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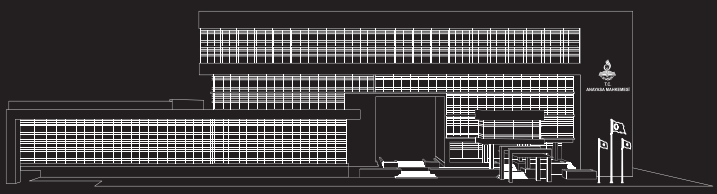
Constitutional Court of the
Republic of Türkiye

Constitutional Justice in Asia

"Judicial Independence as a Safeguard of the Right to a Fair Trial"



11th Summer School of the Association of the Asian Constitutional Courts and Equivalent Institutions (AACC)
18-21 September 2023, Ankara

Constitutional Justice in Asia

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Organised by
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Constitutional Justice in Asia

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Constitutional Court of the Republic of Türkiye
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Constitutional Justice in Asia

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MESSAGE OF THE PRESIDENT

The Constitutional Court of the Republic of Türkiye organized the 11th Summer School Programme of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of "Judicial Independence as a Safeguard of the Right to a Fair Trial" on 18-21 September 2023 in Ankara within the scope of the AACC activities.

We are pleased to organize the 11th Summer School of the AACC. We believe that the presentations of the participants throughout the Summer School made significant contributions to the field of comparative constitutional justice and reflected legal experiences and practices of the AACC members.

Summer School Programmes of the AACC gather the participants in a sincere atmosphere to share their experiences and studies that would contribute to the constitutional justice and rule of law in the Asian continent. These programmes also serve for the expansion and strengthening of cooperation among our institutions. I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School programme for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf our Court and on my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I hope this book will serve as a useful resource for all.

Prof. Dr. Zühtü ARSLAN
President of Constitutional Court of
the Republic of Türkiye

PREFACE

The Constitutional Court of the Republic of Türkiye is a member of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) since 2012. The Constitutional Court also hosts one of the three Permanent Secretariats of the AACC under the Center for Training and Human Resources Development (CTHRD). The main activity of the Center is to organize academic programs on a yearly basis addressing mid-level judges/lawyers of constitutional/supreme courts/councils.

In this framework, the Center plays a vital role in the achievement of the AACC's objectives by fostering cooperation and exchanges of experiences and information among AACC members by organizing summer schools since 2013. While the first Summer School was attended by a number of courts from Asia, the participants of the programme expanded over the years thanks to the growing interest of the member courts/councils of the AACC as well as guest courts from around the world.

The Summer School is an academic event focusing on the constitutional justice and human rights law. The theme of each Summer School is determined on contemporary and global issues of constitutional and human rights law drawing particular attention to the debated issues thereof. Academic discussions target to deal with the theoretical framework of the theme as well as the practice in the respective jurisdictions, with a focus on the case-law of the apex courts. In this vein, the Summer School intends for a sincere discussion of timely and significant aspects of constitutional and human rights law.

Various themes discussed in Summer Schools so far include the principle of equality, the right to fair trial, the freedom of expression, the right to privacy, migration and refugee law, the right to liberty, presumption of innocence and restriction of human rights and freedoms in health emergencies. This year, for being of vital importance for the

protection of all constitutional rights and freedoms, the 11th Summer School is dedicated to "*Judicial Independence as a Safeguard of the Right to a Fair Trial*".

It should be noted that the title should not mislead us. Judicial independence is not merely a safeguard of the right to a fair trial. As reiterated in the decisions of the Turkish Constitutional Court, judicial independence is the primary and most effective safeguard of all other fundamental rights and freedoms, as well as the right to a fair trial.[1]

In the presentations, the general practice followed by the respective constitutional courts/supreme courts regarding judicial independence is succinctly touched upon. The striking cases and decisions of these bodies are also referred to foster a better understanding of the methodology adopted by the respective courts. This book, like the previous ones, will undoubtedly increase the collaboration and exchange of examples of good practices among all involved.

We believe that this book will serve as important source on the constitutional and legal matters regarding judicial independence as a safeguard of the right to a fair trial.

It is our sincere wish that you find this publication useful!

The CTHRD

1 From the closing remarks of Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Türkiye.

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OPENING REMARKS

by

The Secretary General of the Constitutional Court of the Republic of Türkiye

18 September 2023, Ankara

Distinguished Participants,

Ladies and Gentleman,

I would like to welcome you all with my deepest regards. We are delighted to welcome you to the 11th Summer School Programme organised by the Constitutional Court of the Republic of Türkiye under the auspices of the Center for Training and Human Resources Development (CTHRD) of the Association of Asian Constitutional Courts and Equivalent Institutions.

