

# THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RIGHTS RELATED TO ARTICLE 6 UNDER THE ECHR JURISPRUDENCE: INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

**Elena ANDREEVSKA\***

## **Abstract**

*Access to justice is a core fundamental right and a central concept in the broader field of justice. The case-law of the European Court of Human Rights on Article 6 is a complex body of rules. Article 6 of the Convention was inspired by Article 10 and 11(1) of the Universal Declaration of Human rights of 1948. It has also its counterpart – with minor differences in Article 14 of the International Covenant on Civil and Political Rights on 1966. Article 6, which guarantees the right to fair trial, occupies a central place in the system of the Convention. It is generally agreed that this provision is the most frequently cited one of the Convention, both at the national and international levels. This Article contains a variety of rights which are all related to the good administration of justice, not only criminal, but also in the civil and administrative matters. The ‘independent and impartial tribunal established by law’ is one of textual elements of the Fair Trial Right, as long as it has direct and explicit expression in the text of Convention. Even in simple logical way it can be considered as a suite of requirements referring to 1) the notion of tribunal 2) its attribute of being established by law 3) being independent and 4) being impartial.*

**Keywords:** *access to justice, tribunal, independent, impartial, applicability.*

## **I. Introduction**

If the jurisprudence of the Strasbourg Court was an ocean, the Article 6 jurisprudence would be an ocean in ocean.<sup>1</sup> On one hand, it has crucial role in developing and strengthening national judiciary, in increasing its reasonableness and predictability, in pushing the national investigating bodies to give up the archaically practice of oppressing the accused and, after all, in securing Human Rights. On the other hand, the fair trial cases have been periodically giving the European Court of Human Rights (ECHR) an opportunity to enhance its protective role, to develop its interpretative doctrines and to fortify its magnificence as the most effective supranational (and international) human rights protection instrument.<sup>2</sup>

In contrast to the guarantees provided by paragraph 2 and 3 of Article, which are applicable only in the context of criminal proceedings, paragraph 1 of the same provision has

---

\* Professor, Faculty of Public Administration and Political Science, South East European University, Tetovo (e-mail: e.andreevska@seeu.edu.mk)

<sup>1</sup> Historically, Article 6 of the Convention was inspired by Article 10 and 11 (1) of the Universal Declaration of Human Rights of 1948. It has also its counterpart – with minor differences in Article 14 of the International Covenant on Civil and Political Rights of 1966.

<sup>2</sup> The Court has pointed out that 'Article 6 enunciates the rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term'. See *Golder* judgment of 21 February 1975, Series A, No. 18, p.13, pr.28. Moreover, the Court has sometimes described the right guaranteed by Article 6 as 'right to good administration of justice'. The expression 'the right to fair administration of justice' which sometimes is used for its conciseness and convenience . . . does not appear in the text of Article 6, and can also be understood as referring only to the work and not to the organisation of justice. See *Delcourt* judgment of 17 January 1990, Series A, No.11, p.11, pr.25. The Court now generally refers to Article 6 of the Convention as guaranteeing 'the rights to a fair trial'. See *Golder* judgment, p.18.

wider scope of 'civil rights and obligations' beside 'the criminal charge'.<sup>3</sup> Furthermore, a broad construction of the 'civil rights and obligations' in Article 6(1) would then cover all the rights or obligations enforceable by law, regardless of whether the parties are individuals, corporations or public authorities or the State itself.

Active and protective jurisprudence of ECHR has been changing the very structure of Article 6 mosaic as whole. If we draw up the construction of Fair Trial Article following strictly the text in the Convention and then outline its state it result of Court's jurisprudence, we will have basically dissimilar pictures. The Court itself repeatedly emphasizes that the Article 6 protection "... has undergone a considerable evolution in the Court's case-law ..."<sup>4</sup>

The 'independent and impartial tribunal established by law' is one of textual elements of the Fair Trial Right, as long as it has direct and explicit expression in the text of Convention. This provision deals, in principle, with the question whether a certain disciplinary or administrative body determining a dispute has the characteristics of a "tribunal" or "court" within the autonomous meaning of Article 6, even if it is not termed a "tribunal" or "court" in the domestic system.<sup>5</sup> This is the only provision of Article 6 which explicitly refers back to domestic law, warranting a certain degree of inquiry into "lawfulness" from the Court. At the same time, there is a strong presumption that domestic courts know the rules of jurisdiction better, and if the matter of jurisdiction is properly discussed at the domestic level the Court would tend to agree with the domestic courts in a decision on competence to hear the case.<sup>6</sup>

The body need not be part of the ordinary judicial machinery), and the fact that it has other functions besides a judicial one does not necessarily render it outside the notion of a "tribunal"<sup>7</sup>. The term established by law is intended to ensure that the judicial organization does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament. Members of the body do not necessarily have to be lawyers or qualified judges<sup>8</sup>. The body must have the power to make binding decisions,<sup>9</sup> and not merely tender advice or opinions, even if that advice is usually followed in practice.<sup>10</sup>

One of the elements essential for the notion of "tribunal" for the purposes of Article 6 (1) is the existence of power to decide matters "on the basis of rules of law, following proceedings conducted in a prescribed manner".<sup>11</sup> This principle has been established by the Court, *mutatis mutandis*, in case of *Stromek v. Austria*.<sup>12</sup>

The Court's jurisprudence is much richer in interpreting and applying the 'independence' and 'impartiality' requirements than 'tribunal established by law'.

