

# Council of Europe standards on judicial independence

## SUMMARY

Judicial independence is one of the key components of the rule of law (Article 2 of the Treaty on European Union – TEU), together with the fundamental right to a fair trial (Article 47 of the Charter of Fundamental Rights of the European Union) and the principle of effective judicial protection (Article 19(1) TEU). When it comes to standards for judicial independence, a special role is played by the Council of Europe and its judicial body, the European Court of Human Rights (ECtHR) in Strasbourg. This is especially relevant because, according to Article 6(3) TEU, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, are in fact general principles of EU law. The importance of the Council of Europe standards and ECtHR case law have been highlighted, not least in the Commission's 2020 Rule of Law Report.

This briefing discusses a number of documents of the Council of Europe and its bodies, including the Council of Europe's 2010 recommendation on judicial independence, the Magna Carta of Judges adopted by the Consultative Council of European Judges in 2010, and selected documents of the Venice Commission (the 2007 report on judicial appointments, the 2010 report on judicial independence, and the 2016 rule of law checklist).

Finally, the briefing presents an overview of ECtHR case law on judicial independence, focusing on issues such as the concept and criteria for assessing it; procedures for appointing judges and possible irregularities; the question of the term of office, including the vetting of judges and early termination of term in office; the problem of external influences on judges (by the executive); possible lack of internal independence (from other judges); the question of combining judicial office with other work; and, finally, the question of judicial immunity.



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## Introduction

The **rule of law** is one of the founding values of the European Union ([Article 2 TEU](#)). As the European Court of Justice pointed out in its judgment of 19 November 2019, the 'requirement that courts be independent ... forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded' ([AK v Krajowa Rada Sądownictwa](#), para. 120). According to [Article 6\(3\) TEU](#), 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... shall constitute general principles of the Union's law'. Therefore, when looking for benchmarks to assess whether a given judiciary is independent, and standards for building a properly independent judiciary, a special place is occupied by the standards, opinions, and recommendations developed by the Council of Europe, and by the case law of the European Court of Human Rights (ECtHR), which interprets the [Convention](#). This importance was highlighted recently by the European Commission in its [2020 Rule of Law Report](#), where Council of Europe standards were said to 'provide **well-established guidance** to promote and uphold the rule of law' and the ECtHR case law was described as providing for '**key standards** to be respected to safeguard judicial independence'.<sup>1</sup>

## Council of Europe recommendation (2010)

The most recent Council of Europe recommendation on judicial independence is [Recommendation CM/Rec\(2010\)12](#) adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, on judges: independence, efficiency and responsibilities. The recommendation applies to all judges, including those sitting on constitutional courts (para. 1) and to lay (non-professional) judges, unless a given recommendation is addressed only to professional judges (para. 2).

## Concept of independence

The recommendation makes a link between the independence of an individual judge (which guarantees individuals the right to an effective remedy) and the independence of the judiciary as a whole, pointing out that the former is safeguarded by the latter (para. 4). As a general principle, judges must have 'unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts' (para. 5). It is equally important for judges to have sufficient powers to protect their authority and the dignity of the court, which means that all parties and other persons connected to a procedure, even if themselves a public authority (e.g. the prosecutor) need to be subject to the judge's authority (para. 6). Concerning the formal enshrinement of judicial independence, the recommendation requires that it be done in the constitution or 'at the highest possible legal level', and detailed rules should be laid down in legislation (para. 7). Judicial independence must be actionable: judges who consider their independence threatened should have the possibility to have recourse to a judiciary council or another independent authority (para. 8). The recommendation prohibits arbitrary withdrawal of cases from particular judges: such a decision should be based on 'objective, pre-established criteria and following a transparent procedure by an authority within the judiciary' (para. 9). Only judges should decide on their own competence to decide a given case (para. 10).

The recommendation differentiates between '**external**' and '**internal**' independence. External independence refers to independence vis-à-vis the legislative and executive branches, whereas internal independence refers to the independence of each individual judge, as viewed within the structure of the judiciary. The external independence of the judiciary does not preclude the existence of 'constructive working relations' between judges and other authorities involved in the management and administration of courts (para. 12), i.e. typically the Ministry of Justice or another

governmental department. Attempts to influence judges 'in an improper manner' should be subject to sanctions (para. 14). Whereas judges need to justify their judgments in their motives, they should not be required to provide any additional explanations for the decision taken (para. 15). An important guarantee of judicial independence is that judgments may be challenged only within the appropriate judicial appellate procedure or one for re-opening proceedings, but may not be subject to any extra-judicial revision (para. 16). The executive and legislative branches of government may not interfere in judicial decisions, save for (general) amnesty and (individual) right of pardon (para. 17), the former usually being proclaimed by the legislature, and the latter being a traditional prerogative of the head of state in many countries. The legislative and executive are not prohibited from commenting on judicial decisions, but if they do so, they 'should avoid criticism that would undermine the independence of or public confidence in the judiciary' (para. 18). They may state their intent to bring an appeal against a judicial decision, but may not undertake any other actions that could 'call into question their willingness to abide by' such a decision (para. 18).

