

Judicial independence and access to justice

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Presentation outline

1. Independence and the rule of law
2. Independence – where does it originate from?
3. Independence – only a legal concept?
4. External and internal independence
5. ‘Soft’ v. ‘hard’ judicial law
6. Impartiality
7. Independence v. impartiality
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Independence and the rule of law

Judicial independence and impartiality are fundamental guarantees for a fair trial and a prerequisite for democracy and the rule of law. Article 6 of the ECHR stipulates that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

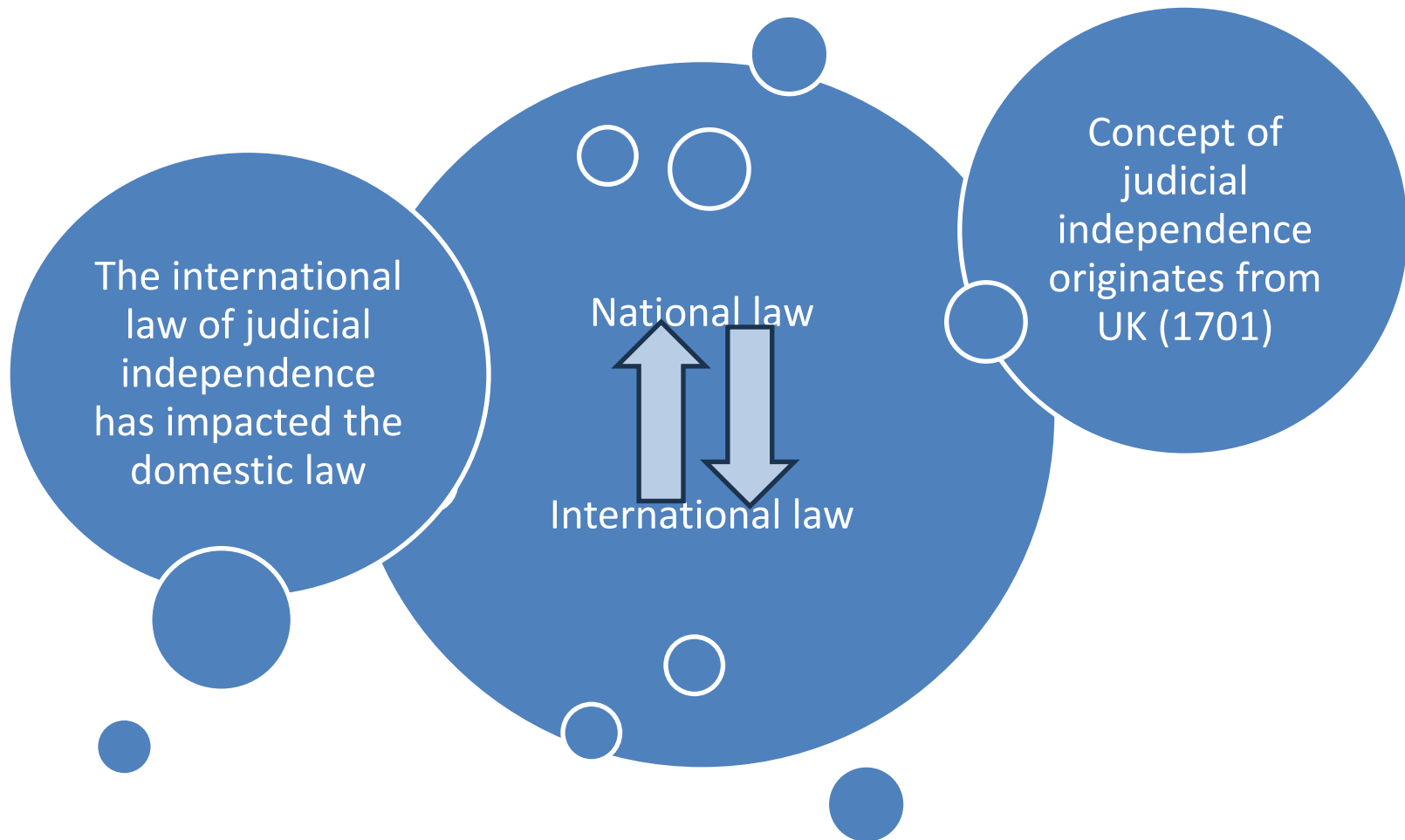


Why is independence important?

