

IMPARTIALITY AND INDEPENDENCE OF JUDGES: THE DEVELOPMENT IN EUROPEAN CASE LAW

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Both the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFR) include the right to a fair trial by an independent and impartial tribunal established by law. The exact meaning of the phrase ‘an independent and impartial tribunal established by law’ has developed in case law. In this article, I analyse how the European Court of Human Rights and the Court of Justice of the European Union have developed these brief statements into more detailed criteria. The approach is historical, that is, I analyse how law has developed, and I also base my analysis on older sources where independence and impartiality have developed. As a tool for assessing independence and impartiality, I introduce five different aspects: 1) Impartiality as a state of mind, 2) Procedural impartiality, 3) Independence as a state of mind, 4) Institutional independence, and 5) The importance of appearances.

1 INTRODUCTION

When the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950, the following clause was included in the right to a fair trial in Article 6 (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.

Also in Article 47 (2) of the Charter of Fundamental Rights of the European Union of 2000 (CFR), a similar clause was introduced:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The exact meaning of the phrase ‘an independent and impartial tribunal established by law’ has developed in case law. In this article, I will analyse what criteria the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) have used to define whether a tribunal is impartial and independent. There are, of course, many texts analysing

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these cases.¹ And the interpretation of Article 47 (2) in the Charter is supported by the case law relating to Article 6 (1) of the ECHR.²

The focus here will, however, be on the way law has developed. That is, a legal historical perspective will be used. As far as I have been able to find, such a perspective has not been used for an analysis of these cases so far. This means that I will not more than indirectly focus on the law as it is, but rather, how law has developed. Laurent Pech and Dimitry Kochenov have recently written a report for Sieps, the Swedish Institute for European Policy Studies, a report which is a casebook overview of key judgments about the rule of law from the Portuguese Judges case³ from September 2021.⁴ In that report, they focus on the most recent developments, whilst I in this article present the historical development up to and including the Portuguese Judges case.

Both the ECtHR and the CJEU have a technique of not often discussing explicitly how an assessment in an earlier case can be rewritten as a principle of law. Rather, the courts phrase legal principles in one case with reference to another case, where an assessment was done *in casu*, as a matter of fact, but where the principle was not made explicit. The courts also use the technique of only seldom referring to the original case where the principle was first formulated, but rather to the most recent case where it was applied. This calls for a legal historical analysis, since the original context of the development of a principle it is not otherwise made explicit.

As a tool for my analysis, I will divide the notions of impartiality and independence into some more detailed categories. This division is also made using a historical understanding, supplemented by requirements according to some more recent international documents.

When I discuss the cases, I will focus on cases where the standards of impartiality and independence are defined in relation to institutions that rather clearly are tribunals in the meaning of Article 6 ECHR and Article 47 of the Charter. This means, that I will not discuss for example the case law about whether an institution has enough characteristics of a court to be able to ask for a preliminary ruling.⁵ Admittedly, the perspectives are interconnected,

¹ See for example D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights*, 4th ed., Oxford: Oxford University Press, 2018, pp. 446-459; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention. Ein Studienbuch*, 7th ed., München: Beck, 2021, pp. 509-522 [Grabenwarter and Pabel 2021]; Katharina Pabel, 'Judicial independence and the court's organisation from the perspective of the European Convention on Human Rights' in Wojciech Piątek (ed.), *Supervision over Courts and Judges. Insights into Selected Legal Systems*, Studies in Philosophy and Social Sciences: Dia-Logos vol. 30, Berlin: Peter Lang, 2021, pp. 27-50 [Pabel 2021]; Cristina Teleki, *Due Process and Fair Trial in EU Competition Law*, Leiden/Boston: Brill/Nijhoff, 2021, doi.org/10.1163/9789004447493_012, pp. 164-188 (ch. 8 'The Case-law of the ECtHR on the Right to an Independent and Impartial Tribunal'); European Court of Human Rights Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), updated to 31 December 2021, pp. 43-69, and European Court of Human Rights Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), updated to 31 December 2021, pp. 19-31.

² Pabel 2021 pp. 28-29.

³ C-64/16, Associação Sindical dos Juizes Portugueses, 27 February 2018, ECLI:EU:C:2018:117.

⁴ Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Sieps Report 2021:3, available at <www.sieps.se>.

⁵ See for example C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, 17 September 1997, ECLI:EU:C:1997:413, and C-53/03, Synetairismos Farmakopoion Aitolias & Akarnanias v GlaxoSmithKline plc and GlaxoSmithKline AEEV, 31 May 2005, ECLI:EU:C:2005:333; Henrik Matz, *Begreppet domstol i EU-rätten. En studie av domstolsbegreppet i bestämmelserna om förhandsavgörande*, Uppsala: Iustus,

as will also be seen when I discuss some cases. Still, I focus on cases where the question is whether a court or tribunal meets the standards of impartiality and independence, rather than on cases where the question is whether an institution is enough independent and meets such standards of impartiality that it is to be considered as a court.

2 A HISTORICAL AND CURRENT UNDERSTANDING OF IMPARTIALITY AND INDEPENDENCE

In this section, I divide the notions of impartiality and independence into some more detailed categories. I do this based on a historical understanding; however, the historical background is very brief and serves only to highlight some important historical facts that provide clear examples of different aspects of independence and impartiality of judges. The discussion is supplemented by requirements according to some more recent international documents.

2.1 IMPARTIALITY AS A STATE OF MIND

Impartiality is a state of mind⁶ of a judge, striving to treat both parties equally. Historically, we can trace this ideal to ancient Rome (Callistratus⁷ and Cicero⁸) and to medieval legal texts (for example Isidore of Seville,⁹ Gratian,¹⁰ and Innocent III¹¹) and medieval oaths of judges.¹² The main theme in these texts is that a judge should not hand down wrongful judgements because of for example friendship, hate or other emotions in relation to the parties, or because of bribes. The theme therefore relates primarily to the procedural function of the court, to be an institution that is neutral between the parties.

According to the Basic Principles on the Independence of the Judiciary, adopted in 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences,

2010. See also C-284/16, Achmea, 6 March 2018, ECLI:EU:C:2018:158, §§ 48-49, and Nils Wahl and Luca Prete, 'The Gatekeepers of Art 267: On Jurisdiction and Admissibility of References for Preliminary Rulings' in *Common Market Law Review*, vol. 55, issue 2, doi.org/10.54648/cola2018035, pp. 511-547.

⁶ I have borrowed this phrase from the ECtHR cases *Khrykin v Russia*, app. no. 33186/08, 19 April 2011, and *Baturlova v Russia*, app. no. 33188/08, 19 April 2011, identical §§ 28-30 in both cases; see below section 3.7.

⁷ Callistratus, Dig. 1, 18, 19, 1. See e.g. Alan Watson (transl. and ed.), *The Digest of Justinian*, vol. 1, Philadelphia: University of Pennsylvania Press, 1998.

⁸ Cicero, *De officiis*, 3, 10, 43-44. See e.g. Cicero, *On Duties. Translated by Walter Miller*, Loeb Classical Library 30. Cambridge, MA: Harvard University Press, 1913, pp. 310-313.

⁹ Isidore of Seville, *Sententiae*, Thomas L. Knoebel (transl. and ed.), New York/Mahwah: The Newman Press, 2018, p. 207. See Luca Loschiavo, 'Isidore of Seville and the construction of a common legal culture in early medieval Europe' in *Clio@Themis. Revue électronique d'histoire du droit*, no. 10, 2016, doi.org/10.35562/cliiothemis.1203.

¹⁰ *Decretum Gratiani* (c. 1140), C. 11 q. 3 c. 78

¹¹ Lotario dei Segni (Pope Innocent III); Robert E. Lewis (ed.), *De miseria humanae conditionis*, (1195) The Chaucer Library, Athens: The University of Georgia Press, 1978, pp. 144-145.

¹² For example the oath of the imperial judge according to the Reichslandfrieden of Mainz 1235, see Ludwig Weiland, *Constitutiones et acta publica imperatorum et regum inde ab a. MCXCVIII usque a. MCCLXXII (1198-1272)*, Hannover 1896, on *Monumenta Germaniae Historia*, www.dmgh.de/index.html, pp. 247 and 262. See Arno Buschmann, 'Der Mainzer Landfriede von 1235 – Anfänge einer geschriebenen Verfassung im Heiligen Römischen Reich' in *Juristische Schulung. Zeitschrift für Studium und Ausbildung*, 1991 pp. 453-460, esp. 454.

inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹³

In the Bangalore Principles of Judicial Conduct, impartiality is expressed thus: ‘A judge shall perform his or her judicial duties without favour, bias or prejudice.’¹⁴ This is the main principle dealing with the actual impartiality as a state of mind; the other principles mainly deal with the impression of the judge in the view of a reasonable observer. However, there is also one specific rule about avoiding influences on the judge’s mind:

A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.¹⁵

Under the value ‘Equality’, there is another relevant statement:

A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”).¹⁶

Judges shall carry out their duties without differentiation on any of these irrelevant grounds.¹⁷

2.2 PROCEDURAL IMPARTIALITY

If the aspects of impartiality described in section 2.1. relate to the judges’ state of mind, there is also a slightly different type of impartiality that relates more to the procedural possibilities of the parties, that is, whether the procedural rules are such that both parties can put forward their arguments equally and before the judge makes up his or her mind. I call this procedural impartiality, and it is an important part of the right to a fair trial, often called ‘equality of arms’.

There are many aspects of procedural impartiality, for example the parties’ equal right to put forward evidence, to have a reasoned judgment, and to have possibilities to appeal a judgment. Also the accountability of judges is related to procedural impartiality, for example when a party puts forward complaints related to a miscarriage of justice. But in this context, I will confine myself to discuss the principle that the judge should hear both parties, ‘Audiatur et altera pars’.

The principle ‘Audiatur et altera pars’ traces its origins to ancient Rome and before,¹⁸ and it is a maxim that represents the essence of equality of arms. The exact phrase ‘Audiatur

¹³ Basic Principles on the Independence of the Judiciary, adopted 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, p. 2.