The recommendation acknowledges that the administration of justice is a question of public interest, but nonetheless urges individual judges to exercise **restraint when it comes to relations with the media** (para. 19). To this end, courts can establish press offices and communication services, rather than leaving contact with the media to individual judges. As far as the external activity of judges is concerned, it must not collide with their impartiality and independence, regardless whether the conflict of interests is actual or only perceived (para. 21). However, judges should always be free to create and to join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law (para. 25). As mentioned above, 'internal independence' in the recommendation refers to the independence 'of each individual judge in the exercise of adjudicating functions' (para. 22). In order to be **internally independent**, judges must be able to act without any restriction, improper influence, pressure, threat or interference, regardless whether they are direct or indirect, come from an authority or not, or are external or internal – including the influence by internal judicial authorities and the judge's hierarchical superiors within the court. Superior courts may give instructions to lower courts regarding individual cases only if they are seized by a preliminary reference or if they are deciding on appeal (para. 23). The allocation of cases to individual judges within a court must be done on the basis of 'objective, pre-established criteria', and cannot be influenced by the wishes of any external actors (para. 24).

## Judiciary councils

The recommendation defines judiciary councils as 'independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system' (para. 23). It provides more details on how such councils should be organised, including that at least half of members of such councils must be judges chosen by other judges from all levels of the judiciary (para. 27), that judiciary councils must be transparent towards judges and towards society (para. 28), that they must follow pre-established procedures (para. 28), their decisions must be reasoned (motivated) (para. 28), and they may not interfere with the independence of individual judges (para. 29).

## Judicial efficiency and resources

The notion of **efficiency** is defined as 'the delivery of quality decisions within a reasonable time following fair consideration of the issues' (para. 31). The recommendation recognises that courts need to be efficient in order to safeguard the right to an effective remedy, but also legal certainty and public confidence in the rule of law (para. 30). The duty to ensure efficiency rests upon individual judges who are obliged to ensure efficient case management (para. 31), but also on the authorities responsible for the organisation of the judiciary: they need to provide judges with conditions that enable them to work efficiently, with all respect for their independence and impartiality (para. 32). The recommendations recognise that an independent and efficient judiciary is impossible without

**adequate resources.** It is therefore a duty of each state to allocate to the judicial power the resources necessary to enable it to function efficiently (para. 33). Resources include, inter alia, sufficient staffing of courts, regards both judicial and support staff (para. 35).

## Selection and career of judges

The recommendation specifies that decisions concerning the selection and career of judges should be based on: (1) **objective criteria**, pre-established by law or by competent authorities; (2) **merit**; and (3) the **qualifications**, skills and capacity required to decide cases (para. 44). Any discrimination based on sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status must be prohibited (para. 45). However, a requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory (para. 45).

When it comes to the **bodies that should be charged with vetting candidates** for the judicial office, the Council of Europe in principle recommends that such an authority should be independent from the executive and legislative, and be composed, at least in half, of judges elected by their peers (para. 46). Although the recommendation also allows the executive or legislative to take such decisions, it states nonetheless that in such a case 'an independent and competent authority drawn in substantial part from the judiciary (...) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice' (para. 47). It is equally important that the judicial appointment authorities ensure the widest possible representation, and follow a transparent procedure, with the reasoning for decisions being made available to candidates upon request, and unsuccessful candidates having the possibility to challenge the decision, at least on procedural grounds (para. 48). Judicial appointments should be made in a **permanent manner**. The recommendation explicitly states that: 'Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists' (para. 49). If judges are to have a term in office, it should be established by law (para. 50). The Council of Europe recommendation does allow for appointment for a **probationary period or fixed term**, but in such cases the decision to confirm or renew the contract must be made by an independent body, not the executive or legislative power (para. 51). The Council of Europe considers that judges should receive both initial and in service training, both in theory and practice (para. 56). The training should be supervised by an independent authority (para. 57) in order to ensure that 'that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office' (para. 57).