<sup>3</sup> In this context, the Court points out that: 'Paragraph 3 of Article 6 contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article 6. The various rights of which a non-exhaustive list appears in paragraph 3, reflect certain aspects of the notion of a fair trial in criminal proceedings. When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots'. See *Artico* judgment of 13 May 1980, Series A. No. 37, p. 15, pr.32. Moreover, the Court has pointed out that 'The Contracting States enjoy a wide discretion as regards the choice of means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 (1) in this filed. The Court's task is not to include those means to the states, but to determine whether the result called for the Convention has been achieved'. See *Colozza* judgment of 12 February 1985, Series A, No. 212-C, p. 26, para.26.

<sup>4</sup> *Borgers v. Belgium*, 30/10/1991, Appl. No. 12005/86, A214-B, para.24.

<sup>5</sup> *H. v. Belgium*, 30 November 1987, paras.50-55.

<sup>6</sup> *Khodorkovskiy (No.2) v. Russia*, 8 November 2011.

<sup>7</sup> See *H. v. Belgium*, Publication A 127 B.

<sup>8</sup> See *Ettl v. Austria*, paras. 36-41, Publication A117A.

<sup>9</sup> See *Sramek v. Austria*, paras 36-42, Publication A084.

<sup>10</sup> See judgment *Compbell and Fells*, paras. 32-33; and judgment *H v. Belgium*, para. 50.

<sup>11</sup> Case of *Sramek v. Austria*, judgment of 22 October, 1984, Application no. 8790/79, para. 36.

<sup>12</sup> Where the applicant complained the violation of Article 6(1) of the ECHR claiming that the Regional Real Property Transnational Authority that examined her case on the domestic level was not independent and impartial tribunal established by law. Despite the regional Authority was not classified as a court under the Austrian law, the Court concluded that "for the purposes of Article 6, however, it comes within the concept 'tribunal' in the substantive sense of this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in the prescribed manner. Ibid.

Nevertheless the latter is also attractive, since – though in fewer cases – it has given (and still gives) the Court opportunity to develop its jurisprudence in means of both textual and contextual interpretation.

As a final point, the right to a trial before an independent and impartial tribunal established by law engages three principles considerations: first, that the tribunal is one established by law; second, that the tribunal is competent to decide on matters brought before it; and, third, that the tribunal is both independent and impartial. It is the independence and impartiality of courts and tribunals that the Human Rights Committee and ECHR have focused most on. Claims brought before the Committee and the Court frequently mix issues of competence, establishment, independence and impartiality and, where this occurs, matters are often decided on the question of independence and impartiality.

## II. Paper Content

### 1. Tribunal Established by Law

The survey of international and regional human rights instruments shows that they all provide for the guarantee to a competent, independent, and impartial tribunal established by law.<sup>13</sup> The common elements to all these texts appear to be *tribunal*, *independent*, *impartial*, and *established by law*. Additionally, the International Covenant on Civil and Political Rights (ICCPR) and the American Court on Human Rights require that the tribunal be “competent”: a requirement which, under the European Court on Human Rights (ECHR), can be construed as being equivalent to the term *established by law*.<sup>14</sup>

The expression “established by law” is not defined in the ICCPR or the ECHR but includes two key requirements: first, that the judicial system is established and sufficiently regulated by law emanating from Parliament; and, second, that each tribunal is established, in the case of all hearings, in accordance with the legal requirements for its establishment.<sup>15</sup>

The concept 'tribunal' is interpreted by the Court in an autonomous manner. The classification in the domestic legal system is not decisive for the qualification of a certain authority as a 'tribunal' within the meaning of Article 6. In the case of *Ringeisen* the Court had to decide whether Article 6 was applicable in an Austrian dispute concerning the purchase of some property. The proceedings took place before an administrative authority (*Grundverkehrsbehörde*). The Court held that the character of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) is of little consequence, so it concluded that the body was a 'tribunal'.<sup>16</sup>

Furthermore, The Court has developed its own substantive requirements of a 'tribunal'. According to the jurisprudence of the Court, a 'tribunal' is

"[...] characterized 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

<sup>13</sup> See e.g. Article 10 of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(1) of the American Convention on Human Rights Law; and Article 7(a), (b) and (d) of the African Charter on Human and Peoples' Rights.

<sup>14</sup> For the purposes of Article 14 of the ICCPR and Article 6 of the ECHR, criminal and civil proceedings must be conducted by a “tribunal established by law”. This requirement, according to the European Court of Human Rights, embodies the principle of the rule of law inherent in the system of the European Convention on Human Rights and its protocols. A body that has not been set up in accordance with the will of the people, i.e., as expressed through the law, would necessarily lack the legitimacy that is needed in a democratic society for such a body to hear the case of individuals. See *Lavents v Latvia* [2002] ECHR 786, para 114, available in French only.