¹⁴ The Bangalore Principles of Judicial Conduct 2002, value 2, p. 2.1.

¹⁵ The Bangalore Principles of Judicial Conduct 2002, value 4, p. 4.14.

¹⁶ The Bangalore Principles of Judicial Conduct 2002, value 5, p. 5.1.

¹⁷ The Bangalore Principles of Judicial Conduct 2002, value 5, p. 5.3.

¹⁸ Detlef Liebs, *Lateinische Rechtsregeln und Rechtsprüche*, 7th ed., München: Beck, 2007, p. 37; Andreas Wacke, ‘Audiatur et altera pars. Zum rechtlichen Gehör im Römischen Zivil- und Strafprozeß’ in Martin Josef Schermaier and Zoltán Végh (eds.), *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag*, Stuttgart: Steiner, 1993, pp. 369-399.

et altera pars' was coined in the Middle Ages, but the principle was mentioned by, for example, Seneca the Younger, who had Medea say: 'He who decides an issue without hearing one side has not been just, however just the decision.' (*Qui statuit aliquid parte inaudita altera, aequum licet statuerit, haud aequus fuit*).¹⁹ What is partly lost in this translation is 'parte inaudita altera', that is, 'with the other party unheard', which points forward to the phrase 'Audiatur et altera pars'.²⁰

The principle has then found its place in various declarations of human rights from the late eighteenth century onwards and also in many constitutions.²¹ It is closely related not only to 'equality of arms' but also to the adversarial principle, and it requires:

a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents.²²

Since procedural impartiality relates to the procedural system as a whole, and to the right to a fair trial in general, it is outside the scope of this article to discuss it in detail.

2.3 INDEPENDENCE AS A STATE OF MIND

According to the ancient and medieval texts mentioned in section 2.1., judges are also required to act independently. Fear is mentioned as an emotion that should not cause the judge to hand down a wrongful judgment. It is important to note that fear not only relates to the parties, but can equally relate to people external to the judicial process. As Isidore of Seville made clear, human judgment is perverted 'by fear when we are afraid to speak the truth out of fear of someone's power'.²³

Fear is in some contexts paired with favour,²⁴ meaning that the judge should not strive for popularity in the local community. So far, these aspects require the judge to act independently, but there are no guarantees as regards tenure or income for a judge that acts independently.

In the Bangalore Principles of Judicial Conduct, this is expressed thus:

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 influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.²⁵

¹⁹ Seneca the Younger, *Medea*, in Seneca, *Tragedies, Volume I: Hercules. Trojan Women. Phoenician Women. Medea. Phaedra*. Edited and translated by John G. Fitch, Loeb Classical Library 62, Cambridge, MA: Harvard University Press, 2018, pp. 334-335; Wacke 1993 p. 375. A translation closer to the original would be 'He who decides anything with the other party unheard, even if he may have decided justly, has hardly been just.'

²⁰ Cf. Wacke 1993 p. 377.

²¹ Wacke 1993 p. 369-371.

²² *Regner v the Czech Republic* [GC], app. no. 35289/11, 19 September 2017, § 146.

²³ Isidore of Seville, *Sententiae*, Thomas L. Knoebel (transl. and ed.), New York/Mahwah: The Newman Press, 2018, p. 207.

²⁴ For example in the oath of the imperial judge according to the Reichslandfrieden of Mainz 1235, see Ludwig Weiland, *Constitutiones et acta publica imperatorum et regum inde ab a. MCXCVIII usque a. MCCLXXII (1198-1272)*, Hannover 1896, on *Monumenta Germaniae Historica*, www.dmgh.de/index.html, p. 247 and 262.

²⁵ The Bangalore Principles of Judicial Conduct 2002, value 1, p. 1.1.

2.4 INSTITUTIONAL INDEPENDENCE

Much can be said about how to define a ‘court’ as an institution,²⁶ and the concept of a ‘court’ is ‘complex and changeable’²⁷ if its history is to be analysed. This is valid for a common law country, perhaps less in a country where law is codified.²⁸ Here, I will highlight one important part of the institutional independence of judges, the permanent tenure.

The earliest examples of guarantees as regards judges’ tenure can be found in the *Reichskammergerichtsordnung* (the statute of the Imperial Chamber Court) of 1555.²⁹ Such guarantees were granted consistently in England after the Revolution Settlement in 1689, even though there are earlier examples there, too, and the principle was confirmed through the Act of Settlement in 1701. Judges were appointed *quamdiu se bene gesserint*, during good behaviour. This was an improvement compared to the earlier situation, when judges could be deposed at the monarch’s will. The income of judges was also fixed at this time.³⁰

The same clause was taken into Article III section 1 of the U.S. Constitution, in force since 1789, and Alexander Hamilton explained that permanent tenure of judicial offices was necessary because it contributed to the independent spirit in the judges, a spirit which was essential if the judges were to check that legislation was in conformity with the constitution.³¹

On the continent, civil servants including judges were generally irremovable from the eighteenth and nineteenth centuries onwards. However, the permanent tenure of judges specifically as a guarantee for institutional independence was introduced after the 1848-49 Frankfurt Parliament, such as in the Austrian constitutions of 1848 (*Pillersdorfsche Verfassung*, Article 28) and 1849 (*Märzverfassung*, Article 101) and in the Prussian constitution of 1850 (Article 87).³²

According to the Basic Principles on the Independence of the Judiciary from 1985, the institutional independence is secured through the requirements that the term of office of judges, and their remuneration and conditions of service, shall be adequately secured by law. Further, judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.³³ And decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.³⁴

²⁶ Sir John H. Baker, ‘The Changing Concept of a Court’ in Sir John H. Baker, *The Legal Profession and the Common Law. Historical Essays*, London: The Hambledon Press, 1986, pp. 153-169.

²⁷ Baker 1986 p. 169.

²⁸ Cf. *Coëme and others v Belgium*, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 98. See below section 6.2.

²⁹ Adolf Laufs (ed.), *Die Reichskammergerichtsordnung von 1555*, Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich, vol. 3, Köln, 1976; Robert Walter, *Verfassung und Gerichtsbarkeit*, Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1960, p. 76.

³⁰ C. H. McIlwain, ‘The Tenure of English Judges’ in *The American Political Science Review*, Vol. 7, No. 2, 1913, pp. 217-229; David Lemmings, ‘The Independence of the Judiciary in Eighteenth-Century England’ in Peter Birks (ed.), *The Life of the Law. Proceedings of the Tenth British Legal History Conference Oxford 1991*, London: The Hambledon Press, 1993, pp. 125-149; Eirik Holmøyvik, ‘Nokre historiske utviklingslinjer for domstolane sitt sjølvstende i Noreg’ in Nils Asbjørn Engstad et al. (eds.), *Dommernes uavhengighet. Den norske dommerforening 100 år*, Bergen: Fagbokforlaget, 2012, pp. 99-125.

³¹ Alexander Hamilton, *The Federalist* No. 78.

³² Robert Walter 1960 pp. 75-77; Eirik Holmøyvik 2012 pp. 119-120.

³³ Basic Principles on the Independence of the Judiciary, pp. 11-12.

³⁴ Basic Principles on the Independence of the Judiciary, p. 20.

2.5 THE IMPORTANCE OF APPEARANCES

That judges should not only be impartial and independent but should also appear impartial and independent was expressed in an English case in November 1923: ‘Justice should not only be done but should manifestly and undoubtedly be seen to be done’.³⁵ Lord Chief Justice Hewart referred to a ‘long line of cases’ without exact references. But the observation of Hewart that ‘nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice’³⁶ relates to the constant need for judges to think about the importance of appearances.

It is unclear what cases Hewart actually might have referred to by the ‘long line of cases’. It has been argued that there might have been no such cases at all, and that the comment by Lord Hewart can rather be contextualised by reference to what was at the time an issue of contemporary concern, namely the independence and impartiality of national judges appointed to the Permanent Court of International Justice. That court started working in 1922, and the judges were to make solemn declarations that they would exercise their powers impartially and conscientiously. In that context, the appearance of impartiality was highlighted.³⁷

What is important with appearances is that judges behave in a way that shows that they are impartial and independent. This can also assist judges in remembering being impartial and independent.³⁸ To help judges remembering the need for being and appearing impartial and independent, there has been a tradition for placing allegoric paintings (*‘Exempla Justitiae’*) in court rooms.³⁹ Such paintings can in a detailed manner present the differences between *justitia* and *injustitia*, but the ideal of an impartial and independent court can also be represented by *Justitia* with sword and scales.⁴⁰ Similarly, simple statements in constitutional documents that judges shall be independent, more or less have a similar symbolic function.⁴¹

In the Bangalore Principles of Judicial Conduct 2002, there are many principles aiming towards the manifestation of independence and impartiality, highlighting the importance of appearances. For example, there are references to the impression of ‘a reasonable observer’ as regards independence⁴² and impartiality.⁴³ The value ‘Integrity’ relates solely to the conduct of a judge ‘in the view of a reasonable observer’,⁴⁴ and the ‘behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary’.⁴⁵ The maxim ‘Justice must

³⁵ R v. Sussex Justices ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233 per Hewart LCJ).

³⁶ Ibid.

³⁷ Anne Richardson Oakes and Haydn Davies, ‘Justice must be seen to be done: A contextual reappraisal’ in *Adelaide Law Review*, vol. 37, 2016, pp. 461-494.

³⁸ Carl Ussing, ‘Domstolene og den offentlige Mening’ in *Tilskueren. Maanedsskrift for Litteratur, Samfundsspørgsmål og almenfættelige videnskabelige Skildringer* 1899 p. 326; Jens Peter Christensen, *Domstolene – den tredje statsmagt*, Århus 2003, pp. 69-89.

³⁹ Georges Martyn, ‘Exempla Iustitiae: Inspiring Examples’ and Alain Wijffels, ‘Justice and Good Governance’ in Stefan Huygebaert et al. (eds.), *The Art of Law. Three Centuries of Justice Depicted*, Tiel: Lannoo, 2016, pp. 39-56 and 154-158; Stefan Huygebaert et al. (eds.), *The Art of Law. Artistic Representations and Iconography of Law and Justice in Context, from the Middle Ages to the First World War*, Cham: Springer, 2018.

