The Judicial Independence as a European Standard

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ARTICLE 6 - Right to a fair trial

• 1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

• 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

• 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
Institutional requirements of a tribunal

The “tribunal” must meet the relevant institutional requirements under Article 6 § 1 of the Convention (Belilos v. Switzerland, § 64)

• (Previously) established by law
• Independent
• Impartial

There must be a subsequent review before a tribunal meeting the institutional and procedural requirements under Article 6 (Flisar v. Slovenia, § 33)
Tribunal established by law

A tribunal must be established by law as that is a guarantee of its legitimacy and compliance with the rule of law.

The aim is to secure that an (unlimited) discretion by the executive or judicial authorities in the organisation of the judicial system is excluded, but that it is regulated by law emanating from Parliament (Coëme and Others v. Belgium, § 98)

Tribunal established by law implies (Lavents v. Latvia, § 114):

• Competence of the tribunal in a matter
• Required composition of the tribunal

Law in this context implies (DMD GROUP, a.s. v. Slovakia, § 59):

• Act emanating from the Parliament
• Any other domestic rule determining composition of a tribunal, such as provisions concerning the independence of the members of a tribunal, the length of their term of office, impartiality and the existence of procedural safeguards
Independent tribunal

Independence under Article 6 § 1 concerns the question of statutory or institutional independence (Mustafa Tunç and Fecire Tunç v. Turkey [GC], § 221)

In order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1 of the Convention, regard must be had, inter alia, to:

• the manner of appointment of its members and their terms of office,
• the existence of safeguards against outside pressures and
• the question whether it presents an appearance of independence.

The concepts of independence and objective impartiality are closely linked, and normally, the Court will accordingly consider both issues together (Findlay v. the United Kingdom, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 281, § 73,)

The notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see Stafford v. the United Kingdom [GC], no. 46295/99, § 78, ECHR 2002-IV).

Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met.
“Justice must not only be done, it must also be seen to be done”
(De Cubber v. Belgium, § 26)

• Any doubts as to the lack of independence or impartiality must be objectively justified (Findlay v. the United Kingdom, § 76)

Independence of a tribunal refers to its independence with regard to:
1) the other powers in the state, and
2) the parties to the proceedings

• That is not the question of appropriate constitutional concepts but the existence of relevant safeguards separating judiciary from possible influences in a particular case (Kleyn and Others v. the Netherlands [GC], § 92)
The Impartiality requirements

The “impartiality” requirement has two aspects:

- Firstly, the tribunal must be **subjectively free** of personal prejudice or bias.
- Secondly, it must also be **impartial from an objective viewpoint** (it must offer sufficient guarantees to exclude any legitimate doubt in this respect).

**Under the objective test**, it must be determined whether there are ascertainable facts which may raise doubts as to the judges’ impartiality. In this respect even appearances may be of importance.

**The objective test** mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings ... It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal ...

It is the confidence that the courts in a democratic society must inspire in the public and above all in the parties to proceedings (see Morris v. the United Kingdom, no. 38784/97, § 58, ECHR 2002-I).

In deciding whether in a given case there is a legitimate reason to fear that these requirements have not been met, is whether this fear can be held to be objectively justified (see, mutatis mutandis, Hauschildt v. Denmark, judgment of 24 May 1989, Series A no. 154, p. 21, § 48).
Subjective and objective test

• The existence of impartiality **must be determined according to a subjective test**, that is, whether the judge held any personal prejudice or bias in a given case; and also

• according to an **objective test**, by ascertaining whether the **tribunal itself** and, among other aspects, its composition, **offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality**

• There is **no watertight division between subjective and objective impartiality**, as the conduct of a judge may not only prompt objectively held misgivings as to his or her impartiality from the point of view of the external observer (the objective test) but may also raise the issue of his or her personal conviction (the subjective test)

• In some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge’s subjective impartiality, the requirement of objective impartiality provides a further important guarantee.

• Likewise, the concepts of independence and objective impartiality are closely linked (see, for example, Findlay v. the United Kingdom, 25 February 1997, § 73, Reports 1997-I),

• It is sometimes difficult to dissociate subjective and objective impartiality (see, for example, Bochan v. Ukraine, no. 7577/02, § 68, 3 May 2007).
Impartial tribunal

• In maintaining confidence in the independence and impartiality of a tribunal, appearances may be important.

• In this respect, “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see De Cubber v. Belgium, 26 October 1984, § 26, Series A no. 86).

• In case of Brudnicka and others v. Poland, no. 54723/00, § 38, ECHR 2005, the Court pointed that given that the members of the maritime chambers (the president and vice-president) are appointed and removed from office by the Minister of Justice in agreement with the Minister of Transport and Maritime Affairs, they cannot be regarded as irremovable, and they are in a subordinate position vis-à-vis the Ministers. Accordingly, the maritime chambers, as they exist in Polish law, cannot be regarded as impartial tribunals capable of ensuring compliance with the requirement of “fairness” laid down by Article 6 of the Convention. In the Court’s view, the applicants were entitled to entertain objective doubts as to their independence and impartiality (see, mutatis mutandis, Sramek v. Austria, judgment of 22 October 1984, Series A no. 84, p. 20, § 42). There has therefore been a violation of Article 6 § 1 of the Convention.
CASE OF MORICE v. FRANCE  
(Application no. 29369/10) JUDGEMENT FROM 23 April 2015

• **Facts** – In 1995 B. B., a judge who had been seconded in the context of cooperation agreements between France and Djibouti, was found dead. His widow, disputing the finding of suicide, filed a complaint as a civil party, and appointed the applicant to represent her in the proceedings.

• In September 2000 the applicant and one of his colleagues wrote to the French Minister of Justice in connection with the judicial investigation into Judge Borrel’s death. They stated that they were approaching the Minister once again about the conduct of Judges M. and L.L. which was “completely at odds with the principles of impartiality and fairness” and they asked for an investigation to be carried out by the General Inspectorate of Judicial Services into the “numerous shortcomings ... brought to light in the course of the judicial investigation”.

• The following day, an article in the newspaper *Le Monde* stated that Mrs Borrel’s lawyers had “vigorously criticised” Judge M. to the Minister of Justice, accusing her in particular of conduct which was “completely at odds with the principles of impartiality and fairness”, and adding that she had apparently failed to register an item for the case file and to transmit it to her successor.

• The two judges filed a criminal complaint as civil parties against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of the offence of public defamation of a civil servant. The applicant was found guilty of complicity in that offence by the Court of Appeal and was ordered to pay a fine of EUR 4,000. The sum of EUR 7,500 in damages was awarded to each of the judges, to be paid by the applicant jointly with the two other defendants.
CASE OF MORICE v. FRANCE
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• The Court found a violation of Article 6 § 1 in respect of the applicant’s complaint that, before the Court of Cassation, his case had not been given a fair hearing by an impartial tribunal, on account of the presence on the bench of a judge who had previously and publicly expressed his support for one of the civil parties. The applicant’s fears about a lack of impartiality could be regarded as objectively justified.

• Two tests of impartiality (Moric v. France [GC], § 73):
  Subjective – the question of the judge’s personal conviction in a particular case
  Objective – the question of the existence of adequate safeguards guaranteeing impartiality of a tribunal

• Appearances are important and therefore judge whose impartiality is put to doubt should withdraw (Moric v. France [GC], § 78)

• When an issue of impartiality of a tribunal arises with regard to a judge’s participation in the decision-making, it is irrelevant to discuss the extent of influence which the judge had on the decision (Moric v. France [GC], § 89)