<sup>15</sup> Consideration also needs to be had to the question of ad hoc or special tribunals and the fact there is no right to trial by jury.

<sup>16</sup> See *Ringeisen - Austria* judgment of 16 July 1971 (Series A-16), paras.94 and 95.

proceedings conducted in a prescribed manner [...] It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 para.1 itself."<sup>17</sup>

Consequently, the notion of 'tribunal' under Article 6 can be analyzed in the light of Court's case-law under the other relevant provisions of the Convention.

In *Neumeister* case the Strasbourg Court, under Article 5, points at the **independence** from "both of the executive and of the parties to the case" as *sine qua non* feature of 'judicial character' of the 'authority called upon to decide' the case<sup>18</sup>.

In *De Wilde, Ooms and Versyp* judgment the Court acknowledged the '**guarantees of judicial procedure**' as another 'common fundamental feature' of the notion of *forum*.<sup>19</sup>

In *Ringeisen* (already Article 6 case) the Court was to decide whether an administrative body ('*Regional Commission*') can pretend to be a 'tribunal' under the Article 6. The Court recalled the tests for 'tribunal' in *Neumeister* and *De Wilde, Ooms and Versyp* and as an additional test pointed at the **term of office** of the body<sup>20</sup>. Also the term '**guarantees of judicial procedure**' was paraphrased into '**proceedings before ... [tribunal to] afford the necessary guarantees**'<sup>21</sup> in order to avoid the word 'judicial', evoking the traditional judiciary very in too direct manner.

Considering and applying those tests in *Ringeisen*, the Court held that '*Regional Commission*' is a 'tribunal' under the Article 6.

Thus, the term 'tribunal' in Article 6 was subjected to autonomous interpretation by Strasbourg Court, so akin to the 'criminal charge' clause, 'tribunal' (under Article 6) must not be defined exclusively referring to national law. Nonetheless, in *Belilos*, decided in 1988, Court held that the description of body in question in national law is also important, though not decisive<sup>22</sup>.

Several elements are contained in these substantive requirements:

- Firstly, a 'power of decision'<sup>23</sup>. The Commission in the *Sramek* case formulated this requirement in a slightly clearer manner: "[...] a tribunal, being an authority with power to decide legal disputes with binding effects for the parties".<sup>24</sup> Soyer and De Salvia have argued that this implies the following: "Il faut donc que le tribunal soit en mesure d'apprécier, par lui même, l'ensemble des éléments – de fait ou de droit – conduisant à la solution du litige".<sup>25</sup>
- Secondly, the body needs to operate "on the basis of rules of law and after proceedings conducted in a prescribed manner".<sup>26</sup>

<sup>17</sup> See *Demicoli – Malta* of 27 August 1991 (Series A-210), para.39. See also: ECHR, 29 April 1988, *Belilos - Switzerland* (Series A-132), para.64.

<sup>18</sup> See *De Wilde*, para.78.

<sup>19</sup> See *De Wilde*, para.78. Nevertheless, the requirement of 'guarantees of judicial procedure' remained vague in *De Wilde, Ooms and Versyp*.

<sup>20</sup> See *Ringesen v. Austria*, 16/07/1971, Appl. no. 2614/65, A13, para.95.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* para.95.

<sup>23</sup> Such a 'power of decision' is also required by the Court when it interprets similar concepts in Article 5 para.3 (see, for example, the case of *Assenov* described in \*\*\* Chapter 4 para.3.1 \*\*\*), Article 5 para.4 (see, for example, *Van Droogenbroeck – Belgium* of 24 June 1982 (Series A-50), para.50 and *Benjamin and Wilson – United Kingdom* of 26 September 2002 (appl. no. 28212/95), para.34) and in Article 13.

<sup>24</sup> EComHR, 8 December 1982, *Sramek - Austria* (to be found in Series A-84), para.71.

<sup>25</sup> *Terra Woningen – Netherlands* of 17 December 1996 (Reports 1996, 2105), para.52: "[...] it is required that the 'tribunal' in question have jurisdiction to examine all questions of fact and law relevant to the dispute before it".

<sup>26</sup> A similar criterion is used when interpreting the notion 'officer authorized by law to exercise judicial power' used in Article 5 para.3. In the *Schiesser* case the Court stated that the officer should decide "by reference to legal criteria".

