MINI-CONFERENCE 2019
INDEPENDENCE OF THE JUDICIARY, THE ROLE OF CONSTITUTIONAL COURTS

Venice Commission
18th meeting of the Joint Council on Constitutional Justice
Rome, Italy
24 May 2019

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Venice Commission: 18th meeting of the Joint Council on Constitutional Justice

Mini-Conference Independence of the Judiciary, the Role of Constitutional Courts

Rome, Italy
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Palazzo della Consulta

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Joint Council meeting

Palazzo della Consulta

Rome, Italy

Mini Conference

Introduction

Tanja Gerwien,
Legal Officer, Division on Constitutional Justice, Secretariat of the Venice Commission

I would like to welcome all of you to this year's mini-conference, in this breath-taking Palazzo della Consulta here in Rome – the home of the Constitutional Court of Italy.

If you are attending the Joint Council on Constitutional Justice for the first time, you will see that we hold these mini-conferences every year after the Joint Council meeting. This gives the Venice Commission's liaison officers and members of its Sub-Commission on Constitutional Justice the opportunity to share the experiences of their courts on the topic chosen for this event.

This year's theme for the mini-conference is the **"Independence of the Judiciary, the role of constitutional courts"** and will lead us to discuss an important role and a perpetually topical one for constitutional courts or councils, supreme courts and other courts with equivalent jurisdiction. I will refer to "constitutional courts" in the aggregate to cover all of them.

– Let us begin with the three branches of power: the Executive, the Legislative and the Judiciary.

Each has a specific and fundamental function and the separation of each of these powers from the other, as we well know, is to prevent one branch impeding on the core functions of the other.

The legislative branch produces the laws, the executive implements and administers public policy that is enacted by the legislative branch and the judiciary interprets the constitution and laws and applies their interpretation to resolve disputes brought before it – which can range from minor disagreements among private persons to the legitimacy of government action.

To resolve these disputes, judges use written constitutions (where they exist), legal codes and laws on which they base their decisions.

In order to render fair and impartial decisions that uphold the rule of law, it is crucial that the judiciary not be subject to undue influence or pressure from the other two branches of power. Ensuring that the judiciary is preserved from political pressure in turn ensures judicial independence, which contributes to the stability of a political system.

Different indicators or markers have been identified to determine whether a country's judiciary is independent. Some argue that it includes three different aspects: the independence of the individual judge (an essential one), the independence of the individual courts and the independence of the entire court system. These may all be guaranteed in different ways. Others include tenure of judges, irreducibility of a judge's salary, compliance with the highest judicial decisions and court orders, extent of judicial review by the highest judicial power, the quality of the standards for the selection of judges, fairness and objectivity of court procedures and so on.

How does the constitutional court come into the picture and what is its role in maintaining judicial independence?

The constitutional court is the guarantor of the constitution or of constitutional principles.

The constitution is a set of fundamental rules and principles or, where there is no written constitution, it consists of established precedents that specify how a state should be governed, how power is distributed and controlled and what rights its citizens possess.

The Council of Europe has been at the forefront of this issue and dealt with all these aspects in various texts over the years. The earliest was the Parliamentary Assembly of the Council of Europe (PACE)'s Recommendation on the Condition of Transsexuals, adopted in 1989.

How do constitutions guarantee judicial independence?

In many countries, the constitution guarantees judicial independence explicitly, whereas in others, judicial independence is guaranteed through a combination of constitutional provisions and statute, which will typically refer to the security of tenure of judges.

In this respect, it should be noted that:

- the Committee of Ministers of the Council of Europe, in its Recommendation of 2010 *on judges: independence, efficiency and responsibilities*[1] states, in its Chapter I, item 7 that *"The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level"*; and

- the Consultative Council of European Judges (CCJE) recommends in its Opinion No. 1, paragraph 16, following the recommendation of the European Charter, to go further: *"the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level."*

The Venice Commission strongly supports the approach that the basic principles, which ensure the independence of the judiciary, be provided in a constitution or in equivalent texts.[2]

As the constitution is binding, there needs to be a way of enforcing it by deciding whether or not an act or a decision is in line with the constitution and provide a remedy if there is a violation. Or, where there is no written constitution, whether established precedents and/or statutes containing these principles have been violated.

This is, roughly, the role of constitutional courts, if we do not go into the different types of constitutional courts and courts with equivalent jurisdiction that exist with "slightly" differing competences.[3]

1. CM/Rec(2010)12.
2. Report on the Independence of the Judicial System Part I: the independence of judges (CDL-AD(2010)004), paragraphs 20-22.
3. For further information see Study on individual access to constitutional justice (CDL-AD(2010)039rev); Key-note speech on the Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies, 2nd Congress of the WCCJ, Christoph Grabenwarter.

This means that the constitutional court is entitled to remove legislation that is in breach of the constitution and, more relevant for our mini-conference today, it can remove legislation that endangers judicial independence. This is often referred to as the constitutional court's role as the "negative legislator". As a result of this, its decisions can be very unpopular with the other branches of power.

In order for this system to work – however – the constitutional court's decisions must be respected, and more importantly, implemented. This means that institutions that are affected by the constitutional court's decisions must accept them and must ensure their implementation.

This might sound like self-punishment, but it is an important indicator of the level of democracy reached in a given country.

As Alexander Hamilton, one of the Founding Fathers of the United States of America has written well over 200 years ago, the judiciary is the weakest of the three branches of powers,[4] and, quoting Montesquieu, he went on to write that the judiciary depends on the political branches to uphold its judgments.

This remains true today – although some scholars have argued that the judiciary is not as weak as Hamilton suggested. However, should the constitutional court's decisions not be implemented properly or taken into account by the institutions concerned and not be followed by other courts – this will pose a direct threat to the authority of the constitutional court and thereby challenge the structure, rules and rights contained in the constitution.

This will, in turn, affect the real level of democracy achieved in a given country and the protection of human rights. It will also ultimately affect the confidence of its citizens as well as the trust this country enjoys within the international community.

The constitutional court's decisions and their implementation are therefore very important indicators on whether a country's democracy, national institutions and protection of human rights are functioning properly.

Nevertheless – and notwithstanding the importance for the constitutional court to defend itself against the two other, stronger, branches of power – it is important that it does not apply excessive self-protection against, for example, the introduction of a legitimate reform of the judiciary.

4. Federalist No. 78.

This means that the constitutional court needs to strike a balance between protecting itself against undue pressure and taking due account of the margin of appreciation, political questions and the democratic legitimacy of parliament. If such a balance is struck, and the separation of powers is respected, then parliament will undoubtedly reiterate by respecting the constitutional court's decisions, the aim of which are to protect the constitution.[5]

Ladies and Gentlemen,

I look forward to your presentations on the experiences of your Courts regarding the independence of the judiciary and am sure that we will have interesting discussions!

Just a brief reminder for today's speakers and for all participants: the proceedings of this mini- conference will be published in a booklet and those of you who have not made a presentation, but wish to contribute a short paper to this booklet on the theme of the mini-conference, are welcome to do so.

5. See Key-note speech on the Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies, 2nd Congress of the WCCJ, Christoph Grabenwarter.

The Independence of the Judiciary: Case-Law from the Italian Constitutional Court

Umberto Zingales, Vice Secretary General, Constitutional Court, Italy

To begin with, just two words about the meaning of the Independence of the Judiciary.

First of all, we can conceive of the principle of independence regarding the judiciary as a whole.

In this sense, the Independence of the Judiciary is a guarantee of the autonomy of judges, and of the judicial system as well: a protection against interferences from other branches of Government. That is, independence from the Legislative and the Executive.

This is independence from undue and external pressure.

And we heard yesterday from Vice President Marta Cartabia the teachings of Montesquieu, that

> *"There is no liberty, if the judiciary power be not separated from the legislative and executive"*
>
> C.L. de Montesquieu, The Spirit of Laws

From a second point of view, we can consider the independence of every single judge, as a deontological way to follow his activity.

In this meaning, we refer in particular to the relations between judges, within the judicial system.

As written by Marta Cartabia

> *"After the end of the Fascist regime, the main concern was to protect the Judiciary from any undue influence of the political branches […] This independence was the key principle of the constitutional design concerning the Judiciary"*
>
> CARTABIA, Italian Constitutional Justice in Global Context, 156

The Italian Constitution establishes (Art. 104) that:

> *"The Judiciary is a branch that is autonomous and independent of all other powers"*

and that

> *"Judges are subject only to the law".*

We also know that independence is strictly linked to impartiality. Indeed, some undue influence could

> *"undermine the fair and impartial administration of justice"*
>
> CARTABIA e altri, op.cit., 156

and that

> *"The lack of independence can degenerate in the absence of impartiality"*

(these are the words that I found in an old decision of the
Italian Constitutional Court: Judgment no. 30/1967)

And we remember as well that the principle of impartiality must be considered in the light of due process: we have a rich constitutional jurisprudence on the rules that regulate the causes of incompatibility of the judges, especially in the field of criminal law (Art. 34 c.p.p.: *ex pluribus*, no. 177/1996; no. 183/2013).

A judge, in order to respect due process, must be independent of the Executive and Legislative powers and impartial.

Let us see how the Italian Constitutional Court highlights these different aspects I have told you about before:

> *"Under the terms of the Constitution (Articles 101(2) and 104(1) of the Constitution), magistrates must be impartial and independent and these values must be protected not only with specific reference to the concrete exercise of their judicial functions, but also as a rule of professional conduct to be observed for all conduct in order to prevent the emergence of any well-founded questions as to their independence and impartiality"*
>
> (Corte cost. 224/2009).

I would now like to tell you, in a few words, the role played by the Italian Constitutional Court on this issue, starting from Judgment no. 224/2009.

Before I discuss this Judgment, I should explain that the Constitutional Court, in Italy, is a fully autonomous constitutional body, within a self-regulating structure, separate from the Judiciary, *id est* from the ordinary and administrative courts.

Therefore, in this case (Judgment no. 224/2009) the Italian Constitutional Court considered a provision of law which imposed a disciplinary penalty on a magistrate became a member of in a political party as president of its provincial federation, on the grounds that it violated the equality of political rights and the judge's right of association.

In particular, in the opinion of the Disciplinary Section of the Supreme Council of the Judiciary, which raised the question of constitutionality before the Italian Constitutional Court with reference to several Articles (2, 3, 18, 49 and 98) of the Constitution, the formal and absolute prohibition on magistrates joining political parties, reinforced by a sanction for its violation, went beyond the legal notion of a mere limitation, namely a regulation which reconciles the political right of the individual with the requirement of impartiality of the judge, including the need to appear impartial.

Moreover, for the Supreme Council of the Judiciary the contested provision was in conflict with the constitutional principle of the equality of political rights, starting from the right of association conferred on all citizens (Article 2 of the Constitution).

The Court ruled the question groundless.

First of all, the Italian Constitutional Court clearly affirmed that

> *"it must be recognised – and there can be no doubts on this matter – that magistrates must enjoy the same freedoms guaranteed to all other citizens and that they may therefore, obviously, not only share a political idea, but also expressly manifest their own opinions in that regard".*

But after saying that, the Court clarified that

> *"it must at the same time be accepted that the functions exercised and the role occupied by magistrates are not indifferent and without effects for the constitutional order".*

This is why in the Constitution we find some specific rules for magistrates, contained in Title IV of Part II (Articles 101 *et seq*): these arrangements, on the one hand, assure a special position, whilst, on the other hand, as a corollary entail the imposition of special duties.

This intends to introduce a weighing of interest between the freedom to associate oneself within a party, protected by Article 49 of the Constitution, and the requirement to guarantee the impartiality of magistrates and also the appearance of independence from the interests of the parties which contend for power. In this sense, Article 98(3) of the Constitution delegates to ordinary legislation to establish

> *"limits on the right of magistrates to join political parties"*

(as well as for other categories of public officials, such as career soldiers in active service, police officers and agents, diplomatic and consular representatives abroad).

Thus, the Italian Constitution makes it possible to introduce, through ordinary legislation, in order to protect and safeguard the impartiality and independence of the judiciary, a prohibition on joining political parties for magistrates. The purpose of this is, therefore, to reinforce the guarantee that they are subject only to the Constitution and the law and in order to prevent the exercise of their functions from being overshadowed by the fact that they are associated with a party structure, which also entails internal hierarchical constraints.

In the case-law we are looking at, the contested provision has implemented the constitutional provision, stipulating that not only the fact of being a member, but also "the systematic and ongoing participation in political parties" amounts to a breach of the disciplinary code: therefore, alongside the formal fact of membership, the systematic alignment with one of the political parties in the

struggle for power is of significance and is also precluded for magistrates since, as is the case for membership, it is also liable to affect the independent and impartial exercise of their functions and to compromise their image.

This is the reason why the Court found that

> *"there has been no violation of the constitutional principles invoked by the referring court because, under the constitutional architecture, the independence of the judiciary from political parties and their methods is a value of particular significance and seeks to safeguard the independent and impartial exercise of the judge's functions, since the citizen must be reassured as to the fact that the activity of magistrates, whether as judges or public prosecutors, is not guided by the desire to favor one particular political party".*

In other words, according to the opinion of the Court, the requirement for the judiciary to be, and to appear, impartial is sufficiently significant to justify a restriction on the judge's political rights:

> *"the introduction of the prohibition is the corollary of a duty of impartiality which applies to the magistrate, extending also to his conduct as an ordinary member of the public, at all times of his working life".*

Nine years after Judgment no. 224/2009, the Italian Constitutional Court has decided on a similar question: Judgment no. 170/2018.

In this case, the Court considered a referral order from the Disciplinary Section of the Supreme Council of the Judiciary, which questioned the constitutionality of a legislative provision making it a disciplinary offence for magistrates (even those not listed among the judicial staff) to enroll in political parties, or participate in their activities in an "ongoing and systematic" way.

The referring court also observed that freedom of political association, which is guaranteed to every citizen under Article 49 of the Constitution, is an expression of the broader freedom of association under Article 18 of the Constitution and, together with the freedoms enshrined in Article 2 of the Constitution, constitutes an essential pillar of the democratic system. Therefore, in balancing it with the need to ensure the independence of the judiciary, it may be limited, but not completely eliminated, in particular in cases where the judge has been placed on leave for election purposes.

In its reasoning, the Court said that

> *"for magistrates, enrollment or systematic and ongoing participation in the activities of a political party, which is forbidden by the disciplinary offense, is one thing; having access to elected positions and public political office is another, and the law in force allows for this under certain conditions […]. It is not unreasonable […] to draw a distinction between these two scenarios, considering the latter to be not only permissible, but the exercise of a fundamental right, while at the same time judging the former to be a disciplinary infraction. Particularly in a regulatory context that allows magistrates to return to their judicial role in the event they lose the election or when their time in office or political assignment is over, the meaning of the principles of independence and impartiality must be preserved, as well as their appearance, as necessary characteristics of the figure of the magistrate, in every aspect of his or her public life. The prohibition in question provides a staunch defense of these principles, and thus must be applied to each and every magistrate, regardless of his or her position".*

In this case, the task of weighing different constitutional interests is particularly difficult.

Indeed, the political representation is, in principle, representation through the political parties, which, under Article 49 of the Constitution, are the associations that allow citizens to contribute to setting national policies following the democratic method, including by means of participation in elections. The Italian Constitutional Court is well aware of this fact and knows that no citizen, not even a citizen-magistrate, runs for office "alone":

> *"Therefore, just like running in political, administrative, or European elections, taking on duties in executive bodies at various levels necessarily presupposes a link between the nominee and the political parties".*

I know it may be difficult to understand this decision. Perhaps the Italian Court had to find a compromise among different opinions (we do not have the dissenting opinion). But, I believe that this judgment must be read in his statement of principle, for which in our legal order there is a

> *"disapproval of activities or behavior likely to create stable bonds between magistrates and political actors, which are visible to the public eye, and which, therefore, compromise not only independence and impartiality, but even the appearance of the same. That is, they compromise the substance*

and the appearance of principles that form the basis of the trust the judiciary must enjoy in a democratic society".

We can find here an implicit reference to the jurisprudence of the European Court of Human Rights:

"even appearances may be of some importance. What is at stake is the confidence that the courts in a democratic society must inspire in the public"

(ECHR, *San Leonard Band Club v. Malta* Judgment, 29 July 2004, § 60).

It seems to me that this is the same position as that of the Venice Commission, in the conclusion of the Report on the Freedom of Expression of Judges (June 2015). In its final part, the Report affirms that

"the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restriction on the freedom of expression, association and assembly of judges including their political activities"

(Report cit., p. 19).

On the merit, declaring the questions of constitutionality of the law unfounded, the Italian Court refers to the prudence of the trial judge, saying at the end that

"falls to the disciplinary court to determine, through a careful evaluation of the concrete case, whether the conduct of the magistrate taking a leave of absence may legitimately include involvement in party activities, or if this amounts to a disciplinary infraction, therefore incurring appropriate sanctions".

Finally, the Court acknowledged that the magistrates' fundamental right under the Constitution to political association and to associate more broadly – is a right that may be limited but not eliminated. But the Court held that the question was unfounded, holding that the legislature had carried out a reasonable weighing of the fundamental rights of magistrates against the important value of ensuring the independence and impartiality (and even the appearance thereof) of the magistracy. The Court saw no unreasonable inconsistency between the legislator's choice to make enrollment in political parties, and systematic and ongoing participation in their activities, punishable offences, while simultaneously permitting magistrates to stand for election and accept political appointments, since enrollment and consistent participation

in the activities of a party may be legitimate indicators of an alliance with a given party sufficient to raise doubts as to the impartiality of a magistrate.

One must also consider that the independence of the judiciary and of the judges means independence from all forms of economic power.

In this sense, the aforementioned Judgment no. 224/2009 stated that judges must be protected by the law of Parliament, avoiding

> *"the conditioning, including the appearance of conditioning, resulting from the involvement in the activities of subjects operating in the business or financial sector".*

This issue is closely connected with another aspect of the independence of the judiciary, their remuneration, for which I recall the Judgment no. 223/2012 of the Italian Constitutional Court.

In this judgment, the Court said that

> *"when ruling on questions relating to provisions on remuneration and rules governing pay increases for magistrates, also and above all with reference to the economic and financial measures that have delayed or otherwise regulated the operation of pay increases over time, this Court has held in general that the independence of the judiciary is also achieved through "the provision of guarantees relating to the status of the members of its various bodies regarding, inter alia, not only career progression but also financial remuneration"*
>
> (see judgment no. 1 of 1978).

In Italy, an automatic adjustment system is applied to judges so as to guarantee a regular pay increase, which is assured by law.

This mechanism constitutes an "inherent element of the structure of magistrates' pay", the ratio of which consists in the implementation of

> *"constitutional principle of the independence of the judiciary, which must be safeguarded also in financial terms (…) by avoiding inter alia their being required to make regular claims against other branches of state".*

The Italian Constitutional Court stated that this mechanism of salary increases

> *"operates in such a manner as to avoid arbitrary interference of one branch of state with another. It should also be added that these principles are also supported by the travaux preparatoires of the Constituent Assembly, which indicate that the absence of a specific indication of the financial*

independence of the judiciary did not entail the exclusion of that aspect from the overall conditions necessary in order to give effect to its autonomy and independence […] "

Besides, the specific nature of that legislation is also a consequence of the fact that, within the organisation of a constitutional state, the judiciary performs a function that is vested in it directly under the Constitution. For this reason, in adopting a mechanism providing for automatic increases in magistrates' pay, on the basis of these constitutional principles the law safeguarded the autonomy and independence of the judiciary from any form of interference that could, albeit potentially, impair that function through a requirement for contractual negotiations. Under that constitutional arrangement therefore, the relationship between the state and the judiciary, as an autonomous and independent branch, goes beyond that of a mere employment relationship under which the contracting party-employer can at the same time be a party to and regulate that relationship.

After all, one of the Founders of the United States of America, Alexander Hamilton, in 1788 wrote that

"next to the permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support"

(HAMILTON, The Federalist Paper, no. 79).

And this is the aim of Judgment no. 223/2012, which found unconstitutional a provision of the law that blocked the mechanism for automatic increases in magistrates' salaries.

To conclude: the Italian Constitutional Court plays an important and sensitive role, in effectively implementing the Constitution.

The Constitutional Court is the ultimate supervisor and the guarantor of the institutional framework, ensuring that constitutional rules and principles are respected by all: *"the Constitutional Court in Italy is in this way not only the "judge of the laws" but also the "judge of the powers"* (CARTABIA, 159).

It is a specific task of the Italian Constitutional Court to guarantee the independence of the judiciary, evaluating the conformity of the laws with the Constitution and striking a fair balance between different constitutional values, taking into account the principles of independence and impartiality of the judiciary and the judges.

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The Independence of the Judiciary: Case-Law of the Irish Courts

Sarahrose Murphy, Senior Executive Legal Officer to the Chief Justice of Ireland and Patrick Conboy, Legal Officer Supreme Court, Ireland

Introduction

The independence of the judiciary is a prerequisite to the rule of law and a core value for the foundation of public confidence in the administration of justice. As the Venice Commission stated in Part I of its Report on the Independence of the Judicial System:

> *"[T]he independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people."*[1]

The principle encompasses two aspects. The first requires judges be independent from the parties in a case and the subject matter of a dispute. The second is a manifestation of the separation of powers, which requires the judiciary as a collective to be independent and free from any pressures from other organs of government.

1. Council of Europe European Commission for Democracy through Law Report on the Independence of the Judicial System Part I: The Independence of Judges (March 2010) at 3.

Judicial independence in Ireland is guaranteed by Article 35.2 of the Constitution of Ireland which provides that judges are to be:

> *"independent in the exercise of their judicial functions and subject only to this Constitution and the law."*[2]

Following appointment to judicial office, all judges make a declaration as required by Article 34.6.1 of the Constitution that they will execute their judicial functions "without fear or favour, affection or ill-will", which illustrates the impartiality with which judges must adjudicate.

As commentators have noted:

> *"The rule of law is that characteristic of a civilised society that is created by the application of the law to every individual in an equal manner. The rule of law is therefore a pillar of civilised society and an independent judiciary ensures the rule of law."*

To borrow another masonry term, it can be said that the judicial arm of government acts as the key stone that ensures that the rule of law is upheld. The Irish Courts have on numerous occasions referred to the separation of powers as being a fundamental principle of the Constitution. The Supreme Court in *Attorney General v. Hamilton* (No. 1)

> *"The doctrine of the separation of powers under the Constitution has been identified by this Court as being both fundamental and far-reaching, and has been set out in various decisions of this Court in very considerable detail."* [3]

Ireland tends to rank highly in international projects which measure the independence of the judiciary. For example, in the 2019 EU Justice Scoreboard, Ireland scored fifth highest among the EU member states in the category of 'perceived independence of courts and judges among members of the public', behind Denmark, Finland, Austria and Sweden.

2. John O'Toole and Sean Dooney, Irish Government Today (3rd edn, Dublin) Gill & MacMillan, p. 200.
3. [1993] I.L.R.M. 81 at 96.

The World Economic Forum's 2018 Global Competiveness Report ranks Ireland 12th out of 140 countries.

Time does not permit a discussion of the Irish position in respect of all areas which are relevant to judicial independence. However, proposed legislation which is currently before the *Oireachtas* (Irish parliament) which would affect the processes relating to judicial appointments, judicial conduct, discipline and ethics are of particular interest and I will first briefly outline those developments. Sarahrose will then provide an overview of a case which is currently before the Irish courts, *Minister for Justice and Equality v. Celmer* (reported as *LM* by the Court of Justice of the European Union), in which a person, sought by Poland on foot of three European Arrest Warrants (EAW) for the purposes of conducting a criminal investigation in relation to drug trafficking, objected to his surrender primarily on the ground that legislative changes affecting the independence of the judiciary undermined the possibility of him having a fair trial.

1. Judicial appointments

The current framework

Pursuant to the Irish Constitution, judges are appointed by the President on the advice of the Government (the Executive arm of the State).[4] The sole discretion of the Executive in the process has given rise to a view that the system is overly politicised, although reports and studies have indicated that there is no evidence that judges have displayed favouritism to the parties which appointed them.[5]

In a recent High Court case, *Beades v. Ireland*, the Court found that the mere fact that a judge is appointed to judicial office on the nomination and advice of government does not mean that such a judge is not independent.[6]

The Courts and Court Officers Act 1995, as amended, sets out the eligibility criteria for persons seeking appointment to judicial office. To be eligible, a candidate must be a member of the legal profession, either a solicitor or a

4. See Articles 13.9, 34.1 and 35.1 of the Constitution of Ireland.
5. All-Party Oireachtas Committee on the Constitution, Fourth Progress Report – The Courts and the Judiciary, p. 7; Bartholomew, Irish Judiciary, 1971.
6. *Beades v. Ireland* [2016] I.E.H.C. 302 at para. 62.

barrister who has practised for a minimum or ten or twelve years, depending on the court on which the vacancy arises. In practice, successful candidates will have practised for considerably longer.
In 1994, on foot of a political controversy concerning the appointment of the then Attorney General (the legal adviser to the Government and chief law officer of the State) as President of the High Court, an appointment which ultimately brought down the then Government, the Judicial Appointments Advisory Board was established.

The purpose of the Judicial Appointments Board is to identify persons and inform the Government of the suitability of those persons for appointment to judicial office. Section 16(6) of the Courts and Court Officers Act 1995 states that:

> *"In advising the President in relation to the appointment of a person to judicial office the Government shall firstly consider those persons whose names have been recommended to the Minister pursuant to this section."*

In effect the Board acts as a clearing-house ensuring that candidates satisfy the eligibility criteria and once satisfied the Board will forward the eligible applications received to the Government for its consideration.

The Board is comprised of the Presidents of the five court jurisdictions in Ireland, the Attorney General, a representative each of the barrister and solicitor professions and three nominees of the Minister for Justice and Equality. In practice, the Board meet as and when a judicial vacancy arises. Such vacancies are advertised in the national press and on the Board's website.[7] The legislation stipulates that the names of seven candidates per vacancy are to be forwarded to the Government for consideration. There is no provision for the Board to rank candidates. In practice all applications received are forwarded to the Government. As the Government enjoys an exclusive constitutional discretion in such nominations, it is open to the Government to nominate a practising lawyer outside of the Board process. The Judicial Appointments Advisory Board process does not apply to the promotion of existing judges.

7. www.jaab.ie.