⁴⁰ Lars Ostwaldt, *Aequitas und Justitia. Ihre Ikonographie in Antike und Früher Neuzeit*, Halle: Peter Junkermann, 2009.

⁴¹ Cf. Walter 1960 pp. 55-56.

⁴² The Bangalore Principles of Judicial Conduct 2002, value 1, p. 1.3.

⁴³ The Bangalore Principles of Judicial Conduct 2002, value 2, p. 2.5.

⁴⁴ The Bangalore Principles of Judicial Conduct 2002, value 3, p. 3.1.

⁴⁵ The Bangalore Principles of Judicial Conduct 2002, value 3, p. 3.2.

not merely be done but must also be seen to be done' is also mentioned.⁴⁶ The value 'Propriety' also provides many principles where appearances are highlighted.⁴⁷

3 DEFINING INDEPENDENCE AND IMPARTIALITY

The first line of case law to be discussed concerns the early steps, beginning with the Neumeister case from 1968, through which the ECtHR in the 1960s and 1970s started to define the core criteria of the independence and impartiality of judges, and what conclusions were drawn in the 1980s. The importance of appearances was first identified separately, beginning with Delcourt in 1970, but that line of case law but was soon merged with the Neumeister line of cases, something that will be discussed in section 4.

3.1 NEUMEISTER 1968: THE COURT'S INDEPENDENCE OF THE EXECUTIVE AND OF THE PARTIES TO THE CASE

The first case in which the ECtHR began to define the independence of a court is the Neumeister judgment from 1968. The ECtHR discussed the matter in the context of the principle of 'equality of arms',⁴⁸ thus, from the perspective of what I call procedural impartiality. The case concerned the applicant Neumeister's detention on remand.⁴⁹ According to the ECtHR, the decisions relating to his detention were given after the prosecuting authority had been heard in the absence of the applicant or his representative on the written request made by the authority. Such a procedure was contrary to the 'equality of arms', which was to be included in the notion of a fair trial.

What was to be tried was, however, not this issue but rather the procedure when Neumeister requested provisional release. The ECtHR did not consider the principle of 'equality of arms' applicable in that context (something which has changed in later case law, and this aspect of the Neumeister case can nowadays be disregarded⁵⁰). The ECtHR applied Article 5 (4) ECHR, according to which everyone who is deprived of his liberty by detention has the right to proceedings by which the lawfulness of the detention shall be decided speedily by a court.

The ECtHR interpreted the word 'court' like this:

This term implies only that the authority called upon to decide thereon must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed.⁵¹

This is a very basic definition of a court. The independence in relation to the executive is highlighted, as well as the independence in relation to the parties (which might be an equivalent to impartiality, see below section 3.6.). What is interesting in this case is the clear statement that whether an institution is a court or not 'in no way relates to the procedure to be followed', something which probably has to be understood in the context of Article 5 (4)

⁴⁶ The Bangalore Principles of Judicial Conduct 2002, value 3, p. 3.2.

⁴⁷ The Bangalore Principles of Judicial Conduct 2002, value 4, pp. 4.1, 4.3. etc.

⁴⁸ Pabel 2021 p. 27.

⁴⁹ Neumeister v Austria, app. no. 1936/63, 27 June 1968, §§ 22-25.

⁵⁰ Harris et al. 2018 p. 360.

⁵¹ Neumeister v Austria, app. no. 1936/63, 27 June 1968, § 24.

ECHR. In more recent case law, the ECtHR has explicitly concluded that the interpretation of Article 5 (4) has developed so that it provides ‘certain procedural guarantees to a detainee’.⁵² These are similar to the notion of a fair trial required by Article 6 (1).

3.2 DE WILDE 1971: ADDING THE PROCEDURAL ASPECT

After Neumeister, the criterion ‘independence of the executive and of the parties to the case’ was used in the De Wilde judgment 1971, to define an institution falling under the concept ‘tribunal’.⁵³ In this case, also the guarantees of judicial procedure were understood as relevant, and the fact that whether the principle of ‘equality of arms’ was not relevant in the Neumeister case did not mean that the same was not ‘true in a different context and, for example, in another situation which is also governed by Article 5 (4)’.⁵⁴ In the Ringeisen judgment later the same year, the ECtHR observed that the proceedings before a regional real property transactions commission afforded ‘the necessary guarantees’.⁵⁵

Further on, in Sramek 1984 and H v Belgium 1987, a ‘tribunal’ was defined through being ‘characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner’.⁵⁶ In Sramek, there is a reference to Campbell and Fell 1984 § 76 (see below section 4.3.), where the wording was different; the rules of law and the proceedings conducted in a prescribed manner were there discussed in a more indirect way.⁵⁷

3.3 RINGEISEN 1971: ADDING THE TERM OF APPOINTMENT

In the just mentioned Ringeisen judgment 1971, the criterion ‘independence of the executive and of the parties to the case’ was also used in the context of Article 6 (1) as regarded the regional real property transactions commission. The ECtHR added that the members of the regional commission were ‘appointed for a term of five years’.⁵⁸ This clarified the phrase ‘independent of the executive and also of the parties’ in the specific case. Even though the judges did not have permanent positions, the five-year tenure offered sufficient independence.

In H v Belgium 1987, the ECtHR made the assessment that there could ‘be no question about the independence of the members’ of the court in question, the Council of the *Ordre des Avocats*, a council which functioned as a disciplinary court for advocates. These judges were ‘elected by their peers’ and were not ‘subject to any authority, being answerable only to their own consciences’.⁵⁹ This statement was given as a matter of fact without references to other cases, and it is mentioned here to illustrate that the way of selecting judges could be equally important to assess independence as the term of office – the judgment seems to

⁵² Lebedev v Russia, app. no. 4493/04, 25 October 2007, §§ 69-71.

⁵³ De Wilde, Ooms and Versyp v Belgium, app. no. 2832/66, 2835/66 and 2899/66, 18 June 1971, §§ 74-80;

⁵⁴ De Wilde, Ooms and Versyp v Belgium, app. no. 2832/66, 2835/66 and 2899/66, 18 June 1971, § 78.

⁵⁵ Ringeisen v Austria, app. no. 2614/65, 16 July 1971, § 95.

⁵⁶ Sramek v Austria, app. no. 8790/79, 22 October 1984, § 36; H v Belgium, app. no. 8950/80, 30 November 1987, § 50.

⁵⁷ Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 and – importantly – the reference there to the information in §§ 38 and 39 about the rules and the procedure.

⁵⁸ Ringeisen v Austria, app. no. 2614/65, 16 July 1971, § 95.

⁵⁹ H v Belgium, app. no. 8950/80, 30 November 1987, § 51.

indicate that the judges had a one year term, since the election was ‘held before the end of each judicial year’.⁶⁰

The independence in relation to parliament was discussed in the Crociani decision by the commission from 1980, dealing with the question whether the Italian constitutional court was impartial in relation to the Italian parliament, notwithstanding the fact that additional judges of the court were chosen by lot from a list of persons drawn up by parliament.⁶¹ The commission did not make a principled statement on how to define this independence, but the case highlights another aspect of the importance of how judges are appointed.

3.4 LE COMPTE 1981: THE COURT’S INDEPENDENCE OF THE EXECUTIVE AND OF THE PARTIES TO THE CASE, PROCEDURAL GUARANTEES AND DURATION OF THE JUDGES’ TERM OF OFFICE

In the Le Compte judgment 1981, the ECtHR summarized the case law so far. With reference to the Neumeister, De Wilde and Ringelsen judgments, the ‘independence of the executive and of the parties to the case’ and ‘guarantees afforded by its procedure’ were relevant for the assessment. But now, the ‘duration of its members’ term of office’⁶² were added to the criteria. This was based on the Ringelsen judgment, and the development in Le Compte in relation to Ringelsen was that the assessment of the five-year tenure in that specific case was transformed into the more general ‘duration of its members’ term of office’.

3.5 PIERSACK 1982: DIFFERENCE BETWEEN INDEPENDENCE AND IMPARTIALITY, AND ADDING SAFEGUARDS OUTSIDE PRESSURES

In the Piersack judgment from 1982, the ECtHR was not convinced by Piersack’s claim that he had been convicted by a court that was not an independent tribunal. On the contrary, the ECtHR held that ‘the three judges of whom Belgian assize courts are composed enjoy extensive guarantees designed to shield them from outside pressures’ according to the Belgian Constitution (at that time Articles 99-100) and by statute, ‘and the same purpose underlies certain of the strict rules governing the nomination of members of juries’.⁶³ The ECtHR made this statement under the heading ‘independent tribunal’ (§ 27), and continued to discuss whether the court was an ‘impartial tribunal’ (§§ 28-32), thus making a difference between the two concepts. The court wrote:

Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given

⁶⁰ H v Belgium, app. no. 8950/80, 30 November 1987, § 25.

⁶¹ Crociani, Palmiotti, Tanassi and Lefebvre d’Ovidio v Italy, app. no. 8603/79, 8722/79, 8723/79 and 8729/79, 18 December 1980, *Decisions and Reports of the European Commission for Human Rights*, vol. 22, pp. 221-222. Cf. Harris et al. 2018 p. 448.

⁶² Le Compte, van Leuven and de Meyere v Belgium, app. no. 6878/75 and 7238/75, 23 June 1981, § 55.

⁶³ Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 26.

case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.⁶⁴

So far, the subjective and objective approaches were different ways of assessing impartiality. The references to the specific Belgian guarantees designed to shield judges from outside pressures were soon transformed into a more general statement. In the *Campbell and Fell* judgment in 1984, the ECtHR formulated the criterion as ‘the existence of guarantees against outside pressures’ with reference to the *Piersack* case and combining it with independence ‘notably of the executive and of the parties to the case’ and with ‘the manner of appointment of its members and the duration of their term of office’, all with reference to *Le Compte*. The question whether the body presents an appearance of independence was also added, with a reference to *Delcourt* (see below section 4).⁶⁵ And as mentioned above, in *Sramek* 1984 a passage in *Campbell and Fell*⁶⁶ was developed into the criterion ‘proceedings conducted in a prescribed manner’.

