

Justice must be seen to be done: Asserting the principle of objective impartiality

In a decision handed down on June 22, 2022, the *Cour de Cassation* (French Supreme Court) overturned a judgment of the Rouen Investigation Chamber and held that an investigating judge who has indicted an individual who subsequently files an application for release from pre-trial detention may not act as liberty and custody judge in this same case.

“As a right guaranteed to individuals by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the impartiality of the judge is an absolute duty, intended to make effective one of the founding principles of the Republic: the equality of citizens before the law”^[1]. The impartiality of the judge is, therefore, an essential element of our democratic society in that it gives meaning to the principle of equality of citizens, a key principle of our democratic State.

The equality of citizens before the law is a flagship principle of the French Republic, the motto of which is “*Liberty, Equality, Fraternity*”. It has also been enshrined in the French constitution^[2]. As such, impartiality, in the sense that it is a guarantee of equality of citizens before the law, is a cornerstone principle underpinning the French Republic and the French judicial system. Even more, it should be a “*universal requirement*” according to Mrs. Josserand^[3].

Impartiality is a key concept in our justice system. Indeed, it allows us to ensure that any individual will be judged in accordance with the principle of fair trial^[4]. It is recognized internally and internationally. At the international level, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights) provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly

necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.^[5]

Case law relies on this Article to define impartiality in a dichotomous way; according to the European Court of Human Rights, there is an objective impartiality and a subjective impartiality.

In the case that led to this decision issued on June 28, 2022^[6], a man who had been indicted for repeated attempted murder was placed in pre-trial detention. Following an extension of this pre-trial detention, he requested to be released.

The liberty and custody judge (*juge des libertés et de la détention*) who objected to this request for release turned out to be the same one who had indicted the individual.

The indictee did not win his case before the Rouen Investigation Chamber and argued that there had been a lack of objective impartiality.

The question that arose was thus as follows: Can a judge who has acted as investigating judge in a case subsequently act as liberty and custody judge in the same case and dismiss an application for release from pre-trial detention?

In its decision of June 28, 2022, the *Cour de Cassation* overturned the decision of the Rouen Investigation Chamber and ruled, in particular, that an investigating judge who has indicted an individual who subsequently files an application for release from pre-trial detention may not act as liberty and custody judge in this same case.

Impartial subjectivity

Based on Article 6(1) of the European Convention on Human Rights, the European Court of Human Rights, in the Piersack judgment, stated that *“Whilst impartiality normally denotes absence of prejudice or bias (...) it can be tested in various ways. A distinction can be drawn (...) between a subjective approach, that is endeavoring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect”*^[7]. As such, French legal scholars unanimously inferred that impartiality has a binary nature; it is either objective or subjective.

Subjective impartiality refers to the judge’s *“personal conviction”*; accordingly, verifying whether subjective impartiality has been respected amounts to verifying whether the judge, faced with a given situation, has not voluntarily favored or disfavored a particular individual^[8].

As such, subjective impartiality can be found in several situations. For example, when a judge describes the defendant’s defense as *“implausible, scandalous, untrue, despicable, repugnant”*^[9]. With these words, the

judge shows that, in his/her “*personal conviction*”, the decision has already been made and that he will not even give the defense lawyer the opportunity to be truly heard.

Subjective impartiality

The principle of impartiality is enshrined in article 6 of the European Convention on Human Rights. However, it is not protected only by this Convention. It is also protected internally, indirectly through the principle of separation of the functions of prosecution and judgment^[10]. As such, the same judge may not, in the same case, prosecute, investigate and judge. He/she can necessarily be responsible only for one of these functions, failing which the decision of the court that is not properly constituted will be null and void. It is therefore this principle of separation of the functions of prosecution, investigation and judgment that translates the concept of objective impartiality in the French domestic legal system.

M. Robert defines objective impartiality as follows: “*Objective impartiality is based on functional and organic considerations and even on appearances: A judge whose lack of impartiality may be legitimately feared must withdraw*”^[11]. Mr. Fourment specifies: “*In objective impartiality, we take into account appearances, the functional roles that the same judge has successively held in the same case*”^[12]. Mr. Pradel explains this search for objective impartiality by the fact that “*Judges did not want a judge, by combining two functions, to deliver bad justice, justice that favors (or disfavors) one party to the trial, justice that is biased, partisan.*”^[13].