- The **purpose** of independence is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence
- Judicial independence is therefore a **pre-requisite to the rule of law**



Concept of judicial independence





Elements of judicial independence

- **Legal elements:** institutional framework establishing legislative provisions and constitutional safeguards of judiciary and judges
- **Ethical elements:** the conduct of judges is essential to the credibility of the courts



Virtue ethics

- The lifelong pursuit for the ultimate good. The main points of ethics are virtue of thought and virtue of character



Virtue judicial ethics

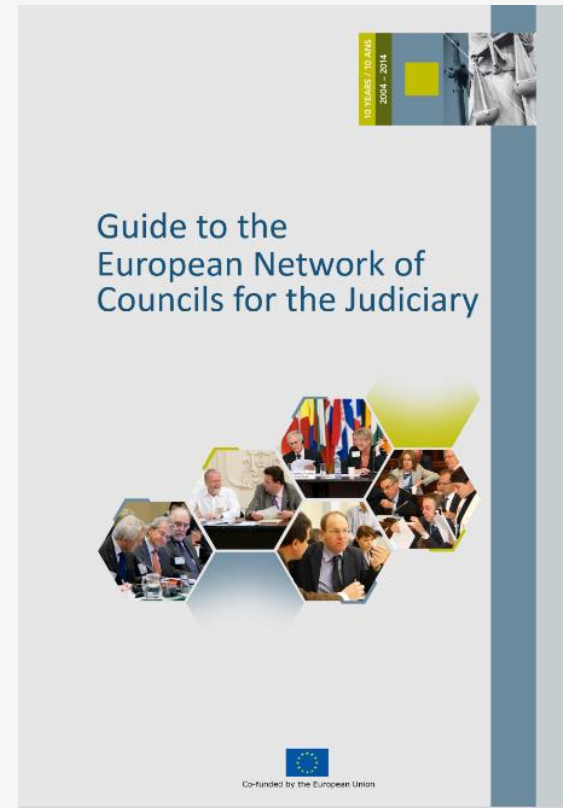
Does being a competent judge mean being a good judge?

NO

Irmgard Gris: *“To be a good judge is a matter of character.”*

What personal qualities must a judge possess?

- In their Judicial Ethics report 2009-2010 (the London Declaration) ENCJ recalls that a judge should perform his role with **wisdom, loyalty, humanity, courage, seriousness and prudence, while having the capacity to listen, communicate and work.** In short, a good judge must also be a good person.



Ten commandments for a judge

- Be kind
- Be patient
- Be dignified
- Don't take yourself too seriously
- Lazy judge is a poor judge
- Don't fear reversal
- There are no insignificant cases
- Be prompt
- Common sense
- Pray for divine guidance

- Judge Devitt, 1961



The role of the judiciary has evolved

- It becomes more than before a corrective power
- It adopts an increased role in law-making
- Side effect: To judicial activism

US judge in Seattle temporarily blocks President Trump's travel ban.

Here's what that means for travelers:

- Trump's executive order kept travelers from 7 countries coming into the U.S.
- Washington State Attorney General asked for a temporary restraining order. A judge granted that order on Friday, meaning those people can travel to the U.S. as they could before.
- The AG's restraining order will stay in place as the judge considers a lawsuit from Washington state.
- The lawsuit asks the court to declare parts of the travel ban unconstitutional. If the lawsuit wins, the executive order could be permanently invalidated nationwide.
- An appeal could put President Trump's executive order back into effect.

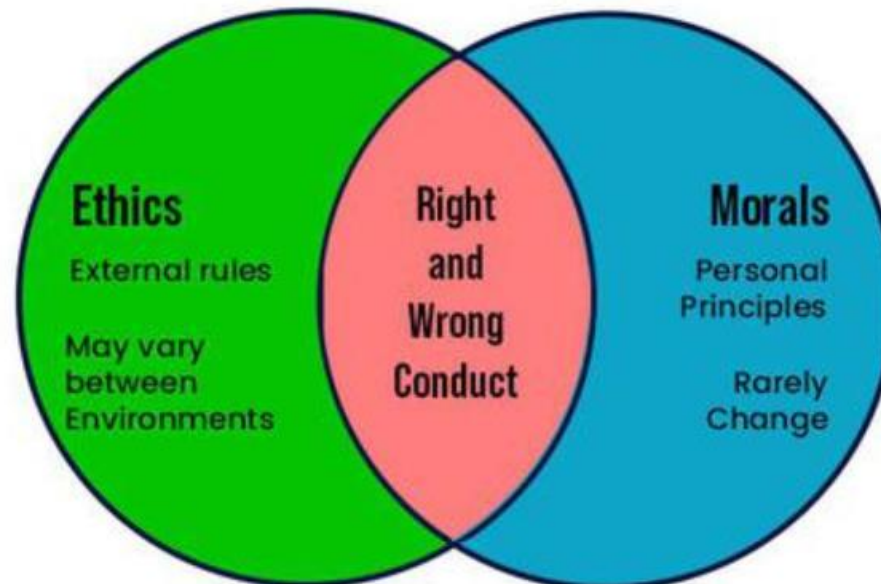
Professional ethics vs. morals

Judicial ethics

- Ethics refer to rules provided by an external source
- Developed by the legal profession itself
- Governed by professional and legal guidelines
- It is related to right and wrong in a particular situation

Morality

- Morals refer to an individual's own principles regarding right and wrong
- It is related to right and wrong
- Some people think that it is innate, others believe that it is learned through experience



Is this an ethics issue?