## Immunity, disciplinary proceedings and ethics

Whereas the recommendations do not mention judicial immunity explicitly, they recognise that the 'interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases **should not give rise to civil or disciplinary liability**, except in cases of malice and gross negligence' (para. 66). Civil cases against judges, in cases of compensation granted by the state for the judicial decision, may be launched only by the state itself (para 67). Judges can be subject to criminal responsibility – with regard to their interpretation of law, assessment of facts or weighing of evidence – only in cases of malice (para. 68), i.e. the standard is higher than in the case of civil liability (malice and gross negligence). The recommendations state that outside the exercise of judicial functions, judges should be liable/responsible under civil, criminal and administrative law in the same way as any other citizen (para. 71). They also state that **disciplinary proceedings** against judges are possible if judges 'fail to carry out their duties in an efficient and proper manner' (para. 69). They must be conducted by an independent authority or by a court, and the judge must have the right to a fair trial, as well as to challenge the decision (para. 69). The recommendations exclude the personal accountability of a judge for a decision that is overruled or modified by a court of higher instance (para. 70). The recommendations envisage the preparation of **codes of judicial**

**ethics**, which should be prepared under the leadership of judges themselves (para. 73). There should be an ethics body within the judiciary to advise judges on their conduct (para. 74).

## Consultative Council of European Judges (CCJE)

The [Consultative Council of European Judges](#) (CCJE) was set up by the Committee of Ministers of the Council of Europe in 2000. Its areas of responsibility cover the independence, impartiality and competence of judges. It was the first body in an international organisation to be composed exclusively of judges and therefore constitutes a unique body at European level. All country members of the Council of Europe may be represented in the CCJE. CCJE members should be chosen in contact with national judiciary councils from among serving judges. The CCJE has so far adopted a total of [23 opinions](#) concerning judicial independence. In 2010, it adopted the [Magna Carta of Judges](#) (MCJ) summarising and codifying its opinions issued during the first 10 years of its existence. The focus of the MCJ is on judicial independence and its guarantees. It provides a typology of aspects of judicial independence as being: (1) statutory, (2) functional, and (3) financial (para 3). Independence should be viewed as vis-à-vis: (1) the other state powers, (2) those seeking justice; (3) other judges; (4) society at large (para. 3). The MCJ enumerates the following **guarantees of judicial independence**:

- decisions on **selection, nomination, and career** must be: (1) based on objective criteria; (2) taken by a body ensuring judicial independence (para. 5);
- **disciplinary proceedings** against judges must: (1) take place before an independent body; (2) be subject to a possible court appeal (para. 6);
- allocation of appropriate human, material and financial **resources**, including adequate remuneration and pensions for judges (para. 7);
- **appropriate training** for judges, organised under the judiciary's supervision (para. 8);
- **involvement** of the judiciary in all decisions affecting its functioning, especially concerning the organisation of courts and procedural laws (para. 9);
- no orders or instructions, or **hierarchical pressure** on judges when it comes to adjudication (para. 10);
- **equality of arms** for prosecution and defence (para. 11)
- **independent status of prosecutors** as a 'fundamental requirement' of the rule of law (para. 11), and
- the right of judges to be members of national and international **judicial associations** (para. 12).

The MCJ expresses a clear preference for the existence of **judiciary councils** which should be independent from legislative and executive powers (para 13). The tasks of such councils should encompass all questions concerning the status of judges, as well as the organisation, functioning and image of the judiciary (para 13). The MCJ requires that judiciary councils be composed exclusively of judges, or at least of a substantial majority of judges, and that the judge-members should be elected by their peers. The MCJ draws a distinction between **deontological principles and disciplinary rules**, requiring that the former be drafted by judges themselves (para 18). Judges should enjoy immunity from criminal responsibility for unintentional failings in the exercise of their functions, but otherwise should be normally responsible for any offences committed outside the scope of their judicial office (para. 20). The MCJ is very clear that any errors in judicial decisions may be corrected only through the system of appeals and, any other failings in the administration of justice should be actionable vis-à-vis the state as such, and not vis-à-vis individual judges (para. 21). Judges should also be immune from civil liability for their judgment, even with regard to possible reimbursement of the state (with regard to damages paid), with the only exception made for intentional misconduct (para. 22).