3.6 BELILOS 1988: REPLACING ‘INDEPENDENCE IN RELATION TO THE PARTIES’ WITH ‘IMPARTIALITY’

In the *Belilos* judgment 1988, the ECtHR referred to *H v Belgium* from 1987, as regards the definition of a tribunal. The ECtHR highlighted the judicial function of a tribunal, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It referred to *Le Compte* as regards the ‘further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure’.⁶⁷

It is interesting to note that ‘impartiality’ was introduced in this case – even though independence and impartiality had been discussed separately in *Piersack*. But now ‘impartiality’ replaced ‘independence of [---] the parties to the case’ in the phrase from the *Le Compte* judgment. This indicates that ‘impartiality’ and ‘independence in relation to the parties’ are synonymous concepts and highlights that independence and impartiality are two different things.

3.7 KHRYKIN AND BATURLOVA 2011: INDEPENDENCE AS A STATE OF MIND

In two cases decided the same day in 2011,⁶⁸ the ECtHR made further clarifications and discussed independence of a judge as, firstly, individual and a state of mind, and, secondly, institutional. This is where ‘independence as a state of mind’, as I have called it, occurs for the first time in the case law.

Independence of the judiciary refers to the necessary individual and institutional independence that are required for impartial decision making. It thus characterises

⁶⁴ *Piersack v Belgium*, app. no. 8692/79, 1 October 1982, § 30.

⁶⁵ *Campbell and Fell v The United Kingdom*, app. no. 7819/77 and 7878/77, 28 June 1984, § 78.

⁶⁶ *Campbell and Fell v The United Kingdom*, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 compared to §§ 38 and 39.

⁶⁷ *Belilos v Switzerland*, app. no. 10328/83, 29 April 1988, § 64.

⁶⁸ *Khrykin v Russia*, app. no. 33186/08, 19 April 2011, and *Baturlova v Russia*, app. no. 33188/08, 19 April 2011, identical §§ 28-30 in both cases.

both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality and the latter with defining relations with other bodies, in particular other state powers ([---]), and are, sometimes, indivisible [...].⁶⁹

As we can see, individual and institutional independence are prerequisites for impartiality, and the judge's state of mind and institutional independence go hand in hand. However, in the next sentence, the state of mind is mostly related to impartiality, and independence is more institutional and concerns relations with other bodies, in particular other state powers. As regards the indivisibility, there are indirect references to Langborger and thus also to Campbell and Fell (see below section 4.3.).

In the two Khrykin and Baturlova cases, the ECtHR also defined the individual independence of judges, clarifying that:

judicial independence also demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from instructions or pressures from the fellow judges and vis-à-vis their judicial superiors.⁷⁰

This was based on the Parlov-Tkalčić judgment from 2009, where reference was made to other cases 'by implication',⁷¹ especially the Daktaras case from 2000.⁷² Finally, the ECtHR discussed how to assess independence and essentially used a standard phrase mentioned below in section 4.3.

3.8 THE NEUMEISTER LINE OF CASE LAW: CONCLUSIONS

In the Neumeister judgment 1968, the ECtHR defined a 'court' as an authority independent both of the executive and of the parties to the case. Thus, it mixed the constitutional position of a court (independence) with its procedural role (impartiality). Beginning in the De Wilde judgment 1971, and more clearly in Sramek 1984, procedural aspects, such as 'equality of arms', were added. Thus, not only the court should be neutral, but the parties should have equal opportunities in the process. In Sramek, there was a reference to Campbell and Fell 1984 (see below), where the wording was different; the rules of law and the proceedings conducted in a prescribed manner were there discussed in a more indirect way.

In Ringeisen 1971, the term of appointment was added as a criterion for independent judges. In the Le Compte judgment 1981, the ECtHR summarized the case law so far. With reference to the Neumeister, De Wilde and Ringeisen judgments, the 'independence of the executive and of the parties to the case' and 'guarantees afforded by its procedure' were relevant for the assessment. But now, the 'duration of its members' term of office' was added as a more general statement than in Ringeisen. In the Campbell and Fell judgment in 1984,

⁶⁹ Khrykin v Russia, app. no. 33186/08, 19 April 2011, and Baturlova v Russia, app. no. 33188/08, 19 April 2011, identical § 28.

⁷⁰ Khrykin v Russia, app. no. 33186/08, 19 April 2011, and Baturlova v Russia, app. no. 33188/08, 19 April 2011, identical § 29.

⁷¹ Parlov-Tkalčić v Croatia, app. no. 24810/06, 22 December 2009, § 86.

⁷² Daktaras v Lithuania, app. no. 42095/98, 10 October 2000.

the ECtHR discussed ‘the existence of guarantees against outside pressures’ with reference to Piersack 1982, where the same aspect was discussed in a more indirect way.

In Piersack 1982, the ECtHR also made a difference between independence and impartiality. Finally, in Belilos 1988, the concept ‘independence in relation to the parties’ was replaced with ‘impartiality’, making the difference between the constitutional position of a court (independence) and its procedural role (impartiality) clearer.

Thus, the method of transforming an assessment in a specific case into a more general statement was used in *Le Compte* 1981 in relation to *Ringeisen* 1971, in *Campbell and Fell* 1984 in relation to Piersack 1982, and in *Sramek* 1984 in relation to *Campbell and Fell* the same year.

Admittedly, when the executive branch is one of the parties before a tribunal, the impartiality and the independence of that tribunal tend to be treated as interconnected. If the tribunal is considered as ‘an arm of the executive’,⁷³ it is neither independent nor impartial. This way of reasoning has also been extended to parties at large, in terms of ‘independence of the executive and of the parties to the case’.⁷⁴ There is good reason to conclude that the ECtHR ‘commonly considers the two requirements together, using the same reasoning’⁷⁵ both as regards independence and impartiality. Still, the *Belilos* judgment highlights the need to keep the two things apart.

In the *Khrykin and Baturlova* cases from 2011, the ECtHR was clearer and understood individual and institutional independence as prerequisites for impartiality. The judge’s state of mind is mostly related to impartiality, and independence is more institutional and concerns relations with other bodies, in particular other state powers.

4 DEFINING THE IMPORTANCE OF APPEARANCES

The second line of case law to be discussed concerns the importance of appearances, first highlighted in the *Delcourt* case from 1970. Soon, however – in the 1980s – this line of case law merged with the *Neumeister* line of cases.

4.1 DELCOURT 1970: JUSTICE MUST ALSO BE SEEN TO BE DONE

As early as in the *Delcourt* case in 1970, the ECtHR referred to the dictum ‘justice must not only be done; it must also be seen to be done’⁷⁶ when assessing whether the right of the Belgian *Procureur général* to be present at the deliberations of the *Cour de Cassation* set the impartiality and independence of that court aside. Since the *Procureur général* was himself independent and was not considered a party to the case, Article 6 was not violated.

To go a little deeper into the reasoning of the ECtHR, there were reasons to question the impartiality of the Belgian court. Such considerations were ‘of a certain importance which must not be underestimated’.⁷⁷ But the ECtHR then continued:

⁷³ *Campbell and Fell v The United Kingdom*, app. no. 7819/77 and 7878/77, 28 June 1984, § 77.

⁷⁴ See e.g. *Le Compte, van Leuven and de Meyere v Belgium*, app. no. 6878/75 and 7238/75, 23 June 1981, § 55.

⁷⁵ Harris et al. 2018 p. 446.

⁷⁶ *Delcourt v Belgium*, app. no. 2689/65, 17 January 1970, § 31. The same issue was tried, after the ‘considerable evolution’ (§ 24) of ECtHR case law, in *Borgers v Belgium*, app. no. 12005/86, 30 October 1991.

⁷⁷ *Delcourt v Belgium*, app. no. 2689/65, 17 January 1970, § 31.

If one refers to the dictum “justice must not only be done; it must also be seen to be done” these considerations may allow doubts to arise about the satisfactory nature of the system in dispute. They do not, however, amount to proof of a violation of the right to a fair hearing. Looking behind appearances, the Court does not find the realities of the situation to be in any way in conflict with this right.⁷⁸

Then, the ECtHR provided reasons why the Belgian court was not partial. If one relates to the British origin of the ‘dictum’ (see above section 2.5.), it can be assumed that the British judge and president of the ECtHR, Sir Humphrey Waldock, brought it into the case.⁷⁹ It can be noted that he gave it a shorter and less emphatic phrasing, omitting what Lord Hewart had said about that justice should ‘manifestly and undoubtedly’ be seen to be done.

In the *Le Compte* judgment 1981 (see above section 3.4.), the *Delcourt* case was used as an authority for the fact that there was no doubt as to the independence of the Court of Cassation and that it raised no problem on the issue of impartiality.⁸⁰ In the same judgment, the ECtHR found that the Belgian Appeals Council had the characteristics of a tribunal.⁸¹ The *Delcourt* and *Neumeister* lines of case law were, however, not discussed in the same context but rather separately.

4.2 PIERSACK 1982: ADDING APPEARANCES ACCORDING TO DELCOURT TO THE NEUMEISTER LINE OF CASE LAW

In the 1982 *Piersack* case (see above section 3.5.), the ECtHR made a distinction between ‘independent tribunal’ (§ 27) and ‘impartial tribunal’ (§§ 28-32) in Article 6 ECHR. In the context of discussing impartiality, the court made a distinction between a subjective and an objective approach: The subjective approach was characterised by ‘endeavouring to ascertain the personal conviction of a given judge in a given case’ and the objective by ‘determining whether [the judge] offered guarantees sufficient to exclude any legitimate doubt in this respect.’⁸²

The ECtHR then discussed the subjective impartiality test with reference to *Le Compte* 1981 and the objective impartiality test with reference to *Delcourt* 1970. The ECtHR did not repeat the dictum as such, but presented its essence in a new way: ‘even appearances may be of a certain importance’.⁸³ The question of appearances is part of the objective test, and the court highlighted that what is ‘at stake is the confidence which the courts must inspire in the public in a democratic society’.⁸⁴

⁷⁸ *Delcourt v Belgium*, app. no. 2689/65, 17 January 1970, § 31.