- Thirdly, the body needs to determine "matters within its competence". This, both comprises material and territorial jurisdiction.<sup>27</sup>
- Lastly, a reference is made to other substantive requirements of Article 6 ECHR, such as judicial independence and impartiality. In the *Benthem* case the Court stated:

“[...] by the word ‘tribunal’, it denotes 'bodies which exhibit [...] common fundamental features', of which the most important are independence and impartiality.”<sup>28</sup>

The prescription that the tribunal must be ‘established by law’ implies the guarantee that the organization of the judiciary in democratic society is not left to the discretion of executive, but is regulated by law. In Commission’s view this does not, however, rule out possibility that parts of this organization, e.g., the institution of specific judicial bodies, may be left by law to the executive by virtue of delegation provided that sufficient guarantees are built in to counteract arbitrariness.<sup>29</sup> And in any case no right to be tried by the ordinary court can be inferred from the provision, provided that a legal basis is present for the special court as well.<sup>30</sup> In its Report in the *Piersack* Case the Commission evidently takes the view that not only the establishment, but also the organization and the functioning of the tribunal in question must have a legal basis, but for the question of whether this tribunal has applied these legal rules in the right way it apparently relies on the opinion of the (higher) national court.<sup>31</sup>

Finally, military and special courts are also covered by term “tribunal” for the purposes of Article 6(1) of the ECHR and Article 14(1) of the ICCPR. Usually, the aim of creation of military or special courts is that states try to create the bodies which are distinct from the ordinary court system and are subjected to special rules and procedures; especially interesting are instances where special or military tribunals which are entitled under domestic law to try civilians. Therefore the Court as well as the Committee subjects them to the requirements of the autonomous meaning of “tribunal” established in their case law.<sup>32</sup>

## 2. Independent and Impartial Tribunal

The requirement of an ‘independent’ and ‘impartial’ tribunal is one of the key parameters of the right to a fair trial, and thus vital to the protection of constitutional and human rights, is not questionable. Originally, this requirement was conceived to address the inherent deficiencies posed by special jurisdictions, in particular tribunals set up *ex post*, for trying cases with political implications.<sup>33</sup>

<sup>27</sup> *Mort – United Kingdom* of 6 September 2001 (appl. no. 44564/98).

<sup>28</sup> *Benthem - Netherlands* of 23 October 1985 (Series A-97), para. 43. See also: *Neumeister - Austria* of 27 June 1968 (Series A-8), para.24; *De Wilde, Ooms & Versyp - Belgium* of 18 June 1971 (Series A-12), para.78; *Ringeisen - Austria* of 16 July 1971 (Series A-13), para.95.

<sup>29</sup> Report of 12 October 1978, *Zand, D&R* 15 (1979), p. 70 (79-81); report of 14 December 1979, *Le Compte, Van Louven*.

<sup>30</sup> Appl. 8299/78, *X and Y v. Ireland*, D&R 22 (1981), p.51 (73).

<sup>31</sup> Report of 13 May 1981, B, 47 (1986), p. 23. In this case the Court did not deal with this point after it had held the complaint concerning the violation of the requirement of impartiality to be well-founded. See Judgment of 1 October 1982, A. 53, p. 16. Also, in the *Bulut* Case, however, the Court took the interpretation of domestic law by the national courts, like in the Commission in the *Piersack* Case, more or less for granted. See Judgment of 22 February 1996, Reports 1996-II, Vol. 5, para. 29.

<sup>32</sup> UN Human Rights Committee, CCPR General Comment 32 (2007), para 14.

<sup>33</sup> See also the findings of the UN Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev. 1 at 14 (1994), para. 4; See e.g. the ECHR decision in *Rotaru v Romania*, (2000) 21/4-7 HRLJ 231, para. 62; *Pfeifer and Plankl v Austria*, (1992) 14 EHRR 692, p 25.

The words “independent and impartial tribunal” were used in the first draft of the Universal Declaration on Human Rights (UDHR).<sup>34</sup> Without doubt, the independence and impartiality of a tribunal is a central pillar of the right to a fair hearing.<sup>35</sup> Moreover, the principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments. Indisputably, this requirement constitutes a general principle of law and it gives rise to one of the most fundamental of human rights.<sup>36</sup>

The adjectives ‘independent’ and ‘impartial’ are the expression of two different concepts. The notion of ‘independence’ refers to the connection between the judge and the administration, whereas the ‘impartiality’ must exist in relation to the parties to the suit. However, the Court has not always drawn a clear borderline between the two concepts.<sup>37</sup>

The distinction between *judicial independence* and *judicial impartiality* has been addressed by both domestic and international jurisprudence. In the *Valente* case, the Canadian Supreme Court held as follows:<sup>38</sup>

Although recognizing the ‘close relationship’ between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “independent”, however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees.

Also in Canada, in the *Lippe* case, the then Chief Justice Lamer stated that:<sup>39</sup>... judicial independence is critical to the public’s perception of impartiality; judicial independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

In this context, *impartiality* is viewed as wider than *independence*, in that a tribunal can be independent and yet be biased against one of the parties to the dispute.<sup>40</sup> Also, impartiality is a guarantee that is linked to the principle of equality before courts and tribunals and involves the idea that everyone should be treated the same. It requires that judicial officers exercise their function without personal bias or prejudice and in a manner that offers sufficient guarantees to exclude any legitimate doubt of their impartiality.<sup>41</sup>

In contrast with the above jurisprudence, it appears that the ECHR does not attach much importance to the distinction between *judicial independence* and *impartiality*. Thus, in *Findlay v United Kingdom*, the ECHR held as follows:<sup>42</sup>

<sup>34</sup> For more on this, see Stefan Trechsel, *Human rights in criminal proceedings*, Vol.XII/3 (Oxford University Press, 2005), p 45; David Weissbrodt, *The right to a fair trial: Article 8, 10, and 11 of the Universal Declaration of Human Rights* (The Hague: Kluwer Law International, 2001), pp 13–15, 17, 33, 45–46, 51–52, 54.