Since the adoption of the Magna Carta of Judges in 2010, the CCJE has adopted 10 more opinions on questions of judicial independence, including [Opinion No 14 \(2011\)](#) on justice and information

technologies (IT), [Opinion No 15 \(2012\)](#) on the specialisation of judges, [Opinion No 16 \(2013\)](#) on relations between judges and lawyers, [Opinion No 17 \(2014\)](#) on the evaluation of judges' work, the quality of justice and respect for judicial independence, [Opinion No 18 \(2015\)](#) on the position of the judiciary and its relationship with the other powers of state in a modern democracy, [Opinion No 19 \(2016\)](#) on the role of court presidents, [Opinion No 20 \(2017\)](#) on the role of courts with respect to the uniform application of the law, [Opinion No 21 \(2018\)](#) on preventing corruption among judges, [Opinion No 22 \(2019\)](#) on the role of judicial assistants and [Opinion No 23 \(2020\)](#) on the role of associations of judges in supporting judicial independence. Concerning judicial independence, [Opinion No 18](#) is of particular interest. It states that judges, as citizens, are allowed to take part in public debate, but at the same time they must be aware that 'there are limits to judicial and legal intervention in relation to political decisions that have to be made by the legislative and executive powers' and, consequently, the judiciary must be careful not to overstep the borders of 'the legitimate area for the exercise of judicial power'. Concerning the role of ministers of justice, the opinion points out that they 'must not exert influence on the administration of courts through directors of courts and judicial inspections in any way that might endanger judicial independence'. Politicians should avoid unbalanced critical commentary that could undermine public trust and confidence in the judiciary. They should never encourage disobedience to judicial decisions or violence against judges. In its most recent [Opinion No 23](#), the CCJE considers it highly desirable that in every country there should be at least one association of judges. The executive and legislative powers should refrain from any interventions that might infringe upon the independence of the associations of judges. Such associations have a key role in safeguarding judicial independence and the rule of law, and could also play a role with regard to training, judicial ethics, and forward planning of judicial reforms.

## Venice Commission

The [European Commission for Democracy through Law](#), known as the Venice Commission, is the **advisory body** of the Council of Europe responsible for constitutional affairs. Its role is to provide its member states with legal advice and help them bring their legal and institutional structures into line with Council of Europe standards, inter alia as regards the rule of law. It is composed of eminent university professors, judges of supreme and constitutional courts, and members of parliaments and civil servants, designated for a four-year term by each member country of the Commission.<sup>2</sup> The Venice Commission has published a [report on judicial appointments](#) (2007) and a [report on the independence of judges](#) (2010). In 2015 it published a [compilation of reports on courts and judges](#), and in 2016 it issued the [Rule of Law Checklist](#) (2016). The Venice Commission regularly issues [opinions](#) on various [judicial reforms](#), proposed or implemented, in its member countries. In recent years, numerous opinions have been adopted with regard to judiciary reforms implemented in Poland, the latest being the [Joint Urgent Opinion](#) of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common Courts, the Law on the Supreme Court and some other Laws, endorsed by the Venice Commission on 18 June 2020.

### Report on judicial appointments (2007)

The Venice Commission's 2007 [report](#) on judicial appointments found that in Europe there is a variety of different systems for judicial appointments, rather than a single model. The report draws a distinction between '**older democracies**' and '**new democracies**'. In the former, the appointment of judges by the executive may work well in practice thanks to 'legal culture and traditions', whereas in the latter, in the absence of legal traditions, there is a need for 'explicit constitutional and legal provisions' to prevent abuses in judicial appointments. In this context, the Venice Commission recommends against Parliaments electing judges (apart from for Constitutional Courts) and advises setting up an autonomous judiciary council composed of a substantive majority of judges elected by other judges and given decisive influence over the appointment and promotion of judges and disciplinary measures against them.

