of Judicial Conduct, judicial independence shall mean that: a judge shall exercise the judicial function independently on the basis of the judge`s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or of any reason.

There are few elements that reflects on the judicial independence. Usually, as main important are encountered: the manner in which the judges are appointed; the qualifications for appointment, the term of office of the judges, their remuneration and qualifications for appointment, the existence of safeguards against insulation, and the appearance of independence.

Impartiality means that in a particular case, while judging and decision-making process, the judge will not be biased by any of the parts and thus, will be able to bring a right decision through a due process.

Public confidence is an element of both judicial independence and judicial impartiality. There is an element of objective, public perception to both independence and impartiality. A perception of the absence of independence and impartiality is as relevant as their actual absence!

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Д-р Арта Билали Зендели[47]
Д-р Шпреса Алими[48]

СУДСКАТА НЕЗАВИСНОСТ И СУДСКАТА НЕПРИСТРАСНОСТ: ДВЕ СТРАНИ НА ПАРИЧКАТА

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Апстракт

Независно и непристрасно судство останува цел што мора да се постигне во Република Северна Македонија. Во овој труд ќе се фокусираме во детално и длабоко значење на судската независност и судската непристрасност, нивните елементи што мора да се почитуваат за независно и непристрасно судство, како и главните елементи на независно и непристрасно судство според Бангалорските принципи на судско однесување (2002 година), Меѓународната адвокатска асоцијација Минимални стандарди на судска независност, Европската конвенција за човекови права и проценка и препораки на Групата на високи експерти за системски прашања на владеењето на правото за Македонија (2017). Неколку случаи од практиката ќе бидат презентирани и во трудот.

Клучни зборови: Судство, независност, непристрасност, кривична постапка, доверба на јавноста.

[47] Вонреден професор, Правен Факултет, Универзитет во Тетово, arta.bilalli@unite.edu.mk
[48] Доцент, Правен Факултет, Универзитет во Тетово, shpresa.alimi@unite.edu.mk