Review of the appointment processReview of the appointment process

In December 2013, the Government announced a public consultation process on examining the system of judicial appointments in Ireland. Submissions were invited in respect of issues such as the appointments process itself, the eligibility criteria, diversity and equality in judicial appointments. The Judiciary established an ad-hoc Judicial Appointments Review Committee (hereinafter, the 'Committee') of judges which made a detailed preliminary submission in January 2014. The Committee observed that:

> *"the relative success of the administration of justice in Ireland has been achieved in spite of, rather than because of the appointment system. The system of judicial appointment in Ireland is by now demonstrably deficient, fails to meet international standards of best practice, and must be reformed if in more challenging times it is to achieve the objective of securing the selection of the very best candidates for appointment to the Irish judiciary and thus contributing to the administration of justice in a manner which will sustain and enhance public confidence."*[8]

The Committee advocated for the establishment of a high level body to carry out research, receive submissions and, within a fixed timescale, develop comprehensive detailed proposals in a structured, principled and transparent way to make a radical improvement in the judicial appointments process.[9] The Committee recommended that the key to the reform of the appointments process rests in the reform of the Judicial Appointments Advisory Board. Among other recommendations, it indicated that: the number of candidates for a single judicial post submitted by the Judicial Appointments Board for Governmental decision should be reduced to three; the Board should be empowered to rank candidates and to designate any particular candidate as "outstanding"; should be specifically empowered to inform the Government when it considers that there are either no, or no sufficient candidates of sufficient quality; and that the Board requires adequate financial resources to enable it to carry out its functions.

8. Judicial Appointments Review Committee, Preliminary Submission to the Department of Justice and Equality's Public Consultation on the Judicial Appointments Process (2014), p. 9.
9. ibid.

Current legislative proposals

The review recommended by the Judicial Appointments Review Committee has not taken place, but the system of the appointment of judges is the subject of a Bill that is currently progressing through the Irish Parliament. The proposed legislation has attracted considerable controversy and has been the subject of intensive scrutiny in the Senate. At the core of the legislative proposal is the establishment on statutory footing of a Judicial Appointments Commission.

I wish to provide a brief background to the circumstances which gave rise to the current legislative proposal. A General Election was held in Ireland in February 2019 and the outcome of that election gave rise to no one political party achieving a basis on which to form a Government. The eventual result was that the party in office was able to form a minority Government with the support of a number of independent members of Parliament, with the abstention of the second largest political party.

It was a requirement of one of those independent members of Parliament that a commitment be contained in the Programme for Government that legislation be enacted to replace the Judicial Appointments Advisory Board with a new Judicial Appointments Commission. In addition, a commitment was given to reforming the judicial appointments process to ensure that it is "transparent, fair and credible."[10] In fulfilling that commitment, in 2017, the Judicial Appointments Commission Bill was published. That Bill, if enacted, would replace the current Judicial Appointments Advisory Board with a Judicial Appointments Commission which would comprise of 13 members: the Presidents of the five Courts,[11] the Attorney General, a practising barrister and a practising solicitor nominated by their respective representative bodies; a lay person who is a member of the Irish Human Rights and Equality Commission, 6 lay members appointed by the Minister of Justice and Equality and a lay chairperson (in contract to the current Board, which is chaired by the Chief Justice). Thus, there would be a lay majority.

10. Department of the Taoiseach, Programme for Partnership Government (2016) www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf.
11. Namely the Supreme Court, the Court of Appeal, the High Court, the Circuit Court and the District Court.

Commentary on the Judicial Appointments Commission Bills

The Bill has attracted considerable attention at both a national and European level. It has been considered by Council of Europe's Group of States against Corruption (GRECO). In respect of judicial appointments, GRECO had recommended in its Evaluation Report on Ireland 2014 that:

> *"the current system for selection, recruitment, promotion and transfers of judges be reviewed with a view to target the appointments to the most qualified and suitable candidates in a transparent way, without improper influence from the executive/political powers."* [12]

In its Interim Compliance Report on Ireland, GRECO questions whether the proposed composition of the Commission under the Judicial Appointments Commission Bill is in line with European standards which, in situations where final judicial appointments are taken by the executive, calls for an independent authority drawn in substantial part from the judiciary to be authorised to make recommendations or opinions prior to such appointments.[13]

In concluding, GRECO stated that its recommendation concerning judicial appointments remains not implemented.

Also commenting on the Judicial Appointments Commission Bill, the European Commission recently stated that:

> *"The envisaged composition of a new body for proposing judicial appointments raises concerns regarding the level of participation of the judiciary. The proposed composition of the Judicial Appointments Commission…, would not be in line with European standards (Council of Europe, 2010) and with the recommendation of the Council of Europe's Group of States against Corruption (Group of States against Corruption, 2018) which require that an independent and competent authority drawn in substantial part from the judiciary be*

12. Group of States Against Corruption (GRECO), Fourth Evaluation Round Report – Ireland, (2014) p. 46.
13. See Recommendation CM/Rec (2010) 12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2002, para. 47.

authorised to make recommendations or express opinions which the relevant appointing authority follows in practice." [14]

Notwithstanding the introduction of a revised mechanism as envisaged in the Judicial Appointments Bill, i.e. a Judicial Appointments Commission, any legislative proposal cannot usurp the constitutionally enshrined power conferred on the Executive pursuant to the Constitution to nominate individuals for judicial office. Any attempt to do so would be unconstitutional inasmuch as it would entrench on the role of the Executive.[15]

2. Conduct, Discipline and Ethics

Article 35.2 of the Constitution of Ireland provides that:

"All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

Whilst Judges are not answerable to the Executive, or indeed the Parliament, as an independent organ of state the judiciary must be held accountable to the People. However, under Article 35.4.1° of the Constitution a judge of any of the Superior Courts – that is a judge of either the Supreme Court, the Court of Appeal or the High Court – shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by both Houses of Parliament. By law, the same mechanism applies to judges of the lower courts – the Circuit Court and the District Court.

No judge, since the foundation of the State, has been removed from office under this mechanism. There have been only two occasions where, faced with the commencement or threat of impeachment process, two judges have decided to resign voluntarily.

In relation to the manner in which Judges comport themselves more generally, Ireland is somewhat unique in that there is no formal mechanism in place for litigants or members of public to make complaints in relation to

14. European Commission Brussels, (27 February 2019) SWD(2019) 1006 final Commission Staff Working Document Country Report Ireland 2019 https://ec.europa.eu/info/sites/info/files/file_import/2019-europeansemester-country-report-ireland_en.pdf., p. 57.
15. Hogan, Kenny, Whyte and Walsh, Kelly: The Irish Constitution, (2018, Dublin) [6.4.17]; *Attorney General v. Hamilton* (No. 1) [1992] 2 I.R. 250.

judges, either in respect of their judicial functions or their conduct outside of the court room.

As with judicial appointments, there have been calls for the establishment of a complaints mechanism applicable to the Judiciary. Ireland is somewhat out of step with other countries which share a similar legal system, background and tradition in not having a system to deal with judicial conduct which falls short of stated misbehaviour or incapacity.[16] As far back as 2000, a Committee on Judicial Conduct and Ethics, under the chairmanship of the then Chief Justice, Ronan Keane, recommended that a judicial council representing all members of the judiciary be established to deal with judicial conduct and ethics, judicial studies and the working conditions of judges. This body would be similar to the Judicial Commission in New South Wales and would share many common features with Judicial Councils in other countries. The Committee made detailed proposals as to how instances of judicial misconduct should be dealt with.

Draft legislation in the form of the Judicial Council Bill 2017 is currently before the Irish Parliament which, if enacted, would result in the establishment of an independent Judicial Council which would promote and maintain excellence and high standards of conduct by judges. [17] The Judiciary has largely been very much in favour of the establishment of such a body. The Council would also provide a means of investigating allegations of judicial misconduct. In this context, the Bill proposes the establishment of a Judicial Conduct Committee. In addition, it would facilitate the ongoing support and education of judges through a Judicial Studies Committee and through the establishment of Judicial Support Committees.

In respect of judicial ethics, as previously stated, upon entering into judicial office, each Judge is required to make and subscribe, in the presence of the Chief Justice, a solemn and sincere promise and declaration that they will uphold the Constitution and the laws to the best of their knowledge and power, without fear or favour, affection or ill-will towards any man.[18] The jurisprudence that has emerged in relation to judicial conduct and ethics originates in the main from judicial recusal and the objective or perceived bias that may

16. Seanad Debates, 22 November 2017, Judicial Council, second stage debate, Minister Charles Flanagan.
17. Explanatory Memorandum, Judicial Council Bill 2017 (Bill No. 70 of 2017).
18. Article 6.1° of the Constitution.

manifest itself in relation to a judge hearing a particular case. Recent decisions of the Supreme Court have sought to clarify and provide guidance on the test to be applied to determining whether a judges' continued involvement in hearing a particular matter may give rise to an actual or perceived bias.[19]

Minister for Justice and Equality v. Celmer/LM

It is widely accepted that the principle of judicial independence is under serious threat in a number of European countries. Given the globalised legal space in which national courts now operate and, in particular, the many instruments of cooperation used by courts in dealing with courts in other jurisdictions, it is perhaps unsurprising that national courts in one jurisdiction should find themselves adjudicating cases involving legal issues hinging on the independence of the Judiciary in another jurisdiction. This was at issue in the case of *Minister for Justice and Equality v. Celmer*[20] (or *LM*[21] as it is referred to by the Court of Justice), which came before the Irish High Court in 2018.

Proceedings in the High Court of Ireland

In *Celmer*, the surrender of the respondent was sought by Poland on foot of three European Arrest Warrants (EAW) for the purposes of conducting a criminal investigation in relation to drug trafficking. The respondent objected to his surrender primarily on the ground that legislative changes to the judiciary, the courts and to the Public Prosecutor undermined the possibility of him having a fair trial.

Section 37 of the European Arrest Warrant Act 2003, which gives effect to the Council (EC) Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedure between EU Member States prohibits surrender where it would be incompatible with the State's obligations under the European Convention on Human Rights (ECHR). The respondent argued that, if surrendered, the recent and proposed legislative changes in Poland created a risk of a flagrant denial of justice so that his rights, including his right to a fair trial pursuant to Article 6 ECHR would be violated. He argued

19. In this regard the decisions of the Supreme Court in *Bula Ltd v. Tara Mines Ltd* (No. 6) [2000] 4 I.R. 412 ; *Goode Concrete v. CRH Plc & Ors.* [2015] 2 I.L.R.M. 289; *O'Driscoll v. Hurley and the Health Service Executive* [2016] IESC 32 are instructive.
20. [2018] IEHC 119; [2018] IEHC 154; [2018] IEHC 153; [2018] IEHC 484.
21. Case C 216/18 PPU.

that these changes fundamentally undermined the basis of mutual trust between the issuing and executing judicial authorities such that the operation of the EAW system was called into question.

The Minister for Justice and Equality (hereinafter, the "MJE") submitted that the surrender should not be prohibited as the respondent did not demonstrate a specific risk to him.

The test for determining whether surrender is prohibited on Article 6 ECHR grounds is well settled in Irish jurisprudence. The individual involved must be exposed to a real risk of a flagrant denial of justice. In *Minister for Justice, Equality and Law Reform v. Brennan*[22] the Supreme Court held that it would take egregious circumstances, "such as a clearly established and fundamental defect in the system of justice of a requesting state", for surrender under the Act of 2003 to be refused on the basis of a breach of Article 6 ECHR rights.

In *Celmer*, the High Court considered a number of documents relied on by Mr Celmer. These included the European Commission document of the 20th December 2017 entitled "Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union"[23] which initiated the procedure under Article 7 TEU suggesting that the European Council find a clear risk of serious breach of the rule of law in Poland, and several Opinions of the Venice Commission on the situation in Poland.[24] Having found that these documents carried significant evidential weight, the High Court found that:

> *"The Reasoned Proposal of the European Commission is, by any measure, a shocking indictment of the status of the rule of law in a European country in the second decade of the 21st Century. It sets out in stark terms what appears to be the deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law."* [25]

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22. [2007] IESC 24.
23. A procedure allows the EU to act in case of a serious breach of rule of law in a Member State.
24. See 904/2017 adopted by the Venice Commission on 7th December 2017 (www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e) accessed 20th May 2019.
25. *Minister for Justice and Equality v. Celmer* (No. 1) [2018] IEHC 119, para. 123.

In *Aranyosi and Căldăraru,*[26] the Court of Justice found, in the context of prohibiting surrender on Article 3 ECHR grounds, that if a finding of general or systemic deficiencies in the protections in the issuing state is made by the executing judicial authority, it is then necessary that the executing judicial authority makes a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. In Celmer, the High Court found it necessary to make a request to the Court of Justice for a preliminary ruling on the following question:

> a) Notwithstanding the conclusions of the Court of Justice in Aranyosi and Căldăraru, where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?
>
> b) If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?"

Decision of the Court of Justice

The Grand Chamber of the Court of Justice delivered judgment on the 25th July 2018. The Court of Justice reiterated its finding in Aranyosi that limitations may be placed on the principles of mutual recognition and mutual trust between Member States in exceptional circumstances. The CJEU held that:

> *"… the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing*

26. (2016) C-404/15.

judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article1(3) of Framework Decision 2002/584."

The Court of Justice stated that the executing judicial authority:[27]

"must, as a first step, assess, on the basis of material that is objective, reliable and properly updated concerning the operation of the system of justice in the issuing Member State… whether there is a real risk connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundament right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment."[28]

The Court went on to address the requirements of the principle of judicial independence and concluded that:

"If having regard to [those requirements], the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalise deficiencies concerning the judicial of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step assess specifically and precisely whether , in the particular circumstances of the case there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk."[29]

The CJEU held that *"[f]urthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk"* and that if the information provided

27. (2018) C 216/18 PPU ,para. 43
28. (2018) C 216/18 PPU ,para. 61
29. (2018) C 216/18 PPU ,para. 68

does not lead the executing judicial authority to discount the existence of a real risk that the individual concerned will suffer in the issuing member State a breach of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the EAW relating to him.[30]

Final Judgment of the High Court

When the case returned to the Irish High Court, the judge requested further information from the issuing judicial authorities in Poland and the respondent submitted his own expert report from lawyers in Poland. The Court found, having been addressed on the lack of significant change to position in Poland, having taken into account the Reasoned Proposal as per its judgment of the 12th March 2018 and, having considered the tests in relation to independence of courts as set out in the judgment of the CJEU, concluded on the evidence that "there [was] a real risk connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached."[31] and that the deficiencies in the independence of the judiciary will affect the court level before which this respondent will be tried if he is surrendered.[32]

However, the High Court concluded that the systemic and generalised deficiencies in the independence of the judiciary in Poland of themselves do not reach the threshold of amounting to a real risk there will be a flagrant denial of this individual's right to a fair trial.

Finally, the Court emphasised that it is the courts of Poland and, perhaps if he were to be convicted and have that conviction upheld on appeal, the European Court of Human Rights, that will have to decide whether any trial of this respondent actually meets the Polish and ECHR standards respectively of the right to a fair trial before an independent and impartial judiciary and that the Irish court had been concerned only with whether the relevant threshold preventing surrender has been reached, in accordance with the principles laid down by the Court of Justice of the European Union.[33]

30. (2018) C 216/18 PPU, para. 76-78.
31. *Minister for Justice and Equality v. Celmer* (No. 1) [2018] IEHC 119, para. 93.
32. *Minister for Justice and Equality v. Celmer* (No. 1) [2018] IEHC 119, para. 97.
33. *Minister for Justice and Equality v. Celmer* (No. 1) [2018] IEHC 119, para. 124.

Appeal to the Supreme Court

At the conclusion of her judgment, the High Court judge certified as a point of law of exceptional public importance to the Supreme Court, as provided for in Section 16(11) of the European Arrest Warrant Act 2003. The Supreme Court has granted leave to appeal directly from the High Court under a provision of the Irish Constitution which provides for what is known as a 'leapfrog appeal', which bypasses the Court of Appeal (which occupies a jurisdictional tier between the High Court and Supreme Court) where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it. As a precondition, the constitutional threshold to be met in order for an appeal from the Court of Appeal to be granted must also be met, i.e. the decision under appeal must involve a matter of general public importance or it is in the interests of justice necessary that there be an appeal.

The appeal centres on the interpretation of the judgment of the CJEU in *LM*. It stems from reference by the CJEU in *LM* in its answer to the questions posed by the Irish High Court to breach "of the essence of his fundamental right to a fair trial." In the High Court, an issue arose as to whether this was setting a standard that was different to that set down in the jurisprudence of the European Court of Human Rights which has set a test of "flagrant denial of justice" in respect of Article 6 ECHR cases.

The appellant argues that a breach of the right to an independent tribunal is, without more, a breach of the essence of the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union. He contends that the High Court, in relying on European Court of Human Rights case-law, rejected this interpretation and concluded that, since other indices of a fair trial are present in the Polish system, the breach of the right to an independent tribunal was not of itself sufficient to amount to a flagrant denial of justice. The applicant argues that it may be necessary to seek clarification from the CJEU as to the correct understanding of its decision in *LM*, in particular as to the meaning of "flagrant denial of justice" under Article 47 of the Charter, and as to whether Article 47 of the Charter offers a higher level of protection to the right to an independent tribunal than the protection afforded under Article 6 ECHR.

The Supreme Court has granted leave to appeal and will be heard at the end of July, barring any unforeseen developments arising during the case management process.

Conclusion

A judicial commentator once observed:

> *"How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air; they know and care nothing about it until it is withdrawn."* [34]

Given the importance of the independence of the judiciary for constitutional democracies, it is vital that this principle be observed.

34. Lewis Lord Atkin (1983) at 176, cited in "Judicial Independence" by Justice CSC Sheller.

When judges speak about judges: How the Greek Council of State views judicial independence

Theodora Ziamou, Associate Judge, Council of State, Greece

Discussing common principles on major constitutional matters help to increase both the solidarity between courts and the quality of judgments.

In my report, I shall not attempt to analyse how judges have manifested an independent stance with their decisions on critical issues of social life. I shall rather discuss how judges themselves safeguard their role and constitutional status by addressing issues that directly challenge their independence. This is necessary because judicial independence is an abstract concept. It is considered to be one of the three pillars of the judicial system in Greece. The other two are judicial effectiveness and accountability. Although the personal and functional independence of judges is guaranteed explicitly in numerous provisions of the Constitution, it is a concept which acquires the importance that its carriers give to it and becomes most evident in the way judges themselves perceive their role in the exercise of their duties. In a number of judgments of the Greek Council of State (hereinafter, "CoS"), the constitutional principle of judicial independence is implemented as a yardstick against which legislative choices affecting the role of the judge in the legal system are measured. In chronological order, the examples from the jurisprudence of the Council of State used, all of them reached in plenary session, concern the following interventions into the workings of the judiciary: the characterisation of church councils as courts of law (CoS 825/1988), the possibility of filing a new claim before the Council of State once the previous claim was rejected

on formal grounds (CoS 2000/1992), the express mention in the judgments of the Council of State of the names of the judges that support a dissenting opinion (CoS 996/1994), the organization of the internal affairs of the Court by the legislator and not by the Court itself (Administrative Plenum 1/2008), the assignment to judges of administrative duties in the executive branch of government (CoS 195/2013), the cutting of salaries of judges on the basis of the second and third Memorandum during the economic crisis (Special Salary Court 88/2013), the legal possibility of claiming from the Greek State, compensation for citizens for wrongful and harmful acts of judges and judicial functionaries (CoS 1501/2014), the promotion of Vice-Presidents of the Court of Audit to the rank of General Commissioner of Justice in the Court of Audit (CoS 435/2019) and asset control of judges (CoS 813-814/2019).

1. Maintaining the identity of courts as courts of law

Even if the legislator names ecclesiastical councils, which are composed of higher members of the Orthodox Church and are granted the power to pass sentence on members of the clergy of the Church of Greece, as courts of law, these councils are not courts and their members are not judges in the sense of the constitutional rules on basic state organisation. No other courts are tolerated by the Greek legal order than the ones which have the institutional guarantees to administer justice in the way prescribed by the Constitution (Articles 87 and 93 et seq.) and which are constituted by judges who enjoy personal and functional independence. The decisions of such ecclesiastical councils are instead challenged before the Council of State by way of application for judicial review (CoS 825/1988).

2. Maintaining the authority of judgments

The constitutional principles of the separation of powers (Article 26 of the Constitution), of the equality of arms (Article 4 of the Constitution) and of judicial independence (Article 87 of the Constitution) have, as a consequence, that a legislative provision which allows for a renewed filing before the Court of claims that were previously rejected on the grounds of lack of authorisation (of the claims) by an attorney-at-law, violates the Constitution (CoS 2000/1992).

3. Enhancing the authority of judges

As early as in 1994 it was held that the provision of Article 93 para. 3 of the Constitution, which stipulates the obligation of publishing dissenting opinions as provided by law, taken together with the legislative provision that requires the explicit mention of the names of the judges who form the concurring and the dissenting opinions, encourages the exhibition of courage by the judges and this in turn reinforces the constitutionally guaranteed judicial independence (CoS 996/1994).

4. Maintaining the freedom to organise its own internal affairs

Judicial independence does not allow for legislative provisions which stipulate that judges should change the senate of their placement every 5 years with the aim of accelerating the administration of justice. The rational organization of the Court in a way that best serves the independence of the system of justice, belongs to the Court itself acting in plenum and does not allow for any interference of the legislator who tries, indirectly, to determine the formations of the Court's senates (Administrative Plenum 1/2008).

5. Staying within the boundaries of judicial capacity

On the basis of the constitutional amendment of 2001, the legislator is prohibited from assigning administrative duties to judges, so as to enhance their personal and functional independence. This is taken to mean that judges may not participate in civil service councils (such as competition councils for the civil service, social security councils, etc.) which operate without the basic guarantee of justice, that is, publicity of procedures, and which allow for the participation of judges in the workings of the executive branch of government (CoS 195/2013, 1835/2018, etc.).

6. Maintaining the status of the profession

The salaries of judges of all courts of law, irrespective of grade, instance or jurisdiction, are determined uniformly, neither on the basis of mathematical calculations nor by reference to the salaries of civil servants or private-law workers. There is a legal requirement posed by Articles 26 (separation and equality of state powers), 87 para. 1 (independence of the judiciary / personal

and functional independence of judges) and 88 para. 2 (salaries of judges determined with special respect to their vocation) of the Greek Constitution, that the salaries of judges be analogous to the salaries of the civil servants of other state powers, that is, the Members of Parliament and Members of Government, as a guarantee for the independent exercise of their duties. The Greek Constitution does not guarantee a specific level for the salaries of judges, but it does guarantee that their salaries remain stable and adequate to secure a decent living for them, relieved from economic worries caused by sudden and back-to-back reductions in their earnings. In this way, judges can devote themselves to the sole mission of administering justice, all by maintaining the prestige of their function and their equal status to members of the other two branches of government. In this constitutional context, the provisions of Statute 4093/2012, which introduced salary cuts on the basis of mathematical analogy and without taking into account all previous cuts, the retro activity of the reductions, the non-justifiability of the purpose of the allowances' cuts and the high constitutional position of judges in Greece (the President of the Supreme Courts can serve as a Prime Minister under certain circumstances), are not acceptable (Decision 88/2013 of the Court with special jurisdiction on the regulation of the salaries of judges).

7. Maintaining the judges' responsibilities as state organs towards the citizens

Judges and judicial civil servants (such as attorney-generals) are not exempted by the constitutional provision of Article 4 para. 5, which stipulates that Greeks, without distinction, must contribute to public burdens according to their capacities. This means that the Greek State may be held liable for a minimum compensation of blatantly wrongful actions of judges, that are linked directly to judicial error and cause substantial and inexcusable harm to individuals (CoS 1501/2014).

8. Preventing the abuse of the promotion system by the government

The promotion, by way of a Cabinet's decision, of a Vice-President of the Court of Audit to the office of the General Commissioner of Justice in the Court of Audit, who has primarily administrative duties and serves only for four years until retirement, requires the prior consent of a judge. The granting of this

prior consent is judicially reviewable by the Council of State (CoS 435/2019). This decision signifies a turn from the previous standing jurisprudence of the Council of State, according to which all matters relating to the promotion of judges to the highest ranks of hierarchy by way of a Cabinet's decision, are non-justiciable.

9. Maintaining the judges' responsibilities as civil servants

The legislative provisions governing the exercise of asset control over judges should be read as the will to enhance the prestige of judges against possible unfounded allegations and establish a climate of trust between citizens and judicial civil servants. In this sense, judicial independence is served by provisions that allow for asset control councils comprised primarily, but not exclusively, of ordinary judges and judicial civil servants (attorney generals). Similarly, it is not against judicial independence for judges - members of such asset control councils, are appointed by the President of the court in which they serve and not by the Supreme Judicial Councils of their jurisdiction, since this appointment does not affect in a permanent, time-consuming and exclusive way, their judicial status (CoS 813-814/2019).

While searching for the existence of judicial independence in legal practice, it is of vital importance to investigate how judges apply the conditions of the exercise of the profession to which they have chosen to devote their lives. It is there that one can see how judges respond to pressures posed by state and social forces to act, not as state employees who answer to the political wishes of others, but as civil servants who have been entrusted with the constitutional task of administering justice on the basis of the Constitution, the law and the exercise of their own free and independent judgment. Being a judge for life is indeed a safeguarded by the Constitution. The real challenge for the judge is to go through life staying true to the special demands of this position. In my opinion, the aforementioned examples of the jurisprudence of the Council of State show that the way to achieve this is by strictly fulfilling one's judicial duties and by rejecting any inclination to treat a case from another point of view (sociological, economical, etc.) or with an expediency other than the law and the Constitution itself.

Independent judge, objective judge and some other topics related to these issues in the European, Inter-American and Peruvian scenarios

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I. Introduction

Taking into consideration that the notion of procedural due process or the procedural dimension of due process, entails such right of any citizen to appear before a competent, independent, and objective authority for solving a conflict of interest or, an uncertain situation with legal relevance in the best conditions of equality, with definitive character and within a reasonable time, we can understand that when we talk about an independent or objective court (assuming both terms are synonyms or have different scopes), we are talking about the core elements of the aforementioned right, with all the consequences for the constitutional state.

That said, and given the importance of this topic, it becomes imperative to determine what is understood when we talk about an independent or impartial court, as well as state what is the scope recognised for the protection of such rights under International Human Rights Law (emphasising in this point which is provided in the European and Inter-American system), as well as in legal systems, such as the Peruvian one. In this context, and taking into account the special characteristics

of Peru's history on this issue, concerns such as the ones related to the independence and impartiality of the judge have become particularly relevant, which I will try to explain hereafter.

II. Treatment of the matter in the European human rights system

A preliminary approach and what is understood as being a Court

It is not a new issue to try to establish as a right, the possibility of having an independent and objective court, for Constitutional Law, nor for International Human Rights Law. For example, we can find references in Article 10 of the Universal Declaration on Human Rights, Article 14 of the International Covenant on Civil and Political Rights, Article 6.1 of the European Convention of Human Rights, and Article 8.1. of the American Convention of Human Rights.