## Report on independence of judges (2010)

The Venice Commission's 2010 [report on the independence of judges](#) recommends that all decisions concerning the appointment and professional careers of judges should be based on merit, applying objective criteria within the framework of the law. It considers that a **judiciary council** is an appropriate method for safeguarding judicial independence, essentially reiterating its view from the report on judicial appointments. The appointment of ordinary judges should be **permanent** (until retirement), and judges appointed for a probation period are seen as problematic from the point of view of independence. **Disciplinary proceedings** should be the task either of judiciary councils or of independent disciplinary courts. The possibility to appeal a disciplinary sanction before an independent court must be guaranteed. Judges should be remunerated in a way corresponding to the dignity of their office, but any bonuses or other benefits based on discretion should be eliminated. Concerning budgetary questions, the judiciary should be heard, possibly via the judiciary council, before its budget is adopted by parliament. The **immunity** of judges should be only functional, i.e. linked to their judicial duties. There is a need for rules providing for the incompatibility of judicial office with any positions that could jeopardise judges' independence or impartiality. More specifically, judges should not exercise any executive functions, and any political activity that could interfere with impartiality must be prohibited. The only way of challenging judicial decisions should be through the appeals process. The Venice Commission is against special powers of the prosecution service or other state body to bring challenges to judicial decisions, especially after the time limit for the appeal has expired for the litigants themselves. The Venice Commission endorses the principle of **internal judicial independence**, which excludes the subordination of judges to other judges as regards judicial decision-making. Finally, when it comes to case allocation, it should be based on objective and transparent criteria established in advance by law or by special regulations based on the law.

## Rule of Law Checklist (2016)

The Rule of Law Checklist was adopted by the Venice Commission in March 2016, and endorsed by the Parliamentary Assembly of the Council of Europe (PACE) in October 2017. It understands judicial independence as freedom from external pressure and lack of political influence or manipulation (para. 74). The checklist highlights **four elements of judicial independence** (para. 75): (1) manner of appointment, (2) term of office, (3), existence of guarantees against outside pressure, including in budgetary matters, and (4) appearance of independence and impartiality. This largely follows ECtHR case law (see below). The checklist points out that judges must have a **permanent term in office**, otherwise they become dependent on the authority that appoints them (para. 76). Concerning **disciplinary proceedings**, disciplinary offences should be set out clearly in law, and the disciplinary body must ensure procedural fairness by way of a fair hearing and the possibility of appeal (para. 78). The system for **promoting judges** must not be based on political or personal considerations (para. 79). The checklist draws attention to the risk that the **non-consensual transfer of judges** to another court could also be used as a politically motivated tool under the guise of a sanction (para. 80). The checklist advises against the possibility of the prosecution service intervening in court cases outside its 'standard' role in criminal proceedings (para. 84). As regards **judiciary councils**, the checklist underlines that they are 'the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration', although it admits that there 'may however be other acceptable ways to appoint an independent judiciary' (para. 81). According to the checklist, the executive may play a role in judicial appointments only in those countries where 'these powers are restrained by legal culture and traditions, which have grown over a long time' (para. 82), noting that 'the involvement of Parliament carries a risk of politicisation' (para. 82). This **does not mean that only judges should appoint judges**, as this 'carries the risk of raising a perception of self-protection, self-interest and cronyism' (ibid). Therefore, judiciary councils should have a balanced composition, avoiding both politicisation and corporatism. The only way in which a judgment can be changed is by appealing to a higher court

(para. 87). Judges should not be subject to hierarchical supervision by other judges, and still less to that of the executive or civil servants (ibid).

## Case law of the European Court of Human Rights

The question of judicial independence is dealt with in the case law of the European Court of Human Rights (ECtHR) under the heading of the right to a fair trial enshrined in Article 6 ECHR. Such a fair trial must be conducted before an 'independent and impartial tribunal established by law'. As a preliminary remark, it should be underlined that, according to established case law of the Court, despite the growing importance of the notion of the 'separation of powers' in its case law (*Stafford v UK*, para. 78), the Court insists that it **does not verify the compatibility of national law and practice with any theoretical constitutional concepts** (*Kleyn v Netherlands*, para. 193, *Sacilor-Lormines v France*, para. 59), but always verifies whether **in a given case** the criteria for independence were met (*McGonnell v UK*, para. 51, *Urban and Urban v Poland*, para. 46).

