



Uniwersytet
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EU Criminal Law

Lecture **Criminal Procedure and Courts 2**

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Right to a fair trial

Article 6 par. 1

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

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



Right to a fair trial

Right to have a case heard by an independent and impartial tribunal established by law

1. The concept of „tribunal” (court)
2. Access to court
3. Institutional guarantees related to court (establishment by law, independence, impartiality)
4. *Procedural (sensu stricto) guarantees*



Right to a fair trial

Right to have a case heard by a tribunal

Tribunal - in the Court's case law a tribunal is defined 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.

That encompasses courts and tribunals in a traditional meaning of these words, as well as other bodies (e.g. administrative bodies)



Right to a fair trial

Right to have a case heard by a tribunal

ECtHR [Grand Chamber] 1 December 2020
Guðmundur Andri Ástráðsson v. Iceland

It is inherent in the very notion of a “tribunal” that it 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.



Right to a fair trial

Right to have a case heard by a tribunal

The Court underlines the paramount importance of a **rigorous process for the appointment of ordinary judges** to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed to judicial posts.

Judicial body which does not satisfy the requirements of independence – in particular from the executive – and of impartiality may not even be characterised as a “tribunal” for the purposes of Article 6 § 1 ECHR.



Right to a fair trial

Right to have a case heard by a tribunal

Prosecution and punishment of minor “criminal” offences by administrative authorities is not inconsistent with the Convention. However the convicted person has to have a possibility of lodging appeal with the “**judicial body that has full jurisdiction**”, meaning empowered to re-analyse the facts of the case and application of law as well as quash the conviction.



Right to a fair trial

Access to court

The right of access to a court secured by Article 6 § 1 of the Convention **is not absolute**, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State.

In this respect, the Contracting States enjoy a certain **margin of appreciation**, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that **the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired**. Furthermore, a limitation will not be compatible with Article 6 § 1 if **it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved**.



Right to a fair trial

Access to court - limitations

1) **Parliamentary immunity** – legitimate if it serves its purposes (secures members of parliament against initiating arbitrary criminal proceedings)

2) **Formal requirements related to access to court (mainly in cases of appeals)**

- the right of appeal may of course be subject to statutory requirements, when applying procedural rules the courts must avoid excessive formalism that would infringe the fairness of the proceedings
- regulations regarding time-limits, access to professional legal aid that in practice make an appeal impossible or excessively restrict right to appeal



Right to have a case heard by a tribunal established by law

The idea of court established by law reflects the principle of **rule of law**, one of the most important values for parties to the ECHR

The phrase “established by law” covers:

- 1) the legal basis for the very existence of a “tribunal”
- 2) the compliance by the court or tribunal with the particular rules that govern it (including, in particular, provisions concerning the independence of the members of a court, the length of their term of office and their impartiality)
- 3) the composition of the bench in each case.



Right to have a case heard by a tribunal established by law

Tribunal that is not established in conformity with the intentions of the legislature will necessarily **lack the legitimacy required in a democratic society to resolve legal disputes.**

“Law”, within the meaning of Article 6 § 1 of the Convention, comprises not only **domestic legislation (acts of parliament) as well as case-law interpreting such provisions but also relevant provision of public international law** (e.g. regarding the jurisdiction of national courts to try cases of most serious international crimes, for example genocide)



Right to have a case heard by a tribunal established by law

The term “established by law” in Article 6 of the Convention is to ensure “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.

There is a visible interrelation between requirement to establish the tribunal by law, its independence and the rule of law principle.



Right to have a case heard by a tribunal established by law

Examples of violations of the discussed principle:

- 1) acting outside its jurisdiction
- 2) violation of rules related to case assignment to judges and lay judges
- 3) the replacement of a judge without providing an adequate reason as required under the domestic law
- 4) trial by a court where some members of the bench were disqualified by law from sitting in the case



Right to have a case heard by a tribunal established by law

Examples of violations of the discussed principle:

- 5) the participation of lay judges in hearings in contravention of the relevant domestic legislation on lay judges
- 6) delivery of judgment by a panel which had been composed of a smaller number of members than that provided for by law
- 7) violation of the rules regarding appointment procedure of judges safeguarding independence of the judiciary (ECtHR [Grand Chamber] 1 December 2020 *Guðmundur Andri Ástráðsson v. Iceland*)



Right to have a case heard by an independent tribunal

Article 6 § 1 of the Convention requires **independence from:**

- the other branches of power (executive and the legislature)
- the parties to the proceedings
- judicial organs other than adjudicating panel (e.g. president of the court)

Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction.