<sup>35</sup> *Delcourt v Belgium* [1970] ECHR 1, para 25; and *De Cubber v Belgium* [1984] ECHR 14, para 30. Also, see Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991, para 19.2, page 113. See also, UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146.

<sup>36</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), pp 393–394.

<sup>37</sup> The principles established in the Court’s case-law with regard to the notions of independence and impartiality apply as well to professional judges and lay judges as to jurors. See Judgment of 22 June 1989, *Langborger*, A. 155, pp. 15-16; judgment of 23 April 1996, *Remli*, Reports 1996-II, Vol. 8, paras 46-48; judgment of 10 June 1996, *Pullar*, Reports 1996-III, Vol. 11, paras 31-32.

<sup>38</sup> *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985), pp. 201–202.

<sup>39</sup> *Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.

<sup>40</sup> The requirement of independence means, in general terms, that tribunals should be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings or from third parties, such as the media. See UN Human Rights Committee, CCPR General Comment 32 (2007), para 25; *Ringeisen v Austria* [1971] ECHR 2, para 95; and *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 55. See also, UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146, para 4: “There shall not be any inappropriate or unwarranted interference with the judicial process”.

<sup>41</sup> See, for example, *Grievies v the United Kingdom* [2003] ECHR 688, para 69.

<sup>42</sup> *Findlay v United Kingdom*, Reports 1997 – I, 263, (1997) 24 EHRR 211, para. 73; also *Incal v Turkey*, Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65; *Sener v Turkey*,

The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case.

In the *Ringeisen* case the Court held that the Regional Commission could be regarded as a ‘tribunal’ as it was ‘independent of the executive and also of the parties’. The latter element, however, refers in fact not to the independence but to the required impartiality of the court. The Court added that the members of the Regional Commission had been appointed for five years and the proceedings before it did offer the necessary guarantees.<sup>43</sup> The comparable line of reasoning was developed in the *Langborger* Case:

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 the question whether the body presents an appearance of independence.<sup>44</sup>

These various characteristics of the notion of independence seems to fall into three categories. Firstly, the tribunal must function independently of the executive, base its decision on its own free opinion about facts and legal grounds. Secondly, there must be guarantees to enable the court to function independently.<sup>45</sup> Thirdly, even a semblance of dependence must be avoided.<sup>46</sup>

However, this aspect no longer refers to the independence, but to the impartiality of the court. Impartiality is also one of the fundamental characteristics of a tribunal. Deriving from the inherent power of judicial authorities to ensure the proper and orderly functioning of proceedings is the ability of judicial officers to hold persons in contempt of court.<sup>47</sup> Measures ordered by courts under contempt of court procedures have been described as akin to the exercise of disciplinary powers.<sup>48</sup> They must be exercised only for their legitimate purpose, i.e., ensuring the proper and orderly functioning of proceedings, and must not be used by judicial officers in a way that would undermine the actual or apparent impartiality of the judge (See also 3.3.2) or otherwise interfere with the practical enjoyment of fair trial rights.<sup>49</sup>

It is of fundamental importance in a democratic society that the courts inspire confidence in the public.<sup>50</sup> To that end, both the ICCPR and ECHR require a tribunal falling within the scope of Articles 14 and 6 respectively to be impartial. The requirement of impartiality has two features: first, that judges do not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them – referred to as subjective impartiality; and, second, that the tribunal must also appear to the reasonable observer to be impartial – referred to as objective impartiality.<sup>51</sup> The Court has

No. 26680/95, (2003) 37 EHRR 34, para. 56.

<sup>43</sup> Judgment of 16 July 1971, A. 13, p. 39.

<sup>44</sup> Judgment of 22 June 1989, A. 155, p. 16. See also the judgment of 29 April 1988, *Belilos*, A. 132, p. 29; judgment of 28 September 1995, *Procola*, A. 326, p. 16; and judgment of 29 November 1995, *Bryan*, A. 335-A, p. 15.

<sup>45</sup> As far as the latter requirement is concerned, it is not necessary that the judges have been appointed for life, provided that they cannot be discharged at will or on improper grounds by the authorities. Implicitly the judgment of 16 July 1971, *Ringeisen*, A.13. Explicitly the report of 12 October 1978, *Zand, D&R* 15 (1979), p. 70 (81-82), and the report of 14 December 1997, *Le Compte, Van Leunen and De Mayere*, B.38 (1984), p. 40.

<sup>46</sup> In the *Bryan* Case the Court held that the very existence of the power of the Secretary of State to revoke the power of an inspector to decide an appeal under the Town and Country Planning Act was enough to deprive the inspector from the appearance of independence. See Judgment of 22 November 1995, A.335-A, para. 38. Also, in the *Sramek* Case, where a member of the court was hierarchically subordinate to one of the parties to the suit, the Court held: ‘Litigants affects the confidence which the court must inspire in a democratic society’. Judgment of 22 October 1984, A.84, pp. 19-20.

