

Ways towards Justice

THE IMPLEMENTATION OF THE PRINCIPLE OF DIVISION OF POWER

IS THE JUDICIARY INDEPENDENT?

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The violation of the principle of judicial independence exists when the legislative and executive power (branches) directly interfere with the course and the outcome of court proceedings, and also when they use their permitted influence (the arrangement of the judicial system and providing working conditions) in a way that directly influences the independence of the judicial branch (judges)

The issue whether and to which extent the judiciary in Serbia is independent, is as a rule being actualized after decisions are being passed in proceedings that are arising media attention, especially if related to political figures. The answer is then being offered by politicians, media, citizens and the judiciary itself. Each of the mentioned categories is observing the problem from their own angle and their own perspective about judicial independence. Therefore the answer to the question is not uniform. Political parties in power are convincing that the executive and legislative branch do not interfere in the work of the judicial branch, while those in opposition claim that such influences do exist. Citizens' opinion on the issue depends primarily upon their belief in a specific political option, and is less a result of their own perspective. The reason why this is so is that the public, and often politicians and even the judiciary itself, do not understand the essence of the principle of the independence of judicial power /branch/ (judges).

Therefore, prior to answering all of the raised questions it would be necessary to give several introductory notes about the importance and the essence of the 'independence of the judicial power/branch' and the assumptions and obstacles for its implementation – REALIZATION.

What does the principle of the independence of the judicial branch exactly mean?

Article 6 of the 'European Convention on the protection of human rights and fundamental freedoms' guarantees 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'. Corresponding to this right (the right to just and unbiased trial) is the judge's obligation to be independent and objective while performing his/her duties, and at the same time the obligation of the state to establish its judicial system in a way that can guarantee for the mentioned right to be realized. Hence, the principle of judge's independence and objectivity represents the citizens' right and is established in their interest, and not in the interest of judges (for whom it represents an obligation), which is frequently being forgotten.

'Impartiality of a judge' reflects his relation towards the parties in a concrete proceeding and represents the obligation for a judge not to incline towards any of them. The state, on its part, is obliged to guarantee that the judge will be objective and to remove all doubts in his objectivity. In this regard numerous international conventions and recommendations have set international standards imposing obligations upon states to organize their judicial systems in a way that will enable court cases to be distributed to judges regardless of who the parties in the case are or what are the legal circumstances in the proceedings (the right to the natural judge), to decide what type of functions, positions or political engagements are incompatible with the judicial function, to ban for cases to be taken away from one judge and to be given to another judge apart from cases envisaged by law, to proscribe that the judge has to be recused if there were circumstances that could raise doubt in regard to his impartiality, etc.

'Impartiality of a judge' reflects his relation towards the executive and legislative branch and represents a ban for both of them to influence a judge while performing his duties (judicial branch).

Why should the judicial branch be independent?

The principle of the 'Impartiality of a judge' originates from the principle of division of power. The principle of division of power is the foundation of contemporary legal and political systems and implies the existence of three divided and functionally independent branches (legislative, executive and judicial) which mutually restrain each other. The very essence of the principle of the division of power into the legislative, executive and judicial branch is their mutual control and it is the type of this control that determines whether this principle is being truly implemented in a state. This was perhaps best explained

by the French political philosopher Charles Montesquieu in his work 'The spirit of laws' - '...in order to avoid the misuse of power, things should be arranged in so that one power restrains another. Everything would be lost if the same man or the same body of prominent officials, regardless whether consisting of nobleman or commons, would be in charge of all three powers'..., if the same person or body...'unites in it's hands both the legislative and administrative power, freedom is impossible since in law nobody can be restrained by it's own will, but rather by someone else's'...

The judicial branch controls the legislative and executive branch by controlling the legality of their acts (Constitutional court is controlling constitutionality and legality of their general acts, and the Courts are controlling the individual ones). On the other hand, the decisions passed by the court are not subject to the control of the other two power branches. This would be the exact reason why it is necessary to provide for the judicial branch (judges) to be functionally independent from the executive and legislative branch. As Montesquieu said 'freedom is impossible if judicial power is not separated from the legislative and executive. If it were joined with the legislative power, the authority over citizen's lives and freedoms would be obstinate, because the lawmaker would be the judge as well. If on the other hand it were merged with the executive power, the judge could have the power of a tyrant.' The answer to the question to what extent judicial power is independent from the executive and legislative power actually reveals to us to what extent are they constricted in their obstinacy, that is to what extent are they forced to abide by the rules prescribed by themselves in the first place.