⁷⁹ Cf. *Borgers v Belgium*, app. no. 12005/86, 30 October 1991, dissenting opinion of judge Martens (from the Netherlands), note 24: ‘Is it by accident that in its *Delcourt* judgment the Court, presided over by the British judge Sir Humphrey Waldock, chose to use a much milder [than the one coined by Lord Hewart] form of the maxim and has continued to use that form instead of the original one?’. Cf. also Haydn Davies and Anne Richardson Oakes, ‘Problems of Perception in the European Court of Human Rights: A Matter of Evidence?’ in *Journal of International and Comparative Law*, vol. 3, no. 2, 2013, pp. 127-128.

⁸⁰ *Le Compte, van Leuven and de Meyere v Belgium*, app. no. 6878/75 and 7238/75, 23 June 1981, §§ 57-58.

⁸¹ *Le Compte, van Leuven and de Meyere v Belgium*, app. no. 6878/75 and 7238/75, 23 June 1981, § 55, and see above section 2.4.

⁸² *Piersack v Belgium*, app. no. 8692/79, 1 October 1982, § 30.

⁸³ *Piersack v Belgium*, app. no. 8692/79, 1 October 1982, § 30; see also *Sramek v. Austria*, app. no. 8790/79, § 42.

⁸⁴ *Piersack v Belgium*, app. no. 8692/79, 1 October 1982, § 30. See Anne Richardson Oakes and Haydn Davies, ‘Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality’ in *Santa Clara Law Review*, vol. 51, no. 2, 2011, pp. 581-586.

Both the dictum, the phrase ‘even appearances may be important’, and the subjective and objective tests were mentioned in the De Cubber judgment of 1984.⁸⁵ The ECtHR highlighted that it did not doubt the impartiality of a judge that had conducted a preliminary investigation, but concluded that the impartiality of the court, where that judge was then a member, ‘was capable of appearing to the applicant to be open to doubt’.⁸⁶ In later judgments, procedures where a judge has made pre-trial decisions in a case, have been tried against this standard.⁸⁷

4.3 CAMPBELL AND FELL 1984: WIDENING THE APPROACH

As already mentioned in sections 3.2. and 3.5., in the Campbell and Fell judgment 1984, the procedural aspects were taken into account indirectly,⁸⁸ the independence and impartiality (the latter at that time called independence ‘of the parties to the case’), and the manner of appointment of the court’s members and the duration of their term of office were taken into account with reference to Le Compte 1981, and the existence of guarantees against outside pressures was taken into account with reference to Piersack 1982. This is the time when the ECtHR had widened its approach and established ‘the core criteria of an independent and impartial tribunal’.⁸⁹ To what followed from Le Compte and Piersack was added, as an integrated criterion and with reference to Delcourt 1970, the question whether the institution presents an appearance of independence.⁹⁰ Thus, through Campbell and Fell, all five aspects discussed in section 2 – that is, impartiality as a state of mind, procedural impartiality, independence as a state of mind, institutional independence, and the importance of appearances – were assessed in one judgment.

The essence of the Campbell and Fell judgment then developed into a standard phrase, used for example in Langborger 1989,⁹¹ Bryan 1995⁹² and Findlay 1997.⁹³ As it was formulated in Langborger § 32:

In order to establish whether a body can be considered “independent”, regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence (see, inter alia, the Campbell and Fell judgment of 28 June 1984 [...] para. 78).

As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a

⁸⁵ De Cubber v Belgium, app. no. 9186/80, 26 October 1984, §§ 26, 30 and 32.

⁸⁶ De Cubber v Belgium, app. no. 9186/80, 26 October 1984, § 30.

⁸⁷ See e.g. Hauschildt v Denmark, app. no. 10486/83, 24 May 1989, § 48, and Fey v Austria, app. no. 14396/88, 24 February 1993, § 30.

⁸⁸ Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 compared to §§ 38 and 39.

⁸⁹ Pabel 2021 p. 28.

⁹⁰ Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 78.

⁹¹ Langborger v Sweden, app. no. 11179/84, 22 June 1989, § 32.

⁹² Bryan v The United Kingdom, app. no. 19178/91, 22 November 1995, § 37.

⁹³ Findlay v The United Kingdom, app. no. 22107/93, 25 February 1997, § 73. Cf. also Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, §§ 99 and 120-121.

given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the *De Cubber* judgment of 26 October 1984 [...] para. 24).

In this case it appears difficult to dissociate the question of impartiality from that of independence.⁹⁴

The last remark was done because what was at stake was the independence and impartiality of a Swedish Housing and Tenancy Court, where the lay assessors had been nominated by, and had close links with, two associations which both had an interest in the continued existence of a negotiation clause which the applicant in the ECtHR case had sought the deletion of from his contract. He could, according to the ECtHR, 'legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim'.⁹⁵

The second and third sections of the quote recurred for example in essence, but not as a direct quote, in *Findlay* 1997.⁹⁶ There reference was made to the *Pullar* judgment from 1996, where on the other hand it was considered more appropriate to examine the applicant's complaints in relation to impartiality, even though independence and impartiality were closely related.⁹⁷ The ECtHR then referred to the subjective and objective tests,⁹⁸ as it has done in many cases referring to the tests as 'constant case-law'.⁹⁹

4.4 THE DELCOURT LINE OF CASE LAW: CONCLUDING COMMENTS

Through *Delcourt*, the maxim 'justice must not only be done; it must also be seen to be done' was brought into the case law of the ECtHR, probably by the British judge Sir Humphrey Waldock, but in a shorter version than the one Lord Hewart had originally coined. The *Delcourt* judgment came two years after *Neumeister*, but not until *Piersack* in 1982 the ECtHR started merging the two lines of case law, discussing the subjective impartiality test with reference to *Le Compte* 1981 (in its turn referring to *Neumeister*) and the objective impartiality test with reference to *Delcourt* 1970.

In *Campbell and Fell* 1984, the approach was widened. The core criteria of an independent and impartial court were established, and the 'appearance of independence' was made a criterion along with the manner of appointment of judges and the guarantees against outside pressure. As regards impartiality, there was an objective test with exclusion of legitimate doubts in focus. This means that, through *Campbell and Fell*, impartiality as a state of mind, procedural impartiality, independence as a state of mind, institutional independence, and the importance of appearances, were assessed, even though the different aspects were not categorised in that manner explicitly.

⁹⁴ *Langborger v Sweden*, app. no. 11179/84, 22 June 1989, § 32.

⁹⁵ *Langborger v Sweden*, app. no. 11179/84, 22 June 1989, § 35.

⁹⁶ *Findlay v The United Kingdom*, app. no. 22107/93, 25 February 1997, § 73.

⁹⁷ *Pullar v the United Kingdom*, app. no. 22399/93, 10 June 1996, § 29.

⁹⁸ *Pullar v the United Kingdom*, app. no. 22399/93, 10 June 1996, § 30.

⁹⁹ E.g. *Mežnarić v Croatia*, app. no. 71615/01, 15 July 2005, § 29. See also *Morice v France* [GC], app. no. 29369/10, 23 April 2015, §§ 73-78 and *Ivanovski v The Former Yugoslav Republic of Macedonia*, app. no. 29908/11, 21 January 2016, §§ 137-141.

5 A COMPARISON WITH THE EXTERNAL AND INTERNAL ASPECTS OF INDEPENDENCE ACCORDING TO THE CJEU

So far, I have dealt with ECtHR case law, and I have identified Campbell and Fell 1984 as the judgment where all the relevant criteria were assessed. I will now turn to the CJEU and discuss how that court discussed the approach according to Campbell and Fell further.

5.1 WILSON 2006: INTRODUCING THE EXTERNAL AND INTERNAL ASPECTS

In the Wilson judgment from 2006,¹⁰⁰ the CJEU had to decide a case where it was disputed whether two disciplinary councils for lawyers in Luxemburg were to be considered as courts or tribunals, or whether they did not meet the characteristics of such institutions. This was not in the context of whether these councils could ask for a preliminary ruling but rather whether an appeal procedure required by a directive was implemented. The CJEU referred to its case law about which institutions could be defined as courts in the context of preliminary rulings, namely ‘whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law’,¹⁰¹ but it then developed the criteria of independence and impartiality. According to the CJEU, the ‘concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision’.¹⁰²

Apart from being this neutral third party, the concept of independence has – according to the CJEU – ‘two other aspects’.¹⁰³ This way of defining independence was a novelty in this case and the two aspects were called external and internal. The CJEU defined the external aspect thus:

The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (see, to that effect, Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, paragraph 21, and Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 36; see also, to the same effect, Eur. Court HR Campbell and Fell v. United Kingdom, judgment of 28 June 1984, Series A No 80, § 78). That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office (Joined Cases C-9/97 and C-118/97 Jokela and Pitkäranta [1998] ECR I-6267, paragraph 20).¹⁰⁴

The CJEU judgments mentioned in this quote contain assessments *in casu* rather than principled statements, which are therefore new in the Wilson case. However, in § 78 in

¹⁰⁰ C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587.

¹⁰¹ C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 48.

¹⁰² C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 49, with reference to two cases relating to the right to require preliminary rulings.

¹⁰³ C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 50.

¹⁰⁴ C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 51.

Campbell and Fell (see section 4.3. above), the ECtHR had discussed independence ‘of the executive and of the parties to the case’ and included ‘the manner of appointment of [the court’s] members and the duration of their term of office’, ‘the existence of guarantees against outside pressures’ and ‘the question whether the body presents an appearance of independence’ as relevant factors for the assessment. The CJEU then continued with the other aspect:

The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity (see, to that effect, Abrahamsson and Anderson, paragraph 32) and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.¹⁰⁵

The reference to Abrahamsson again is to an assessment *in casu*, but it is interesting to note the reference to Campbell and Fell 1984 in the preceding paragraph. This was before the ECtHR in *Belilos* 1988 replaced the concept ‘independence in relation to the parties’ with ‘impartiality’. One might wonder whether the ECtHR notion of independence ‘of the executive and of the parties to the case’ inspired the CJEU to distinguish between external and internal independence rather than independence and impartiality and to describe impartiality as ‘linked to’ the internal aspect.