At the constitutional level, we also find references to this topic, despite the fact that many times, such reference has not been direct, but considering the independence and impartiality as part of other rights. In this respect, we can mention as examples, those who include it as part of the right to due process (or fair trial, as the European Court of Human Rights usually calls it), as well as, those who address the issue as in Spain, before the final judgment number 145/1988 was issued, considering it an aspect of the right to a judge (ordinary), predetermined by law.[1]

That said, there are different things on which we should all be able to agree, or at least, familiarise ourselves with so as to identify the content and scope of the different concepts involved herein. In other words, having a common notion on the way in which some topics are understood, such as what ought to be understood when we talk about an independent and impartial court. And, to this effect, I will start by explaining what a court is.

1. As it is well-known, the right of an ordinary judge predetermined by law is regulated by article 24.2 of the Constitution of Spain. Said this, it is necessary to mention, as stated by Javier García Roca Vidal in a very comprehensive study, which is basis for our text, that in Spain such distinction among the different rights, involved herein, have not always been used with the same consistency. We suggest revising GARCIA ROCA, Javier and VIDAL ZAPATERO, José Miguel – *"El Derecho a un Tribunal Independiente e Imparcial"* (article 6.1 of the European Court of Human Rights: a specific guarantee of minimums before a rule of justice. In: GARCIA ROCA, Javier and SANTOLAYA, Pablo (Coordinators) – *La Europa de los Derechos: El Convenio Europeo de Derechos Humanos.* Lima, Palestra, 2004. p. 49.

To come closer to what is understood as being a Court, it is without any doubt interesting the way the European Court of Human Rights approaches this concept. It takes a much broader perspective as compared to the legal orders of some states, which have agreed to submit their legal jurisdictions to that important institution with jurisdictional competencies.

Hence, and within the rights, which part of the legal doctrine considers as related to access, development and finalisation of process[2], is the right to an independent and impartial court. It is after the case of *Belilos vs Switzerland* (final judgment issued on 29 April 1988), that the concept of what a court is, is given to those instances and/or institutions that:

- Decide in the exercise of their judicial powers.

- Comply with and/or abide by certain requirements.

Let us now analyse the content of both aspects. When we talk about a court in view of its capacity to decide in the exercise of its judicial power, it is understood that it is an institution that resolves issues in light of its legal jurisdiction according to certain regulations and acting pursuant to certain procedures previously established. This in turn, as Garcia Roca and Vidal Zapatero[3] state, implies having legal jurisdiction to be able to render decisions, which are legally binding.[4]

What has been just said takes us to different positions to what has been stated in some constitutions, or at least, to the way in which their relevant constitutional provisions have been understood. Without any doubt, there is a broad concept of the term Court, which does not rule out the possibility that the jurisdictional body could also have administrative powers.[5] It neither rules out that an entity may be considered to be a Court even if it is not entirely

2. In this effect, por example, we can find what is stated by REBATO PEÑA, María Elena – *La Evolución de la Jurisprudencia del Tribunal de Derechos Humanos*. In: DIAZ REVORIO, Francisco Javier (compiler) – Jurisprudencia del Tribunal Europeo de Derechos Humanos. Lima, Palestra. 2004, p. 49.
3. See in this sense GARCÍA ROCA, Javier and VIDAL ZAPATERO, José Miguel – Op. Cit. p. 328-329.
4. They adopt what was established in case *Benthem v. Holland,* on October 23, 1985.
5. In this regard, the provisions in case *Campbell and Fell v. UK*, with final judgment of June 28, 1984.

composed of professional judges. However, it is stated that having professional judges on a regular basis, underpins a greater independence of the judges.[6]

Moreover, it is not even understood as an obligatory requirement the fact that a Court has to be part of the judicial machinery.[7] Finally, what seems to be considered as a Court, in light of what was established in the case of *Campbell & Fell v. UK*, on 28 June 1984, they are independent and objective entities, established through statutory rules (and not necessarily by law in its formal meaning) that act pursuant to the guarantees given as a result of the jurisdictional activity carried out. To what has been just said, I would also dare to add that we should also be before entities with judicial pronouncements, which are legally binding, unless there is an opinion to the contrary.

On the other hand, when we talk about complying with certain requirements, to mention only some examples, we are thinking about guarantees (or situations which in turn can represent rights and guarantees) such as independence, impartiality or the term of office of those who are members of the Court. The aim of all this is to align perspectives that are in essence so different about this concept, such as the Anglo-Saxon or the Romanic-Germanic concepts, since both of them coexist in the current European scenario.

The longstanding idea about independence and its scope

Said in colloquial language, independence entails the possibility of taking its own decisions without anyone's intervention or interference, no matter if the person who wants to interfere is our hierarchical superior, someone of our own institution or work environment, or a third party or external entity to our entity or environment. In the cases contemplated above (hierarchical

6. By way of example, I would like to mention that the European Court of Human Rights considers as a Court, an institution comprised of officials and even, militaries. Examples of cases with courts comprised of officials are *ETH v. Austria* of April 23, 1987; *Ringeisen v. Austria* of January 16, 1997; or *Stalinher and Kuso v. Austria* of March 24, 1997. In case of militaries, it becomes pertinent to review what was stated in case *Engel, et al. v. Holland*, where it was decided that the Supreme Military Court of Holland, comprised by four military jurors and two non-military, not only was a court but one that could be considered as independent and impartial.
7. This is what was admitted by the European Court of Human Rights in cases such as *Sramek v. Austria* of October 22, 1984; or *Demicoli v. Malta*, with final judgment dated August 22, 1991. In this last case, it was even accepted that a parliamentary chamber, the House of Representatives of Malta, be accepted as a court, since it was exercising jurisdictional functions.

superior or someone from our entity), it would be considered as internal independence and, in the last cases (third party or external entity to our entity or environment), it would be considered as external independence.

In the specific case of the European system, what hast just been said is indeed presupposed, given the European Court of Human Right's concern focused on some main lines: the first one, clarifying that the scope of independence is not limited to the relationship between judges and governments, but it also includes the parties themselves.[8] The second one, which we will for sure mention later, that impartiality is a necessary condition but not enough to secure the independence of those who judge.[9]

However, the issue to which the European Court gives greater significance is the criteria to take into consideration to secure the independence of a Court. This criterion, already outlined in the well-known final judgment in the case of *Campbell & Fell v. UK*, are as follows:

- The type of appointment of its members.
- The term of office of its members.
- The existence of guarantees against external pressures.
- That the entity (Court) appears as independent.

With respect to the type or way the appointment is made as an evaluation variant, those systems that promote an appointment carried out by the Government, the Congress, or both, are not disqualified. The only thing requested is not to engage in gross interference or to exercise influence with improper grounds.[10]

And, with respect to the term of office, taking into consideration the aforementioned case of *Campbell & Fell*, the European Court opts for greater stability in the position as an aspect to assess when evaluating if there is actual independence or not. However, taking into account the text of the instant final judgment, it is not clear what are the parameters to state such initial assertion, since it is stated that an appointment for three years as a member of a disciplinary entity should be enough, for as long and to the extent it was an

8. We recommend reviewing to this effect what was resolved by the European Court of Human Rights in case *Ringeisen v. Austria*, with final judgment of July 16, 2001.
9. A good approach to this topic can be found in final judgment issued in the aforementioned *Ringeisen v. Austria*.
10. This was prescribed, among other cases, in the report issued by the then existing Commission when debating about *Zand v. Austria* on October 12, 1978.

unpaid position. In this context, the European Court of Human Rights would add that it would be difficult to find people willing to take over such a sensitive endeavour without being paid for it. The consistency of these arguments is not the best.

When talking about guarantees for the judges against external pressures, no formal protection mechanisms are established, but tacitly no circumstances are presented which in practice would make judges as mere executors of decisions adopted by others (and specially, by the governments).

In the same train of thought, the irremovability of judges will be sought, trying to protect them from the removal of their positions during their appointment, unless there are grounds for pleading legally established reasons. This is the sense followed in the aforementioned final judgment issued in the case of *Campbell v Fell*, and also the one issued by the same Court in Eccles, *Mc Phillips and Mc Shave v. Ireland*.[11]

That said, we have to acknowledge that despite the fact that the European Court of Human Rights claims to carry out an objective test, the determination of the last criteria required to specify if we are before an independent Court, the appearance of independence is not an easy task. Let us compare what was established in *Sramek v. Austria* (1984) with what was previously established in *Rengeiser v. Austria* (1971). In the instant case, we are before a guideline, which being established as obligatory, should be evaluated with more rigorous criteria, unless there is an opinion to the contrary.

Impartiality as a notion consistently used by the European Court of Human Rights

It is not difficult to find references in the European Court of Human Rights case-law regarding impartiality or if we are in front of an objective Court. Pursuant to some research done, there are over two-hundred cases in the case-law of the Strasbourg Court on this issue.[12]

However, while reviewing what was established in these cases, more than stating a definition, the final judgments issued by the European Court of Human Rights, highlight the importance of this topic (*De Cubber v. Belgium*, 1984) or gives a notion, whether in the line of understanding impartiality as absence of

11. Case adopted with the same number 12839/87.
12. To this effect, GARCIA ROCA, Javier and VIDAL ZAPATERO, Jose Miguel, op. cit., 337, despite the fact that the authors clarify that more than half of the cases mentioned are related to security courts in Turkey.

injury[13] or interpreting it as indifference, neutrality, or a possibility of solving according to the law and not according to personal conviction of the judge.[14]

For all the foregoing reasons, this notion of impartiality or that of objective Court, very associated with the notion of an independent Court, would imply the following:

- A subjective dimension, linked to the internal conviction formation of a judge in a certain case; and an objective dimension, usually articulated with the necessity of establishing certain guarantees in favour of whom is being judged. The subjective dimension, actually related in Spain with the bonds between the judge and the parties, if they could have affected their neutrality, is a presumption. The objective dimension, related in the Iberian Peninsula with the bonds between the judge and the object of the process, is required. These considerations, as well as other provisions about this topic, have been adopted in two particularly relevant final judgments: *Piersack v. Belgium* (1982) and *De Cubber v. Belgium* (1984).[15]

- The appearance of impartiality must be present, considering it of special importance in order to avoid losing the public trust in the existing jurisdictional bodies. What this involves is specified in another case against Belgium, which is prior even to *Piersack and De Cubber*; it is the *Delcourt* case, with final judgment on 17 January 1970. In this case, the European the European Court of Human Rights, stated as follows:

  "[...] justice must not only be done, it must also be seen to be done"

That said, the determination of whether this appearance is met or not, will always be arguable. There is reference then to the necessity to face an objectively justified fear, concept that, in our opinion, could have an important vagueness and even, some suggestion of subjectivity, which ought to be reversed.

- Entails an assessment done on a case-by-case basis: this is known as the Hauschildt doctrine, established in the final judgment issued in case *Hauschildt v. Denmark*, issued on 24 May 1989.

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13. Is what appears from *Piersack v. Belgium*, case resolved in 1982.
14. In the same line of reasoning, what was resolved in case *Huber Morel v. France*, with final judgment dated June 6, 2000.
15. A question that could well be asked is how to verify in these cases, respect of the so-called subjective impartiality. Normally, in Europe, after recognising the issue complexity, reference is made to case *Kyprianov v. Chipre*, with final judgment of January 27, 2004.

From there on, the European Court of Human Rights expanded what was stated in some of its other pronouncements, stating that it is enough for a judge to (a) participate in preparatory, preliminary, or investigative activities in a process to question partiality. For this, it is also relevant to establish what the objective and nature of the adopted measures in the process are. All this may also have an important subjective burden, which would have to be neutralised.[16]

Along the line of neutralising the risks associated with this situation, it is interesting to link some topics in which the judicial impartiality is discussed before the European Court of Human Rights. To this effect, we can find the following cases:

- When the judge acted as a prosecutor during the preliminary investigation (*Piersack v.Belgium*).
- When investigative and judiciary functions overlap, which also include sanctions such as:

  a) The judge carried out an investigative act (*Bulut v. Austria* 22.02.1996).

  b) A judge has rendered decisions such as pre-trial detention (*Hauschildt v. Denmark*; *Padovani v. Italy* of 02.26.1993; *Perote Pellón v. Spain* of 07.25.2002., etc.).

  c) The judge issued a bill of indictment (*Castillo Algar v. Spain* of 08.28.1998).

  d) The judge issued an opening order for trial after the prosecution report (*Saraiva de Carvalho v. Portugal* of 04.22.1994)

  e) The judge heard pleadings at the pre-trial stage (Saint Marie v. France of 12.16.1992).

- If the judges had already given their opinion about the culpability of the defendant in a different proceeding against such person (*Rojas Morales v. Italy* of 11.16.2000; Ferrantelli and Santagello v. Italy of 07.07.1996).

16. In this particular case, the judges who convicted a persona gave him also five days of imprisonment, considering that they had been insulted during the process. Here, according to the European Court, the subjective impartiality is broken, based on two considerations: the conflicting relationship between the judges and the involved party; and the conviction that they had that those judges could have given a less drastic measure to the one given. I therefore recommend revising, among others, what was stated by GARCIA ROCA, Javier and VIDAL ZAPATERO, Jose Miguel. Op. cit. p. 342.

- Attendance of non-judges during Court deliberations:
  a) Prosecutors (*Delcourt v. Belgium*).
  b) Government representatives (*Kress v. France*, among others).
  c) Government authorities (*Sovtransavto Holding vs Ucrania* of 07.26.2002).
- Courts comprised by judges who had already given their opinion about the issue (*Oberschick v. Austria* of 05.23.1991; *Ferrantelli and Santagello v. Italy*).
- Existence of ideological considerations or those related to the judge's beliefs (professional or member of a jury) who question his/her ability to judge with impartiality (*Hotm v. Sweden*, of 11.25.1993, where political bonds between jurors and one of the parties is claimed. And in cases *Remli v. France* of 03.30.1996, *Gregor v. UK* of 02.25.1997, and *Sander v. UK* of 05.09.2000 where racist claims were raised).
- Judicial impartiality and media. Media interviews of judges (*Buscemi v. Italy* of 12.16.1999 and *Lavents v. Letonia* of 11.28.2002).
- Media pressure on judges (*Sunday Times v. UK* of 04.26.1999 and *Worm v. Austria* of 08.29.1997).
- Presence on judging entities of personas with interests linked to one of the parties (*Holm v. Sweden*, where the jury belonged to the same party of one of the parties. *Langborger v. Sweden* of 06.22.1989, where judges had been recommended by associations which were contrary to one of the parties; *Pescador Valero v. Spain* of 06.17.2003, where the judge was an associate professor of the college he was judging; *Sigurdsson v. Iceland* of 04.10.2003, where the supreme judge is paid off with a debt held by his wife with a bank; *Wettsein v. Switzerland* of 12.12.2000, where the judge was the lawyer of one of the parties in a different proceeding).
- Even in such proceedings which we will call disciplinary, despite the understanding that each State has a what ought to be understood as criminal or administrative-sanctioning, the European Court of Human Rights shall assess the judge's impartiality.(This is what happened, to quote a case, in *Demicoli v. Malta*, where the Parliament is not objective when sentencing a journalist who had offended them).
- Work of entities with consulting and jurisdictional functions (in one case or in a controversy), in cases: *Procola v. Luxembourg* of 09.28.1995; Mc *Gonell v. UK* of 02.08.2000; and *Kleyn, et al. v. Holland* of 05.06.2003.

- Military courts, especially the British ones, in cases such as *Findlay v. UK* of 02.25.19977; or *Cooper v. UK* of 12.16.2003).
- Turkish State Security courts, in cases *Incal v. Turkey* of June 9, 1998 and *Ocalan v. Turkey* of March 12, 2003.

Very interesting and illustrative elements and considerations have been generated in Europe. Certainly, some of them have inspired other contexts. However, it is also fair to say, that both in America and in Peru in particular, things have gone differently, as we will see hereinafter.

III. The Scenario Outlined by the Inter-American System

Some particularities and a broad notion of court and a mention of competent court

A literal reading of Article XXVI of the American Declaration of Human Rights recognises the right to have, within the scope of criminal proceedings, the right to a fair trial before a competent court, a court previously established by law. This text, which seems clearly incomplete, will soon be qualitatively improved by the provisions of Article 8.1 of the American Convention on Human Rights, which states the following:

> *"(...) 8.1. Everyone has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature (...) ".*

Soon the Inter-American Commission, in reports such as those referring to the cases of Cuba (1983) or Chile (1985), also highlighted the importance of having a judiciary with independent courts, which is a central element for the realisation of human rights in general.[17]

The Inter-American Commission also sought to make it clear that there was no need to adhere to a literal reading of the American Declaration, and therefore, the requirements of a competent court and impartial process are not limited to the criminal scope. Finally, it was specified that there was a set of concrete practices that constituted a violation of the right to an independent and impartial court.

17. In this respect is the report on Cuba (1983), more specifically on its page 67, paragraph two; or the report on Chile (1985), especially in paragraphs five and six of page 162.

With regard to the latter, we can find cases such as the ones listed below:

1. Cases in which the judges accept and comply with government regulations.
2. Use of mechanisms such as transfers or dismissals for those judges that are in conflict with the government's interests.
3. Appointments based on political criteria.
4. Lack of guarantees for the irremovability of judges.
5. Appointment of judges by military authorities.
6. Granting the police the power to issue custodial sentences.
7. Self-limitation of judicial work, especially when controlling acts decided and approved at governmental level.[18]

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8. Special courts, whether they are linked to military dynamics or planned to analyse certain matters in particular.[19]

However, it will be the responsibility of the Inter-American Court to make some of the most important contributions on this matter in our region.

One of them is clearly based on the decision made by the Court in the case "Peruvian Constitutional Court", or the interpretation that it gives to the concept

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18. In this line is, to quote some cases, the one indicated in the Annual report 1979 · 80, in the part referred to Paraguay (more directly the fifth paragraph of its page 111), the one indicated in the Guatemala report of 1983 (and more properly in paragraphs fourteen and fifteen of its page 96); or what was said in the Annual Report 1983-1984 about Haiti (situated in the fifth paragraph of its page 111). A good synthesis of this evolution is found in O'DONNEL, Daniel. Protección Internacional de los Derechos Humanos. Lima, Comisión Andina de Juristas, varied issues, p. 158-159.
19. In the always delicate military issue, the Commission has sustained for more than a decade that the substitution of the ordinary courts for military justice has normally meant both the subordination of the military judges to the political power as to its lesser technical preparation, a serious detriment to the guarantees that all the processes must enjoy. In this regard were, for example the report "Diez Años" (especially on its page 338); or the reports on Argentina (1980), specifically in the first paragraph of its page 745, in the case Guatemala (1983), more directly on page 103, paragraph 32; or Chile (1985), especially in paragraphs 139, 140 and 143, located between pages 199 and 200.

"Court". In fact, in paragraph 77 of the sentence issued in this case dated 31 January 2001, the Inter-American Court noted that:

> *"(...) Every person subject to a trial of any kind before a State entity must have the guarantee that said entity is competent, independent and impartial."*

The concept "court" is not necessarily confined to jurisdictional institutions. As noted by the court in the case of *Baruch Ivcher v. Peru* (with sentence dated February 6, 2001), it is important to establish these courts previously. Said courts being understood in the broad sense, (keep in mind that in the case of "Constitutional Court" this evaluation is applied to the Peruvian Congress, and in the case of *Baruch Ivcher* it is applied to a government agency responsible for naturalisation and migration issues[20]). If not, the competence, impartiality and independence standards that the American Convention seeks to ensure would be violated'.[21]

Then, a certainly remarkable difference between the Inter-American and the European models was established. Such a difference is related to the fact that the former establishes the judge and/or competent court, i.e. the one called to render justice within previously established parameters (territory, subject, degree, time, and amount) as an element to protect as well. When addressing this issue, it is necessary to note how in the scenario of the competent judge it will be common to find, for example, doctrinal or jurisprudential references to concepts such as "natural judge" or "judge predetermined by law". Moreover, in many cases they are used as synonyms. That said, it is important to note

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20. The case of the "Peruvian Constitutional Court" is linked to the impeachment (a procedure of political trial and preliminary hearing that the Congress of Peru may take against some senior state officials) initiated by Fujimori congressmen to the detriment of those members of the Constitutional Court, maximum interpreter of the Peruvian Constitution, which considered unconstitutional the law for which they wanted to allow a third consecutive election of Alberto Fujimori Fujimori to the Presidency of the Peruvian Republic.
On the other hand, in case *"Baruch Ivcher"*, what happened had a different origin and connotation. Ivcher, an Israeli-born and Peruvian naturalized citizen, became an important critic of Fujimori's government due to the news that were disseminated by a channel of his property. Taking into account that the Telecommunications Law of Peru did not allow persons with a nationality other than the Peruvian one to be majority shareholders of a media company, rudely, and by a resolution issued by an officer of a grade below the competent one, declared the administrative act by which Ivcher had acquired Peruvian nationality void. That way, he was stripped of the communication medium through which he had been questioning Fujimori and his environment. In both situations, as it can be clearly seen, the violation of rights had not been committed or validated by bodies with jurisdictional competencies.
21. In this regard are paragraphs 114 and 115 of the sentence issued by the Court in case *"Baruch Ivcher"*).

that strictly speaking, although linked together, the terms "natural judge" and "judge predetermined by law" do not mean the same thing but, in any event, we find in the court case-law certain cases that relate to both, even when the processes in which the competences of the so-called "military justice" are discussed in terms of natural judge are more noticeable.

In other words: the concept of natural judge, which arose at a time when not all the people were judged by the same judges, suggests that we should be judged by someone who, due to the nature of his/her activities is entitled to do so. Thus, for example, in Peru it is a military judge who should decide in the proceedings initiated against another military man for the alleged crimes of function attributed to the latter. That judge, however, would not be able to prosecute or sentence a civilian or a retired military man. On the other hand, the idea of the judge predetermined by law is rather linked to the distribution of jurisdictional competences carried out in application of the principle of legality. It would violate the right to a judge predetermined by law to submit a dispute to a civil judge when it is foreseen that such type of cases are to be prosecuted by a criminal judge, only to mention an example in this regard.

The Inter-American Court abounds in competent judge precedents. However, without a doubt, the most noticeable cases are linked to military justice and the problems related to the right to a natural judge.

Thus, there are cases such as the case of *"Loayza Tamayo"* where, in the Court's view, military judges encroached on the competence that belonged to the ordinary judge (taking up a court case) and the powers of investigation that both the National Police and the Public Prosecutor have[22]. Further, the dispute related to the determination of military justice's competences, as well as a comment on "faceless" (anonymous) judges should be considered.

With regard to "military justice", even before the judge's decision in the well-known case of *"Genie Lacayo"*, with a sentence dating bach to 29 January 1997, it is not seen as opposed to the Convention.[23] Something that would certainly be considered a violation of this treaty is to subject civilians to military courts[24]

22. In that vein is paragraph 61 of the sentence "Loayza Tamayo", dated September 17, 1997.
23. We recommend seeing what paragraph eighty-four of the sentence for case "Genie Lacayo").
24. Recognized in sentences issued in cases "Castillo Petruzzi", dated April 30, 1999 (especially its whole paragraph 128); "Cantoral- Benavides", dated August 18, 2000 (with special emphasis in its section 112), or "Las Palmeras", dated December 6, 2001 (and more exactly, in its paragraph 52).

or, even in case of military courts, not limiting such courts' work to military crimes[25], even if the intention is to judge human rights violations[26] or, finally, if a former or retired military man is prosecuted.[27]

The topic of "faceless" (anonymous) judges undoubtedly demands additional comments. It is necessary to point out that its implementation is not defined as a violation of the rights we have been analysing, but only as a limitation to them; a restriction that, as it would be inferred from a reading of the Court's decision in the case of *"Castillo Petruzzi"*, is almost at the threshold of what is considered reasonable, especially if, as it usually happens when a system of judges of that kind is established, such judges cannot be challenged.[28]

In short, herein we have several undoubtedly important clarifications about the independence and impartiality of judges that would be well worth not to ignore. Let us move on now to the topics of analysis for which we have been invited, establishing the comparisons and projections that may result.

Returning to the concepts of "Independence and Impartiality" and a comparison between the European Court's view and the Inter-American Court's view.

A review of the jurisprudence of the Inter-American Court of Human Rights with regard to independent courts shows that, although there is no specific definition of the term "independence", the way in which it is used gives an idea in this respect, even though the concern of the Inter-American Court has been more oriented to explain if in certain cases in particular we are or are not before an independent court or, if not, to determine whether or not we are facing a situation that is contrary to judicial independence by analysing the acknowledged case.

It is along this line of thought that we interpret the assertion issued by the Inter-American Court, which considers that the idea of an independent court is preserved by a correct system of appointments, or by securing tenure in office as a way to guarantee that the judge is free from pressure, especially of an external nature[29].

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25. It is advisable to review what is mentioned in '*Durand y Ugarte*', with sentence dated August 16, 2000, and more specifically in Paragraph 117; *"Cantoral-Benavides",* specially its paragraph 113; or *"Las Palmeras"*, especially what is mentioned in its paragraph 52.
26. In that sense is resolution for case *"Durand and Ugarte"*, especially in paragraph 118.
27. A good example of this topic is found in case "Cesti Hurtado", with sentence dated September 26, 1999, and more specifically in its paragraph 151.
28. Here we recommend reviewing the paragraph of the sentence issued in case *"Castillo-Petruzzi"*).
29. We recommend reviewing the information provided in paragraph 133 of *"Castillo Petruzzi"*.

That fully coincidies with the arguments of the European Court of Human Rights in cases such as *Findlay vs United Kingdom*, a Judgment dated 25 February 1997.[30]

The Inter-American Court of Human Rights will also insist that it is part of judicial independence to appoint ordinary judges under legally established rules.[31] It will also be said that it does not seem to correspond to the idea of an independent tribunal those cases in which the members are appointed by high commanders of the Armed Forces, as is the case with military justice of several Latin American countries.[32]

The same can be said about impartiality. Just as we cannot find a definition of independence in the jurisprudence of the Inter-American Court (but from the work done we can draw a notion thereon, including the ability of the judge to act and exercise his competence without interference, either from colleagues and/or hierarchical superiors within the so-called "internal independence", or from officials of other institutions, and especially the President of the Republic, congressmen or ministers of State, within the so-called "external independence"), we cannot find a definition of impartiality, but we do find a set of elements that allow us to have a clear notion about it.

> "(...) the idea of an independent court is preserved by a correct system of appointments, or by securing tenure in office as a way to guarantee that the judge is free from pressure (...)"

It can be understood then that when we speak of "impartial court" or "impartiality" we think that controversies or situations of uncertainty the resolution of which is being sought should be addressed in the most objective way possible, leaving aside the personal interests and/or relationships that could occasionally arise between the judges and or problems they may have to face.

This general statement is corroborated when we appreciate in detail what was stated in several pronouncements of the Inter-American Court of Human Rights. Thus, for example, the impartiality of the military courts will be discussed in cases such as *"Castillo Petruzzi"* (and more specifically in its paragraph 130), *"Cantoral Benavides"* (especially in paragraph 114) or *"Las Palmeras"* (mainly in paragraphs 50 and 53).