### Concept of independence and criteria for assessment (test)

In *Ringeisen v Austria* (16 July 1971) the Court emphasises that judicial independence comprises both independence from the executive and from the parties. In its case law, the Court developed a **four-pronged test**. Thus, in *Luka v Romania* (21 July 2009) the ECtHR ruled that, in order to establish whether a tribunal can be considered 'independent', regard must be had, inter alia, to the (1) **manner of appointment** of its members and (2) their **term of office**, (3) the existence of **guarantees against outside pressures**, and (4) the question as to whether the body presents an **appearance of independence**. In the case at hand, the ECtHR did not rule out that possibility of lay judges (assessors in judicial panels), but required that such persons be free from outside pressure. In the case at hand, this was not guaranteed, as they were removable from office and could discharge other functions and activities assigned to them by the organisations on whose behalf they had been elected (employers' associations and trade unions). As can be seen from this test, the Court also put emphasis on the **appearance of independence** to external observers. Already in *Piersack v Belgium* (1 October 1982) the Court distinguished between a subjective and objective approach to judicial impartiality. The subjective aspect endeavours to ascertain the personal conviction of a given judge in a given case, and the objective approach focuses on determining whether the judge offered guarantees sufficient to **exclude any legitimate doubt** in this respect. The Court further stressed that, in order for the courts to inspire in the public the confidence that is indispensable, account must also be taken of questions of internal organisation. In this case, a former prosecutor, after being appointed judge, was to decide a case in which he had acted as prosecutor previously. This undermined the public trust, allowing the public to fear that he did not offer sufficient guarantees of impartiality.

### Appointment of judges

As mentioned earlier, the Court's approach is that of refraining from imposing upon the states-parties to the Convention any particular constitutional model (*Kleyn v Netherlands*, para. 193, *Sacilor-Lormines v France*, para. 59). Therefore, the, '**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' (*Campbell and Fell v UK*, para. 79; *Maktouf and Damjanović v Bosnia and Herzegovina*, para. 49; *Flux v Moldova (No 2)*, para. 27). In *Flux* a judge had been **appointed to the Supreme Court by Parliament**, but there was no evidence that his term in office could be terminated by the executive or legislature, and no evidence of any influence was adduced, which allowed the Court to conclude that he was independent. In *Filippini v San Marino* (26 August 2003) the Court rejected as manifestly ill-founded a complaint concerning the fact that San Marino **judges were appointed by Parliament** and, as such, their political sympathies could play a role in their appointment. This meant that that political sympathies, which may play a part in the process of appointing judges, could not in themselves give rise to legitimate doubts as to their independence

and their impartiality. It emphasised that once appointed, the judges were not subject to any pressure and received no instructions from the Parliament and that they acted in complete independence. In [Clarke v UK](#) (25 August 2005) the Court also rejected an application based on the fact that **district and circuit judges in England are appointed by the Lord Chancellor**. The Court observed that there is no hierarchical or organisational connection between the judges and the Lord Chancellor's Department. Although the Lord Chancellor had power to remove such judges, subject to judicial review, in practice this power was never used. Therefore, an objective observer would have had no cause for concern. In [Ástráðsson v Iceland](#) (1 December 2020) the Court introduced the concept of merit in judicial appointments, stating that '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' (para. 220). It also added that 'the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be' (para. 222).

## Irregularities in judicial appointments

In [Ástráðsson](#) the ECtHR dealt with the question of irregularities of judicial appointments. It formulated a three-step test to determine whether such irregularities were serious enough to violate the fundamental right to a tribunal established by law. In the first prong of the test it is necessary to consider whether there has been a **manifest breach of the domestic law**, in the sense that the breach must be objectively and genuinely identifiable as such (para. 244). Nonetheless, the absence of such a manifest breach does not of itself rule out the possibility of a violation of the right to a tribunal established by law if the appointment procedure was **seemingly in compliance** with the rules, but it **nevertheless produced results incompatible with the object and purpose** of the Convention right (para. 245). In the second prong of the test, the breach in question must be assessed in the light of the **object and purpose** of the requirement of a 'tribunal established by law', in order to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Merely technical breaches which do not undermine the judge's independence fall below the test's threshold (para. 246). In fact, only those breaches that **affect the essence of the right to a 'tribunal established by law'** are likely to result in a violation of that right (para. 247). The third prong of the test refers to the **legal consequences of the breach for the individual's Convention rights** (para. 248). Once a breach of the relevant domestic rules has been established, the assessment by the national courts of the legal effects of such breach must be carried out on the basis of the relevant Convention case law and the principles derived from it (para. 251). The ECtHR can also make such an evaluation in a subsidiary manner (para. 249-250), especially if the findings of the national court are arbitrary or manifestly unreasonable (para. 251). The question of irregularities in judicial appointments was returned to in [Xero Flor v Poland](#) (7 May 2021) which concerned the appointment of **Constitutional Court judges in the place of judges already elected** by the previous term of Parliament but whom the President refused to swear into office. The ECtHR found that the president and parliament acted in manifest contradiction to national law by refusing to swear in properly elected judges, thereby exerting unlawful external influence upon the Court and impairing the legitimacy of the election process.