- „A catholic trial judge who believes that the death penalty is immoral should recuse herself from any cases that could result in a death penalty“

(Amy Coney Barret)





External and internal judicial independence

External independence: freedom from undue external influence

Internal independence: The potential threat to judicial independence that might arise from an internal judicial hierarchy.

Judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of **other judges**

Internal independence is a soft law concept



- The concept was first mentioned in international soft law and in professional standards in the early 1980s.
- ECtHR acknowledged this aspect of judicial independence explicitly for the first time in 2009.



Quiz

What are the challenges related to internal independence today?

Internal independence

- The Netherlands adopted numerous aspects of NPM in its judicial management. The developments appeared to have taken the Dutch judiciary in a direction increasingly contested by many judges.
- *'We are deeply concerned about the organisation of the judiciary and the adverse consequences for the internal independence of judges and the quality of the administration of judges. /.../ Increasingly, courts are managed like large companies, in which output figures are leading, the Council for the Judiciary acts as a 'Board' and court managers as 'Division boards. /.../.'*

Hard law vs. soft law

- Non-binding norms have large impact in the development of standards on judicial independence, competence of judges, and quality of justice systems.
- Non-binding but with tangible practical effect
- Relationship between ECtHR judgements and soft law is mutually beneficial: on the one side, soft judicial rules need acceptance by ECtHR not to be marginalized, on the other side, open-textured ECHR benefit from the concrete content and value-laden standards of soft judicial law.





Quizz

Can you name a few examples of soft law on the issue of independence/impartiality??

What defines “tribunal” in the ECtHR case law?



established by law



the power to issue binding decisions



independence and impartiality



the ability to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner



having full jurisdiction over the case



the duration of its members' terms of office

Guðmundur Andri Ástráðsson v. Iceland

- The judgment added that the very notion of a “tribunal” implied that it **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 (§§ 220-221). A rigorous process for the appointment of ordinary judges is of paramount importance to ensure that the most qualified candidates in both these respects are appointed to judicial posts. The higher a “tribunal” is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. /.../ Such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a “tribunal”, but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of judges (§ 222).

Tribunal/court

- **CoE** and **EU law** use the term tribunal rather than court. The word ‘tribunal’ is given an **autonomous meaning**, and the CJEU has applied consistent principles in determining whether a body qualifies as a tribunal.
- Not necessarily a court of classic kind

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Why autonomous interpretation?

Let's think about...

- Who adopts the law?
 - The Council (+ the EP) - qualified majority vote
- Who applies the law?
 - national authorities (courts) all around Europe (27)
- How?
 - In a different (their own) way (?)
- In order to achieve rights and duties deriving from EU measures are applied uniformly and equally across the EU

esf evropský sociální fond v ČR EVROPSKÁ UNIE MINISTERSTVO ŠKOLSTVÍ, MLÁDEŽE A TĚLOVÝCHOVY INVESTICE DO ROZVOJE VZDELÁVÁNÍ

CJEU: Examples

- **Does Court of Auditors** qualify as a tribunal? (CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, 19 December 2012, paras. 19-31)
- **Does a Commission for Protection against Discrimination** qualify as a tribunal? (CJEU, C-394/11 *Valeri Hariev Belov v. CHEZ Elektro Bulgaria AD and others*)
- **Does an arbitral body** qualify as a tribunal? (CJEU, C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, 13 February 2014, paras. 18–25)





*Epitropos tou Elegktikou Synedriou
sto Ypourgeio Politismou kai
Tourismou v. Ypourgeio Politismou
kai Tourismou - Ypiresia
Dimosionomikou Elenchou*

- **The CJEU ruled that the Court of Auditors did not constitute a tribunal** because: (i) it had ministerial links, which meant it was not acting as a third party in relation to the interests at stake; (ii) its jurisdiction was limited to *a priori* auditing of the state's expenditure, and did not include making a determination; (iii) its decision did not acquire the force of *res judicata* and its proceedings were not intended to lead to a decision of a judicial nature; and (iv) the beneficiary of the expenditure at issue was not a party to the proceedings before the Court of Auditors.