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30. And more specifically what is mentioned in paragraph 73 of said sentence and in accordance with the criteria affirmed by, among others, SALADO OSUNA, Ana. The Peruvian cases at the Inter-American Court of Human Rights. Trujillo. Normas Legales, especially p. 298.
31. In this regard, what is mentioned by the Inter-American Court of Human Rights in cases *"Castillo Petruzzi"*, basically in its paragraph 129, or "Baruch Ivcher", especially in paragraph 112.
32. Review what is mentioned, among others, in paragraph 130 of case *"Castillo Petruzzi"*.

The question as to whether or not the Congress can be an impartial Court is also under discussion. This is related to the case of "Peruvian Constitutional Court", when the parliamentary process of impeachment is analysed, as a mechanism by which constitutional, political and even criminal liability of government officials is determined in Peru (or at least, that determination is entrusted to the corresponding authority). It shall be concluded thereby that impartiality is not guaranteed if, amongst other things, those who were originally complainants then become judges.[33]

As noted by Ana Salado,[34] to clarify this idea, if in the Inter-American context there are lots of assumptions and definitions that have, on the other hand, been thoroughly defined and explained in other contexts, the coincidence of perspectives on this subject are clearly evident: to assume impartiality as a central requirement for the full validity of the constitutional state and a democratic society; or to understand it as a necessary condition to ensure the development of different aspects of due process or a fair trial, are some constants on both sides, but not the only ones.

Here, as in Europe, the personal impartiality of the judge is presumed to be iuris tantum, and the relevance of facing impartiality is recognised, a concept that, in this case, due to its inaccuracy, generates the same qualifications already expressed in the analysis of the European system. In this context, the practical use of the two ways to evaluate the impartiality of the judge, the so-called "subjective evaluation" and "objective evaluation" becomes undeniable.[35]

Strategies in many coinciding points, and in which the existing differences do not generate contradictory or conflicting situations. In any event, they are not only useful as inputs to support what can or should be done in the face of undeniably relevant issues: let us not forget that, in addition to what is implied by a well-known provision of the Vienna Convention, a sort of treaty of treaties at a global level, whereby domestic law cannot be invoked to disregard international obligations; at least in Peru, and thanks to the Fourth Final and Transitory Provision of the Constitution of 1993 and article five of the Preliminary Title of the Constitutional Criminal Code, it has been undoubtedly established that the understanding of the content and other scopes of the different Fundamental Rights must be done in accordance with the regulations that would have been made in the different treaties signed and ratified by Peru, as well as with the sentences issued by the entities whose interpretation of these treaties is binding.

33. This is mentioned in paragraph 78 of the sentence to which we have just referred.
34. We refer here to SALADO OSUNA, Ana Op. Cit - Loc. Cit.
35. In the same line, SALADO OSUNA, Ana. Op. Cit- Loc. Cit.

It is now necessary to see how this issue has been addressed in Peru, a state in which respect for fundamental rights (and especially for due process) unfortunately has not been very common. We must not forget that, during the nineties, Peru was the State that received the most recommendations from the Commission, as well as sentences from the Inter-American Court, basically due to complaints related to violation of rights such as due process and personal freedom. Let us therefore proceed to address this task and then formulate our own conclusions in this regard.

IV. Treatment accorded to these issues in the Peruvian legal order

An incomplete development in the regulation of these subject matters

An analysis of the evolution of the Peruvian legal order shows how there has been a progressive incorporation of the right to due process and the elements that shape it, although this has not occurred systematically. In addition, its embodiment has occurred with a few inaccuracies and ambiguities.

Thus, for example, in the Political Constitution of 1979, there was no explicit reference to due process, although it is true that several of the aspects that make up its procedural dimension were present therein as part of the then erroneously denominated "Guarantees of the Administration of Justice ", provisions set forth in Article 233 of said constitutional text. However, it was a context in which there was still a rather limited understanding of due process which, thanks to the effort of legal doctrine, the work of certain judges, certain changes introduced in the 1993 Constitution, but especially, a very interesting jurisprudence of the Peruvian Constitutional Court, nowadays fortunately responds to very different parameters, qualitatively better, but not exempt from some difficulties and/or ambiguities.[36]

Something similar could be said about concepts such as the independent judge, the competent judge and the impartial judge. Even the Provisional

36. Unfortunately this is not an appropriate space to address the evolution and current state of the situation of a matter of undeniable relevance, to which many countries have given a good deal of attention and in which we have invested our best efforts. That said, if the reader has the interest and patience to review our point of view on this matter, and specially how it has evolved in Peru, I would like to suggest consulting my book "Jurisdicción Constitutional, Impartición de Justicia, y Debido Proceso: un acercamiento más didáctico a sus alcances y problemas." In: ESPINOSA-SALDANA BARRERA, Eloy (Coordinator) - Derechos Fundamentales y Derecho Procesal Constitucional, Lima, Jurista, 2005, especially page 59 *et seq*. 18.

Statute of 1821, passed by Mr José de San Martín, contained pronouncements such as the one shown below:

Section Eight - Article 1

> "(...) Every citizen has the equal right to preserve and defend his honor, liberty, security, property and existence, and shall not be deprived of any of these rights, except when such deprivation is due to the pronouncement of the competent authority, issued according to Law."

Then, the different Constitutions began to include provisions on independent, impartial and competent judges and/or courts in an incomplete and impartial manner. That said, from the beginning of our history, the prosecution of some crimes was assigned to authorities such as the Captaincy General or the Public Security Court created in 1822. In 1832, a law was passed to regulate the jurisdiction between the Military Courts and the Ordinary Courts of First Instance, and in the Constitution of 1834, the Supreme Council of War had already been incorporated into the most relevant norm of our legal order. And from then on, a recurrent matter has always been to determine how to control the excesses that were committed and continued to be committed within those spaces[37], which were always configured as exceptions to a rule that, at least initially, were not even defined clearly. In summary, there is an incomplete and unsystematic treatment of a matter of this relevance, and should there still be any doubt about it, we only need to see treatment given to matters such as judicial independence and impartiality to corroborate what has been said.

Just by reading the 1993 document you can realise that our current constitution does not include articles such as Article 10 of the Universal Declaration of Human Rights, Article 25 of the American Declaration, Article 14.1 of the International Covenant on Civil and Political Rights, or Article 8.1 of the American Convention on Human Rights. Instead, and under the misleading heading of "(...) Are principles and rights of the jurisdictional function" various sections of Article 139 include references such as the following:

- The requirement to observe due process and jurisdictional protection, and subsequently, to incorporate aspects related to the judge predetermined by law and/or the natural judge (subsection 3).
- The acknowledgment of the independence in the exercise of the jurisdictional function, and subsequently, to specify a series of situations in which

37. A very good summary of what happened in this regard is found in DONAYRE MONTESINOS, Christían - La reforma de la Justicia MIlitar. Lirna, Jurista.

it is understood that the independence of judges could be undermined (subsection 2).

Along with all this, Article 146 of the Constitution of 1993, in addition to pointing out some incompatibilities for those who exercise jurisdictional function, and determining the remuneration that a Peruvian judge can receive, it stipulates that the State must guarantee judges' judicial independence, irremovability, permanence in the service and a decent remuneration.

Now, and in the face of a normative approach that is not exactly the best structured in technical terms, fortunately at the jurisprudential level some important contributions have been made, but they still do not resolve all the existing ambiguities and limitations. Therefore, if we had to group at least in some ideas everything said and done about it, we should do the following:

- The existence of a trend to expand the scope of action and protection of the right to due process in general, as well as of some of the aspects that compose it in particular.
- The understanding that impartiality and judicial independence are closely related concepts, although it does not always seem to be sufficiently clear the way in which this linkage materialises.
- The additional concern for categorising the issue of legal jurisdiction, especially if having to deal with particularly sensitive matters, such as, for example, those related to the so-called "military justice".

Let us then move on to briefly discuss the state of the matter, its virtues and risks.

The faces of the current state of the matter, its merits and difficulties

A very comprehensive understanding of the concept "Court" in relation to these matters

A first comment on the subject cannot disregard the fact that at the doctrinal and jurisprudential level, a broad understanding of the right to due process has taken shape in Peru, thereby turning towards the North American formulation of the concept, where the term "due" does not only refer to a compliance of guidelines and/or procedures, but involves a commitment to act in accordance with certain values, among which justice stands out or seeks to stand out. Here, on the other hand, the term "process" is not limited to a judicial process, but covers all acts of authority, especially - but not exclusively

- when that authority (judicial, administrative or corporate among individuals) resolves conflicts. Finally, the term "of law" does not only imply submission to the congress laws, but goes further, demanding whoever holds authority to always act according to the law, understood as the legal order of a State (and even a supranational one, if we submit sovereignly to it).[38]

Substantive due process in administrative headquarters was prescribed in processes such as *"Félix Herrera Huaringa" (*file 090-97-AAATC); *"Huamán González"* (file 439-99-AA / TC) or "*Lourdes Catalina Carpio Salas"* (case file 675-97-AA / YC), to mention only a few cases. Substantive due process in jurisdictional premises has finally, been developed in cases such as *"José Antonio Sandoval"* (file 662-2000-HC / TC), *"Luis Bedoya de Vivanco"* (with sentence issued on 29 January 2002, among others.

As we can clearly see, we are already facing a practice that has been very well established in Peru for some years, which even the most bitter critics of the constitutional court today do not propose to disrupt.

The aforementioned has had multiple consequences, some of them directly linked to the issue that we have been analysing. One of them is quite evident: in Peru, due process, both in its procedural dimension and in the substantive one, is not limited to a jurisdictional scenario, it is also invokable both in an administrative scope and in a corporate one among individuals[39]. The idea of limiting the interpretation of the concept "court" to institutions with jurisdictional-type attributions, whether exclusively jurisdictional or jurisdictional with some additional administrative decision margin, is something actually neglected in Peru, where, as can be seen, it has gone even further (or at least much more frequently) than what has already been expressed at the Inter-American level, leaving us with no possible point of comparison with the European one.

There is more, however. The most recent case-law matter in the Constitutional Court of Peru is related to a concern about how to establish clearer parameters on Judicial Independence: scope, required budget to materialise it, purpose and relations with another concept of as much importance as the one of

38. Phenomenon whose motivations and evolution are discussed in works such as those outlined in notes previous to this one.

39. Thus, just to mention some cases, the existence of due process in administrative proceedings has been admitted in cases such as *"Manuel Benitez Raymundo" (*file 292-96-AA / TC); *"María Quiróz Blas"* (file 594-96-AA / TC) and a very long etcetera.
Due Process in corporately particular relationships has been addressed in cases such as *"Pedro Arnillas Gamio"* (file 067-93-AA / TC); *"Francisco Wiliiam Palomino Mendoza"* (file 331-96-AA / TC); *"Rafaela Quispe Rojas"* (file 685-97-AA / TC), to mention only some of the oldest.

impartiality, just to mention some. I will discuss this, as well as the greater or lesser fortune of the task we have assumed right away.

Some efforts made to categorise and explain judicial independence and impartiality better

After the fall of fujimorism, whose level of intervention and interference in the institutions and officials responsible for the administration of justice in Peru has been, by far, the most intense of all our republican history, some of the matters that begin to be recurrently discussed before the Peruvian Constitutional Court are those related to judicial independence and impartiality. This is related to two distinct situations: on the one hand, those who demanded the restoration of their rights or the compensation for the damages suffered under the former government. On the other hand, those involved in the dynamics of fujimontesinist corruption alleging that the prosecution that is now taking place is violating their rights; these being two of the most frequent questions related to an alleged lack of independence of the judges or to judicial actions that they qualify as biased.

The Constitutional Court then begins to "take action on the matter" and will be concerned to establish some basic considerations on the matter. It will first try to establish at least a common understanding of what is judicial independence. It will say about it:

> *"(...) Judicial independence must be understood as that self-determining capacity to proceed to the declaration of law, delivering and enforcing rulings, within the frameworks established by the constitution and the law. Strictly speaking, it is a condition for the effectiveness of free will"*[40].

The Peruvian Constitutional Court will say, on that occasion, that one of the basic characteristics of a democratic society is the trust that courts should inspire in citizens. It adds later, thereby clarifying agreement with Article 43 of the Constitution, that judicial independence is necessary to inspire said trust.

Later on, the Court itself tries to explain, in more detail, the concept of independence, noting that said independence involves a mandate for all political powers (whether they are part of our institution or not) and even individuals to respect the autonomy of the judiciary or ordinary courts in the development

40. Affirmation extracted from STC 0023-2003-AI / TC, and more properly from its substantiation number 28.

of their functions[41]. Here, without a doubt, it is more precise and is referring to both internal and external independence.

Independence is reached if certain assumptions are obtained or materialised, among which we could mention the existence of an adequate and sufficient financial cover - which is a true guarantee for the autonomy of the judiciary and the judges' independence[42] - or the separation of powers, also invoked as support for judicial impartiality, in line with the proposals made in Europe by the European Court of Human Rights[43]. And, since we are discussing guarantees, said judicial independence, now seen as indispensable for building trust in the courts[44], does not only claim previous conditions (assumptions), but also requires certain guarantees, necessary and timely measures to ensure that the institutions that render justice, as well as the people who form part thereof, do their work in strict compliance with the law and the Constitution, thus avoiding the interference of strangers (other public or social "powers", and even other entities of the same judicial body) when defining and interpreting the sector of the legal order that they wish to apply.[45] The permanence in the service is undoubtedly one of them, in spite of the limits that are recognised in Peru.[46]

It is worth mentioning that the Peruvian Constitutional Court itself admits that, when referring to permanence in the service, we are facing a situation the development of which must occur within certain constitutionally established limits. The first one is of an internal nature, and refers to the fact that only one whose conduct lacks any personal or professional suitability in line

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41. In this sense, what is indicated in case *"Jorge Barreto"* (file 2465-2004-AA / TC), and mainly in its substantiation seven.
42. Assertion made in, among other pronouncements, the forty-first substantiation of STC 004-2004-CC / TC.
43. The content of substantiation thirty-four of the STC 004 2004-CC /TC points in that direction. It is in the same line, we insist, of the proposals of the Court of Strasbourg, because it presupposes independence (in this case, basically external), which results in impartiality, fundamentally in its objective dimension.
44. Affirmation included in the thirty-third substantiation of sentence 004-2004-CC / TC, citing *Piersack vs Belgium*, important sentence of the European Court of Human Rights to which we have already referred in the present work.
45. That is in general what is set forth in sentences such as the one issued with file 0321-2004-AA /TC (mainly in twenty-eighth and twenty-ninth substantiations). It should certainly be noted that in most of these cases the requirements are usually raised to the officer, and could be addressed to other important officers.
46. Here, the concepts mentioned in file SSTC-2209-2002-AA/TC (tenth substantiation) and 0321-2004-AA/TC (third substantiation).

with his or her position and functions. The second is one of a rather temporary type, since service in the position is rarely considered eternal. That is why the appointment is now for a given period or until the person reaches a given age.

Then a key issue here will be what is understood by impartiality or judicial impartiality, a concept certainly not expressly mentioned by the Peruvian Constitution of 1993, to later try to determine what is the relationship between independence and impartiality, and between both concepts and that of a judge predetermined by law.

In its sentence related to the case of "*Barreto*" (File 2465-2004-AA / TC), the Peruvian Constitutional Court notes that impartiality would be a consequence of having independent judges and an ordinary or autonomous judiciary.[47] It will go even further because, while trying to establish which are the areas of action specific to the concept of independence and which are those related to impartiality, the high court will point out that:

> *"(...) while the guarantee of independence, in general terms, alerts the judge about external influences, the guarantee of impartiality is linked to demands within the process, defined as the independence of the judge from the parties and the object of the process itself".*[48]

The Constitutional Court will add that both ideas, independence and impartiality, are part of a whole, so that respect for the principle of independence cannot be invoked as long as there are situations that generate reasonable doubt about the bias of judges.[49]

However, this does not mean that there are no minimum standards to demonstrate whether independence and impartiality are really at risk, even though it may seem difficult to make an analysis based on parameters that at first seem to have a significant subjective burden[50], and even this impartiality and that independence are possible limits and even sanctions for those who misunderstand these concepts, fail to fulfill the duties and responsibilities inherent to the exercise of their functions.[51]

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47. We recommend seeing paragraph eighty-four of the sentence for case *"Genie Lacayo"*).
48. In this regard, what is indicated in case *"Jorge Barreto"* (file 2465-2004-AA / TC), and mainly in its seventh substantiation.
49. See STC 2465--2004-AA/TC, ninth substantiation.
50. Neutrality and prudence are discussed (see in this respect STC 7465 2004 AC/TC, substantiation 21).
51. With this respect, STC 2465-2004-AA/TC, and mainly in its twelfth substantiation.

The concern about impartiality does not end there. Surely noting the difficulties that usually exist in this regard, the Peruvian Constitutional Court will seek to define which in its opinion are inappropriate behaviours from a court or judge who claims impartiality. This will point to:

- The prevalence of political preferences in their decisions.
- The existence of disproportionate public demonstrations regarding the personal position about a given sentence.
- Lack of neutrality in the judge's actions.
- The disregard of the duties that correspond to the jurisdictional competencies.
- The existence of repeated sanctions against the judge for not having followed these behaviour guidelines in other processes or in this same process.
- The formulation of opinions on proceedings still pending without judgment, and entailing social relevance.
- The formulation of opinions from an investigating judge, on the possible culpability of a defendant, which undoubtedly goes beyond his functions[52]

However, perhaps the most relevant change in terms of impartiality is linked to whether the configuration of military tribunals violated the impartiality of the judge or not. In the case of *"Tineo Silva et al."* (File 010-2002-AI / TC), the Peruvian Constitutional Court endorsed the evaluation made by the Inter-American Court in the case of *"Cantoral- Benavides"*, assuming that the impartiality of the judge was affected by the fact that the Armed Forces have the double function of first militarily combating the subversives, and then judging them and imposing penalties on those groups.[53]

And if the aforementioned did not have sufficient substance, subsequently the supreme authority of the Peruvian Constitution will note that:

> "The fact that military courts are mostly made up of "active officers" violates the principles of independence and impartiality of the jurisdictional function, in addition to the principle of the separation of

52. Information taken from various pronouncements of the supreme authority of the Peruvian Constitution, pronouncements among which file STC2465-2004-AA/TC stand out, particularly in its eleventh, twenty-third and twenty-fifth substantiations.
53. In this regard, see 45th substantiation of STC 010-2002-AA/TC.

powers. On the one hand, those who make up the various instances of military jurisdiction are officials of such military institutes; and on the other, because, in principle, it is incompatible for people subject to the principles of hierarchy and obedience, such as professional military men or women who exercise jurisdictional functions, to be both independent and impartial".[54]

However, there have also been cases where it was said that judicial impartiality had not been violated. That for example, has been the answer given in all cases in which people, justly or unjustly involved with the fujimontesinist mafia, question the conformation of the so-called anti-corruption courts, which they precisely accuse of not being impartial. There, along with other allegations, the Peruvian Constitutional Court will note that what is really desired in these cases is not an *ad hoc* trial of a person, but a sub-specialisation in the criminal scope, which was duly justified by the complexity of the matter, the procedural burden and the particular demands of the service.[55]

In summary, we can see how, with undeniable common areas with regard to what is proposed in Europe[56], but also with certain particularities. In Peru, impartiality has been approached as very closely linked with judicial independence; however, let me make some remarks before concluding.

These remarks basically deal with two lines of action. The first will imply a point about how the topic of the competent judge has been outlined. The second relates more to the guarantees through which, in addition to having competent, independent and impartial courts, the Peruvian Constitutional Court seeks to ensure that the judges act in accordance with certain parameters of justice. We will then discuss those two issues very briefly.

54. This is mentioned in the substantiation fourty-two of STC 003··2003-AA/TC.
55. Answers given in sentences such as STC 1013-2003-HC/TC or 1076-2003-HC/TC were of this kind, among many others.
56. Moreover, even in some cases, the Peruvian constitutional court, citing *Piersack* and *De Cubber*, endorse two elements very typical of the treatment given to impartiality in Europe: the presumption of the impartiality of a judge and the existence of appearance of impartiality. Regarding this, for example, see the tenth substantiation of sentence 2465-2004--AA/TC.

The competent judge and the suggested guarantees to ensure that a competent, independent and impartial court is also fair

Aspects regarding the competent judge have already been addressed here, in part when talking about the category and its development in the Inter-American system, but also when Peruvian jurisprudence has been reviewed. However, we want to emphasise some aspects in particular, hand in hand with what has been said and/or done by the Peruvian Constitutional Court.

> *"(...) the Peruvian Constitutional Court will note that what is really desired in these cases is not an ad-hoc trial of a person, but a sub-specialization in the criminal field, which was duly justified (...)"*

One point to highlight is undoubtedly the concern of the high court to set a concept for the term "judge predetermined by law": Although the natural judge and the judge predetermined by the law are usually considered synonyms (consideration which is in fact questionable), interesting clarifications have been made about their content and scope.

In the case of *"Luis Bedoya de Vivanco"* (file 1076-2003-HCATC), and before that in the case of *"Calmell del Solar"* (file 0290-2002-HC/TC), the Peruvian Constitutional Court begins to make some important clarifications about the judge predetermined by law. Generally speaking, it will suffice to avoid judging an individual by "jurisdictional bodies of exception" or by "special commissions created for that purpose, whatever their denomination".[57] Therefore, whoever wants to achieve this shall necessarily have to be a judge or have jurisdictional powers (exceptional or exceptional judges may even be ruled out, but not specialised judges). Also, the powers of the judge should have been previously determined by law.[58]

It will also be said that this predetermined judge could operate as a guarantee for independent and competent judges, but mainly to prop up impartial judges. This follows a parameter established by the Italian Constitutional Court in its Order 521/199159.521/1991[59]. As the sentence issued in file 1013-2003-HC / TC says, guaranteeing the impartiality and independence of the judges

57. In this regard, see STC 1076- 2003-HC/TC, especially substantiation four.
58. Review at this point file STC 1076-2003 HC/TC
59. In this respect is file STC 0290-2002-HC/TC, substantiation eight.

also acts as a counterweight to the configuration of the predetermination of those judges.[60]

Much more could undoubtedly be said about the concept of the competent judge, a subject that we are bound to return to in our future work. I would like to conclude with this section of the present text referring to an additional concern of our Constitutional Court: to propose a series of guarantees that some guidelines promoted by the Inter-American Commission on Human Rights in this regard, seek to ensure that a court, in addition to being competent, independent and impartial, should be fair.

Among such guarantees are:

- The right of the defendant to prior and detailed notification of the charges against him/her.
- The right to communicate freely and privately with their defender.
- The right to defend themselves personally or through the assistance of a lawyer of their choice.
- The right to communicate freely and privately with their defender.
- The right to be granted an adequate amount of time and means to prepare their defense, to question witnesses who are in court and to obtain the appearance of witnesses, experts and other persons who may shed light on the facts in dispute.[61]

Even when we have enough reservations about the fact that justice is obtained only by applying certain jurisprudentially established formulas, it is illustrative to appreciate, as is the case in a constitutional state, that the determination of the scope of action of the person performing judicial tasks is not free, but that must always respect certain guidelines, which will be - as in this case in particular - according to law if they are rational and, above all, reasonable.

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60. In this regard, see substantiation six of STC 013-2003-HC/TC. However, and as the Peruvian constitutional court case-law affirms, neither the judge predetermined by law, nor the independence or the judicial impartiality are affected if, by administrative resolution, the existence of a sub-specialization of criminal courts required by law (files 1320-2002- HC/TC and others) is specified.
61. This can be seen in cases such as *"Tineo Silva y otros"*(file 010 -2002-AI/TC), and mainly its substantiation one hundred one.

V. Final remarks

It is now time to make a preliminary balance, after this quick overview of the state of the matter on a subject as relevant as the one outlined here.

It was discussed in this paper how, despite the limitations of the design to be applied, and with the risks that always involve the case by case solution of the problems posed (most of the categories used to resolve may be accused of having a significant subjective burden), soon we can see a trend, which we hope will be irreversible, to strengthen the scope of action of rights so closely linked to the preservation of citizen credibility in their systems of justice, or at least the possibility of accompanying the work and development of each person in particular (and of everyone in general) with parameters that have the merit of objectivity and predictability that should always characterise legal interpretation, especially if it is in the scenario of conflicts, and that hetero-competitive task has been entrusted to organisms or entities with jurisdictional powers. That is certainly positive.

On the other hand, confirming what has been done in other latitudes, we can note that what is developing in Peru, even when it is insufficient, seems to be on track. In addition, and to follow that same line of an even greater and better protection, it is not necessary, as in Peru some sectors of public opinion claim, to make express constitutional reforms, which, since there do not seem to be conditions to debate and approve them, they can become the pretext for not taking responsibility, or doing it in a less intense way than that which, in this context, is presented to us as indispensable.

We are therefore facing new paths with interesting benchmarks, very much in spite of the difficulties that already exist and those that are about to arise. Hopefully, we will not "fall out of step" in these efforts, and take advantage of the contributions of comparative experience, in order to enhance the improvements and increase the legitimacy of our different institutions. The consolidation of the constitutional state in our different countries demands it.

A review of the constitutional jurisprudence on the independence of judges. The cases of the Chilean Constitutional Court

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I. Introduction

I will give an account of some cases reviewed before the Constitutional Court that allow us to observe how the concept of judicial independence and its correlated principle of impartiality has been constructed in its jurisprudence.

For this, it is important first to briefly review the norms that serve to build the constitutional guarantee of judicial independence and what the scope of said guarantee is.

There is no provision in the constitutional text that expressly recognises the guarantee of judicial independence. This guarantee is rather a constitutional norm that can be constructed through various provisions of the Constitution.

The Constitutional Court has recognised judicial independence as an essential element of due process. The Chilean Constitution establishes due process as the mandate of the legislator to always establish the guarantees of a fair and rational procedure, as indicated in Article 19 No. 3, sixth paragraph, of the

Constitution. From this constitutional clause, the Constitutional Court has recognised the consecration of a right to due process.

However, it should be pointed out that number 3 of Article 19 of the Constitution establishes various guarantees that establish the minimum elements that a due process must contain, thus recognising the right to defense, not being judged by special commissions, the guarantee of being judged by means of a prior procedure legally processed.

Thus, in its jurisprudence, the Court has indicated what the minimum elements of due process are based on this constitutional provision. It has declared that due process must contain elements such as timely knowledge of the action and due location, bilaterality of the hearing (adversarial), provision of relevant evidence and the right to challenge the decision of a court, impartial and appropriate and established previously by the legislator.

It is from this general clause that the guarantee of fair and rational trial or due process is established, which has allowed the Court to evaluate when a certain legal procedure complies with due process guarantees, but also to establish whether sufficient guarantees are given so that this procedure is processed before an independent court.