## Term in office

In [Brudnicka v Poland](#) (3 March 2000) the Court found that maritime chambers in Poland (which hear disputes in maritime law) are not independent, because their presidents and vice-presidents are **appointed and removed from office by the minister of justice** in agreement with the minister of transport and maritime affairs. They cannot be regarded as irremovable, and they are in a subordinate position vis-à-vis the ministers (para. 41). In [Gurov v Moldova](#) (11 July 2006) the ECtHR found that a Moldovan court was not 'a tribunal established by law' because, at the relevant time, judges whose **term of office had expired** were authorised to continue to exercise their functions for an undetermined period, until such time as the President decided the question of their

appointment, and that there was no legislation governing this matter. In those circumstances, the Court considered that the participation of a judge whose term of office had expired in the hearing on the applicant's case had no a legal basis. In addition, that practice was contrary to the principle that the organisation of the courts in a democratic society must not depend on executive discretion. In [Urban and Urban v Poland](#) (30 November 2010) the Court ruled that an **assessor (trainee judge)** in a Polish criminal court was not independent because the minister of justice could remove her from office at any time (para. 53). The ECtHR underlined that 'the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence' (para. 45). In [Maktouf and Damjanović v Bosnia and Herzegovina](#) (18 July 2013) the ECtHR (Grand Chamber) ruled that the Court of Bosnia and Herzegovina was independent even if its judges were appointed by the Office of the High Representative for Bosnia and Herzegovina for a renewable period of two years. In the Court's view, such a **short period of term in office** and its renewability was justified by the provisional nature of the arrangements for post-war Bosnia and the mechanics of international judicial secondments. This, in the Court's view, did not undermine judicial independence but only strengthened it, as the judges were professional judges from other countries and would be capable of restoring public confidence in the judiciary in Bosnia.

## Early termination of office as a result of judicial reform

In [Baka v Hungary](#) (23 June 2016) the Court (Grand Chamber) analysed a case concerning the termination of the term in office of the president of the Hungarian Supreme Court due to the **entry into force of a new constitution** that liquidated the Supreme Court and created the Curia in its place. The ECtHR found a violation of the Convention due to the fact that the former president of the former Supreme Court did not have access to an independent tribunal to review the expiry of his term in office, as provided for by the new Constitution. In [Xhoxhaj v Albania](#) (9 February 2021) analysed an application from an Albanian Constitutional Court ex-judge who had been dismissed from office as part of a process of the 'vetting' of all Albanian judges and prosecutors by a special commission. The ECtHR held that the Convention had not been breached, as there had been a **sufficient legal basis** for the special commission, the vetting bodies were 'tribunals established by law', and they were not subject to any pressure from the executive. The ECtHR had no objections to the vetting bodies being drawn from **individuals from outside the judiciary**, as this prevented conflicts of interest and strengthened public confidence. The law provided that members of the vetting bodies are irremovable for their (short) term in office.

## Presence of lay judges (assessors) on judicial panels

In [Langborger v Sweden](#) (22 June 1989) the Court, analysing the independence and impartiality of the Swedish Housing and Tenancy Court, noted that, in order to establish whether a body can be considered **independent**, regard must be had, inter alia, to (1) the manner of appointment of its members, (2) their term of office, (3) the existence of guarantees against outside pressures and (4) the question as to whether the body presents an appearance of independence. As to the question of **impartiality**, a distinction must be drawn between a **subjective test**, seeking to establish the personal conviction of a given judge in a given case, and an **objective test**, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. The Court analysed the presence of lay assessors at the Swedish court, nominated by the landlords' association and by the tenants' association. In the case at hand, the Court found that their objective impartiality and appearance of independence were impaired because they had been nominated by, and had close links with, two associations that both had an interest in the outcome of litigation, different to that of the applicant. The fact that the lay assessors were deciding cases on a panel with professional judges did not change this outcome.

## External influences upon the judge

In [Sramek v Austria](#) (22 October 1984) the Court noted that when determining whether a tribunal could be considered to be independent as required, appearances may also be of importance. In the case at hand a member of the tribunal was in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, which cast doubt on his independence. In [Kress v France](#) (7 June 2001) the Court found that the presence of **government commissioners** at the secret deliberations of the judges violated the Convention because a commissioner could have an opportunity to bolster his submissions in favour of one of the parties in the privacy of the deliberations room. In [Agrokompleks v Ukraine](#) (6 October 2011) the Court emphasised that the principle of judicial independence imposes obligations on all other state authorities to respect and abide by the judgments and decisions of the courts, and to **refrain from interfering** in court cases. In [Sacilor Lormines v France](#) (9 November 2006) the Court found a violation of the Convention in a case where a member of the French Council of State had been **offered a senior position in the ministry** with which the applicant was litigating.