Hence, the legislative and executive branch are restraining judicial power by proposing and passing laws which arrange the judicial system based on which the courts are passing their decisions and by which conditions for their work are created. As it can be seen, not every influence of the legislative and executive power on judicial power represents a violation of the principle of independence of judicial power. Simplified, legislative and executive power must interfere in the organization of judicial power, but not in its functioning (course of a trial and passing of a decision).

The violation of the principle of judicial independence exists when legislative and executive branches directly interfere in the course and the outcome of the court proceedings, but also when they perform its permitted influence (arrangement of the judicial system and providing for working conditions) in a way that indirectly affects the independence of the judicial branch.

Having in mind that a direct influence upon judges in performing their duties ('ordering' of judgments, threats or promising of certain benefits to judges and similar) is not only forbidden, but unlawful as well, such cases are rare and fairly easy to detect. It is not difficult to say whether the judicial branch is independent in systems that frequently have cases like this. However, the fact that such direct influence on the judicial branch does not exist or is rare does not necessarily mean that the judicial branch is in fact independent. Indirect influence ('misuse' of the permitted influence) is much harder to detect exactly because it is indirect and as rule not unlawful. For these very reasons the issue of judiciary independence was, and still is a subject of numerous international resolutions and recommendations (especially in the Council of Europe). Thus international standards were established on the basis of which it is evaluated whether the judicial branch in one country is independent, exactly by evaluating the way (legal) in which the state arranges its judiciary.

How to secure judicial independence?

As far as I know there is not even one country in the world that does not proclaim independence of the judicial branch. However, in order to avoid that this proclamation becomes only a dead letter it is necessary to provide for the conditions for its realization. There must be guarantees that it will be implemented. The issue of judicial independence in a state is actually the issue whether and to what extent guarantees for judicial independence exist.

This is, first of all, the normative (constitutional and legal) framework, or the so-called legal guarantees. Hence, the constitution and laws should be the ones to constitute the legal system that prevents every forbidden influence of the legislative and executive branches upon the judicial branch. This pertains primarily to the election of judges, their liability and dismissal, permanence of their function, non-transferability, immunity and financial position.

Furthermore, there are so-called real guarantees of judicial independence. Legal guarantees are not sufficient to provide real independence of the judiciary. It is necessary for some conditions to exist in a state that will enable their implementation and respect in real life. There are many factors of influence in this regard, primarily the general social and economic situation and the level of political and legal culture in a given state.

Finally, factual independence of the judiciary is guaranteed by the judge's personality. If the judge is not independent as a person, if he/she is susceptible to influences and especially those coming from the other two branches, the judiciary will not be independent regardless of the existing legal and real guarantees. The independence of a judge as a person does not depend only upon his character (honesty,

honor, braveness, integrity, openness) but also upon the extent to which he/she is free as a person and able to use that freedom, upon his cultural level, expertise and financial security.

For the full independence of the judiciary as a branch of power it is necessary to provide all three types of described guarantees. The lack of one of them does not guarantee the independence of the judicial system. For instance, even when all legal and genuine guarantees do not exist we can still have independent judges. The problem is that in such conditions independence of the judicial branch depends only upon the judge's character, while the system must not depend exclusively upon an individual. Vice versa, a system must 'produce' an independent judge. It is important to point out this circumstance in order to understand what is to be done through judicial reforms in order to achieve true independence of the judiciary. Particularly due to the fact that the independence of the judicial branch is frequently being identified only with judge's personality, not only by the general public but in political circles as well. Thus the problem is being simplified and the solution seen primarily in the changes of the judiciary personnel. However, such changes are necessary but not sufficient to solve the problem of the independence of the judicial branch (or to solve other problems referring to its quality and efficiency).