In the following, I will refer to some cases that may explain how the Court has understood judicial independence and its correlated principle of an impartial judge.

It is worth remembering that the primary function of the Chilean Constitutional Court is regulatory control, so it is not up to the Court to review whether judicial independence is materially fulfilled, that is, if the judge in a given case has acted impartially or independently. This corresponds more to the hierarchical superiors, that is to say, in the pyramid structure that characterises the Chilean Judicial power, each higher degree in a process will correspond to an evaluation of how the lower instance has failed.

Thus, the Court's task is rather to evaluate in the abstract, when appropriate, whether the institutional design established by the norms sufficiently guarantees the independent judge. Also in the concrete analysis of rules, the Court will be responsible for evaluating whether a certain legal provision in its application to the specific case will provide sufficient guarantees of an independent judge.

1. THE CASE OF MILITARY JUSTICE AND CRIMINAL CASES INVOLVING CIVILIANS

The cases reviewed in the place of inapplicability due to unconstitutionality are related to the competence of the military courts of justice regarding military crimes committed by civilians. According to the Code of Military Justice, Article 5 of the military jurisdiction is responsible for the knowledge of military crimes, except express jurisdiction over some crimes committed by civilians, but does not clearly state whether the jurisdiction also covers crimes committed by military agents regarding civilians. Thus, in some cases in which civilians were victims of crimes committed by the military, civilians, in order to see the damage caused repaired, must necessarily go to military justice.

There is a series of cases in which the Constitutional Court has declared the inapplicability due to unconstitutionality of the provision that would allow the Military Justice to have knowledge of crimes committed by the military with respect to civilians.

Specifically, in case STC 2493, but also 292 and 2902, the Court declared the inapplicability of this rule of military procedural law, declaring, among other reasons, that the military jurisdiction affects the due and necessary independence and impartiality of the Court.

Thus, in case STC 2902, the Constitutional Court examined the situation of police mistreatment (in Chile the Carabineros are subject to military jurisdiction) of a civilian. By application of the rule, the complaint of unfair humiliation committed by Carabineros against the civilian citizen was referred to the Military Prosecutor's Office. However, the citizen filed an action of inapplicability for unconstitutionality before the Constitutional Court, arguing that the application of this rule violates the guarantee of due process, in particular, being judged by an impartial tribunal.

The Constitutional Court declared that this provision, by allowing a civilian to be subject to military jurisdiction, effectively violates due process.

Thus, the Court reasoned that when civilians are submitted to military jurisdiction, the necessary independence and impartiality of the Court is affected. It pointed out that the institutional structure of the military jurisdiction does not provide sufficient guarantees of independence. In this regard, it should be noted that the process in the military jurisdiction leads to an investigating prosecutor, who depends on the military forces. Then this investigating prosecutor must report to a judge, who also belongs to the armed forces and order. This structure, the

Court estimated, which translates into judges in the military process having a hierarchical link with the military high command, do not provide sufficient guarantees of independence of the judges. As a result, the rule that allows judging civilians in the military jurisdiction was declared inapplicable.

What is remarkable about this case and others, is that it recognises the application of the American Convention on Human Rights internally, in particular Article 8 that guarantees all persons to be heard by a judge or a competent court, to a public trial and to be judged by an independent and impartial tribunal.

It is worth remembering that the Chilean State was condemned by the Inter-American Court of Human Rights precisely because of the submission of civilians to military jurisdiction. This was the case in *Palamara Iribarne v. Chile*. The reasoning of the Inter-American Court was accepted in the judgment of this case. Thus, the Constitutional Court declared that the interpretation given regarding the inapplicability of the challenged provision has its interpretative support in the decision of the Court.

The reasoning of this case by the Constitutional Court has been highlighted as an expression of the doctrine of review of Convention compliance that has been developed in Latin America, having an impact on several of the reasonings of the constitutional courts of the region.

That there is not enough relational distance between the investigating prosecutor and the judge regarding the parties or intervening parties, as well as between the latter and the highest military authority of the place, for whom the membership in the same institution joins them and for which there is a linked hierarchy and chain of command.

2. HUMAN RIGHTS CASES. APPLICATION OF THE OLD CRIMINAL PROCEDURE. KNOWLEDGE OF CAUSES BY MINISTERS VISITING. 5189 (CASE FREI)

In this case we are no longer dealing directly with judicial independence, but rather with impartiality. Impartiality and independence should be considered as connected situations, but with different substantivities. Thus, while independence is related to an organic aspect, in terms of the structure to which it is attached in the judicial system, impartiality rather refers to relations that the judge may have with the parties or the litigious issue. In short, independence is related to the separation of powers, while impartiality is precisely related to the relationship of the judge with the

parties or the purpose of the trial. However, in order to guarantee impartial justice, it is necessary that conditions or guarantees of independence be given.

In the *Frei* case, STC 5189, the Court dealt precisely with the issue of impartiality.

The case focuses on the action brought against the perpetrators of the assassination of former President Frei Montalva, who ruled the country during the 1960s and subsequently died under suspicious circumstances in a private clinic, in the middle of the dictatorial period. The former president had become a problem for the regime as he began to line up in his favour the opposing forces to the military regime.

From the procedural point of view, the evolution of criminal procedure systems in Chile should be taken into account as a context.

Until 2005, an old criminal procedure was in force in Chile, which had the characteristics of an inquisitive one, in which an investigating judge investigates, reviews the evidence, and finally resolves the criminal case by providing the sentence. This regime was subsequently reformed by an accusatory procedural system, in which, among other things, the separation of the criminal investigation, now from the Public Prosecutor's Office and the resolution of the case, at the hands of an oral criminal court prevails.

However, by constitutional provision and the rules of the same new procedural code, for those events that occurred prior to 2005, the rules of the old criminal procedure apply. This applies to the case under review.

In effect, the investigating judge of the case, which was responsible for the investigation, took evidence, testimony of witnesses, had to rule on the criminal responsibility of those accused of being part of the assassination of the former president of the Republic. The investigating judge conducted the investigation for almost 15 years.

One of the defendants of the crime presented a request of inapplicability before the Constitutional Court, challenging the rules that allow the appointment of a judge exclusively dedicated to investigating causes that are of high public interest. For the defendant of the criminal process, being judged by someone who has carried out the investigation for more than 15 years does not provide sufficient guarantees of impartiality and therefore, the rules that allow his performance as a judge should be declared unconstitutional as regards its application to the concrete case.

The Court rejected these allegations declaring that, in this case, there is not sufficient evidence to conclude that the judge has a partial approach to the case.

Firstly, the Court distinguished between subjective and objective impartiality. Objective impartiality implies external conditions that might compromise the judge's objectivity. It concerns issues such as the structure where he acts. Subjective impartiality implies a more psychological view of how a judge approaches the case.

For the Court in a inapplicability of unconstitutionality, as a concrete evaluation of the application of a rule in a concrete case, the question on whether the structure of the old criminal procedure is adequate to guarantee impartiality, is not admissible. This evaluation – so states the Court - can only be made in an abstract evaluation of the law, and this is not allowed, since the Constitution declares that the old procedure is applicable forto all cases before 2005. Thus, it is not possible to evaluate the conformity of the old criminal procedure to the Constitution, since the Constitution itself recognised this procedure as valid system.

Impartiality, now understood as subjective, is a question that the Court cannot respond to, since the plaintiff in the case had provided no evidence that the judge in this case would lead his investigation and later resolution of the case in a way that does not sufficiently guarantee his impartiality. Therefore, concludes the Court, there is a breach of the Constitution by the application of the old criminal procedure.

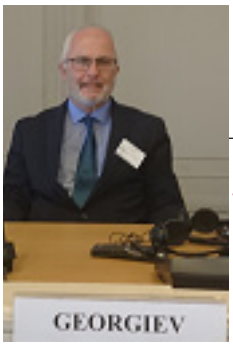
CONCLUSIONS

I have reviewed two cases that can enlighten us about the content of the due process clause in the Chilean Constitution and how an essential element – the independence and impartiality of judges – has been understood by the Court and has been declared in its jurisprudence.

As you have may have noticed, both cases have a common ground: they deal with criminal procedure and both have inquisitive elements, since the judge leads the investigation and then provides a sentence. This system has been overtaken by the new accusatory criminal process. However, these old procedures remain in force for some of the criminal cases and some defendants want to have a sufficient guarantee of an independent judge.

For the Court this guarantee is not sufficiently granted in a military court, but in civilian justice, there are enough elements to declare the conformity of the procedure and the actions of the judge in accordance with the Constitution's mandate.

Case-law of the Constitutional Court of the Republic of Bulgaria



Valentin Georgiev, Secretary General, Constitutional Court, Bulgaria

The principles of the Judiciary as enshrined in the modern constitutions are a meaningful reproduction and materialisation of the principle of the state governed by the rule of law. The most salient feature of the Judiciary is its sovereignty and separation from the other two branches of power, as is the independence of its bodies. If devoid of such independence, the Judiciary would be unable to perform its major function and to see that the law-abiding state functions.[1]

– It is only for the Judiciary that independence is explicitly proclaimed in the Constitution as its intrinsic feature. This is a position that the Constitutional Court[2] explains with the key importance of the independence of the Judiciary for the dispensation of justice.

– In the consistent understanding of the Constitutional Court's jurisprudence[3], the independence of the Judiciary rests on two levels: first, its independence from the other branches of power (the principle of the separation of powers, yet also of their interaction); and second, the independence of the individual judge, prosecutor and investigating officer in the performance of their functions. The presence of the two sentences in the second paragraph of

1. Друмева, Ем., Конституционно право, Пето допълнено и преработено издание, С., Сиела, 2018 г., с.497-498/Drumeva, Em., Constitutional Law, fifth enlarged and revised edition, S., Siela, 2018, pp. 497-498.
2. Decision no. 3 of 2015 on Constitutional Case no. 13/2014.
3. Decision no. 11 of 2002 on Constitutional Case no. 18/2002.

Art. 117 of the Constitution is the indication of the constitutionally enshrined independence of individuals who are engaged in the dispensation of justice just as it is the indication of the independence of the whole system in which these individuals operate, that is, the Judiciary.

– The separation of the Judiciary from the other two branches of power is a projection and materialisation of the principle of the separation of powers (Art. 8 of the Constitution). The latter is present in our Constitutional Court's jurisprudence with content that corresponds to the achievements of modern constitutional law. The Constitutional Court has had the occasion to explain that the principle of the separation of powers does not create an insurmountable fence between the constituted powers, but presupposes interaction and cooperation between them[4]. There is no "Chinese Wall" between the branches of power, as they interact and are a manifestation of the unity of State power and State sovereignty.

– By definition, the Judiciary interacts with both the Legislature and the Executive. Thus, in its Decision No. 8 of 2006, the Constitutional Court considered that the possibility for the Minister of Justice to submit nominations to the Supreme Judicial Council (hereinafter, "SJC"), possibility of which was "elevated" to the constitutional level by the Third Amendment to the Constitution, does not undermine the principle of the separation of powers. The rationale behind that conclusion is that the Minister is free to nominate, whereas it is the SJC's secret ballot from which the Minister is excluded that decides.

– However, it would go beyond the constitutionally tolerable ceiling of interaction between the separate branches of power if the actions of the bodies of the Judiciary were made subject to prior authorisation by a body of the Executive. In consideration thereof, the Constitutional Court declared

4. Decision no. 8 of 2006 on Constitutional Case no. 7/2006; Decision no. 8 of 2005 on Constitutional Case no. 7/2005, etc.

unconstitutional a provision in the Ministry of Interior Act setting out that officers and sergeants of the Ministry of the Interior shall not be investigated and detained without the authorisation of the Minister of the Interior.[5]

– An important aspect of the independence of the Judiciary vis-à-vis "the other branches of power" has a budgetary dimension, as set out in the Constitution: the judicial branch of power shall have an independent (sovereign) budget (Art. 117, para 3). No other constitutionally established institution enjoys such financial sovereignty.[6] The Constitutional Court insists that from a logical perspective the notions in Art. 117, paras 2 and 3 of the Constitution "the Judiciary shall be independent" and "the Judiciary shall have an independent budget" correlate – equally significant dependencies between which there exists an interrelation and which have meaning only when they correlate. For the Judiciary to be independent, it should have a budget that will not depend on factors outside the system.[7]

– The budgetary sovereignty of the Judiciary has been the target of binding interpretation by the Constitutional Court[8]. According to the interpretation given, in principle, of the provision of Art. 117, para 3 of the Constitution, is to detach the budget of the Judiciary from the budget allocation competence of the Council of Ministers as per Art.106, in order to ensure the independence of the Judiciary. However, the sovereignty of the budget of the Judiciary does not infringe upon the allocation competence authority of the supreme representative body – the National Assembly. The Parliament shall approve the State Budget and budget performance report (Art. 84, item 2 of the Constitution), while the sovereign budget of the Judiciary is an ingredient of the State Budget.[9]

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5. Decision no. 3 of 1998 on Constitutional Case No. 1/1998; vide: Decision no. 2 of 2008 on Constitutional Case no. 1/2008 wherewith the Constitutional Court declared unconstitutional Art. 191 of the Republic of Bulgaria Defense and Armed Forces Act by virtue of which officers and sergeants from the armed forces shall not be detained without the authorization of the Minister of Defense.
6. Decision no. 4 of 2003 on Constitutional Case no. 2/2003.
7. Decision no. 4 of 2004 on Constitutional Case no. 4/2004.
8. Art. 149, para 1, subpara 1 of the Constitution makes it binding on the Constitutional Court to provide binding interpretations of the Constitution. The prerogative under Art. 149, para 1, subpara 1 of the Constitution makes the Republic of Bulgaria one of the few countries in the world with a Constitution-assigned competence to interpret the Constitution in abstract terms. Considerations in favor of binding interpretation by the new Constitutional Court prevailed in the 7th Grand National Assembly which made it one of the Court's prerogatives that the classical constitutional law models do not have. The Constitutional Court jurisprudence that followed proved that it had been the right choice, in the compelling opinion in theory and in practice.
9. Decision no. 18 of 1993 on Constitutional Case no. 19/1993.

- The Constitutional Court's jurisprudence sticks to the principle that the budget of the Republic of Bulgaria should provide the financial resources to enable the functioning of the constitutionally established institutions of the State, including the bodies of the Judiciary, while the separation of powers and their prerogatives are accounted for. Therefore, any annual State Budget Act that does not provide for allocations for individual constitutionally established State institutions may be declared unconstitutional, as it paralyses the operation of these institutions.[10]

- The independence of the magistrates is the second indispensable ingredient for the Judiciary to be effective and impartial. Art. 117, para 2 of the Constitution reads that in the performance of their functions all judges, court assessors, prosecutors and investigating officers shall be subservient only to the law. The Constitutional Court's jurisprudence has provided a clarification[11] that this text of the Constitution outlines the field of application of functional independence that is manifest when the power functions of the judges, court assessors, prosecutors and investigating officers are performed in the exercise of their vested prerogatives in conformity with their specific position within the structure of the Judiciary and the activity performed.

- Functional independence cannot exist unless it is ensured by the other kind of magistrate's independence – his/her individual independence which materialises in the establishment and application of legal institutes that are to guarantee it: irremovability from office, immunity and incompatibility with the performance of certain activities. This position is explicitly recognised in the Bulgarian constitutional jurisdiction. In the Constitutional Court's view, the independence of the Judiciary and in particular of the magistrate (in the broader sense: the judge, the prosecutor, the investigating officer), is guaranteed by their abidance by the law and nothing but the law in the decision taking, the freedom to hold an intimate belief, the privilege of **irremovability from office, immunity** and suchlike.[12]

- The Constitution's provisions concerning magistrates' immunity have moved at a fast pace over time to bring about, as it is, a situation where both criminal and civil law absolve judges, prosecutors and investigating officers from accountability for whatever they do or decree in their official capacity as long as the criminal offence is not premeditated (Art. 132, para 1). They enjoy just functional immunity that is intended to generate a "salubrious climate" free

10. Decision no. 17 of 1995 on Constitutional Case no. 13/1995.
11. Decision no. 3 of 2015 on Constitutional Case no. 13/2014.
12. Decision no. 6 of 1993 on Constitutional Case no. 4/1993.

of pressure and interference to handle the cases and files. Given this substance and scope, unaccountability is intended to guarantee the independence of the mentioned officials whenever they perform their functions.[13]

- One of the guarantees for the independence of the Judiciary is its right to appoint, demote, relocate and dismiss the judges, prosecutors and investigating officers[14]. Premising on the understanding that the best protection of the independence of magistrates, both external and internal, can be extended by the Supreme Judicial Council (hereinafter, "SJC"), the constitutional lawmaker granted the SJC a set of prerogatives related to staff policy implementation within the Judiciary. Thus the independence of the Judiciary is ensured and guaranteed by, *inter alia*, the institution of a standalone autonomous body within the Judiciary and staff selection is assigned to that body.[15]

- Prior to the Fifth Amendment to the Constitution, all judges, prosecutors and investigating officers, but for the Prosecutor General, the Chairman of the Supreme Court of Cassation (SCC) and the Chairman of the Supreme Administrative Court (SAC), were appointed, promoted, demoted and relocated subject to a SJC decision. The peg of the Fifth Amendment was the change within the SJC structure which impacted the internal configuration and balance of the relations between the courts and the prosecution so as to improve efficiency, transparency and accountability as a need of which the public was aware. The Supreme Judicial Council was divided into two colleges: judges and prosecutors (including investigating officers). The principle of the composition of the SJC from three sources *(ex officio* members, members elected by the Judiciary and members elected by the National Assembly) remained; after the restructuring the SJC functions in three formats: – a college of judges, a college of prosecutors and a plenum (all members). The division of the SJC into two colleges was welcomed by, *inter alia*, the European Commission for Democracy through Law as a well considered and timely move.[16]

- Taking into account the relations between the occupation of positions within the Judiciary and the principle of independence, the Constitutional Court assumed that the independence of the judges, prosecutors and investigating officers as appealed for would be achieved when a credible and effective

13. Decision no. 17 of 2018 on Constitutional Case no. 9/2018.
14. Decision no. 8 of 1994 on Constitutional Case no. 9/1994.
15. Decision no. 1 of 1999 on Constitutional Case no. 34/1998.
16. Opinion on the Draft Act to Amend and Supplement the Constitution (In The Field Of The Judiciary) of the Republic of Bulgaria, Adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

mechanism was in place for in-house selection in the relocation and promotion of staff on the basis of unambiguous rules and procedures.[17]

- The law-set requirements to be met for an appointment to a magistrate's position are directly relevant to the autonomy of judges, prosecutors and investigating officers. Moral integrity is one of the criteria of eligibility for appointment (Art. 162 of the Judiciary Act) as a judge, prosecutor and investigating officer and it is not accidental that the lawmaker placed special emphasis on this and put it first and made it override professional standing. Independent dispensation of justice in the name of the people and in protection of the rights and legitimate interests of citizens and corporate entities can be expected only from judges, prosecutors and investigating officers who, in addition to professional standing, possess moral integrity.

- Drawing on the requirement that judges, prosecutors and investigating officers should stick to the rules of moral conduct in their profession and in their private life, the Constitutional Court concluded that the suspension of payment of a gratitude compensation to those who quit the Judiciary until the close of the criminal proceedings against a magistrate (Art. 225, para 3 of the Judiciary Act) is not in contravention of the Constitution. The Court's compelling reason was that the solution adopted forms a continuation of a systematic and consistent legislative approach that is based on the idea that moral integrity and professional standing of the judges, prosecutors and investigating officers are the testimony of and the guarantee for their autonomy.[18]

- The account above leads to the conclusion that the principle of the independence of the Judiciary is substantially and conceptually recognised in the Bulgarian Constitutional Court's jurisprudence. The Constitutional Court of the Republic of Bulgaria consistently upholds and disallows digressions from the principle of the independence of the Judiciary and thereby creates a friendly environment in which it can fully perform its function of the protection of rights and legitimate interests.

17. Decision no. 12 of 2018 on Constitutional Case no. 1/2018.
18. Decision no. 17 of 2018 on Constitutional Case no. 9/2018.

La Cour de justice de l'Union européenne et le respect du principe de l'indépendance du juge national

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I. Introduction: la valeur européenne de l'État de droit et le principe de l'indépendance du juge

1. Le Traité sur l'Union Européenne (TUE), le Traité sur le fonctionnement de l'Union Européenne (TFUE) et la Charte des droits fondamentaux constituent un véritable cadre constitutionnel, dont il revient, au sens de l'article 19 TUE, à la Cour de justice de l'Union européenne et aux juridictions nationales d'assurer le respect.

2. L'article 2 TUE dispose que «*L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que le respect des droits de l'homme, y compris des droits des personnes appartement à des minorités*». Le traité ajoute que «ces valeurs sont communes aux États membres». Le respect de l'État de droit est ainsi considéré comme un impératif du droit primaire, en ce sens qu'il est érigé en condition de participation des États membres à l'Union Européenne et de la pérennité de cette dernière, par les articles 7 et 49 TUE. L'article 49 TUE impose en effet expressément aux États candidats à l'intégration de l'Union Européenne le respect et la promotion des valeurs énoncées à l'article 2 TUE. L'article 7 TUE permet quant à lui à l'Union européenne de sanctionner tout État membre qui ne respecte pas les valeurs fondatrices énumérées à l'article 2 TUE. Il prévoit un mécanisme renforcé de garantie des principes de l'État de droit en cas de violation grave et systématique. La mise en œuvre de cette procédure peut conduire à une suspension de certains des droits découlant de l'application des traités à l'État membre en question, y compris de ses droits de vote au sein du Conseil. Cette sanction peut par conséquent conduire à la suspension de la participation de l'État membre concerné au processus décisionnel européen.

3. Or, bien que l'Union européenne ne reçoive jamais la qualification textuelle et expresse d'«Union de Droit» dans les traités[1], les constituants ont cependant érigé l'État de droit en valeur constitutionnelle fondatrice de l'Union. En effet, ce principe initialement cantonné à la sphère étatique est consacré par les constituants européens comme valeur fondatrice de l'Union. Aux fins de l'interprétation de ce principe, les juges européens se sont inspirés des traditions constitutionnelles communes aux États membres[2]. Le concept d'État de droit s'est également vu doté d'une dimension supranationale.[3]

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1. Ricardo Gosalbo Bono, *État de droit et droit de l'Union européenne,* Revue de l'Union européenne 2011, p. 213.
2. À cet égard, il y a lieu de rappeler l'étude n° 711/2013 de la Commission de Venise du Conseil de l'Europe qui a dégagé une définition synthétique de l'État de droit : « l'État de droit repose sur un droit sûr et prévisible, dans lequel toute personne a le droit d'être traitée par les décideurs de manière digne, égale et rationnelle dans le respect du droit existant et de disposer des voies de recours pour contester les décisions devant des juridictions indépendantes et impartiales selon une procédure équitable». Trois exigences résultent de cette définition : la notion de hiérarchie des normes et la soumission aux règles de droit, le respect des droits fondamentaux et le contrôle juridictionnel de ces principes » (point 15).
3. Voir Lisa Mende, *L'État de droit à l'épreuve de l'intégration européenne*, Revue de l'Union Européenne 2018, p. 589 et Ricardo Gosalbo Bono, *État de droit et droit de l'Union européenne, Revue de l'Union européenne* 2011, p. 213.

4. Selon la conception européenne, la réalisation de l'Union de droit dépend, par ailleurs, de la mise en œuvre d'une protection juridictionnelle effective, en tant que droit au juge.[4] L'État de droit ne peut pas se réaliser sans un contrôle de légalité des normes.

5. Ainsi, par l'arrêt *Les Verts/Parlement*[5], la prise en compte du droit au recours effectif a été reconnue comme une valeur de caractère constitutionnel. La Cour a ainsi affirmé que « la Communauté économique européenne est une communauté de droit en ce que ni ses États membres ni ses institutions n'échappent au contrôle de la conformité de leurs actes à la Charte Constitutionnelle de base qu'est le traité. Le traité a établi un système de voie de recours complet et de procédures destiné à confier à la Cour de Justice le contrôle de légalité ». Cette idée est depuis lors continuellement réaffirmée.[6]

6. Le droit à un recours juridictionnel effectif est en effet appréhendé sous le prisme de l'État de droit. La protection juridictionnelle, telle que consacrée par la Cour, devient «consubstantielle à l'ordre juridique communautaire et son existence intimement liée à la communauté en tant que communauté de droit».[7] Elle irrigue désormais tout le système juridique de l'Union européenne.

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4. F. Picod, *Droit au juge et voies de droit communautaire. Un mariage de raison,* in L'Union européenne : Union de droit, Union des Droits. Mélanges en l'honneur de Philippe Manin, Paris, A. Pedone, 201, p. 907 à 920 et Jonathan Wildemeersch, *Le mythe du droit à un effectif dans le contentieux de la légalité des actes de l'Union européenne*, thèse de doctorat, 2018, Liège Université, p. 14.
5. Arrêt du 23 avril 1986, *Les Verts/Parlement*, 294/83, EU:C:1986:166, point 23.
6. Voir notamment l'avis 1/91 (Accord EEE – I) du 14 décembre 1991, EU:C:1991:490, point 11 ; arrêt du 14 juin 2012, *CIVAD*, C-533/10, EU:C:2012:347, point 33 ; arrêt du 26 juin 2012, *Pologne/Commission*, C-335/09 P, EU:C:2012:385, point 48 ; arrêt du 26 juin 2012, *Pologne/Commission*, C-336/09 P, EU:C:2012:386, point 36 ; ordonnance du 18 avril 2013, *Germanwings*, C-413/11, non publiée, EU:C:2013:246, point 16 ; arrêt du 25 avril 2013, *Inuit Tapiriit Kanatami e.a./Commission*, T-526/10, EU:T:2013:215, point 91 ; arrêt du 19 décembre 2013, *Telefónica/Commission*, C-274/12 P, EU:C:2013:852, point 56 ; arrêt du 6 octobre 2015, *Schrems*, C-362/14, EU:C:2015:650, point 60 ; arrêt du 21 septembre 2016, *Commission/Espagne*, C-139/15 P, EU:C:2016:707, point 117 ; arrêt du 21 septembre 2016, *Commission/Espagne*, C-140/15 P, EU:C:2016:708, point 117 ; arrêt du 30 mai 2017, *Safa Nicu Sepahan/Conseil*, C-45/15 P, EU:C:2017:402 point 35 ;.
7. Ph. Leger, *Le droit à un recours juridictionnel effectif*, in Fr. Sudre et H. Labayle (dir.), Réalités et perspectives du droit communautaire des droits fondamentaux, Bruxelles, Bruylant, 2000, p. 85 à 123, notamment p. 92 et 93.

7. Elle se trouve inscrite dans les traités, à l'article 19 du TUE, qui impose aux États membres l'établissement des voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union, et à l'article 47 de la Charte des droits fondamentaux, intitulé « Droit à un recours effectif et à accéder à un tribunal impartial », qui est le pendant des articles 6 et 13 de la CEDH[8] et garantit le droit fondamental de tout citoyen européen à une protection juridictionnelle effective.