*Merck Canada Inc. v Accord
Healthcare Ltd and Others*

- “**The jurisdiction** of the *Tribunal Arbitral necessário* does **not stem from the will of the parties, but from Law No 62/2011**. That law confers upon that tribunal compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs. In addition, if the arbitral decision handed down by such a body is not subject to an appeal before the competent appellate court, it becomes **definitive and has the same effects as a judgment handed down by an ordinary court.**”

Impartiality/independence

CCJE (Opinion No. 1, 1994): “The judicial independence serves as the guarantee of impartiality.”

CCJE (Opinion No. 3): “The judicial independence is a pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.”

They are tightly **intertwined and functional in character**: they are means protecting the ability of the judge to perform the relevant judicial function

Independence: no outside source, which would prevent the judge from performing his function

Impartiality: individual quality of a decision-maker who is free from irrelevant pressures with regard to the decision to be taken (towards himself, parties, lawyers, public opinion)

Is there a potential
threat to judicial
independence if
there is decrease of
salaries of
judges???



Example

- The Portuguese legislature temporarily reduced the remuneration of a series of office holders in the public sector, including the judges of the Court of Auditors. The Trade Union of Portuguese Judges, acting on behalf of those judges, brought an action before the Supreme Administrative Court of Portugal seeking the annulment of those budgetary measures. The ASJP contended that the salary-reduction measures infringed ‘the principle of judicial independence’ enshrined not only in the Portuguese Constitution but also in EU law.

Is the organisation of the judiciary in MS the EU's business?

- CJEU: To the extent that the Court of Audits may, as a 'court or tribunal', rule on questions concerning the application or interpretation of EU law Portugal must ensure that the court meets the requirements essential to effective judicial protection. Maintaining such a court's independence is essential and inherent in the task of adjudication. It is required not only at EU level, but also at the level of the MS and, therefore, as regards national courts. **It is essential to the proper working of the judicial cooperation system between national courts and the CJEU.**

Is the organisation of the judiciary in MS the EU's business?

- That essential freedom from external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence (Associação Sindical dos Juízes Portugueses, C-64/16, paras. 44-45).

National courts are to ensure “the full application of European Union law (...) and (...) judicial protection of an individual’s rights under that law” (*Opinion 1/09*, § 68). If politicians can influence courts’ decisions, they can use this leverage to pursue sheer protectionism, instead of advancing the interests linked to the EU internal market. In addition, deficiencies of judicial independence in one MS entail problems for the courts in other MS, as the latter are obliged to recognize and enforce judicial decisions coming from other EU MS. Should the courts trust the judgments from the State in which the division of powers is blurred?

MS and their legal orders differ as to the substance and procedures, ways and level of protection of fundamental rights, court organisation and the expediency of proceedings. These differences are treated as diversity and have not prevented the EU from establishing the European area of justice based on mutual trust and mutual recognition of judgments.

How to find the limits of States’ freedom to organise their judiciary? How to differentiate between a “reorganisation” and a breach of the rule of law? Is the EU (and if yes, who exactly – Council, CJEU?) legitimized to make such a decision? And what consequences should be drawn if a breach of the rule of law is established?

These issues can be important for all 24 EU acts introducing mutual recognition of judgments (more than 20 instruments with regard to cooperation in civil and criminal matters).

The *LM* case arose in the context of one of them – the European Arrest Warrant (EAW) Framework Decision.

Example: LM case (C-216/18 PPU)

- The CJEU was asked by an Irish court to address one of the most serious legal challenges of the EU: the consequences of restrictions imposed upon judicial independence in one MS for other MS. The sequence of laws adopted in 2015-2018 in Poland has been assessed commonly by various external and internal institutions as “enable(ing) the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice and thereby pos(ing) a grave threat to the judicial independence as a key element of the rule of law”

According to the judgment, national courts should apply **both steps of the *Aranyosi* test** when judicial independence in the issuing country is endangered.

If the executing court possesses a strong evidence of systemic or generalised deficiencies in this respect, it should proceed to the **second step – of individual case assessment**: the executing judicial authority must refrain from giving effect to the European arrest warrant only if there are substantial grounds for believing that that person will run a real risk of a breach of the fundamental right to a fair trial (§ 78 and 59).