Anyway, the CJEU concluded that the guarantees of independence and impartiality require rules, particularly:

as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.¹⁰⁶

Here, the CJEU referred to a few cases, of which the most interesting to note are the *Dorsch Consult* case from the line of cases about the right to ask for a preliminary ruling and the ECtHR judgment in *De Cubber* (see above section 4.2.).

5.2 PORTUGUESE JUDGES 2018: ADDING REMUNERATION OF JUDGES

We will now turn to the CJEU case law as regards courts that react on possible infringements of the guarantees for their independence and impartiality and ask the CJEU for a preliminary ruling about how to assess their status. The first in this line of case law is from 2018, the *Associação Sindical dos Juizes Portugueses* case, commonly called the Portuguese Judges case. The CJEU defined independence thus:

The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any

¹⁰⁵ C-506/04, *Wilson*, 19 September 2006, ECLI:EU:C:2006:587, § 52.

¹⁰⁶ C-506/04, *Wilson*, 19 September 2006, ECLI:EU:C:2006:587, § 53.

hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions [...].¹⁰⁷

In the judgment, there is a reference to *Wilson*, but there is no discussion about the external and internal aspects. The phrasing is also new, even though the content resembles earlier case law. There is also a reference to another case, *Margarit Panicello*, where the external and internal aspects were mentioned.¹⁰⁸ The fact that the *Portuguese Judges* case did not require the CJEU's discussion about impartiality might be the reason why the CJEU did not discuss the dichotomy between external and internal aspects.

In the *Portuguese Judges* case, the CJEU specified the guarantees for independence by adding remuneration:

Like the protection against removal from office of the members of the body concerned (see, in particular, [---] *Wilson* [---]), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.¹⁰⁹

The *Portuguese Judges* case is particularly important since the CJEU established a general obligation for the Member States to guarantee and respect the independence of their national courts, and it can be considered one of the *Grandes Décisions* of the CJEU.¹¹⁰

5.3 LM 2018: THE EXTERNAL AND INTERNAL ASPECTS REVISITED

In the wake of the backsliding of the rule of law in Poland, the CJEU has had to answer questions from other countries about whether to surrender suspects of crime to Poland according to the European Arrest Warrant procedure and whether there is still a right to a fair trial in Poland with access to independent and impartial courts. In the LM case, the CJEU referred to the *Portuguese Judges* case and repeated the wording there as regards independence but related it to the external aspect according to the *Wilson* judgment.¹¹¹ As regards the internal aspect, the CJEU referred to the *Wilson* case but described impartiality with partly different words:

The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law ([...] *Wilson* [...]) paragraph 52 and the case-law cited).¹¹²

¹⁰⁷ C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, § 44.

¹⁰⁸ C-503/15, *Margarit Panicello*, 16 February 2017, ECLI:EU:C:2017:126.

¹⁰⁹ C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, § 45.

¹¹⁰ Pech and Kochenov 2021 pp. 15 and 32.

¹¹¹ C-216/18 PPU, LM, 25 July 2018, ECLI:EU:C:2018:586, §§ 63-64.

¹¹² C-216/18 PPU, LM, 25 July 2018, ECLI:EU:C:2018:586, § 65.

The most important difference is that the CJEU replaced the phrase ‘seeks to ensure a level playing field for the parties to the proceedings and their respective interests’ with ‘seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests’. There seems to be no material difference but rather a different use of metaphors, the one where ‘equal distance’ is used being clearer, even though ‘level playing field’ refers to the fairness of the trial. The CJEU also summed up what the guarantees for independence *and* impartiality should mean, when it comes to the content of the rules about courts:

Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, *inter alia*, that dismissals of its members should be determined by express legislative provisions [...].

There is a reference to a case about whether a board was to be considered a court in the context of the preliminary ruling procedure.¹¹³ The distinction between the external and internal aspects of independence has later on been used frequently by the CJEU.¹¹⁴ Some reflections about this way of defining independence and impartiality are relevant:

Firstly, that independence and impartiality require rules that are part of what I have called institutional independence. These rules relate very much to what in the ECHR context is discussed under the heading ‘tribunal established by law’, see section 6. They deal with how judges are appointed and their protection against being removed.

Secondly, that the difference between external and internal independence relates – through *Wilson and Campbell and Fell* – to the independence ‘of the executive and of the parties to the case’ and – through *Campbell and Fell* read in the light of *Belilos* – to the difference between independence and impartiality in the case law of the ECtHR.

Thirdly, that the ‘internal aspect’ of independence, which is essentially impartiality, is something completely different from the concept ‘internal independence’, defined as the independence of a judge in relation to other judges and aiming to protect judges from undue pressure from within the judiciary.¹¹⁵

6 TRIBUNAL ESTABLISHED BY LAW

When I now turn to the criterion ‘tribunal established by law’, I will have to return to the *Piersack* case from 1982, but then the main development has taken place more recently, especially through the *Ástráðsson* judgment in 2020.

¹¹³ C-222/13, *TDC*, 9 October 2014, ECLI:EU:C:2014:2265.

¹¹⁴ See e.g. C-274/14, *Banco de Santander*, 21 January 2020, ECLI:EU:C:2020:17, §§ 57-63, and C-357/19 et al., *SC Euro Box Promotion SRL*, 21 December 2021, ECLI:EU:C:2021:1034, §§ 215-243.

¹¹⁵ Joost Sillen, ‘The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights’ in *European Constitutional Law Review*, vol. 15, issue 1, March 2019, doi.org/10.1017/S1574019619000014, pp. 104-133.

6.1 PIERSACK 1982: THE COMPOSITION OF THE BENCH IN EACH CASE?

The Piersack case has been mentioned in relation to both lines of case law, since the ECtHR made a distinction between ‘independent tribunal’ (§ 27) and ‘impartial tribunal’ (§§ 28-32) in Article 6 ECHR, discussed the existence of ‘guarantees designed to shield [judges] from outside pressures’,¹¹⁶ and referred to the importance of appearances in the Delcourt line of case law, and introduced the subjective and the objective test. What is now going to be addressed is that the ECtHR also attached importance to the criterion ‘tribunal established by law’ in Article 6 ECHR.¹¹⁷

The applicant Piersack had at first argued that the national court was not a tribunal established by law because of the participation on the bench of a judge who was not, according to Piersack, independent and impartial. Piersack had later on refrained from putting forward that argument, and the ECtHR concluded that there was a violation of Article 6 on other grounds. The ECtHR just commented the matter like this:

In order to resolve this issue, it would have to be determined whether the phrase “established by law” covers not only the legal basis for the very existence of the “tribunal” – as to which there can be no dispute on this occasion (Article 98 of the Belgian Constitution) – but also the composition of the bench in each case; if so, whether the European Court can review the manner in which national courts – such as the Belgian Court of Cassation in its judgment of 21 February 1979 [...] – interpret and apply on this point their domestic law; and, finally, whether that law should not itself be in conformity with the Convention and notably the requirement of impartiality that appears in Article 6 § 1 [...].¹¹⁸

This can be seen as a first step towards not only assessing that a tribunal had a basis in law but also assessing that the composition of the bench in each case was according to law. However, the question whether this was a task for the ECtHR remained unresolved.

6.2 COËME 2000: LAW EMANATING FROM PARLIAMENT

In Coëme 2000 § 98, the ECtHR recalled that the phrase ‘tribunal established by law’ was meant to indicate ‘that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament’ with reference to a decision of the European Commission from 1978.¹¹⁹ The ECtHR added:

Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.¹²⁰

¹¹⁶ Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 27.

¹¹⁷ Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 33.

¹¹⁸ Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 33.

¹¹⁹ Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 98, see Zand v Austria, application no. 7360/76, Commission's report 12 October 1978,

¹²⁰ Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 98.

What was at stake in the case was that the Belgian Court of Cassation in a case had claimed jurisdiction also over defendants that were to be tried by another court. There was a connection between those defendants and the defendants that were actually to be tried by the Court of Cassation, but the rule giving the Court of Cassation jurisdiction was made up by the court itself.¹²¹ This was not acceptable. There was no reference to Piersack, probably because the Coëme case dealt with the question whether the court had jurisdiction rather than with the question whether the composition of the bench was in conformity with the relevant rules.

6.3 LAVENTS 2002: THE COMPOSITION OF THE BENCH IN EACH CASE

What was indicated in Piersack and partly clarified in Coëme about that the composition, organisation and competence of a court need to be established by law has been discussed in other cases. For example, in the Lavents judgment from 2002, the ECtHR clarified that the expression ‘tribunal established by law’ did not only relate to the basis of the existence of a court but also the composition of the bench in each case (*L'expression « établi par la loi » concerne non seulement la base légale de l'existence même du tribunal, mais encore la composition du siège dans chaque affaire*).¹²²

In the judgment, the court referred to another judgment¹²³ where this standard was not explained in an equally principled manner; this means that the Lavents case is the first judgment where the principle was expressed explicitly. However, the court also referred to a decision of admissibility in the Buscarini case, where the ECtHR had expressed the principle explicitly with a reference to Piersack.¹²⁴ As we have seen above, the ECtHR did not actually assess the question in that judgment, because it was not necessary since there was a violation of Article 6 ECHR for other reasons. However, the result according to the Buscarini decision is that the composition of a court must be in accordance with law. The Buscarini decision then was referred to in many of the cases which the Ástráðsson judgment was built upon (see below section 6.5).