8. L'article 47, paragraphe 1, est ainsi rédigé : «Toute personne dont les droits et libertés garantis par le droit de l'Union ont été violés a droit à un recours effectif devant un tribunal dans le respect des conditions prévues au présent article». L'article 47, paragraphe 2, de la charte reconnaît par ailleurs le principe de l'indépendance du juge dans les termes suivants : «Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable par un tribunal indépendant et impartial, établi préalablement par la loi ….».

9. Le principe d'une protection juridictionnelle effective recouvre donc deux exigences. Tout d'abord, il comprend le droit d'accès à un juge. Ensuite, celui ci implique la mise en œuvre de garanties qui assurent au contrôle juridictionnel son efficacité et son effectivité. Il s'agit des exigences du procès équitable, qui se fonde sur le respect rigoureux du principe d'indépendance du juge[9] . Or, ce même principe implique l'exigence d'indépendance et d'impartialité des juridictions, qui se révèlent essentielles pour permettre une protection juridictionnelle réelle et effective.

10. À cet égard, on distingue l'indépendance «externe» et l'indépendance «interne». L'indépendance externe «structurelle» implique que les juges soient protégés contre les interventions ou pressions extérieures qui pourraient

8. Voir les explications relatives à la charte des droits fondamentaux (2007/C 303/02), «Explication ad article 47 – Droit à un recours effectif et à accéder à un tribunal impartial»: «Le premier alinéa se fonde sur l'article 13 de la CEDH» ; «Le deuxième alinéa correspond à l'article 6, paragraphe 1 de la CEDH» ; en ce sens voir, arrêt du 22 décembre 2010, DEB, C-279/09, EU:C:2010:811, point 32 : «Selon les explications afférentes à cet article, lesquelles, conformément à l'article 6, paragraphe 1, troisième alinéa, TUE et à l'article 52, paragraphe 7, de la charte, doivent être prises en considération pour l'interprétation de celle-ci, l'article 47, deuxième alinéa, de la charte correspond à l'article 6, paragraphe 1, de la CEDH».
9. S. Adam et P. Van Elsuwege, *L'exigence d'indépendance du juge, paradigme de l'Union européenne comme union de droit, Journal du droit européen*, 2018, § 2, p. 334 et ss.

compromettre leur indépendance de jugement[10]. L'indépendance externe «individuelle» s'attache, quant à elle, à l'indépendance personnelle du juge, à qui il incombe une certaine neutralité, une prise de distance et une absence de parti pris dans une affaire dans laquelle il statue.

11. En ce qui concerne l'exigence d'indépendance « interne », celle-ci a trait à la notion d'impartialité. Il est exigé du juge de faire preuve d'objectivité et son intérêt ne doit résider que dans la stricte application de la règle de droit, et non dans la solution donnée au litige.[11] L'impartialité est double. Le tribunal doit être à la fois subjectivement impartial, ce qui suppose l'absence de manifestation de préjugé personnel, et être objectivement impartial, et avoir ainsi l'apparence d'impartialité et exclure tout doute légitime.[12]

II. Le principe d'indépendance du juge dans la procédure préjudicielle au sens de l'article 267 TFUE

12. Au sens de l'article 267 TFUE, la Cour se prononce uniquement sur des demandes de décisions préjudicielles qui sont présentées par des juridictions nationales.[13] Dans l'appréciation de l'autorité qui introduit la demande, elle évalue si le juge de renvoi est une «juridiction», en ce sens qu'elle répond au critère d'indépendance dans l'exercice de ses fonctions.

13. Ainsi, dans l'affaire *Margarit Panicello* (C-503/15)[14], la Cour a précisé qu'elle n'était pas compétente pour répondre aux questions posées par le greffier d'un tribunal espagnol *(Secretario Judicial del Juzgado de*

10. Arrêt du 19 septembre 2006, *Wilson*, C-506/04, EU:C:2006:587, point 51 ; arrêt du 17 juillet 2014, *Torresi*, C-58/13 et C-59/13, EU:C:2014:2088, point 18.
11. Arrêt du 19 septembre 2006, *Wilson*, C-506/04, EU:C:2006:587, point 52.
12. Arrêt du 1er juillet 2008, *Chronopost et La Poste/UFEX e.a.*, C-341/06 P et C-342/06 P, EU:C:2008:375, point 54 ; ordonnance du 15 décembre 2011, *Altner/Commission*, C-411/11 P, non publiée, EU:C:2011:852, point 15 ; arrêt du 31 janvier 2018, *Gyarmathy/FRA*, T-196/15 P, non publié, EU:T:2018:47, point 98.
13. Les autres critères pertinents pour reconnaître la qualification de juridiction sont l'origine légale de l'organisme, sa permanence, le caractère obligatoire de sa juridiction, la nature contradictoire de la procédure, l'application, par l'organisme, des règles de droit (voir, notamment, arrêt du 22 décembre 2010, RTL Belgium, C 517/09, ECLI:EU:C:2010:821, point 36, arrêt du 19 décembre 2012, *Epitropos tou Elegktikou Synedriou*, C-363/11, EU:C:2012:825, point 18, et jurisprudence citée ; arrêt du 12 juin 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, point 23).
14. Arrêt du 16 février 2017, *Margarit Panicello,* C-503/15, EU:C:2017:126, points 31 à 42.

Violencia sobre la Mujer Único de Terrassa), celui-ci ne constituant pas une « juridiction » au sens de l'article 267 TFUE, dans le cadre d'une action en paiement d'honoraires. En effet, si, dans cette affaire, le *Secretario Judicial* procédait effectivement à l'examen des actions en paiement d'honoraires et satisfaisait à l'exigence d'indépendance considérée sous son aspect interne, en ce qu'il s'acquittait bien de ses tâches en toute objectivité et impartialité, quant aux parties au litige et à leurs intérêts respectifs dans celui-ci, la Cour a constaté que le Secretario Judicial ne satisfaisait pas à cette exigence considérée sous son aspect externe, laquelle requiert l'absence de lien hiérarchique ou de subordination à l'égard de toute entité pouvant lui donner des ordres ou des instructions, le *Secretario Judicial* étant, en effet, appelé à connaître de l'action en paiement d'honoraires en cause au principal en respectant les principes d'unité d'action et de dépendance hiérarchique.

14. Dans cette optique de vérification de la qualité de l'organe la saisissant au titre de l'article 267 TFUE, l'exigence d'indépendance du juge peut être associée, du fait des garanties induites par une procédure de cette nature, à celle selon laquelle l'organe en cause ne peut adresser à la Cour une demande de décision préjudicielle que s'il est appelé à statuer dans le cadre d'une procédure destinée à aboutir à une décision de caractère juridictionnel[15] , l'organe concerné devant notamment avoir la qualité de tiers par rapport à l'autorité d'adoption de la décision faisant l'objet du recours.[16]

15. La Cour s'assure également de l'existence de règles et de garanties d'indépendance et d'impartialité de l'organe de saisine au regard de son fonctionnement interne et de la nomination et de la récusation de ses membres, qui doivent permettre «d'écarter, dans l'esprit des justiciables, tout doute légitime quant à l'imperméabilité de ladite instance à l'égard d'éléments extérieurs

15. Arrêt du 31 janvier 2013, *Belov*, C-394/11, EU:C:2013:48, point 39 ; arrêt du 30 novembre 2000, *Österreichischer Gewerkschaftsbund*, C-195/98, U:C:2000:655, point 25.

16. «La notion d'indépendance, qui est inhérente à la mission de juger, implique avant tout que l'instance concernée ait la qualité de tiers par rapport à l'autorité qui a adopté la décision frappée d'un recours et cette notion vise ainsi, en particulier, à assurer l'égale distance par rapport aux parties au litige et à leurs intérêts respectifs au regard de l'objet de celui-ci», ordonnance du 28 novembre 2013, *Devillers*, C-167/13, EU:C:2013:804, point 15 ; voir également arrêt du 6 octobre 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, points 19-21.

et à sa neutralité par rapport aux intérêts qui s'affrontent devant elle»[17]. À cet égard, afin de considérer la condition relative à l'indépendance de l'organisme de renvoi comme remplie, la jurisprudence exige notamment que les cas de révocation des membres de cet organisme soient déterminés par des dispositions législatives expresses[18] et suffisamment précises[19]. Afin d'assurer leur neutralité, les juges concernés doivent, par exemple, pouvoir se déporter en cas de conflit d'intérêt avec les parties au litige.

16. En matière d'indépendance externe, l'exigence d'indépendance n'est pas remplie lorsque l'organe de saisine entretient des liens organiques ou fonctionnels avec l'autorité dont il a à juger des actes[20] , et que celle-ci est susceptible de lui donner des instructions.[21] La seule circonstance que l'organe concerné soit de nature ordinale ou corporatiste ne suffit cependant pas nécessairement à écarter sa qualité éventuelle de juridiction, la Cour s'assurant en tout état de cause de l'existence, ou non, de garanties suffisantes en matière d'indépendance et d'impartialité dudit organe.[22]

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17. Ordonnance du 16 février 2017, *Air Serbia et Kondic,* C-476/16, EU:C:2017:874, point 19 ; voir également en ce sens, arrêt du 9 octobre 2014, *TDC*, C 222/13, EU:C:2014:2265, point 32.
18. Arrêt du 31 janvier 2013, *D. et A.*, C-175/11, EU:C:2013:45, point 97, et ordonnance du 14 mai 2008, *Pilato*, C-109/07, EU:C:2008:274, point 24 ; voir également arrêt du 9 octobre 2014, *TDC*, C-222/13, EU:C:2014:2265, point 32.
19. Ordonnance du 16 février 2017, *Air Serbia et Kondic*, C-476/16, EU:C:2017:874, point 25.
20. Arrêt du 30 mars 1993, *Corbiau*, C-24/92, EU:C:1993:118, points 15-17 ; voir également ordonnance du 28 novembre 2013, *Devillers*, C-167/13, EU:C:2013:804, dans laquelle il ressortait de la décision de renvoi et du dossier que le Conseil régional en cause était un organe dont la mission consistait à assurer, notamment, le respect des règles de déontologie afférentes à la profession de vétérinaire. Le requérant lui était opposé dans le cadre d'une procédure disciplinaire engagée à son encontre par ce dernier. Le Conseil régional constituant l'autorité décisionnaire, il a été jugé qu'il n'avait pas la qualité de tiers par rapport aux intérêts en présence. Bien que le médecin vétérinaire instructeur ne participait pas aux délibérations ni aux décisions prises en matière disciplinaire, la Cour a constaté qu'il existait un lien fonctionnel étroit entre ce dernier et le Conseil régional : « Il s'ensuit que, lorsqu'il prend une décision disciplinaire, le Conseil régional ne possède pas l'impartialité requise à l'égard du contrevenant éventuel pour constituer une juridiction au sens de l'article 267 TFUE » (points 17-20).
21. Voir arrêt du 24 mai 2016, *MT Højgaard et Züblin*, aff. C-396/14, EU:C:2016:347, point 26 (concernant la reconnaissance de la qualité de «juridiction » du Klagenævnet for Udbud - Commission des recours en matière de marchés publics, Danemark).
22. Dans le cas du Conseil national de l'ordre des avocats italiens : voir arrêt du 17 juillet 2014, *Angelo Alberto Torresi et Pierfrancesco Torresi* (affaires jointes C-58/13 et C-59/13), ECLI:EU:C:2014:2088, points 15-30.

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17. Bien évidemment, la plupart du temps, c'est dans le cadre de renvois formulés par des autorités administratives dont l'indépendance, ou celle de leurs membres, n'était pas suffisante pour accéder à la qualité de «juridiction», au sens de l'article 267 TFUE, que cette problématique s'est généralement posée devant la Cour.[23]

III. Le principe de l'indépendance du juge dans l'application du droit de l'Union au niveau national

18. Si l'exigence d'indépendance du juge s'applique bien évidemment au juge de l'Union lui même, celle ci s'impose également aux juridictions des États membres lorsque ces dernières sont amenées à interpréter et appliquer le droit de l'Union, conformément à l'article 19, paragraphe 1, TUE.

3.1. Le principe de l'indépendance du juge national au soutien de l'effectivité du droit de l'Union

19. La Cour relie désormais explicitement le principe d'indépendance du juge au principe de protection juridictionnelle effective reconnu par l'article 19, paragraphe 1, TUE. Selon cette disposition, l'article 19, paragraphe 1, du traité sur l'Union européenne (TUE) prévoit que : «Les États membres établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union et impose expressément aux États-membres l'établissement des voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union».[24]

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23. Voir à cet égard, par exemple, l'arrêt du 31 mai 2005, *Syfait e.a.*, C-53/03, EU:C:2005:333, points 29-31, concernant l'Epitropi Antagonismou (commission hellénique de la concurrence) qui ne satisfait pas à ce critère, celle-ci étant soumise à la tutelle du ministre grec du Développement, ce qui implique que celui-ci est habilité, dans certaines limites, à contrôler la légalité de ses décisions. Même si ses membres jouissent d'une indépendance personnelle et fonctionnelle, il n'apparaît pas, par ailleurs, que la révocation ou l'annulation de leur nomination soit soumise à des garanties particulières, ce qui ne semble pas de nature à faire obstacle efficacement aux interventions ou pressions indues du pouvoir exécutif à l'égard desdits membres. Voir également arrêt du 9 octobre 2014, *TDC*, C-222/13, EU:C:2014:2265, point 32 et arrêt du 4 février 1999, *Köllensperger et Atzwanger*, C-103/97, EU:C:1999:52, points 19-25.

24. L'article 19, paragraphe 2, TUE prévoit que : « Les juges et les avocats généraux de la Cour de justice et les juges du Tribunal sont choisis parmi des personnalités offrant toutes garanties d'indépendance et réunissant les conditions visées aux articles 253 et 254 du traité sur le fonctionnement de l'Union européenne. Ils sont nommés d'un commun accord par les gouvernements des États membres pour six ans. Les juges et les avocats généraux sortants peuvent être nommés de nouveau.».

20. Le 27 février 2018, dans l'arrêt *Associação Sindical dos Juízes Portuguese*,[25] la grande chambre de la Cour s'est ainsi prononcée sur la validité, au regard du principe de l'indépendance des juges, de réductions de salaire appliquées aux juges de la Cour des comptes au Portugal. En raison d'impératifs liés à l'élimination du déficit budgétaire excessif du Portugal et dans le contexte d'un programme d'assistance financière de l'Union à cet État membre, le législateur portugais avait réduit, de manière temporaire, la rémunération d'une grande partie de la fonction publique portugaise. L'Association syndicale des juges portugais avait formé un recours contre ces mesures budgétaires, considérant qu'elles violaient le principe de l'indépendance des juges. La juridiction de renvoi avait interrogé la Cour sur la compatibilité desdites mesures avec l'article 19 TUE et l'article 47 de la charte.

21. Le gouvernement portugais avait principalement axé sa défense sur l'idée que la réglementation nationale en cause au principal n'était pas constitutive d'une mesure de mise en œuvre du droit de l'Union au sens de l'article 51 de la Charte, qui conditionne l'applicabilité de celle-ci, semblant déduire de la jurisprudence relative à ce dernier l'incompétence manifeste de la Cour pour statuer sur l'interprétation tant de l'article 19 TUE que de l'article 47 de la Charte. Il soutenait également que le principe d'indépendance des juges tel qu'invoqué par la requérante au principal et la juridiction de renvoi,[26] ne découlait ni de l'article 19 TUE, ni de l'article 47, paragraphe 1, de la Charte.

22. La Cour a d'abord souligné que l'article 19 TUE, qui concrétise la valeur de l'État de droit affirmée à l'article 2 TUE, confie la charge d'assurer le contrôle juridictionnel dans l'ordre juridique de l'Union non seulement à la Cour, mais également aux juridictions nationales. Elle a rappelé, à cet égard, que l'existence même d'un contrôle juridictionnel effectif destiné à assurer le respect du droit de l'Union est inhérente à un État de droit. Tout État membre

25. Arrêt du 27 février 2018, *Associação Sindical dos Juízes Portugueses,* C 64/16, EU:C:2018:117. Cela même contrairement à la position exprimée par l'avocat général Saugmandsgaard Øe qui avait suggéré à la Cour, dans ses conclusions du 18 mai 2017, de distinguer à cet égard la notion de «protection juridictionnelle effective » du principe de « l'indépendance des juges», l'obligation pour les États membres d'établir des possibilités de recours en vertu de l'article 19 TUE étant, selon lui, de caractère essentiellement procédural et se distinguant du droit à une procédure équitable devant une juridiction indépendante (EU:C:2017:395, points 63-65).

26. Observations du gouvernement portugais, point 77 de l'arrêt de la Cour dans l'affaire *Associação Sindical dos Juízes Portugueses,* C 64/16, EU:C:2018:117 : le principe de l'indépendance étant ici entendu comme l'impartialité de l'organe juridictionnel contre des incursions extra-judiciaires et illégales dans le déroulement de la procédure.

doit, en conséquence, assurer que les instances relevant, en tant que « juridiction », au sens défini par le droit de l'Union, de son système de voies de recours dans les domaines couverts par le droit de l'Union satisfont aux exigences d'une protection juridictionnelle effective. Ainsi, dès lors que la Cour des comptes est susceptible de se prononcer, en qualité de juridiction, sur des questions portant sur l'application ou l'interprétation du droit de l'Union, le Portugal doit garantir que cette instance satisfait aux exigences inhérentes à une protection juridictionnelle effective.

23. La Cour a relevé à cet égard que, afin que cette protection soit garantie, la préservation de l'indépendance d'une telle instance est primordiale ainsi que le confirme l'article 47, deuxième alinéa, de la charte. La garantie d'indépendance s'impose, en effet, non seulement au niveau de l'Union, mais également au niveau des États membres, pour les juridictions nationales. Cette notion d'indépendance suppose, notamment, que l'instance concernée exerce ses fonctions juridictionnelles en toute autonomie, sans être soumise à aucun lien hiérarchique ou de subordination à l'égard de quiconque et sans recevoir d'ordres ou d'instructions de quelque origine que ce soit, et qu'elle soit protégée d'interventions ou de pressions extérieures susceptibles de porter atteinte à l'indépendance de jugement de ses membres et d'influencer leurs décisions. Or, selon la Cour, la perception d'un niveau de rémunération en adéquation avec l'importance des fonctions qu'ils exercent constitue une garantie inhérente à l'indépendance des juges.

24. Au cas d'espèce, la Cour a toutefois constaté que les mesures de réduction salariale en cause n'avaient pas été appliquées qu'aux membres de la Cour des comptes et s'apparentaient donc à des mesures générales visant à faire contribuer un ensemble de membres de la fonction publique nationale à l'effort d'austérité. En outre, ces mesures avaient une vocation temporaire et avaient été définitivement supprimées au 1er octobre 2016. Dès lors, la Cour a dit pour droit que l'article 19, paragraphe 1, second alinéa, TFUE ne s'oppose pas à l'application de mesures générales de réduction salariale, telles que celles en cause au principal, liées à des contraintes d'élimination d'un déficit budgétaire excessif ainsi qu'à un programme d'assistance financière de l'Union.

25. Il découle de cette jurisprudence que tout État membre doit garantir que ses juridictions satisfont aux exigences dont dépend une protection juridictionnelle effective, y inclus la préservation de l'indépendance des juges, et que cette dernière est horizontalement protégée en vertu même du droit de

l'Union devant l'ensemble des juridictions des États membres. Il est en effet intéressant de constater que la Cour, dans cet arrêt, n'a pas limité le champ d'application ratione materiae de l'article 19, paragraphe 1, TUE aux seules situations dans lesquelles les États membres mettent en œuvre le droit de l'Union (comme c'est le cas de la charte) mais définit celui-ci par référence aux «domaines couverts par le droit de l'Union» (point 29), de sorte que l'exigence d'indépendance du juge est applicable à l'ensemble des juridictions des États membres dont l'action est susceptible de relever du droit de l'Union. En adoptant une telle approche, la Cour assume ainsi pleinement sa responsabilité juridictionnelle, en tant que « garante ultime du respect du droit » dans l'interprétation et l'application des traités.[27]

3.2. Le principe de l'indépendance du juge au regard de l'application du droit de l'Union dans le cadre de l'espace de liberté, de sécurité et de justice

26. Le principe de l'indépendance du juge a été examiné par la Cour notamment sous l'angle de la protection juridictionnelle effective, et notamment de l'article 47 de la charte, dans différentes affaires récentes au soutien de l'application du droit de l'Union dans le cadre de l'espace de liberté, de sécurité et de justice.

27. Ainsi, dans l'arrêt *El Hassani* (C-403/16)[28], dans le contexte de la détermination et de la mise en œuvre du droit à l'exercice d'un recours prévu par l'article 32, paragraphe 3, du code des visas (règlement n° 810/2009) à l'encontre des décisions de refus de visas formulées par les autorités nationales concernées, la Cour a rappelé que la charte était applicable et que son article 47 constituait une réaffirmation du principe de protection juridictionnelle effective, selon lequel toute personne a droit à ce que sa cause soit entendue par un tribunal indépendant et impartial. Elle a rappelé que la notion d'indépendance, qui est inhérente à la mission de juger, implique avant tout que l'instance concernée ait la qualité de tiers par rapport à l'autorité qui a adopté la décision frappée d'un recours.

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27. Observations du gouvernement portugais, point 77 de l'arrêt de la Cour dans l'affaire *Associação Sindical dos Juízes Portugueses,* C 64/16, EU:C:2018:117 : le principe de l'indépendance étant ici entendu comme l'impartialité de l'organe juridictionnel contre des incursions extra-judiciaires et illégales dans le déroulement de la procédure.
28. Arrêt du 13 décembre 2017, *Soufiane El Hassani*, C 403/16, EU:C:2017:960.

28. C'est, ensuite, dans le cadre de la mise en œuvre du mandat d'arrêt européen, institué par la décision-cadre 2002/584, que la Cour a été amenée à se prononcer à différentes reprises sur l'indépendance du juge, à tout le moins, dans un premier temps, au titre de l'examen de la qualité ou non « d'autorité judiciaire » de l'autorité d'émission du mandat d'arrêt, aux termes des articles 1 et 6 de la décision-cadre, cette qualité étant notamment examinée sous l'angle de l'indépendance de l'autorité en cause.[29]

29. Dans l'arrêt *Minister for Justice and Equality (Défaillances du système judiciaire)* (C 216/18 PPU)[30], ce débat a pris une autre dimension : la Cour, en formation de grande chambre, a, en effet, été amenée à se prononcer sur la possibilité ou non, pour une autorité d'exécution, de s'abstenir de donner suite au mandat d'arrêt, en cas de risque réel de violation du droit d'accès à un tribunal indépendant en raison de défaillances systémiques ou généralisées en ce qui concerne l'indépendance du pouvoir judiciaire de l'État membre d'émission. Saisie d'une demande d'exécution d'un mandat d'arrêt européen délivré par une juridiction polonaise, une autorité d'exécution irlandaise s'était interrogée sur les conséquences, pour l'exécution de cette demande, des changements récemment apportés au système judiciaire par le gouvernement polonais, qui avaient conduit la Commission européenne à adopter, le 20 décembre 2017, une proposition motivée invitant le Conseil à constater, sur le fondement de l'article 7, paragraphe 1, TUE, l'existence d'un risque clair de violation grave de l'État de droit par la Pologne.

30. Lorsque une personne faisant l'objet d'un mandat d'arrêt européen invoque, pour s'opposer à sa remise à l'autorité judiciaire d'émission, l'existence de défaillances systémiques ou, du moins, généralisées qui, selon elle, sont susceptibles d'affecter l'indépendance du pouvoir judiciaire dans l'État membre d'émission et de porter ainsi atteinte au contenu essentiel de son droit fondamental à un procès équitable, l'autorité judiciaire d'exécution est tenue d'apprécier l'existence ou non d'un risque réel que la personne concernée subisse une violation de ce droit fondamental.

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29. Voir notamment les arrêts suivants : arrêts du 10 novembre 2016, *Poltorak*, C 452/16 PPU, EU:C:2016:858, points 28 ; *Kovalkovas*, C 477/16 PPU, EU:C:2016:861, points 29, 42 ; arrêt du 27 mai 2019, *PF*, C-509/18, ECLI:EU:C:2019:457, points 52, 56, 57.
30. Arrêt du 25 juillet 2018, *Minister for Justice and Equality (Défaillances du système judiciaire),* C 216/18 PPU, EU:C:2018:586, points 48-51.

31. La Cour a indiqué à ce propos que les informations figurant dans une proposition motivée adressée par la Commission au Conseil sur le fondement de l'article 7, paragraphe 1, TUE, constituent des éléments particulièrement pertinents aux fins de cette évaluation. La Cour a cependant précisé que ce n'est qu'en présence d'une décision du Conseil européen constatant, dans les conditions prévues à l'article 7, paragraphe 2, TUE, une violation grave et persistante dans l'État membre d'émission des principes énoncés à l'article 2 TUE, tels que ceux inhérents à l'État de droit, suivie de la suspension par le Conseil de l'application de la décision cadre 2002/584 au regard de cet État membre, que l'autorité judiciaire d'exécution serait tenue de refuser automatiquement d'exécuter tout mandat d'arrêt européen émis par ledit État membre, sans devoir procéder à une quelconque appréciation concrète du risque réel couru par la personne concernée de voir affecter le contenu essentiel de son droit fondamental à un procès équitable.

32. Si l'autorité judiciaire d'exécution constate qu'il existe, dans l'État membre d'émission, un risque réel de violation du contenu essentiel du droit fondamental à un procès équitable en raison de défaillances systémiques ou généralisées en ce qui concerne le pouvoir judiciaire de cet État membre, de nature à compromettre l'indépendance des juridictions dudit État, cette autorité doit, dans un second temps, apprécier, de manière concrète et précise, si, dans les circonstances de l'espèce, il existe des motifs sérieux et avérés de croire que, à la suite de sa remise à l'État membre d'émission, la personne recherchée courra ce risque. La Cour a précisé à ce propos que l'autorité judiciaire d'exécution devait solliciter, auprès de l'autorité judiciaire d'émission, toute information complémentaire qu'elle juge nécessaire pour l'évaluation de l'existence d'un tel risque.

33. Cet arrêt confirme d'avantage encore l'importance du principe d'indépendance du juge dans l'ordre juridique de l'Union européenne, en remettant en cause, au cas d'espèce, au besoin, la confiance mutuelle sur laquelle s'appuie la coopération judiciaire établie par les instruments, tel le mandat européen, de l'espace de liberté, de sécurité et de justice. Il en va de la protection des valeurs aussi essentielles que le droit d'accès à un tribunal indépendant et à un procès équitable, et, finalement de l'État de droit.