Impartiality

The existence of impartiality must be determined on the basis of the following (Micallef v. Malta [GC], § 93; Nicholas v. Cyprus, § 49):

- a **subjective test**, where regard must be had to the personal conviction and behaviour of a particular judge, i. e., whether the judge held any personal prejudice or bias in a given case;
- **an objective test**, by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

Designed to give effect to founding principle: everyone is equal before the law:

- Analysing facts based on the applicable law in a well balanced manner
- Without acting in a way which would favour or **could be seen to favour the interest of any of the parties**

Impartiality



“I’m recusing myself from this case.”

➤ **EU law** has consistently followed the principles established by the ECtHR’s case law regarding the two required aspects of impartiality: subjective and objective impartiality.

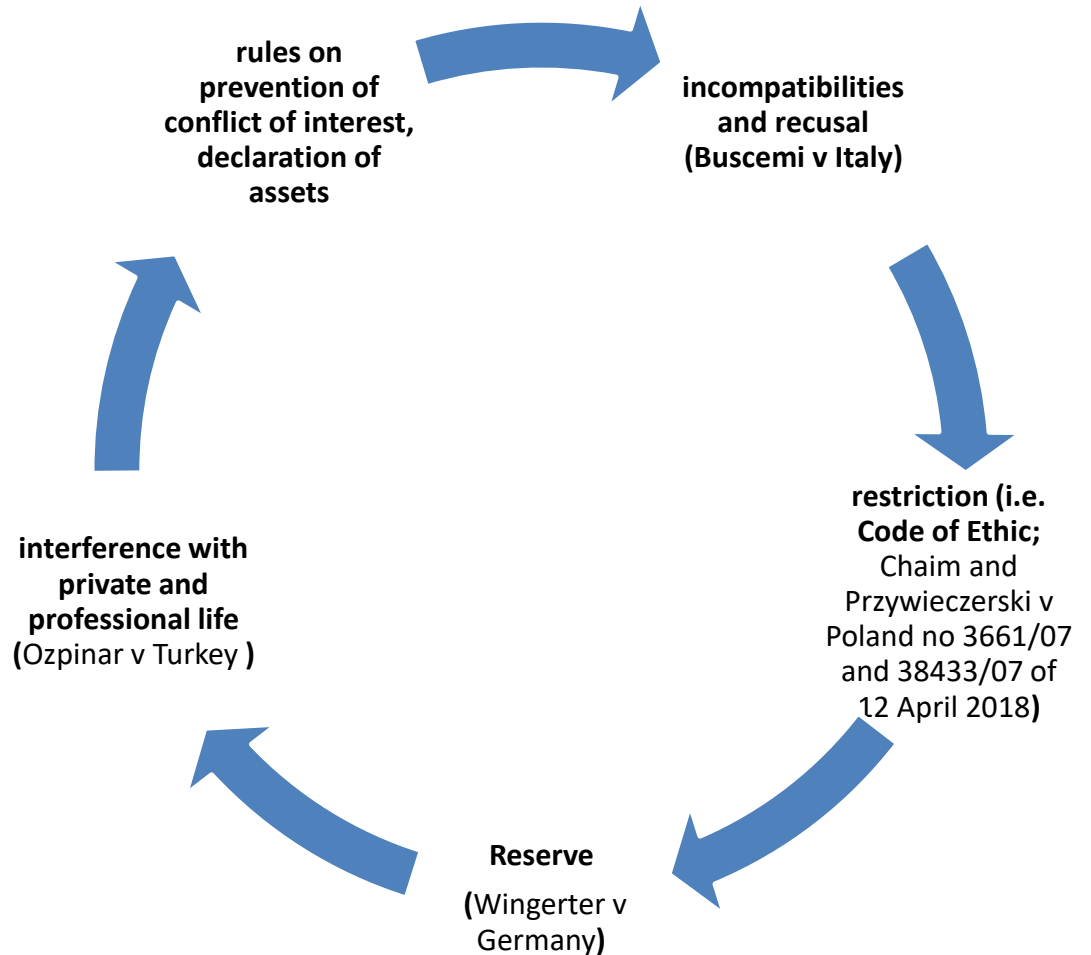


Quizz

Through what rules is the
impartiality of judges guaranteed?

Impartiality of judges is guaranteed through rules concerning:

Treating all sides in dispute fairly, equally and without prejudice or bias.



ECtHR: Impartiality – objective test

- **Piersack v. Belgium:** “What is at stake is the confidence which the courts in a democratic society must inspire in the public.”
- **Hauschildt v. Denmark:** “The fear that the judge or tribunal lacks impartiality must be such that it can be held to be objectively justified; the standpoint of the accused on this matter, although important, is not decisive.”
- **De Cubber v. Belgium:** One of the three judges of the criminal court who had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question. (...) “Even appearances may be important ...”

- How about this?