As you are aware, this year's theme is the "Judicial Independence as a Safeguard of the Right to a Fair Trial". In all the programmes we organise for the Summer School, we exchange information by learning about the experiences, judicial practices and legislation of the member countries, focusing on a different topic each year. We have compiled all the presentations from the 10 Summer Schools held so far in the book "Constitutional Justice in Asia". In this way we have actually acquired a considerable amount of knowledge. In particular, each country had the opportunity to explain its diverse practices, case-law and legislation, and in this way, we also had a very serious corpus in the summer school programmes that we gathered together. In this regard, we would like to express our gratitude to all member countries for their contributions over the years. Although we continued with a brief online programme during the COVID period, we maintained the Summer Schools and ensured that they continued on a regular basis. This was particularly crucial for us because the Training Centre was founded before the establishment of the Permanent Secretariats of the Association of Asian Constitutional Courts and this Training Centre continues to serve as the cement of this Association. Therefore, we are very pleased to organise these programmes.

In addition, it goes without saying that we continue to expand each year. This year we have 52 participants from 26 countries. We are pleased with this, as it strengthens our exchange and cooperation even more. Needless to say, we have included the independence of the judiciary on this year's agenda since one of the most important elements of the right to a fair trial is the judicial independence. In fact, as you are well aware, the right to a fair trial is comprised of many sub-rights. These include the right to hear witnesses, the right to publicity, and one of the most important sub-rights is the judicial independence. We are of the opinion that the judicial independence is one of the most controversial issues in every country, so we believe that sharing your practices here will make a significant contribution. As part of AACC's recent activities, we have also upgraded our website and you can find the section on these activities and programmes there.

First of all, of course, such organisations are not easy and I would like to thank all my colleagues who have contributed to this organisation. I sincerely hope that cooperation and solidarity between our countries, and especially between our courts, will continue to grow. I extend my warmest greetings to all of you. I welcome you all again to Türkiye and Ankara and I wish you a successful and fruitful programme, thank you.

Dr. Murat ŞEN
Secterary General of Constitutional
Court of the Republic of Türkiye

JUDICIAL INDEPENDENCE IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Ali Bozkaya

EUROPEAN COURT OF HUMAN RIGHTS

JUDICIAL INDEPENDENCE IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Ali Bozkaya[*]

The purpose of this article is to briefly present an overview of the concept of "judicial independence" from the perspective of the case-law of the European Court of Human Rights ("ECHR"). It will first touch upon the concepts of "judicial independence" and "independent tribunal"; then, elaborate on how judicial independence should be understood in terms of relations with the executive, the Parliament, the parties and the High Council of the Judiciary; and finally present the criteria for assessing the independence of tribunals, as laid down by the ECHR in its case-law.

I. THE CONCEPT OF JUDICIAL INDEPENDENCE

The right to a fair hearing under Article 6 § 1 of the European Convention on Human Rights ("the Convention") requires that a case be heard by an "independent and impartial tribunal". Thus, judicial independence is a condition *sine qua non* for the right to a fair hearing under Article 6 of the Convention (see *Grzęda v. Poland* [GC], no. 43572/18, § 301, 15/03/2022) and judicial independence is a prerequisite to the rule of law (ibid., § 298). Indeed, judges cannot uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees enshrined in the Convention on matters directly touching upon their independence and impartiality (ibid., § 264).

The term "independence" characterises both a state of mind which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based

[*] Lawyer and Project Manager of the European Court of Human Rights.

on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the performance of his or her duties (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 234, 01/12/2020).

Moreover, the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when the ECHR refers to the "special trust and loyalty" that judges must observe, it concerns loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour (see *Grzęda*, cited above, § 264).

II. THE NOTION OF INDEPENDENT TRIBUNAL

The notion of independence of a tribunal entails the existence of procedural safeguards to separate the judiciary from other powers (see *Guðmundur Andri Ástráðsson*, cited above, § 215). In assessing the independence of a court within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members, a question which pertains to the domain of the establishment of a "tribunal" (ibid., § 232). The ECHR has also emphasized the need to protect members of the judiciary against measures potentially undermining their independence and autonomy, including from the standpoint of the applicability of Article 6 § 1 and access to a court (see *Grzęda*, cited above, §§ 298 and 300-309, and in relation to disciplinary proceedings, *Ramos Nunes de Carvalho e Sá c. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, 2018, § 196, 06/11/2018).