There are many court decisions dealing with breaches of objective impartiality. A few examples are provided hereafter. The following may be considered as breaches of objective impartiality: The situation where some members of the Luxembourg Council of State successively carried out both advisory and judicial functions in the same case^[14] (this calls into question the structural impartiality of the institution), the situation where a liberty and custody judge ruled on the pre-trial detention of an individual and was then part of the court that judged the same individual under the so-called immediate appearance procedure (*procédure de comparution immédiate*)^[15]. Breach of objective impartiality is also established when a judge took part in a decision of the Indictment Division on the pre-trial detention of an accused person who was subsequently referred to the criminal court. Indeed, said judge may not be part of the criminal court because he/she necessarily proceeded to a preliminary examination of the merits of the case^[16].

In its decision of June 28, 2022, the *Cour de Cassation* identified a new type of breach of objective impartiality.

Indeed, it held that a judge who has found reliable and consistent evidence leading to the indictment of an individual may no longer serve as liberty and custody judge in the same case.

This position can easily be explained by the very concept of objective impartiality.

Certainly, investigating judge may indict “*an individual against whom there exists reliable and consistent evidence making it appear likely that such individual has participated, as perpetrator or accomplice, in the*

commission of the offenses that he/she has been asked to investigate”^[17].

On the other hand, the liberty and custody judge must, for his/her part, ensure, in accordance with the law, that such reliable and consistent evidence does exist when considering a custodial or semi-custodial measure^[18].

As such, the judge who has served as investigating judge and then as liberty and custody judge in the same case exercises the same control twice. This successive role of the same judge infringes the principle of objective impartiality – *or at least* – creates a situation of legitimate fear as to his/her impartiality.

This decision issued by the *Cour de Cassation* on June 28, 2022 is fully in line with European case law that relies on Lord Gordon Hewart’s adage: “*It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*”.

[1] See .
<http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques/limpartialite>

[2] See in this respect Melin-Soucramanien (F.), “La question prioritaire de constitutionnalité”, *Les cahiers du Conseil Constitutionnel*, No. 29, October 010

[3] Josserand (S.), *L’impartialité du magistrat en procédure pénale*, foreword. J. Francillon, Bibliothèques des sciences criminelles, LGDJ, Paris, 1998

[4] See in this respect Robert (J.), Duffar (J.), *Droit de l’homme et libertés fondamentales*, Montchrestien, Paris, 8^{ème} ed., 2009

[5] Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 which came into force on September 3, 1953, as amended by Protocols No. 11 and No. 14

[6] Criminal Chamber of the *Cour de Cassation*, June 28, 2022, No. 22-82.698

[7] European Court of Human Rights, October 1, 1982, Piersack vs. Belgium, Application No. 8692/79

[8] See in this respect Fourment (F.), *Procédure pénale*, Paradigme, Paris, 14^{ème} ed., 2013

[9] Commission, Opinion, October 29, 1993, Boeckmans: réc., No. 12

[10] FOURMENT (F.), op. cit., p. 293

[11] ROBERT (J.), DUFFAR (J.), op. cit.

[12] FOURMENT (F.), op. cit.

[13] PRADEL (J.), *Procédure pénale*, Cujas, Paris, 18^{ème} ed. 2015

[14] CEDH, September 28, 1995, Procola v. Luxembourg, Application No. 14570/89, §44-45

[15] Criminal Chamber of the *Cour de Cassation*, September 23, 20210, No. 10-81.245; Criminal Chamber of the *Cour de Cassation*, December 8, 2009, No. 09-85.623, Bull. Crim. No. 208.

[16] Criminal Chamber of the *Cour de Cassation*, October 12, 1983, No. 82-93.569.

[17] Article 80-1 of the French Code of Criminal Procedure

[18] (see for example Criminal Chamber of the *Cour de Cassation*, May 11, 2021, No. 21-81.277, duty based on the combination of Articles 80-1 and 137 of the French Code of Criminal Procedure)

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