<sup>47</sup> *Ravnsborg v Sweden* [1994] ECHR 11, para 34.

<sup>48</sup> *Ibid.*

<sup>49</sup> UN Human Rights Committee, CCPR General Comment 32 (2007), para 25.

<sup>50</sup> See *Padovani v Italy* [1993] ECHR 12, para 27; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Farhi v France* [2007] ECHR 5562, para 23; *Jasinski v Poland* [2005] ECHR 883, para 53.

<sup>51</sup> UN Human Rights Committee, CCPR General Comment 32 (2007), para 21; *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992), para 7.2; *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), paras 10.2–10.4; *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008), para 9.5; *Piersack v Belgium* [1982] ECHR 6, para 30; *Incal v Turkey* [1998] ECHR 48, para

recognized the difficulty of establishing a breach of Article 6 of the ECHR on account of subjective partiality and, for this reason, has in the vast majority of cases focused on the objective aspects of impartiality.<sup>52</sup> However, there is no clear-cut division between the two notions since the conduct of a judge may not only prompt misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of her/his personal conviction (subjective test).<sup>53</sup>

Subjective impartiality is obviously difficult to assess.<sup>54</sup> The Court therefore cautiously likes to repeat that ‘the personal impartiality of judge is to be presumed until there is proof to the contrary’.<sup>55</sup>

The objective approach refers to the question whether the way in which the tribunal is composed and organized, or whether a certain coincidence or succession of functions of one of its members, may give rise to doubt as to the impartiality of the tribunal or that member. If there is reason for such doubt, even if subjectively there is no concrete indication of partiality of person in question, this already amounts to an inadmissible jeopardy of the confidence which the court must inspire in a democratic society.<sup>56</sup> The fear that the tribunal or a particular judge lacks impartiality must ‘be held to be objectively justified’, so the standpoint of the accused on this matter, although important, is not decisive.<sup>57</sup> This objective-approach-test has been applied in several cases.<sup>58</sup>

There is no doubt that ensuring the independence and impartiality of the judges is not only the responsibility of States. It is also the responsibility of Judges themselves. An important milestone in this context is the development of the Bangalore Principles of Judicial Conduct,<sup>59</sup> developed by Judges, for Judges. They were tentatively developed in 2000 but are now increasingly seen as a reference document which all judiciaries and legal systems can accept. Its principles describe the professional and ethical code of conduct for Judges and also outline in a more practical way what exactly the concept of independence and impartiality mean for them. The six values described in the Bangalore Principles are independence, impartiality, integrity, propriety, equality, competence and diligence. Security of tenure, financial security and institutional interference are highlighted as important conditions for independence and it is also stressed that objective or subjective independence do not suffice. The judiciary should also be perceived as independent and impartial, and any test should include that perception. It is interesting to note that the document also stresses the fact that due consideration of a case should take precedence over ‘productivity’. After all, judges have

---

65; and *Wettstein v Switzerland* [2000] ECHR 695, para 42; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Sara Lind Eggertsdottir v Iceland* [2007] ECHR 553, para 41.

<sup>52</sup> *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

<sup>53</sup> *Ibid.*

<sup>54</sup> For an example, see the *Bockmans* case, which ended in a friendly settlement in front of the Commission in 1965.

<sup>55</sup> *De Cubber* judgment of 26 October 1984, Series A no. 86, p. 14, para. 25.

<sup>56</sup> See the judgment of 1 October 1982, *Piersack*, A. 53; judgment of 26 October 1984, *De Cubber*, A. 86; judgment of 25 June 1992, *Thorgeir Thorgeirson*, A. 239; judgment of 24 February 1993, Fey, A.255-A; judgment of 26 February 1993, *Padovani*, A.257-B.

<sup>57</sup> Judgment of 24 May 1989, *Hauschildt*, A.154, p.21; judgment of 25 June 1992, *Thorgeir Thorgeirson*, A.239, p. 23; judgment of 24 February 1993, Fey, A. 255, p. 12; judgment of 26 February 1993, *Padovani*, A.257-B, p.20.

<sup>58</sup> See Judgment of 24 August 1993, *Nortier*, A.267,p.15; judgement of 22 April 1994, *Saravia de Carvalho*, A.286-B, p.38; judgment of 24 May 1989, *Hauschildt*, A.154, p. 22; judgment of 16 December 1992, *Sainte-Marie*, A253-A, p. 16; judgment 24 May 1989, A.154, p. 23; judgment of 24 August 1993, *Nortier*, A.267, p. 16; judgment of 22 April 1994, *Saravia de Carvalho*, A.286-B, p. 39; judgment of 26 October 1984, *D Cubber*, A 86, pp. 15-16; report of 7 May 1985, *Yaacoub*, A.127, pp. 11-13; judgment of 29 April 1988, *Belilos*, A.132, p. 30. See also the judgment of 24 February 1993, Fey, A.255-A, pp. 13-14 and compare the *Thorgeir Thorgeirson* Case, judgment of 25 June 1992, A.239, pp. 23-24, where the applicant’s claim that the court lacked impartiality because it had taken over the public prosecutor’s functions in the legal absence of the latter, was not upheld by the Court, and the judgment of 22 February 1996, *Bulut*, Reports 1996-II, Vol. 5, para. 34, concerning a judge who had questioned witnesses in the pre-trial phase.