## Internal judicial independence (pressure from within)

The need for internal judicial independence was acknowledged by the ECtHR implicitly in 2000, and explicitly in 2009.<sup>3</sup> Violations of internal judicial independence have been found in former socialist countries such as Croatia, Hungary, Lithuania, Romania, and Slovakia, and, outside the EU, in Russia and Ukraine.<sup>4</sup> The concept was spelled out in [Parlov-Tkalčić v Croatia](#) (22 December 2009) where the Court emphasised that 'judicial independence 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 directives or pressures from the fellow judges** or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court' (para. 86). In [Moiseyev v Russia](#) (9 October 2008) the Court found a violation of internal judicial independence on account of the fact that the president of the court had replaced all the judges of the panel hearing Moiseyev's case three times, supporting the impression that they were replaced in order to secure a certain outcome in the case.

## Combining judicial office with other work

In [Findlay v UK](#) (25 February 1997) found that a UK martial court did not give appearances of independence because all members of the court were **directly subordinate** to the convening officer – who also performed the role of prosecuting authority and who, acting as confirming officer, even had the power to vary the sentence imposed. In [Gürkan v Turkey](#) (3 July 2012) the Court found a Turkish military court to lack independence and impartiality because **judges were at the same time army officers**, subject to military discipline. In [Incal v Turkey](#) (9 June 1998) the Court found that the Turkish National Security Court could not be regarded as an independent and impartial tribunal because the applicant could legitimately fear that because one of the judges of the National Security Court was a military judge he might allow himself to be unduly influenced by considerations that had nothing to do with the nature of his case. This was especially so because the **applicant was a civilian and some of the judges were military officers**. The Court emphasises that even appearances may be of a certain importance because public confidence in courts is at stake in democratic societies, especially for criminal cases. In [Wettstein v Switzerland](#) (21 December 2000) the Court found that two judges – **practising lawyers (Rechtsanwälte) acting as part-time judges** – were not independent in a concrete case because they had litigation with the applicant in different cases, and those cases actually overlapped in time (were still pending). In [Pabla Ky v Finland](#) (22 June 2004) the Court found no violation of the Convention in a case where a **judge of the Court of Appeal was at the same time an MP of the Finnish Parliament**. The Court rejected the applicant's arguments that this violated the principle of the separation of powers, as it did not apply in the abstract. In [Procola v Luxembourg](#) (28 September 1995) the Court found that there were potentially legitimate grounds to doubt the independence of the Luxembourgish Council of State, for structural

reasons relating to the fact that **judges of the Council have also advisory duties vis-à-vis the government** regarding the legality of acts that they then review as judges. However, in [UFC Que Choisir de Côte d'Or v France](#) (30 June 2009) the Court found that the fact that Members of the French Council of State gave advice on governmental decrees did not, per se, undermine their independence and impartiality. The **principle of the separation of powers did not operate in the abstract**. It had to be shown by the applicant concretely that the same judges actually advised the government on the decree he challenged. On the facts of the case, no member of the bench hearing the application for annulment of a decree had previously participated in the bench that had delivered the opinion on that act. In [McGonell v UK](#) (8 February 2000), the ECtHR found that the bailiff of the Royal Court of Guernsey was not independent because he first advised on the adoption of a certain regulation, and would then be involved in its judicial review.

## Judicial immunity

In [Zubarev v Russia](#) (5 February 2015) the Court ruled that rules on **judicial immunity**, barring defamation claims against judges acting in their professional capacity, are compatible with the Convention. This is because judges should be at liberty to exercise their functions with independence and without fear of consequences, while litigants can always bring an appeal to a higher court, without suing the judge personally.

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## ENDNOTES

<sup>1</sup> [2020 Rule of Law Report: The rule of law situation in the European Union](#), COM(2020) 580 final, pp. 1 and 9.

<sup>2</sup> In addition to 47 Council of Europe member states, the Venice Commission also includes 15 non-member countries.

<sup>3</sup> J. Sillen, '[The concept of "internal judicial independence" in the case law of the European Court of Human Rights](#)', *European Constitutional Law Review*, Vol. 15(1), 2019, p. 105.

<sup>4</sup> Sillen, *ibid.*, p. 106.

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