6.4 FLUX 2007: APPOINTMENT OF JUDGES BY THE EXECUTIVE OR THE LEGISLATURE

In some cases, the ECtHR has commented on the fact that the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case law.¹²⁵ In the Flux (no. 2) judgment, the ECtHR decided that appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.¹²⁶ This was based on one of the findings in Campbell and Fell, where the court had not made the principle explicit but had found that appointment by a minister did not in itself mean

¹²¹ Pabel 2021 p. 31.

¹²² Lavents v Latvia, app. no. 58442/00, 28 November 2002, § 114.

¹²³ Bulut v Austria, app. no. 17358/90, 22 February 1996, § 29.

¹²⁴ Buscarini v San Marino, app. no. 31657/96, 4 May 2000.

¹²⁵ Stafford v the United Kingdom [GC], app. no. 46295/99, 28 May 2002, § 78, with reference to Incal v Turkey, app. no. 22678/93, 9 June 1998.

¹²⁶ Flux (no. 2) v Moldova, app. no. 31001/03, 3 July 2007, § 27.

that judges were not independent.¹²⁷ The assessment in Flux (no. 2) was then repeated in further cases, and the growing importance of the separation of powers did not change this.¹²⁸

6.5 ÁSTRÁÐSSON 2020: THE NEW DEFINITION OF ‘ESTABLISHED BY LAW’

In the *Astráðsson* judgment (Grand Chamber) from 2020, the question was whether the new Icelandic Court of Appeal was a ‘tribunal established by law’. The fact that the Court of Appeal as such was established by a law emanating from Parliament was not contested,¹²⁹ but also the participation of the judges in the examination of a case needs to be based on law. In sum, the phrase ‘established by law’ covers not only the legal basis for the very existence of a ‘tribunal’ but also the compliance by that tribunal with the particular rules that govern it. The ECtHR related to the earlier statements that the ‘law’ should emanate from parliament and the importance of the separation of powers.¹³⁰ The court continued, in a review of its own case law, to say that ‘compliance with the requirement of a “tribunal established by law” has so far been examined in a variety of contexts – under both the criminal and civil limbs of Article 6 (1) – including, but not limited to, the following’¹³¹ aspects:

1. a court acting outside its jurisdiction,¹³²
2. the assignment or reassignment of a case to a particular judge or court,¹³³
3. the replacement of a judge without providing an adequate reason as required under the domestic law,¹³⁴
4. the tacit renewal of judges’ terms of office for an indefinite period after their statutory term of office had expired and pending their reappointment,¹³⁵
5. trial by a court where some members of the bench were disqualified by law from sitting in the case,¹³⁶
6. trial by a bench the majority of which was composed of lay judges despite the absence of a legal basis in domestic law for the exercise of judicial functions as a lay judge,¹³⁷

¹²⁷ *Campbell and Fell v The United Kingdom*, app. no. 7819/77 and 7878/77, 28 June 1984, § 79.

¹²⁸ *Maktouf and Damjanović v Bosnia and Herzegovina [GC]*, app. no. 2312/08 and 34179/08, 18 July 2013, § 49.

¹²⁹ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 206.

¹³⁰ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, §§ 211-215.

¹³¹ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 217.

¹³² Reference made to *Coëme and others v Belgium*, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, §§ 107-109, see above section 6.2., and *Sokurenko and Strygun v Ukraine*, app. no. 29458/04 and 29465/04, 20 July 2006, §§ 26-28.

¹³³ Reference made to *DMD GROUP, a.s. v Slovakia*, app. no. 19334/03, 5 October 2010, §§ 62-72; *Richert v Poland*, app. no. 54809/07, 25 October 2011, §§ 41-57; *Miracle Europe Kft v Hungary*, app. no. 57774/13, 12 January 2016, §§ 59-67; *Chim and Przywieczerski v Poland*, app. no. 36661/07 and 38433/07, 12 April 2018, §§ 138-142; and *Pasquini v San Marino*, app. no. 50956/16, 2 May 2019, §§ 103 and 107.

¹³⁴ Reference made to *Kontalexis v Greece*, app. no. 59000/08, 31 May 2011, §§ 42-44.

¹³⁵ Reference made to *Gurov v Moldova*, app. no. 36455/02, 11 July 20016, § 37, and *Oleksandr Volkov v Ukraine*, app. no. 21722/11, 9 January 2013, §§ 152-156.

¹³⁶ Reference made to *Lavents v Latvia*, app. no. 58442/00, 28 November 2002, § 115, see above section 6.3., and *Zeynalov v Azerbaijan*, app. no. 31848/07, 30 May 2013, § 31.

¹³⁷ Reference made to *Gorguiladzé v Georgia*, app. no. 4313/04, 20 October 2009, § 74, and *Pandjikidzé and others v Georgia*, app. no. 30323/02, 27 October 2009, § 110.

7. the participation of lay judges in hearings in contravention of the relevant domestic legislation on lay judges,¹³⁸
8. trial by lay judges who had not been appointed in compliance with the procedure established by the domestic law,¹³⁹
9. delivery of a judgment by a panel which had been composed of a smaller number of members than that provided for by law,¹⁴⁰ and
10. conduct of court proceedings by a court administrator who was not authorised under the relevant domestic law to conduct such proceedings.¹⁴¹

In sum, a court must not only be established by law but also have jurisdiction according to law, the case must be assigned to the court and judge correctly, judges must be appointed correctly, and the procedural rules about the competence of the court must be adhered to.

After making its summary in ten bullet points, the ECtHR Grand Chamber found that the case provided the court ‘with an opportunity to refine and clarify the meaning to be given to the concept of a ‘tribunal established by law’, and to analyse its relationship with the other ‘institutional requirements’ under Article 6 (1) of the Convention, namely, those of independence and impartiality’.¹⁴²

As regards the definition of a ‘tribunal’, the court recalled the phrasing of independence in *Belilos* – ‘in particular of the executive; impartiality; duration of its members’ terms of office’¹⁴³ – and added the requirement that a tribunal should be ‘composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law’.¹⁴⁴

As regards ‘established’, the ECtHR noted, with reference to an earlier case,¹⁴⁵ that ‘irregularities in the appointment procedure’ of judges could mean that a tribunal was not established by law.¹⁴⁶

As regards ‘by law’, the ECtHR clarified, *firstly*, that ‘the requirement of a “tribunal established by law” also [means] a “tribunal established in accordance with the law”’, and *secondly*, that its concern is to ensure ‘that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive’.¹⁴⁷ As regards the more specific phrase ‘established in accordance with’ rather than ‘established by’, it is clear from the references to the *Ilatovskiy*,¹⁴⁸ *Momčilović*,¹⁴⁹ and *Mocanu*¹⁵⁰ cases that it means that it is not sufficient that the court as an institution is established by law, on the contrary, it must

¹³⁸ Reference made to *Posokhov v Russia*, app. no. 63486/00, 4 March 2003, §§ 39-44.

¹³⁹ Reference made to *Ilatovskiy v Russia*, app. no. 6945/04, 9 July 2009, §§ 38-42.

¹⁴⁰ Reference made to *Momčilović v Serbia*, app. no. 23103/07, 2 April 2013, § 32, and *Jenița Mocanu v Romania*, app. no. 11770/08, 17 December 2013, § 41.

¹⁴¹ Reference made to *Ezgeta v Croatia*, app. no. 40562/12, 7 September 2017, § 44.

¹⁴² *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 218.

¹⁴³ *Belilos v Switzerland*, app. no. 10328/83, 29 April 1988, § 64.

¹⁴⁴ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, §§ 219-222.

¹⁴⁵ *Ilatovskiy v Russia*, app. no. 6945/04, 9 July 2009.

¹⁴⁶ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, §§ 223-228.

¹⁴⁷ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 230.

¹⁴⁸ *Ilatovskiy v Russia*, app. no. 6945/04, 9 July 2009.

¹⁴⁹ *Momčilović v Serbia*, app. no. 23103/07, 2 April 2013.

¹⁵⁰ *Jenița Mocanu v Romania*, app. no. 11770/08, 17 December 2013.

also be assessed whether the composition of the court is in conformity with the relevant rules and that the judges have been appointed in a correct way.

Since independence is a requirement for an institution to be a ‘tribunal’, the reasoning can become circular when the assessment is to be made whether a tribunal is independent. The ECtHR observes this and states that the aim is ‘upholding the fundamental principles of the rule of law and the separation of powers’.¹⁵¹ Therefore, ‘the examination under the “tribunal established by law” requirement must not lose sight of this common purpose and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the above-mentioned fundamental principles and to compromise the independence of the court in question’.¹⁵²

Then, the ECtHR clarifies what independence is:

“Independence” refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (see, *mutatis mutandis*, *Khrykin v. Russia*, no. 33186/08, §§ 28-30, 19 April 2011).¹⁵³

After this, the ECtHR develops a ‘threshold test’, which aims to answer ‘the basic question whether any form of irregularity in a judicial appointment process, however minor or technical that irregularity may be, and regardless of when the breach may have taken place, could automatically contravene that right’.¹⁵⁴ The ‘threshold test’ has been applied also later,¹⁵⁵ and the concept ‘established in accordance with the law’ has influenced the case law of the CJEU.¹⁵⁶

¹⁵¹ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 233.

¹⁵² *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 234.

¹⁵³ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 234.

¹⁵⁴ *Ástráðsson v Iceland*, app. no. 26374/18, 1 December 2020, § 235. See §§ 236-252 as to how the threshold test works, and cf. partly concurring, partly dissenting opinion by judge Pinto de Albuquerque, who writes that ‘the right to a court established by law is a self-standing Convention right and its own autonomous content is not to be confused with that of the principles of independence, impartiality or irremovability of judges’ and continues: ‘The appointment of a judge to a court in accordance with the relevant eligibility criteria is undoubtedly part of the essence of this right. This is also supported by the fact that a significant number of Contracting Parties consider that the requirement of a “tribunal established by law” covers the legal procedure for the appointment of judges and allows or even imposes the reopening of the proceedings in the event of a judgment being adopted by a judge who has been unlawfully appointed to office’ (§ 9).

¹⁵⁵ *Xero Flor v. Poland*, app. no. 4907/18, 7 May 2021, §§ 243-291.