34. À cet égard, il y a lieu de rappeler également les arrêts dans les affaires jointes C 508/18 *OG* (parquet de Lübeck) et C 82/19 PPU *PI* (parquet de Zwickau) ainsi que dans l'affaire C 509/18 *PF* (procureur général de Lituanie). Dans ces affaires,

deux ressortissants lituaniens et un ressortissant roumain s'opposaient, devant les juridictions irlandaises, à l'exécution de mandats d'arrêt européens émis par des parquets allemands et le procureur général de Lituanie aux fins de poursuites pénales. Les trois personnes concernées faisaient valoir que les parquets allemands et le procureur général de Lituanie ne sont pas compétents pour émettre un mandat d'arrêt européen, dès lors qu'ils ne sont pas une «autorité judiciaire» au sens de la décision cadre relative au mandat d'arrêt européen et, en particulier, ne sont pas indépendants par rapport au pouvoir exécutif étant donné qu'ils appartiennent à une hiérarchie administrative dirigée par le ministre de la Justice, de sorte qu'il existe un risque d'ingérence politique.

35. La Cour a dit pour droit que, tant les parquets allemands que le procureur général de Lituanie, dont le rôle est essentiel dans la conduite des procédures pénales, peuvent donc être considérés comme participant à l'administration de la justice pénale. Toutefois, l'autorité chargée d'émettre un mandat d'arrêt européen doit agir de manière indépendante dans l'exercice de ses fonctions, même lorsque ce mandat se fonde sur un mandat d'arrêt national émis par un juge ou une juridiction. Elle doit, à ce titre, être en mesure d'exercer ces fonctions de façon objective, en prenant en compte tous les éléments à charge et à décharge, et sans être exposée au risque que son pouvoir décisionnel fasse l'objet d'ordres ou d'instructions extérieurs, notamment de la part du pouvoir exécutif, de telle sorte qu'il n'existe aucun doute quant au fait que la décision d'émettre le mandat d'arrêt européen revienne à cette autorité et non pas, en définitive, audit pouvoir.

36. Dès lors, selon la Cour, la notion d'« autorité judiciaire d'émission » au sens de la décision cadre ne vise pas les parquets d'un État membre, tels que ceux de l'Allemagne, qui sont exposés au risque d'être soumis, directement ou indirectement, à des ordres ou à des instructions individuels de la part du pouvoir exécutif, tel qu'un ministre de la Justice, dans le cadre de l'adoption d'une décision relative à l'émission d'un mandat d'arrêt européen. En revanche, cette notion vise le procureur général d'un État membre, tel que celui de la Lituanie, qui, tout en étant structurellement indépendant du pouvoir judiciaire, est compétent pour exercer les poursuites pénales et dont le statut lui confère une garantie d'indépendance par rapport au pouvoir exécutif dans le cadre de l'émission d'un mandat d'arrêt européen.

3.3 Le non respect du principe de l'indépendance du juge comme violation des obligations fondamentales résultant des articles 19, paragraphe 1, TUE et 47 de la charte des droits fondamentaux

37. À la fin de l'année 2018, la Commission a introduit un recours en manquement contre la Pologne en lui reprochant de ne pas respecter les obligations qui lui incombent en vertu des dispositions combinées de l'article 19, paragraphe 1, second TUE, et de l'article 47 de la Charte des droits fondamentaux pour non-respect du principe d'indépendance et d'inamovibilité des juges par l'adoption de la loi du 8 décembre 2017, relatif à l'abaissement du départ à la retraite des juges de la Cour suprême, qui reviendrait à modifier, sans régime transitoire, de manière profonde et immédiate, la composition de la Cour suprême de Pologne ainsi que par l'adoption de mesures législatives permettant au président de la République de Pologne de prolonger le mandat actif de ces juges de manière discrétionnaire et sans contrôle juridictionnel.

38. Ces réformes posent la question de l'ingérence des pouvoirs exécutif et législatif dans la composition et le fonctionnement des institutions juridictionnelles, tel que le tribunal constitutionnel ou encore la Cour suprême.

39. Dans l'affaire en manquement, la Pologne a soutenu que les mesures litigieuses ne relèvent pas du champ d'application matériel de l'article 19, paragraphe 1, second alinéa, TUE. Elle a argué que les dispositions nationales ne constituent pas des mesures de mise en œuvre du droit de l'Union et que l'article 19, paragraphe 1, second alinéa, TUE ne prévoit qu'une obligation générale d'établir les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union. La définition générale de cette obligation ne permettrait donc pas de considérer que la Charte, y compris son article 47, constituerait une norme de contrôle des dispositions nationales régissant le fonctionnement de la justice.[31]

40. Sur la base des dispositions combinées de l'article 19, paragraphe 1, second alinéa, TUE et de l'article 47 de la charte, la Cour, réunie en grande chambre, a, dans un premier temps, par ordonnance en référé rendue le 17

31. Mémoire en défense de la République de Pologne dans l'affaire C 619/18, point 38.

décembre 2018[32] , ordonné à la République de Pologne de suspendre immédiatement l'application des dispositions nationales en cause. Ensuite, dans l'arrêt prononcé le 24 juin 2019[33], elle a accueilli le recours en manquement introduit par la Commission, en suivant les conclusions de l'avocat général Tanchev du 11 avril 2019.[34]

41. En premier lieu, elle a pris position sur l'applicabilité et la portée de l'article 19, paragraphe 1, second alinéa, TUE. À cet égard, elle a rappelé que cette disposition impose à tous les États membres d'établir les voies de recours nécessaires pour assurer une protection juridictionnelle effective, au sens notamment de l'article 47 de la charte des droits fondamentaux de l'Union européenne, dans les domaines couverts par le droit de l'Union. Plus particulièrement, tout État membre doit, en vertu de l'article 19, paragraphe 1, second alinéa, TUE, assurer que les instances qui relèvent, en tant que «juridiction», au sens défini par le droit de l'Union, de son système de voies de recours dans les domaines couverts par le droit de l'Union et qui, partant, peuvent être appelées à statuer sur des questions liées à l'application ou à l'interprétation de ce droit, satisfont aux exigences d'une protection juridictionnelle effective, ce qui vaut en l'occurrence pour la Cour suprême polonaise. Par ailleurs, la Cour a indiqué que, pour garantir que cette juridiction soit à même d'offrir une telle protection, la préservation de son indépendance est primordiale, ainsi que le confirme l'article 47, deuxième alinéa, de la charte des droits fondamentaux. L'exigence d'indépendance des juridictions, qui est inhérente à la mission de juger, relève du contenu essentiel du droit à une protection juridictionnelle effective et du droit fondamental à un procès équitable, lequel revêt une importance cardinale en tant que garant de la protection de l'ensemble des droits que les justiciables tirent du droit de l'Union et de la préservation des valeurs communes aux États membres énoncées à l'article 2 TUE, notamment la valeur de l'État de droit.

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32. Ordonnance (référé) du 17 décembre 2018, *Commission/Pologne* (C 619/18 R, EU:C:2018:1021. Cette ordonnance faisait suite à une ordonnance en référé rendue antérieurement par Mme la vice-présidente de la Cour inaudita altera parte, par laquelle celle ci avait provisoirement fait droit à la demande de mesures provisoires présentée par la Commission (ordonnance du 19 octobre 2018, *Commission/Pologne,* C 619/18 R, non publiée, EU:C:2018:852).
33. Arrêt du 24 juin 2019, *Commission/Pologne* (Indépendance de la Cour suprême), C-619/18, EU:C:2019:531.
34. Cononclusions de l'avocat général Tanchev dans l'affaire *Commission/Pologne* (Indépendance de la Cour suprême), C- 619/18, EU:C:2019:325.

42. En deuxième lieu, la Cour a précisé la portée de cette exigence. À ce sujet, elle a énoncé que les garanties d'indépendance et d'impartialité en découlant postulent l'existence de règles, notamment en ce qui concerne la composition des instances concernées, la nomination, la durée des fonctions ainsi que les causes d'abstention, de récusation et de révocation des membres les composant, qui permettent d'écarter tout doute légitime, dans l'esprit des justiciables, quant à l'imperméabilité desdites instances à l'égard d'éléments extérieurs et à leur neutralité par rapport aux intérêts qui s'affrontent. En particulier, cette indispensable liberté des juges à l'égard de toutes interventions ou pressions extérieures exige certaines garanties propres à protéger la personne de ceux qui ont pour tâche de juger, telles que l'inamovibilité. En l'occurrence, la Cour a constaté que la réforme contestée a pour conséquence une cessation anticipée de l'exercice des fonctions juridictionnelles des juges en exercice au sein de la Cour suprême et qu'elle ne saurait dès lors être admise que si elle est justifiée par un objectif légitime et proportionnée au regard de celui-ci et pour autant qu'elle n'est pas de nature à susciter, dans l'esprit des justiciables, des doutes légitimes tels que ceux mentionnés ci-avant.

43. En dernier lieu, la Cour s'est prononcée sur le pouvoir discrétionnaire, accordé par la nouvelle loi sur la Cour suprême au président de la République, de prolonger la fonction judiciaire active des juges de cette juridiction au-delà du nouvel âge de départ à la retraite fixé par cette loi. Elle a relevé que, s'il appartient aux seuls États membres de décider s'ils autorisent ou non une telle prolongation, il demeure que, lorsque ceux-ci optent pour un tel mécanisme, ils sont tenus de veiller à ce que les conditions et les modalités auxquelles se trouve soumise une telle prolongation ne soient pas de nature à porter atteinte au principe de l'indépendance des juges. À cet égard, la circonstance qu'un organe tel que le président de la République soit investi du pouvoir de décider ou non d'accorder une telle prolongation éventuelle n'est, certes, pas suffisante, à elle seule, pour conclure à l'existence d'une atteinte audit principe. Toutefois, il importe de s'assurer que les conditions de fond et les modalités procédurales présidant à l'adoption de telles décisions soient telles qu'elles ne puissent pas faire naître, dans l'esprit des justiciables, des doutes légitimes quant à l'indépendance des juges concernés. À cette fin, il importe, notamment, que lesdites conditions et modalités soient conçues de telle manière que ces juges se trouvent à l'abri d'éventuelles tentations de céder à des interventions ou à des pressions extérieures susceptibles de mettre en

péril leur indépendance. De telles modalités doivent, ainsi, en particulier, permettre d'exclure non seulement toute influence directe, sous forme d'instructions, mais également les formes d'influence plus indirectes susceptibles d'orienter les décisions des juges concernés.

44. De nombreuses affaires préjudicielles, toutes relatives, à un titre ou à un autre, aux réformes judiciaires en cours en Pologne, sont pendantes devant la Cour de justice.[35]

45. En particulier, les affaires C 585/18, C 624/18 et C 625/18 visent la question de savoir si la Chambre disciplinaire de la Cour suprême de Pologne, crée ex nihilo, satisfait aux exigences d'indépendance judicaire établies par le droit de l'Union. Cette chambre disciplinaire, chargée de statuer sur les litiges portant sur la mise à la retraite des juges de la Cour suprême de façon anticipée et illégale au titre de l'article 19, paragraphe 1, second alinéa, TUE, est composée de juges, sélectionnés au préalable par le Conseil national de Magistrature (ci-après, «CNM»), conformément à la Constitution Polonaise, en vue d'être nommés par le Président de la République.

46. Dans ses conclusions sur ces affaires, présentées le 27 juin 2019, l'avocat général Tanchev considère que le modèle de constitution et le mode de fonctionnement du CNM n'offrent pas de garantie d'indépendance par rapport aux pouvoirs législatif et exécutif, la chambre disciplinaire ne satisfaisant pas aux exigences d'indépendance des juges énoncées à l'article 47 de la Charte. À cet égard, il rappelle tout d'abord que les mesures relatives à la nomination des juges sont des aspects importants des garanties d'indépendance de la magistrature en droit de l'Union et qu'ainsi les règles portant sur la composition et le fonctionnement d'un organe national en charge de sélectionner les juges, tel qu'un conseil de la magistrature, peuvent être prises en compte aux fins d'apprécier si une juridiction nationale offre des garanties d'indépendance suffisantes au regard du droit de l'Union. En effet, compte tenu du rôle crucial d'un CNM ou tout organe similaire pour garantir l'indépendance du pouvoir judiciaire national, il doit être lui-même indépendant et libre de toute interférence des autorités législatives et exécutives dans l'exécution de ses missions. Il constate néanmoins qu'en l'espèce le mode de désignation des

35. Il s'agit d'un recours en manquement (affaire C-192/18) et de plusieurs demandes de décision préjudicielle déférées par la Cour suprême polonaise (affaires C-537/18, C-585/18, C-624/18, C-625/18, et C-668/18), la cour suprême administrative polonaise (affaire C-824/18) et des juridictions polonaises inférieures (C-558/18, C-563/18 et C-623/18).

membres judicaires du CNM en Pologne est de nature à affecter défavorablement l'indépendance du CNM, dans la mesure où ce dispositif implique un très haut degrés d'influence des autorités législatives sur ce dernier, celles-ci choisissant des candidats qui bénéficient de peu ou d'aucun soutien de la part des juges, de sorte que l'opinion de la communauté judiciaire ne détient pas un poids suffisant dans le processus de sélection des membres du CNM. En outre, la loi sur le CNM prévoit une révocation prématurée des mandats des membres existants du CNM. Enfin, le remplacement immédiat desdits membres existants du CNM, en sus du mode de désignation critiqué, doit être considéré comme une entrave de plus à l'indépendance du CNM par rapport aux autorités législatives et exécutives.

47. À cet égard, il y a lieu de rappeler également l'affaire préjudicielle hongroise C 564/19 sur l'indépendance des juges. Le renvoi s'inscrit dans le cadre d'une procédure pénale, initiée contre un ressortissant suédois ne comprenant pas la langue hongroise, qui est la langue du litige au principal. Dans le cadre de cette procédure touchant des questions liées aux droits à l'interprétation, le juge de renvoi a posé plusieurs questions sur les conséquences de la réforme judiciaire hongroise, lancée en 2011. Le juge de renvoi a précisé que depuis 2012, l'administration et la gestion centrale du système judiciaire appartient à la présidente de l'Office national de la justice qui a été nommée par l'Assemblé nationale. La présidente a des compétences étendues qui visent, *inter alia*, la nomination et l'affectation des chefs de juridictions et elle peut adresser des d'instructions à l'encontre des chefs de juridictions et dispose de pouvoirs disciplinaires à l'encontre des juges.

48. Selon le juge de renvoi, la présidente de l'Office national de la justice a régulièrement violé le principe de l'indépendance des juges par sa pratique de déclarer infructueux les avis de vacances aux postes de chef de juridiction sans motivation suffisante et pour avoir procédé à la désignation des chefs de juridictions temporaires, de manière complètement discriminatoire. Dès lors que le chef de juridiction a une influence directe sur le travail et l'avancement professionnel des juges, y compris la répartition des affaires, le pouvoir disciplinaire et l'environnement du travail, la réglementation actuelle hongroise peut, selon le juge de renvoi, violer les droits à un recours effectif et à un tribunal impartial, protégés par l'article 47 de la Charte, et peut être contraire à l'article 19, paragraphe 1, seconde alinéa du TUE portant sur l'obligation des États membres d'assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union.

IV. Le rôle combiné des procédures juridictionnelle et politique en vigueur dans les traités européens aux fins de la protection du principe d'indépendance du juge

49. Des références à l'indépendance du juge ont encore été incluses dans une résolution du Parlement européen du 12 septembre 2018[36] relative à une proposition invitant le Conseil à constater, conformément à l'article 7, paragraphe 1, TUE, l'existence d'un risque clair de violation grave par la Hongrie des valeurs sur laquelle l'Union est fondée. La Hongrie a présenté un recours devant la Cour de justice le 17 octobre 2018, aux fins de l'annulation de cette résolution du Parlement européen.[37] Cette saisine est prévue par l'article 269 TFUE,[38] qui concerne la contestation de la légalité d'un acte adopté par le Conseil européen ou par le Conseil en vertu de l'article 7 TUE. La compétence de la Cour est cependant simplement limitée aux « prescriptions de procédure ».

36. Résolution du Parlement européen du 12 septembre 2018 (n° P8_TA(2018) 0340) relatif à une proposition invitant le Conseil à constater, conformément à l'article 7, paragraphe 1, du traité sur l'Union européenne, l'existence d'un risque clair de violation grave par la Hongrie des valeurs sur lesquelles l'Union est fondée.
37. Affaire C-650/18, Hongrie/Parlement européen.
38. Article 269, TFUE : « La Cour de justice n'est compétente pour se prononcer sur la légalité d'un acte adopté par le Conseil européen ou par le Conseil en vertu de l'article 7 du traité sur l'Union européenne que sur demande de l'État membre qui fait l'objet d'une constatation du Conseil européen ou du Conseil, et qu'en ce qui concerne le respect des seules prescriptions de procédure prévues par ledit article. »

50. Dans cette affaire, la Hongrie reproche au Parlement Européen d'avoir, dans le cadre du vote de la résolution, « gravement enfreint les dispositions de l'article 354 du TFUE » et de l'article 178, paragraphe 3, du règlement intérieur du Parlement Européen, par la prise en compte des seules voix «pour» et « contre » pour le calcul des suffrages exprimés par les membres du Parlement européen, à l'exclusion des abstentions, les autres moyens reposant sur les conséquences diverses de la violation alléguée[39]. La Hongrie soulève ainsi, dans le contexte strict du cadre fixé par l'article 269 TFUE, quatre moyens afférents à des prescriptions de procédure.

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39. Dans l'affaire C-650/18, « à l'appui de son recours, le gouvernement hongrois invoque quatre moyens :
1. Pour le gouvernement hongrois, dans le cadre du vote de la résolution attaquée, le Parlement européen a gravement enfreint les dispositions de l'article 354 TFUE et de son propre règlement intérieur. Dans le cadre de ce vote, seules les voix « pour » et « contre » ont été prises en compte dans le calcul des suffrages exprimés par les membres du Parlement européen, à l'exclusion des abstentions, ce qui va à l'encontre des dispositions de l'article 354 du TFUE et de l'article 178, paragraphe 3, du règlement intérieur du Parlement européen. Si les abstentions avaient été prises en compte, le résultat du vote aurait été différent (premier moyen).
2. Deuxièmement, le président du Parlement européen n'a pas demandé l'avis de la Commission des Affaires constitutionnelles du Parlement européen (AFCO) sur l'interprétation du règlement intérieur, alors qu'il existait, avant le vote, un doute sérieux quant à la manière dont les suffrages devaient être pris en compte. Il a ainsi enfreint le principe de sécurité juridique, car tant avant qu'après le vote, il existait des incertitudes, qui ont subsisté, quant à l'interprétation qu'il convient de donner du règlement intérieur (deuxième moyen).
3. Troisièmement, selon le gouvernement hongrois, dans le cadre du vote de la résolution attaquée, les pouvoirs démocratiques conférés aux membres du Parlement européen et les principes fondamentaux de l'égalité de traitement des députés et de démocratie indirecte ont été enfreints. Les députés n'ont pas été en mesure de faire usage des pouvoirs nécessaires à l'exercice de leur fonction de représentant du peuple conformément au principe de démocratie, qui implique la possibilité de s'abstenir (troisième moyen).
4. Quatrièmement, selon le gouvernement hongrois, la résolution attaquée enfreint le principe fondamental de coopération loyale entre les institutions de l'Union et les États membres conformément à l'article 4, paragraphe 3, du TUE et les principes juridiques de l'Union tels que les principes de la coopération de bonne foi entre les institutions, de la confiance légitime et de la sécurité juridique, dans la mesure où les conclusions qui y sont tirées sont fondées sur des procédures d'infraction déjà closes ou toujours pendantes (quatrième moyen). »

51. Alors que la Pologne avait elle aussi fait l'objet de la procédure de l'article 7 TUE, le 20 décembre 2017[40], antérieurement à l'introduction du recours en manquement dans l'affaire C-619/18 mentionné précédemment, la question qui se pose désormais est celle de savoir si l'enclenchement de cette procédure fait obstacle à l'introduction du recours en manquement ?

52. Il convient d'ores et déjà de rappeler que l'articulation de ces deux instruments a déjà fait, par le passé, l'objet de débats doctrinaux sous le prisme de l'adage « *Lex specialis derogat legi generali* ». La question ainsi posée est de savoir si l'article 7 TUE devait être analysé en tant que disposition «spéciale» en matière de contrôle et de sanction de l'inobservance des valeurs de l'Union européenne au détriment de la disposition «générale» qu'incarne l'article 258 TFUE.[41]

53. Dans ses conclusions dans l'affaire C 619/18, l'avocat général Tanchev[42], déjà citées, a indiqué que plusieurs arguments permettraient de répondre par la négative et de soutenir que l'introduction séparée et l'invocation simultanée de ces deux procédures est juridiquement possible et envisageable. Le premier argument dans ce sens a trait à la lettre des articles. La formulation respective de ces deux articles ne laisse pas penser que ces deux dispositions sont exclusives l'une de l'autre, et ce d'autant plus que l'article 258 TFUE se réfère aux obligations faites aux État membre en vertu des traités. Cette référence engloberait donc toutes les règles de droit de l'Union. Un deuxième argument, qui vient au soutien du premier, est celui de la différence de nature, de régime et de finalité des procédures, soulignant leur autonomie respective et leur lien de complémentarité. Concernant la nature, la procédure de l'article 7 TUE est une procédure essentiellement politique alors que l'article 258 TFUE prévoit un recours direct en manquement, véritable voie juridique. Concernant le régime et la finalité, l'article 7 TUE permet de mettre fin aux violations graves et persistantes, par un État membre, des valeurs énumérées à l'article 2 du TUE tandis que l'article 258 TFUE a pour but de faire constater la violation du droit de l'Union afin de faire

40. Proposition motivée conformément à l'article 7, paragraphe 1, du Traité sur l'Union européenne concernant l'état de droit en Pologne, COM(2017)835 final, 20 décembre 2017.
41. Voir « *Safeguarding EU values in the Member States – Is something finally happening ?* », *Common Market Law Review*, Vol. 52, 2015, p. 619, 626-627.
42. Conclusions de l'avocat général Tanchev dans l'affaire *Commission/Pologne* (Indépendance de la Cour suprême), C-619/18, EU:C:2019:325, points 49-51.

respecter celui-ci par un État-membre. Au regard de ces arguments, le déclenchement du mécanisme de l'article 7 ne ferait pas obstacle à l'introduction d'un recours en manquement.

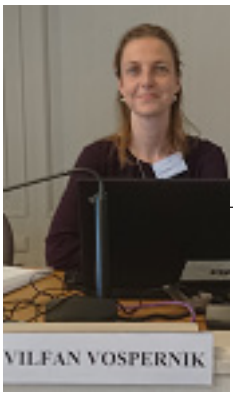
V. Conclusions

54. Le respect du principe de l'indépendance du juge est désormais de la plus grande actualité, tant politique que judiciaire. Il se trouve à l'intersection du droit national et du droit de l'Union. L'application du droit de l'Union ne peut pas être garantie si les valeurs fondatrices de l'Union ne sont pas respectées. L'indépendance des juges est au cœur de ces valeurs, en tant que principe primordial permettant la protection même des droits fondamentaux et de la démocratie.

55. Les juridictions nationales et surtout les cours constitutionnelles occupent une place centrale dans ce système de garanties. C'est justement dans la collaboration et le dialogue entre elles et avec la Cour de justice, que ces valeurs, et notamment celle de l'indépendance, peuvent être protégées pour que l'Union européenne reste une Union de droit.

56. Ces événements témoignent, en tout état de cause, d'une prise de conscience générale des institutions, non seulement juridictionnelles, mais également politiques, que la garantie d'indépendance du juge conditionne désormais non seulement le bon fonctionnement de l'Union mais aussi la confiance des citoyens en celle-ci.

Celestina Iannone et Guillaume Etienne, chef d'unité et administrateur-juriste, Direction de la recherche et de la documentation de la Cour de justice de l'Union européenne ► Page 111



The European Court of Human Rights' case-law on the independence of the judiciary

Ana Vilfan Vospernik, Senior Lawyer, Jurisconsult's Directorate, European Court of Human Rights

Dialogue between Judges 2018: Seminar on the Authority of the Judiciary

> *"… the judicial branch … is faced today, in a number of our countries, with dangers to its authority, its legitimacy, and its effective action as the guardian of the rule of law."*
>
> Former ECHR President Guido Raimondi

Creating a European Judicial Space

- *"Il sistema multilivello di tutela"*
- Interaction between the national legal order, the ECHR and the Court of Justice of the EU (European order/national traditions)
- Interpretation of the Convention in harmony with international law, as far as possible: the Court does not operate in a vacuum
- European and international texts, including the opinions of the Venice Commission

The Rule of Law & Article 6 ECHR

Right to a fair trial

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

Other relevant Articles of the ECHR at stake

- **Article 8: respect for private life**
- **Article 10: freedom of expression**

To a lesser extent:

- Article 11: freedom of assembly and association
- Article 14: prohibition of discrimination

Types of applications

- Applicants complaining about the lack of independence of the tribunal that examined their cases (Art. 6)
- Judges themselves complaining about the appointment or dismissal proceedings, pressure, disciplinary proceedings, etc. (Art. 6, 8 and 10)
- Sources: HUDOC, Case-law Guides, «Dialogue between Judges 2018», etc.

Art. 6 – "Independence" and "Impartiality"

The right to a fair hearing under Article 6 § 1 requires that a case be heard by an "independent and impartial tribunal". The concepts of "independence" and "impartiality" are closely linked and, depending on the circumstances, may require joint examination (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 150 and 152)

Impartiality

- The general principle: The subjective and objective tests also apply to Constitutional Court proceedings (*Mežnarić v. Croatia*, §§ 29-32).

- *Steck-Risch and Others v. Liechtenstein*: Impartiality of a CC judge in a small country where the judiciary is operating part-time and where the same persons function as judges and practising lawyers (no violation).
- *Švarc and Kavnik v. Slovenia*: Impartiality of a CC judge who had acted as a legal expert for the applicant's opponent in the civil proceedings at first instance (violation).
- *Bellizzi v. Malta:* Alleged lack of impartiality where the judicial assistant of the CC President had acted for one of the parties in prior civil proceedings in the same case (no violation; §§ 29-32).

Applicability to CC proceedings

Article 6 § 1 is applicable to Constitutional Court proceedings, under its civil limb, if they relate to "the determination of civil rights and obligations" (*Pierre-Bloch v. France*, § 48; *Voggenreiter v. Germany*, §§ 30-33).