<sup>59</sup> See ECOSOC 2006/23

the privilege to put human rights into action. Their selection, resources, training and conduct are therefore of the utmost importance.

### III. Conclusion

The main difference of the requirement of “fairness” from all the other elements of Article 6 is that it covers proceedings as a whole, and the question whether a person has had a “fair” trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage.<sup>60</sup>

The assessment of the notion of a “tribunal established by law” involves a more general examination of the statutory structure upon which the whole class of the bodies in question is set up; it does not, as a rule, pertain to the examination of the competence of a particular body in the circumstances of each and every case – such as the reassessment of domestic lawfulness of the territorial or hierarchical jurisdiction of a certain court or the composition of the bench which dealt with the applicant’s grievances.

Only in some very exceptional cases does the Court undertake to examine the notion of a “tribunal established by law” as including domestic lawfulness of the composition of the bench; the standard of proof in this respect is very stringent, and a total absence of domestic statutory basis – rather than a mere doubt or insufficiency of competence by a particular body or its member – must be shown by the applicant..

The requirement of an independent and impartial tribunal established by law is one of the key components of the right to a fair trial and, therefore, vital to the protection of individual rights, is not questionable. This is because the guarantee ensures that individual rights of parties to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial. On the other hand, the guarantee of an independent and impartial tribunal is considered as the foundation of the rule of law. Indeed, without an independent and impartial judiciary, one may wonder whether the law itself can have a real meaning.<sup>61</sup>

Notwithstanding to above, it is to be born in mind that there is no such thing as ‘pure judicial independence and impartiality’. Naturally, in the exercise of their judicial functions, judges, as a human beings, will be influenced by the prevailing political, social and economic conditions in their respective jurisdictions.<sup>62</sup> In addition, judicial decision, make often than not, are influenced by a judge’s personal history. Everyone has personal history that affects their judgment pervasively. Thus, through personal history can be a cause of judicial fallibility, it is perhaps absurd to hold that a judge should decide as s/he had not personal history.

### References

- African Charter on Human and Peoples’ Rights.
- American Convention on Human Rights Law.
- Antonio Cassesse, *International Criminal Law* (Oxford University Press, 2003).
- Appl. 8299/78, *X and Y v. Ireland*, D&R 22 (1981).
- *Artico* judgment of 13 May 1980, Series A. No. 37.
- *Belilos - Switzerland* (Series A-132).
- *Benjamin and Wilson – United Kingdom* of 26 September 2002 (appl. no. 28212/95).
- *Bentham - Netherlands* of 23 October 1985 (Series A-97).

<sup>60</sup> Monnell and Morris v. the United Kingdom, paras.55-70.

<sup>61</sup> For an excellent discussion on the relationship between judges and politics, see Carlo Guarnieri, *The power of judges: A comparative study of courts and democracy* (Oxford University Press, 2002), pp 4–13.

<sup>62</sup> Carlo Guarnieki, *The powers of judges: A comparative study of courts and democracy* (Oxford University Press, 2002), pp. 4-13.