Right to have a case heard by an independent tribunal

“Independence” refers 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.



Right to have a case heard by an independent tribunal

In determining whether a body can be considered to be “independent” the Court has had regard to the following criteria:

- 1) the manner of appointment of its members;
- 2) the duration of their term of office;
- 3) the existence of guarantees against outside pressures;
- 4) whether the body presents an appearance of independence.



Right to have a case heard by an independent tribunal

No particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of independence provided that other necessary guarantees are present.



Right to have a case heard by an independent tribunal

Appointment of judges by the executive (e.g. President, Prime Minister, the King) is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory duties.

The Court notes that, according to the Constitution at the material time, the authority responsible for the appointment of judges, namely the Council of Justice, was presided over by the President of Armenia. However, the fact that members of a tribunal are appointed by the executive does not in itself call into question its independence. The Court notes that judges were appointed to their posts on the basis of a special proficiency test. Furthermore, safeguards of the independence of judges, such as security of judge's tenure, their irremovability and freedom from outside instructions or pressure, were guaranteed by the Constitution and the implementing legislation. In the Court's opinion, these safeguards were sufficient to exclude the applicant's misgivings about the independence of the tribunal in his case (Galstyan v. Armenia).



Right to have a case heard by an independent tribunal

The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified.

The Court considers in this connection that where a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt about those persons' independence.



Right to have a case heard by an independent tribunal

The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified.

Such a situation seriously affects the confidence which the courts must inspire in a democratic society. The Court considers that the applicant – tried in a martial-law court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear being tried by a bench which included two military judges and an army officer acting under the authority of the martial-law commander. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court makes no difference in this respect (Şahiner v. Turkey).



Right to have a case heard by an independent tribunal

In order to determine whether a “tribunal” can be considered to be independent as required by Article 6 § 1, **appearances may also be of importance.**

What is at stake is the **confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.**



Right to have a case heard by an independent tribunal

In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, **the standpoint of the accused is important but not decisive**. What is decisive is whether his doubts can be held to be objectively justified. No problem arises as regards independence when the Court is of the view that **an “objective observer” would have no cause for concern about this matter in the circumstances of the case at hand**.



Right to have a case heard by an impartial tribunal

Impartiality - the absence of prejudice or bias

The existence of impartiality for the purposes of Article 6 § 1 must be determined according to a:

- 1) **subjective test** – assessment of personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case;
- 2) **objective test** – assessment of whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.



Right to have a case heard by an impartial tribunal

As to the subjective test, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court.

The Court has held that the personal impartiality of a judge must be presumed until there is proof to the contrary.

As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (by words, reactions during trial, in decisions issued at trial).



Right to have a case heard by an impartial tribunal

As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality.

This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.



Right to have a case heard by an impartial tribunal

The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test. It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.

In this respect even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.



Right to have a case heard by an impartial tribunal

Violations of right to impartial court:

- 1) Failure of the national courts to examine a complaint of a lack of impartiality.
- 2) The court issued a decision in the case confirming the guilt of the defendant, before the case was resolved.
- 3) The case concerns the interests of the judge (relatives).
- 4) The judge was performing different procedural functions in the same proceedings (e.g. was a prosecutor).
- 5) Family affiliation between judges deciding on a case at different levels of jurisdiction.
- 6) Family affiliation with one of the parties.
- 7) A criminal trial against an applicant in a court where the victim's mother worked as a judge.

Remember that in most cases the specific facts of the case are decisive.



Right to have a case heard by an impartial tribunal

Interrelation between independence and impartiality

There is a close link between the concepts of independence and objective impartiality. For this reason the Court commonly considers the two requirements together.

The principles applicable when determining whether a tribunal can be considered “independent and impartial” apply equally to professional judges, lay judges and jurors. However, they not apply to prosecutors.



Further reading:

**Guide on Article 6 of the European Convention on
Human Rights Right to a fair trial (criminal limb) – p. 1-31**

<https://prawo.uni.wroc.pl/node/45303>