¹⁵⁶ *C-487/19, W.Ż.*, 6 October 2021, ECLI:EU:C:2021:798, §§ 124-130; *C-542/18 RX-II* and *C-543/18 RX-II, Simpson and HG*, ECLI:EU:C:2020:232, § 74.

6.6 THE PIERSACK LINE OF CASE LAW: CONCLUSIONS

In Piersack 1982, the ECtHR just commented that the composition of the bench in each case might be governed by the standard ‘established by law’. In Coëme 2000, it was clarified that ‘law’ was law emanating from parliament. In the Lavents case 2002, which built upon the decision in Buscarini from 2000, it was clarified that ‘established by law’ actually means that the composition of the bench is in accordance with law.

In Ástráðsson, the ECtHR summed up the case law and developed it as regards the lawful composition of the court. Case law between Lavents and Ástráðsson had dealt with irregularities in the appointment of judges and the composition of courts, but the ECtHR now got a chance to clarify the principles to be applied. Even though ‘irregularities in the appointment procedure’ might mean that a court is not established by law, a threshold test was introduced to avoid considering a tribunal not established by law because of any minor or technical irregularity in appointment processes. It is interesting to note that the development of the concept ‘established by law’ is later than the other parts of the case law on independence and impartiality.

7 CONCLUDING COMMENTS

In this section, I will provide some concluding comments and sum up the analysis that I have made in the preceding sections. One important conclusion is that the details in the assessments of impartiality and independence have developed slowly and inconsistently, in spite of the fact that independence and impartiality of judges are not new concepts.

7.1 IMPARTIALITY AS A STATE OF MIND

As I mentioned in section 2.1., impartiality as a state of mind is a very old ethical requirement when being a judge, and it continues to be highly relevant. There are, however, not many cases in which the ECtHR or the CJEU have been able to conclude that a judge was actually partial in his or her mind.¹⁵⁷ This is not surprising, since it is difficult to assess the impartiality in the mind of the judge (subjective impartiality), and this means that the question of appearances will be most important for the assessment (objective impartiality). The personal impartiality of a judge is presumed until there is proof to the contrary, but on the other hand, the requirement of objective impartiality provides an important guarantee for a fair trial.¹⁵⁸ Even though it is easy to understand the difficulties that would arise if the ECtHR were to assess impartiality as a state of mind of national judges, this means that national judges can only obtain very limited guidance through the case law of the ECtHR and the CJEU.

In early cases, the standard approach was to assess independence and impartiality together, as independence ‘of the executive and of the parties to the case’. However, in the Belilos judgment 1988, the concept ‘impartiality’ replaced the earlier concept ‘independence of [---] the parties to the case’. This indicates that these concepts are synonymous, but it also relates to the lacking difference between assessments of independence and impartiality. Even though the state can act as a party and try to influence the court in that capacity, conceptually

¹⁵⁷ Pabel 2021 pp. 40-412, Harris et al. 2018 pp. 451-452.

¹⁵⁸ See for example *Kyprianou v Cyprus*, app. no. 73797/01, 15 December 2005, §§ 118-135.

that behaviour can be distinguished from situations where the state more generally threatens the independence of courts.

In the *Khrykin and Baturlova* judgments 2011, the ECtHR defined impartiality as independence as a state of mind. Still, the conceptual distinction between independence and impartiality is unclear, at least in comparison to the *Wilson* and *LM* cases from the CJEU, where the discussion of independence and impartiality – or literally the external and internal aspects of independence – are clearer. Still, for a judge to know how to be impartial in his or her mind, not much detailed information can be obtained from ECtHR and CJEU case law. The judge needs to consult other texts, such as the Bangalore principles.

7.2 PROCEDURAL IMPARTIALITY

Procedural impartiality has not been so much discussed from the point of view of the judge and how a fair trial with ‘equality of arms’ functions as a means to keep the judge impartial.¹⁵⁹ Unsurprisingly, procedural impartiality has been discussed in terms of whether the parties have had equal opportunities to present their cases under conditions that do not place them at a substantial disadvantage compared to the opponent.¹⁶⁰ That lies outside the scope of this article, but I would like to highlight that just as institutional independence is a guarantee for independence as a state of mind of a judge, procedural impartiality can function as a guarantee for impartiality as a state of mind. If institutional independence helps the judge thinking independently, procedural arrangements where there is equality of arms and where both parties can put forward their arguments help the judge thinking impartially. It is not only a duty for a judge to listen to both parties, but it is also required that the legislator arranges the procedure so that equality of arms prevails.

7.3 INDEPENDENCE AS A STATE OF MIND

Fear is, since the Middle Ages, repeatedly mentioned as an emotion that should not cause a judge to hand down a wrongful judgment,¹⁶¹ and fear can relate to both the parties and people external to the judicial process. Fear is in some contexts paired with favour,¹⁶² meaning that the judge should not strive for popularity in the local community. But just as impartiality as a state of mind is difficult to assess, independence as a state of mind also is.

In the *Portuguese Judges* case, the CJEU concluded that judges should function ‘wholly autonomously, without being subject to any hierarchical constraint’.¹⁶³ This not only relates to institutional arrangements but also to the attitude of the individual judge. Just like impartiality as a state of mind, independence as a state of mind is an ideal of which not much detailed information can be obtained from ECtHR and CJEU case law.

¹⁵⁹ Cf. however *Campbell and Fell v The United Kingdom*, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 compared to §§ 38 and 39.

¹⁶⁰ *Regner v the Czech Republic* [GC], app. no. 35289/11, 19 September 2017, § 146.

¹⁶¹ *Isidore of Seville, Sententiae*, Thomas L. Knoebel (transl. and ed.), New York/Mahwah: The Newman Press, 2018, p. 207.

¹⁶² For example in the oath of the imperial judge according to the Reichslandfrieden of Mainz 1235, see Ludwig Weiland, *Constitutiones et acta publica imperatorum et regum inde ab a. MCXCVIII usque a. MCCLXXII (1198-1272)*, Hannover 1896, on *Monumenta Germaniae Historia*, www.dmgh.de/index.html, p. 247 and 262.

¹⁶³ C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, § 44.

7.4 INSTITUTIONAL INDEPENDENCE

Institutional independence has been easier to assess than the impartiality and the independence in the minds of judges, but on the other hand, the criterion ‘tribunal established by law’ developed late, at least in comparison to other aspects of the institutional independence or the importance of appearances. For example, in *Ringeisen* 1971, the term of appointment was considered a criterion for independent judges, and in the *Piersack and Campbell and Fell* judgments from the early 1980s, the ECtHR discussed ‘the existence of guarantees against outside pressures’. *Campbell and Fell* 1984 established the ‘core criteria’ of an independent and impartial tribunal,¹⁶⁴ and according to later case law, for example *Khrykin and Baturlova* 2011 (see section 4 above), the factors to assess can be summarised thus:

- the manner of appointment of the members of the court,
- their term of office,
- guarantees against outside pressures,
- guarantees against pressure from within courts,
- separation of powers.

The criterion ‘established by law’ has developed later than many other of the aspects. Only in the *Ástráðsson* judgment from 2020, the ECtHR clarified that the concept tribunal ‘established by law’ is to be understood as ‘established in accordance with law’, indicating that a court must not only be established by law but also have jurisdiction according to law, the case must be assigned to the court and judge correctly, judges must be appointed correctly, and the procedural rules about the competence of the court must be adhered to. From the case law of the CJEU, it should be mentioned that the Portuguese judges and LM cases show that guarantees as regards appointment and remuneration mean that there are also guarantees for independence.

If the different parts of institutional independence are understood as means for helping the judge thinking independently, it must be highlighted that it is the duty of the legislator or the drafters of constitutions to arrange resilient institutions.

7.5 THE IMPORTANCE OF APPEARANCES

Through *Delcourt* 1970, the maxim ‘justice must not only be done; it must also be seen to be done’ was brought into the case law of the ECtHR, probably by the British judge Sir Humphrey Waldock, but in a shorter version than the one Lord Hewart had originally coined. Even though the word ‘appearance’ was mentioned in *Delcourt*, it was in *Piersack* 1982 that the importance of ‘appearances’ was linked to the ‘objective approach’.¹⁶⁵ In *Campbell and Fell* 1984, the ‘appearance of independence’ was made a criterion for an independent court.¹⁶⁶

When the ECtHR started developing its case law as regards the role of judges in the 1960s and early 1970s, it started interpreting the right to a fair trial according to Article 6

¹⁶⁴ Pabel 2021 p. 28.

¹⁶⁵ *Piersack v Belgium*, app. no. 8692/79, 1 October 1982, § 30.

¹⁶⁶ *Campbell and Fell v The United Kingdom*, app. no. 7819/77 and 7878/77, 28 June 1984, § 78.

ECHR, without much reference to historical facts and principles that could have guided the court, such as common European constitutional principles and the various oaths and documents where judicial ethics has been defined. This is perhaps not very surprising, since the task of the court was to interpret and apply the convention.¹⁶⁷ What is more surprising is the weight attached to the maxim ‘justice must not only be done; it must also be seen to be done’. Obviously, it was of British origin, even though it was probably coined in an international context.

I would say that bringing the maxim ‘justice must not only be done; it must also be seen to be done’ into its case law it is a very important contribution by the ECtHR to the definition of the ethics of judges. It has been criticised,¹⁶⁸ based on a need to distinguish between independence and impartiality¹⁶⁹ with which I agree, but I think it is important for a judge to consider all the four different factors – impartiality as a state of mind, procedural impartiality, independence as a state of mind, and institutional independence – from the point of view of appearances. Judges will then have to be aware of which impressions different types of behaviour will give, and such awareness can contribute to strengthening the independence and impartiality in their minds.¹⁷⁰

¹⁶⁷ Article 45 of the original text of the ECHR (1950).

¹⁶⁸ Oakes and Davies 2013 pp. 130-137 and 157-160; Oakes and Davies 2016 pp. 493-494.

¹⁶⁹ Oakes and Davies 2016 p. 492.

¹⁷⁰ Ussing 1899 p. 326; Christensen 2003 pp. 69-89.

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