- *Borgers v. Belgium*, 30/10/1991, Appl. No. 12005/86, A214-B.
- Carlo Guarnieki, *The powers of judges: A comparative study of courts and democracy* (Oxford University Press, 2002).
- *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008).
- *Colozza* judgment of 12 February 1985, Series A, No. 212-C.
- *Compbell and Fells* judgment.
- *De Cubber* judgment of 26 October 1984, Series A no. 86.
- *De Cubber v Belgium* (1984).
- *De Wilde, Ooms & Versyp - Belgium* of 18 June 1971 (Series A-12).
- *Delcourt* judgment of 17 January 1990, Series A, No.11.
- *Delcourt v Belgium* [1970].
- *Demicoli – Malta* of 27 August 1991 (Series A-210).
- Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991.
- EComHR, 8 December 1982, *Sramek - Austria* (Series A-84).
- ECOSOC 2006/23.
- *Ettl v. Austria*, paras. 36-41, Publication A117A.
- European Convention on Human Rights.
- Explicitly the report of 12 October 1978, Zand, D&R 15 (1979).
- *Farhi v France* [2007] ECHR 5562.
- *Findlay v United Kingdom*, Reports 1997 – I, 263, (1997) 24 EHRR 211.
- *Golder* judgment of 21 February 1975, Series A, No. 18.
- *Grievs v the United Kingdom* [2003] ECHR 688.
- *H v. Belgium* judgment.
- *H. v. Belgium*, 30 November 1987.
- *H. v. Belgium*, Publication A 127 B.
- *Incal v Turkey* [1998] ECHR 48.
- *Incal v Turkey*, Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65; *Sener v Turkey*, No. 26680/95, (2003) 37 EHRR 34.
- International Covenant on Civil and Political Rights of 1966.
- *Jasinski v Poland* [2005] ECHR 883.
- Judgment 24 May 1989, A.154.
- Judgment of 22 February 1996, *Bulut*, Reports 1996-II, Vol. 5.
- Judgment of 26 October 1984, *D Cubber*, A 86.
- Judgment of 22 April 1994, *Saravia de Carvalho*, A.286-B.
- Judgment of 24 August 1993, *Nortier*, A.267.
- Judgment of 24 May 1989, *Hauschildt*, A.154.
- Judgment of 1 October 1982, *Piersack*, A 53.
- Judgment of 10 June 1996, *Pullar*, Reports 1996-III, Vol. 11.
- Judgment of 16 December 1992, *Sainte-Marie*, A253-A.
- Judgment of 16 July 1971, A. 13.
- Judgment of 16 July 1971, *Ringeisen*, A.13.
- Judgment of 22 April 1994, *Saravia de Carvalho*, A.286-B.
- Judgment of 22 June 1989, A. 155.
- Judgment of 22 June 1989, *Langborger*, A. 155.
- Judgment of 22 November 1995, A.335-A.
- Judgment of 23 April 1996, *Remli*, Reports 1996-II, Vol. 8.
- Judgment of 24 August 1993, *Nortier*, A.267.
- Judgment of 24 February 1993, *Fay*, A. 255.
- Judgment of 24 February 1993, *Fey*, A.255-A.
- Judgment of 24 February 1993, *Fey*, A.255-A.
- Judgment of 24 May 1989, *Hauschildt*, A.154.
- Judgment of 25 June 1992, *Thorgeir Thorgeirson*, A. 239.
- Judgment of 25 June 1992, *Thorgeir Thorgeirson*, A.239.
- Judgment of 26 February 1993, *Padovani*, A.257-B.
- Judgment of 26 February 1993, *Padovani*, A.257-B.
- Judgment of 26 October 1984, *De Cubber*, A. 86.
- Judgment of 28 September 1995, *Procola*, A. 326.
- Judgment of 29 April 1988, *Belilos*, A. 132.
- Judgment of 29 April 1988, *Belilos*, A.132.

- Judgment of 29 November 1995, *Bryan*, A. 335-A
- *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992).
- *Khodorkovskiy (No.2) v. Russia*, 8 November 2011.
- *Kyprianou v Cyprus* [2005] ECHR 873.
- *Kyprianou v Cyprus* [2005] ECHR 873.
- *Kyprianou v Cyprus* [2005] ECHR 873.
- *Lavents v Latvia* [2002] ECHR 786.
- *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3.
- *Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.
- *Monnell and Morris v. the United Kingdom*.
- *Mort – United Kingdom* of 6 September 2001 (appl. no. 44564/98).
- *Neumeister - Austria* of 27 June 1968 (Series A-8).
- *Padovani v Italy* [1993] ECHR 12.
- *Pertterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004).
- *Pfeifer and Plankl v Austria*, (1992) 14 EHRR 692.
- *Piersack Case*, judgment of 22 February 1996, Reports 1996-II, Vol. 5.
- *Piersack v Belgium* [1982] ECHR 6.
- *Ravnsborg v Sweden* [1994] ECHR 11.
- Report of 12 October 1978, Zand, D&R 15 (1979).
- Report of 13 May 1981, B, 47 (1986).
- Report of 14 December 1979 *Le Compte, Van Louven*.
- Report of 14 December 19979, *Le Compte, Van Leunen and De Mayere*, B.38 (1984).
- Report of 7 May 1985, *Yaacoub*, A.127.
- Resolutions 40/32 and 40/146.
- *Ringeisen - Austria* judgment of 16 July 1971 (Series A-16).
- *Ringeisen - Austria* of 16 July 1971 (Series A-13).
- *Ringeisen v Austria* (1971).
- *Ringesen v. Austria*, 16/07/1971, Appl. no. 2614/65, A13.
- *Rotaru v Romania*, (2000) 21/4-7 HRLJ 231.
- *Sara Lind Eggertsdottir v Iceland* [2007] ECHR 553.
- *Sramek Case* judgment of 22 October 1984, A.84.
- *Sramek v. Austria*, judgment of 22 October, 1984, Application no. 8790/79.
- *Sramek v. Austria*, paras 36-42, Publication A084.
- *Terra Woningen – Netherlands* of 17 December 1996 (Reports 1996, 2105).
- *Thorgeir Thorgeirson* judgment of 25 June 1992, A.239.
- Trechsel, Stefan, *Human rights in criminal proceedings*, Vol. XII/3 (Oxford University Press, 2005).
- UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146.
- UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly.
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, CCPR General Comment 32 (2007).
- UN Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev. 1 at 14 (1994).
- Univers
- al Declaration of Human Rights of 1948.
- *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985).
- *Van Droogenbroeck – Belgium* of 24 June 1982 (Series A-50).
- David Weissbrodt, *The right to a fair trial: Article 8, 10, and 11 of the Universal Declaration of Human Rights* (The Hague: Kluwer Law International, 2001).
- *Wettstein v Switzerland* [2000] ECHR. 695.