The fact that proceedings have taken place before a constitutional court does not suffice to remove them from the ambit of Article 6 § 1. Since these proceedings may significantly differ from ordinary court proceedings, the Court is applying the principles developed under Article 6 § 1, or establishing new principles with due regard to the nature of the CC proceedings (fair-trial guarantees, public hearing, length of proceedings, …)

Applicability to CC proceedings

- Type of CC proceedings:
- It matters little that the Constitutional Court considered the case on a referral of a question for a preliminary ruling or on a constitutional appeal lodged against judicial decisions. The same is true, in theory, where the Constitutional Court examines an appeal lodged directly against a law if the domestic legislation provides for such a remedy (*Voggenreiter v. Germany*, §§ 30-33 and the references therein).
- However, a Constitutional Court that can inquire into the contested proceedings, only from the point of view of their conformity with the Constitution without examining all the relevant facts, is not considered to have "full jurisdiction" within the meaning of Article 6 § 1 (*Zumtobel v. Austria,* § 30).

Proceedings before the Italian CC

> *"… the Court has observed on many occasions that, in the Italian legal system, litigants are not entitled to apply directly to the Constitutional Court. Only a court which is hearing the merits of a case has the possibility of making a reference to the Constitutional Court, at the request of a party or of its own motion. Accordingly, such an application cannot be a remedy whose exhaustion is required under the Convention … The principles established in judgments nos. 348 and 349 of 24 October 2007 are to be welcomed, particularly regarding the place assigned to the Convention in the Italian legal system and the encouragement given to the national judicial authorities to interpret domestic standards and the Constitution in the light of the Convention and the Court's case-law. … However … the objection [of non-exhaustion] raised by the Government must be rejected."* (*Parrillo v. Italy* [GC], §§ 101-105)

Employment disputes concerning judge

Vilho Eskelinen criteria:

> (a) the State's national law must have expressly excluded access to court for a relevant post or category of staff; and
>
> (b) exclusion must be justified on objective grounds in the State's interest.

The applicant's access to court was impeded by the transitional provisions of the new legislation – to conclude that Article 6 § 1 was applicable, the Court attached weight, in particular, to the fact that the CC did not dismiss the constitutional complaint as lacking a legal basis (*Baka v. Hungary* [GC], §§ 109 & 111).

An independent tribunal – separation of powers

The term "independent" refers to independence vis-à-vis the other powers (the executive and the Parliament) (*Beaumartin v. France*, § 38) and vis-à-vis the parties (*Sramek v. Austria*, § 42). Compliance with this requirement is assessed, in particular, on the basis of statutory criteria, such as the manner of appointment of the members of the tribunal and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside

pressures (see, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 153-156). The question whether the body presents an appearance of independence is also of relevance (ibid., § 144; *Oleksandr Volkov v. Ukraine*, § 103). The defects observed may or may not have been remedied during the subsequent stages of the proceedings (*Denisov v. Ukraine* [GC], §§ 65, 67 and 72).

External and internal independence of judges

Specific case: Judges' independence vis-à-vis the High Council of the Judiciary

The fact that judges appealing against decisions of the High Council of the Judiciary (or equivalent body) come under the authority of the same body as regards their careers and disciplinary proceedings against them has been examined in the cases of *Oleksandr Volkov v. Ukraine*, § 130, and *Denisov v. Ukraine* [GC], § 79 (violations), and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 157-165 (no violation). The Court assessed and compared the disciplinary systems for the judiciary in the States concerned in order to determine whether there were any "serious structural deficiencies" or "an appearance of bias within the disciplinary body for the judiciary" (*Ramos Nunes de Carvalho e Sá v. Portugal*, §§ 157-160) and whether the requirement of independence was complied with (ibid., §§ 161-163).

Applications lodged by judges

- *Baka v. Hungary* [GC], no. 20261/12, 23.6.12
- *Denisov v. Ukraine* [GC], no. 76639/11, 25.9.18 no. 76639/11, § 25
- *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9.1.13
- *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 6.11.18

Baka v. Hungary

- **Article 6 § 1: access to court by a judge to challenge the termination of his mandate**
- **Article 10: termination of his mandate as a result of public comments made by a judge**

- The applicant, a former judge of the ECHR, publicly criticised, in his capacity as President of the Supreme Court, proposed legislative reforms of the judiciary. Subsequent constitutional and legislative changes resulted in the premature termination of his mandate as President and excluded the possibility of judicial review of that termination.
- He complained under Article 6 about a lack of access to court and under Article 10 about a disproportionate interference with his freedom of expression. The GC found a violation of both Articles.
- "121. … the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful … Although its above findings with regard to the issue of applicability do not prejudge its consideration of the question of compliance …, the Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge … the respondent State impaired the very essence of the applicant's right of access to a court."
- "168. … the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in the exercise of his right to freedom of expression … the applicant expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty …
- 174. .. the impugned restrictions on the applicant's exercise of his right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse.
- 175. In sum, even assuming that the reasons relied on by the respondent State were relevant, they cannot be regarded as sufficient to show that the interference complained of was "necessary in a democratic society,, notwithstanding the margin of appreciation available to the national authorities."

Denisov v. Ukraine

- Article 8: the notion of private life in the context of employment disputes.
- The applicant was dismissed from the position of President of the Kyiv Administrative Court of Appeal, on the basis of a failure to perform his administrative duties (managerial skills) properly. He remained as a judge in the same court. He complained, *inter alia*, under Article 6 that the proceedings before the High Council of Justice (hereinafter, "HCJ") and the Higher Administrative Court (hereinafter, "HAC") about his removal had not been independent or impartial and under Article 8 about a violation of his right to respect for his private life.
- On 25 April 2017 a Chamber relinquished jurisdiction. The Grand Chamber found his complaint under Article 8 to be incompatible ratione materiae since neither the reasons for nor the consequences of his dismissal had relevantly affected his "private life". The GC found a violation of Article 6.

Oleksandr Volkov v. Ukraine

- Article 6 §§ 1 and 3: Disciplinary proceedings brought against a judge of the Supreme Court culminating in his dismissal for acting in breach of professional standards.
- The Court noted that the domestic law contained no limitation period for application of the sanction. The incidents criticised by the High Council of Justice had taken place seven years earlier. The Court concluded that this had placed the applicant in a difficult position, as he had had to mount his defence with respect, *inter alia*, to events which had occurred in the distant past. While the Court did not find it appropriate to indicate how long the limitation period should have been, it considered that such an open-ended approach to disciplinary cases involving the judiciary posed a serious threat to the principle of legal certainty. There had thus been a violation of Article 6 § 1 on account of the breach of the principle of legal certainty caused by the absence of a limitation period.
- "130. The Court observes that the judicial review was performed by judges of the HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment,

disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality …, the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the "independence and impartiality" required by Article 6 of the Convention." (see *Ramos Nunes* [GC])

Ramos Nunes de Carvalho e Sá v. Portugal

- Article 6 §§ 1 and 3: review by a judicial body of disciplinary proceedings against a judge (independence/impartiality, scope of the review and lack of a public hearing)

- The case concerns three sets of disciplinary proceedings against the applicant judge which led to 240 days suspension from duty imposed by the High Council of the Judiciary (hereinafter, "CSM"). The Judicial Division of the Supreme Court reviewed and upheld those disciplinary decisions and penalties. The applicant complained mainly under Article 6 § 1. The Chamber found that there had been a violation of Article 6 § 1 (civil) given the cumulative effect of the lack of independence and impartiality of the CSM, the insufficient scope of the review of the Judicial Division and the lack of a public hearing. The case was referred by the Panel to the Grand Chamber in October 2016. The GC found the complaint about the independence and impartiality of the CSM to be inadmissible (out of time) and her complaint under Article 6 § 3 (a) and (b) incompatible ratione materiae. It concluded that there had been no violation of Article 6 § 1 (civil) as regards the independence/impartiality of the Judicial Division of the Supreme Court, but the GC did a find a violation based on the insufficient scope of the Supreme Court's review and the lack of public hearing.

- "158. … regard being had to the arguments advanced by the Chamber which examined the case of *Oleksandr Volkov*, these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary, as was the case in the specific context of the Ukrainian system at the time, rather than as a general conclusion …

- 160. By contrast, in the present case, no such serious issues have been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM. … the Court finds it appropriate to examine together the issues of the independence and impartiality of the Judicial Division of the Supreme Court …"

- "163. In more general terms, the Court considers it normal that judges, in the performance of their judicial duties and in various contexts, should have to examine a variety of cases in the knowledge that they may themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. However, a purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation. Even in the context of disciplinary cases a theoretical risk of this nature, consisting in the fact that judges hearing cases are themselves still subject to a set of disciplinary rules, is not in itself a sufficient basis for finding a breach of the requirements of impartiality.
- 164. Consequently, having regard to all the specific circumstances of the case and to the guarantees aimed at shielding the Judicial Division of the Supreme Court from outside pressures, the Court considers that the applicant's fears cannot be regarded as objectively justified and that the system in place in Portugal for reviewing disciplinary decisions of the CSM does not breach the requirement of independence and impartiality under Article 6 § 1 of the Convention."

Applications about independence lodged by parties

- *Mutu and Pechstein v. Switzerland*, nos. 40575/10 *et al*., 2 October 2018
- *Thiam v. France*, no. 80018/12, 18 October 2018

Mutu and Pechstein v. Switzerland

- Article 6 of the Convention: settlement of disputes by means of arbitration and the implications for procedural fairness guaranteed by that article
- The applicants, respectively a professional footballer and a professional speed skater, were involved in proceedings before the Court of Arbitration for Sport (hereinafter, "CAS") in Lausanne. The CAS operates within the framework of an independent private law foundation. It was set up for the purposes of hearing disputes arising in the international sports sector (for example, contractual disputes between footballers and their clubs in the case of the first applicant/the imposition of disciplinary sanctions in the case of the second applicant). An appeal from the CAS's decisions may be filed with the Swiss Federal Tribunal.

- The applicants complained that the proceedings before the CAS were unfair because the panels which heard their cases lacked independence and impartiality. The applicants' appeals to the Swiss Federal Tribunal were unsuccessful. Both applicants complained in the Convention proceedings under Article 6 (on different grounds) about the alleged lack of independence and impartiality of the CAS. The second applicant also complained that neither the CAS nor the Swiss Federal Tribunal held a public hearing in her case. The Court found a breach of the Convention only in respect to a lack of a public hearing before the CAS in the case of the second applicant.

Thiam v. France

- Article 6 § 1: criminal proceedings brought against the applicant, in the course of which the former President of the French Republic, Nicolas Sarkozy, applied to join the proceedings as a civil party
- The Court found that Mr Sarkozy's intervention as a civil party in the criminal proceedings against Mr Thiam had not created an imbalance in the parties' rights and in the conduct of the proceedings. The Court also held that the participation in the proceedings of a public figure who played an institutional role in the career development of judges was capable of casting a legitimate doubt on the latter's independence and impartiality. However, after examining the manner in which judges were appointed, their statutory condition and the particular circumstances of the case, it saw no reason to conclude that the judges called upon to decide in the applicant's case were not independent for the purposes of Article 6 § 1.

Judicial dialogue President Linos-Alexandre Sicilianos

- "Dialogue with the national courts is truly part of our Court's DNA. In this regard, the Superior Courts Network is a perfect illustration of such dialogue, bringing together a community which is united by the desire to apply the principle of subsidiarity effectively and shares the common aim of ensuring that the decisions reached at domestic level are compatible with European case-law. …
- Like my predecessors, I express my full support for the Superior Courts Network and for strengthening these ties, without losing sight of each participant court's independence.

- I … pay tribute to the superior courts which have already joined the Network and thank them for their essential contribution to its success, and look forward to welcoming those superior courts which have not yet joined our number."

Superior Courts Network, (SCN) Dialogue with superior courts

- Initiative of the Court, supported by member States.
- Objective: create a structure for a continuous and practical dialogue with superior courts, focussing on Convention case-law.
- Research Division provides the coordination of the SCN.
- Current membership : 77 courts from 36 member States
    - valued contribution to comparative work of the ECHR
    - sharing their Convention related material

José Luis Vargas Valdez, Judge, Federal Electoral Tribunal, Mexico

Judicial independence in Mexico: appointment, safeguards and legal responsibilities

I. Introduction

According to the theory and several international instruments, the necessary values and principles of the judicial branch to properly foster the rule of law are, among others: impartiality, integrity, accessibility, objectivity, professionalism, legal certainty, transparency, equality and, of course, independence. Therefore, we can assert that independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial.[1]

Judicial independence has been a historically relevant concept. It goes as far as the English Establishment Act of 1701, which implied it. Since then, this principle has been considered a cornerstone of the rule of law.[2]

In this essay, I will first address the concept of judicial independence in a broad and theoretical way. That is: what does it actually mean and why is it important? Afterwards, I will focus, with a more practical approach, on how

1. Bangalore Principles of Judicial Conduct. 2002. Link: https://bit.ly/2FyIrD3.
2. ASENSIO, Rafael. Imparcialidad Judicial y Derecho al Juez imparcial. Editorial Aranzadi. 2002.

that principle can be effectively preserved, analysing the case of Mexico and how it's legal and constitutional system guarantees judicial independence before, during and after the mandate of constitutional justices, while detecting good practices and areas of opportunity.

Before I tackle these matters, it is very important to mention that we cannot give judicial independence for granted. It implies an active role of all the involved actors in order to be effectively and constantly respected. In the context of the electoral justice system in particular, this effort is fundamental. We cannot overlook the fact that the political parties are, at the same time designers and recipients of the rules of the democratic dynamics, including the role and structure of the electoral courts.

Beyond institutional challenges to overcome, electoral judiciary, as any other, is always under external pressures, due to its conflict-solver nature. To clarify this situation, I will provide two examples that recently took place in Mexico:

a) When the High Chamber of the Electoral Tribunal of the Federal Judicial Branch (TEPJF, for its acronym in Spanish) was studying the possible annulment of the election of a state´s governor, some federal congressmen of one of the involved parties (which has majority in the Congress and is also the party of the President) made public their intention to reduce the constitutional mandate of the justices of the Electoral Tribunal.[3]

b) A few months ago, in Mexico, the head of the Senate submitted the proposal to create a new Chamber within the Supreme Court, specialised in corruption. This proposal would involve the appointment of 5 new justices (in addition to the 11 that are already in office) by the senators of the political party with the majority of the seats, which would imply the possibility of changing the majority of the Supreme Court.[4]

3. Iniciativa del Sen. Cruz Pérez Cuéllar, del Grupo Parlamentario Morena, con proyecto de decreto para reformar el Artículo Cuarto de las disposiciones transitorias de la Ley Orgánica del Poder Judicial de la Federación (reformado el 3 de noviembre de 2016), correspondientes al Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Orgánica del Poder Judicial de la Federación y de la Ley General del Sistema de Medios de Impugnación en Materia Electoral (publicado el 1 de julio de 2008). Link: www.senado.gob.mx/64/gaceta_del_senado/documento/86365.
4. ARVIZU Arrioja, Juan. "Monreal va por reforma para "sustituir" la Judicatura Federal". El Universal. 05 de abril de 2019. Link: www.eluniversal.com.mx/nacion/politica/monreal-va-por-reforma-para-sustituir-la-judicatura-federal.

In this context, the importance of constitutional and legal safeguards for a strong and independent judiciary becomes evident.

WHAT IS JUDICIAL INDEPENDENCE?

Recommendation (94)12 of the Council of Europe on the Independence, Efficiency and Role of Judges provides that "in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[5]

Judicial independence means that a judge is able to interpret law free from any external influence (positive dimension) and without subjective biases or preconceived political loyalties (negative dimension).[6]

As stated by the General Assembly of the United Nations in the "Basic principles regarding the independence of the judiciary" [7]:

- States must guarantee judicial independence and, consequently, all public institutions must respect it;
- This implies that each State has to provide the necessary means for the judiciary to adequately perform its duties; and finally
- Judges must be protected by freedom of expression and associa tion.

Judicial Independence is essential for the adequate jurisdictional function of a constitutional rule of law, it is a foundation of the principle of the separation of powers and a necessary condition for impartial conflict resolution and effectivity of human rights.

5. Council of Europe. Recommendation (94)12 of the Council of Europe on the Independence, Efficiency and Role of Judges. Principle 1.2.d. P. 2. Link: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2.
6. LINARES, Sebastián. La independencia judicial: conceptualización y medición. Política y gobierno. Vol. XI. No. 1. CIDE. 2004.
7. United Nations. Basic principles on the independence of the judiciary. 1985. Link: https://bit.ly/2JfeGrC.

JUDICIAL INDEPENDENCE IN MEXICO

As stated previously, due to its litigious nature, the judicial function is frequently subject to external pressures, and in the case of the Federal Electoral Tribunal of Mexico, such pressures are common precisely because of the political nature of the disputes it must resolve. For instance, the case I just mentioned, regarding the possible annulment of the election of a state's governor.

But pressure can also come from external actors. For example, last year, when the Tribunal was solving a famous controversy regarding the inclusion of an independent candidate in the presidential ballot, there was enormous and unprecedented pressure from the media to solve the issue in a certain way, even though the suggested solution could have been contrary to the presumption of innocence of the candidate.

The independence of the judiciary cannot depend exclusively on the ethics of the judge; it must also be protected by the Constitution and a set of legal and institutional safeguards. In the following paragraphs, I will briefly analyse the guarantees of judicial independence in Mexico, particularly regarding the High Chamber of the Federal Electoral Tribunal.

A. BEFORE THE MANDATE: SELECTION AND APPOINTMENT

In the Mexican system, the justices of the High Chamber of the Electoral Tribunal are selected and appointed according to the following process:

i. After a public announcement to all interested parties is made, the Supreme Court selects three candidates for each vacant seat (of 7) and submits three proposals to the Senate.
ii. If the Senate accepts the Court's proposals, it must select and ap point the new justices within the next 15 days by the vote of 2/3 of its present members.
iii. If the Senate rejects the Court's proposal, then a new proposal must be submitted within the next three days, and the Senate must select and appoint the new justices within the next five days.

This appointment mechanism has some advantages. On one hand, the required legislative majority (2/3 of the Senate) to select and appoint a justice guarantees that most parties should reach a consensus, which strengthens the political legitimacy and impartiality of the appointed judge. On the other hand, the previous public announcement promotes the selection of specialised and highly professional profiles, as well as the transparency of the designation process. The disadvantage is that the law does not consider a mechanism to avoid the stagnation of the designation process.

B. DURING THE MANDATE

1. Irremovability / stability

The judicial guarantee of stability or irremovability from the mandate intends to protect the independence of the judge from external pressures, either from private or public actors. In that sense, the Mexican Constitution (Article 99) provides that the justices of the High Chamber shall remain in office for nine years. The Constitution also establishes that they can only be removed from their position only in two cases:

a. If, during their mandate, their actions or omissions seriously damage fundamental public interests, in which case the Congress must proceed to a "political judgement"; and
b. If during their mandate, they commit a serious crime, in which case the Chamber of Deputies must initiate an indictment proce dure and, given sufficient proof, remove the justice from his or her position for the duration of the criminal trial.

2. Remuneration

The Venice Commission recommends that, for judges, a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties.

In a similar fashion, the Universal Charter of the Judge states that judges "must receive sufficient remuneration to secure true economic independence", and

that such "remuneration must not depend on the results of the judge's work".[8] In Mexico, the Constitution (Article 94) provides that the remuneration of justices, magistrates and judges shall not be reduced during their mandate.

Regardless of that, in Mexico, recently all the judges of the Federal Judiciary voluntarily reduced their income by 25%, as a result of the pressures of the new Executive Branch.

3. Case allocation

The Venice Commission has stated that, in order to enhance impartiality and independence of the judiciary, it is highly recommended that the procedure of distribution of cases between judges should follow objective and transparent criteria.

In Mexico, the Internal Statute of the Electoral Tribunal states that all cases shall be assigned to the justices according to the alphabetical order of their last name and following the chronological and successive order in which each case is presented to the Tribunal. Besides that, the Tribunal is currently developing an automatised electronic allocation system.

4. Safeguards of independence must be recognized at Constitutional level

The Venice Commission strongly recommends that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts.

In that sense, he Mexican Constitution establishes the general structure, designation processes, attributions, competences, responsibilities and safeguards of the Judicial Branch, which includes the Electoral Tribunal.[9] Few essential aspects are left to the secondary legislation (such as the details of the designation process of the justices of the Electoral Tribunal).

8. International Association of Judges. Universal Charter of the Judge. 1999. Link: https://bit.ly/2xgE4aS.
9. Articles 94 to 101 of the Mexican Constitution.

5. Budgetary (financial) autonomy

According to the Venice Commission, decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its opinion about the proposed budget to parliament.

In this sense, it is essential for the judicial branch to be completely independent from the other two branches of the government in all matters related to the proposal and management of its financial resources. Otherwise, the judiciary would be subject to extreme political pressures since the amount and allocation of its resources is a necessary condition to fulfil its constitutional duties.

According to the Mexican Constitution (Articles 99 and 100), the Judicial Branch is in charge of directly proposing its own budget to the Chamber of Deputies, and of the administration of its resources.

6. Jurisdiction (internal independence)

The Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination in their judicial decision-making activity.

The establishment of specific and limited jurisdictions strengthens the independence of lower judges, from undue influence or pressure of the higher courts, and reduces the risk of assigning cases according to private interests.

In Mexico, both the Constitution and the Organic Law of the Judicial Branch clearly settle the competences and jurisdictions of each court and judge. Furthermore, the six lower chambers of the Electoral Tribunal have absolute independence in their decisions, as long as they respect the jurisprudence of the High Chamber.

7. Transparency

The transparent processing of the cases resolved in a court sets a barrier to, and discourages, all those actors who seek to exert external pressure on judicial decisions.

The Mexican Constitution (Article 99) establishes that the sessions of the High and the Regional Chambers of the Electoral Tribunal, must be public.

Nowadays, new technologies allow to boost the effects and scope of open and transparent justice.

8. Security and protection

According to the Report on guarantees for the independence of justice operators, issued by the Inter-American Commission on Human Rights in 2013, the situation in Mexico is delicate, since, as a consequence of the violence related to organised crime, on many occasions, the judges cannot act with full independence because they are subject to threats, intimidation, harassment and other illegal pressures.[10] Moreover, as mentioned before, the litigious nature of the judiciary – particularly in electoral matters – makes it a subject of constant political pressure.

9. Excuse or recusation

The excuse or recusation is an interlocutory provision or injunction during the course of a legal action that seeks to excuse or impede a judge from performing his/her legal duties in a particular case because of a potential conflict of interests or lack of impartiality. It can be voluntarily requested by the judge (in this case, the ethical behaviour of the judge is crucial) or promoted by any of the involved parties in the trial.

10. Organization of American States. Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas. 2013. Link: https://bit.ly/2a99PZF.

According to the Mexican legal system[11] , precisely, all judges may propose to excuse themselves from participating in the adjudication of a particular case, because of a potential conflict of interest, and the parties are also enabled to request the recusation of a judge from the case. The excuse or recusation petitions must be solved by the Plenary of the respective Tribunal's chamber.

10. System of responsibilities

None of these judicial independence safeguards are enough if they are not reinforced by a parallel system of responsibilities. In this sense, the Mexican Constitution (Article 111) establishes that the justices of the Supreme Court, the counselors of the Federal Judiciary and the justices of the Electoral Tribunal may be subject to trial, in which case the Chamber of Deputies will have to declare, by absolute majority of its members, whether or not to level the charges against the accused. Through this mechanism, it is guaranteed that the constitutional immunity to safeguard the independence of the judges, does not imply impunity.

On the other hand, several international organisations, such as the United Nations or the Venice Commission, recommend that States encourage the creation of an independent body in charge of the administration, selection, appointment and disciplinary regime of the judicial branch, as a guarantee of independence. In this regard, the Mexican Constitution (Article 94) establishes that the Council of the Federal Judiciary is the body in charge of the administration, vigilance and discipline of the judicial branch.

C. AFTER THE CONCLUSION OF THE MANDATE: SAFEGUARDS TO REDUCE THREATS TO JUDICIAL INDEPENDENCE AT THE END OF THE MANDATE

In the case of judges who were appointed for a specific period, the judicial independence at the final stage of their mandate, can be secured through the existence of a legal impediment to perform positions related to their function for a certain period of time.

11. Organic Law of the Judicial Branch.

In Mexico the members of the Electoral Tribunal may not act as lawyers or representatives in any trial before the organs of the Judiciary of the Federation, within the next two years following the date of their retirement.

I believe that the legal recognition of a pension system helps to guarantee judicial independence at this stage. In Mexico, justices of the Supreme Court are entitled to a pension for lifetime retirement. Nevertheless, there is no equivalent or similar prescript applicable to the justices of the Electoral Tribunal.

CONCLUDING REMARKS

Up to this point, we have explored the different dimensions and the importance of judicial independence, both in Mexico and the world. In summary, it could be said that judicial independence is a necessary condition:

- For judicial impartially;
- For the legitimacy of the judiciary; and
- For the preservation of the rule of law and the effective separation of powers.[12]

To conclude, I would like to recall what Adam Smith stated, while referring to the separation of powers and judicial independence:

> *"When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called, politics. The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power."*

I would add: "and of any other improper influence, whether it comes from a public or a private actor."

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Joint Council on Constitutional Justice

In order to steer cooperation between the constitutional courts and the Venice Commission, the Venice Commission established the Joint Council on Constitutional Justice (JCCJ), which is composed of members of the Venice Commission and the liaison officers, appointed by the constitutional courts. The JCCJ has a double presidency, which means that its meetings are co-chaired. One of the chairs is a member of the Venice Commission, elected by the Commission at a plenary session and the other is a liaison officer, elected by the liaison officers during the meetings of the JCCJ. The mandates of the two co-chairs run for two years each. The constitutional courts and councils and supreme courts with constitutional jurisdiction participating in the Joint Council thus have a very strong role in determining the Venice Commission's activities in the field of constitutional justice.

The geographical scope of the Joint Council covers the Venice Commission member states, associate member states, observer states and states or entities with a special cooperation status which is equivalent to that of an observer (South Africa, Palestine). Within the JCCJ, all participating courts – whether from member or observer states – benefit from the same type of cooperation. The European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights participate in the Joint Council as well.

The meetings of the JCCJ usually focus on the publication of the Bulletin on Constitutional Case-Law, the production of the CODICES database, the Venice Forum (Classic, Newsgroup, Observatory) and on the cooperation with regional and linguistic groups of constitutional courts as well as the World Conference on Constitutional Justice.

The meetings of the JCCJ are generally followed by a "mini-conference" on a topic in the field of constitutional justice, chosen by the liaison officers during which they present the relevant case-law of their courts (e.g. "Gender, Equlaity and Discrimination" in 2018).

The JCCJ meets once a year, at the invitation of one of the participating courts (June 2018: Lausanne, Switzerland). Every third year the JCCJ meets in Venice, either before or after a plenary session of the Venice Commission.

The Venice Commission

The Venice Commission – the full name of which is the European Commission for Democracy through Law – is an advisory body of the Council of Europe on constitutional matters. Its primary role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also contributes to the dissemination and consolidation of a common constitutional heritage and provides "emergency constitutional aid" to states in transition.

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