Furthermore, State authorities should be under an obligation to ensure the independence of a national judicial council from the executive and legislative powers, especially in order to safeguard the integrity of the judicial appointment process. The removal, or threat of removal, of a judicial member of the National Council of the Judiciary

during his or her term of office has the potential to affect the personal independence of that member in the exercise of his or her duties (*Grzęda*, cited above, § 300-309).

The term "independent tribunal" refers essentially to independence of judiciary vis-à-vis the other powers (the executive and the Parliament) (see *Beaumartin v. France*, no. 15287/89, § 38, 24/11/1994), the parties (see *Sramek v. Austria*, no. 8790/79, § 42, 04/03/1979) and also the national judicial council, as follows:

A. Independence vis-à-vis the executive

The fact that judges are appointed by the executive and are removable does not *per se* amount to a violation of Article 6 § 1 of the Convention (see *Clarke v. the United Kingdom* (dec.), no. 23695/02, 25/08/2005). Indeed, the appointment of judges by the executive is permissible provided that the appointees are free from influence or pressure when carrying out their adjudicatory role (see *Guðmundur Andri Ástráðsson*, cited above, § 207, and *Flux v. Moldova (no. 2)*, no. 31001/03, § 27, 03/07/2007; see also, concerning the appointment of the President of the Court of Cassation by the executive, *Zolotas v. Greece*, no. 38240/02, § 24, 02/06/2005; and, concerning the appointment of the judges of the Council of Administrative Law by the regional administrative authority, *Majorana v. Italy* (dec.), no. 75117/01, 26/05/2005).

However, the independence of judges will be undermined where the executive intervenes in a case pending before the courts with a view to influencing the outcome (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 80, 25/07/2002; and *Mosteanu and Others v. Romania*, no. 33176/96, § 42, 26/11/2002).

B. Independence vis-à-vis the Parliament

In the same vein, the fact that judges are appointed by Parliament does not by itself render them subordinate to the authorities if, once appointed, they receive no pressure or instructions in the performance of their judicial duties (see *Sacilor Lormines v. France*, no. 65411/01, § 67, 12/05/2005).

Nevertheless, legislative reforms on judicial system may entail important consequences on judicial independence. The above

mentioned *Grzęda* case concerned a serving judge who had been elected as a judicial member of the body with constitutional responsibility for safeguarding judicial independence (the National Council of the Judiciary). He had been dismissed from this position prematurely by operation of the law, after legislative reform, in the absence of any judicial oversight of the legality of that measure (while remaining in office at the same court). The ECHR found that this lack of oversight of a measure connected with the protection of judicial independence could not be regarded as being in the interests of a State governed by the rule of law, and that the second condition of the *Vilho Eskelinen* test concerning the applicability of Article 6 – justification of the exclusion of the access to a court on objective grounds in the State's interest- had therefore not been satisfied. The Court pointed out that "[m]embers of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective" (ibid., §§ 295-327). In such circumstances, regard should be had to "the strong public interest in upholding the independence of the judiciary and the rule of law", and, if there had been reforms of the judicial system by the government, to the overall context in which they had taken place (ibid., §§ 346 and 348-349).

The ECHR noted the growing importance which international and Council of Europe instruments, the case-law of international courts and the practice of other international bodies were 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 (see *Baka v. Hungary* [GC], no. 20261/12, § 121, 23/06/2016; and *Grzęda*, cited above, §§ 327 and 345; see also, concerning prosecutors, *Kövesi v. Romania*, no. 3594/19, § 156, 05/05/2020; with regard to disciplinary matters, *Ramos Nunes de Carvalho e Sá*, cited above, §§ 176-186; and *Eminağaoğlu v. Türkiye*, no. 76521/12, §§ 99-104, 09/03/2021; and with regard to a compulsory transfer, *Bilgen v. Türkiye*, no. 1571/07, § 63, 09/03/2021).

C. Independence vis-à-vis the parties

In case a tribunal's members include a person, who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation would seriously affect the confidence which the courts must inspire in a democratic society (see *Sramek*, cited above, § 42).

D. Independence vis-à-vis the High Council of the Judiciary

The ECHR examined, in *Denisov v. Ukraine* ([GC], no. 18512/02, § 79), *Oleksandr Volkov v. Ukraine* (no. 21722/11, § 130, 09/01/2013), and *Ramos Nunes de Carvalho e Sá* (cited above, §§ 157-165) cases, situations where decisions of the High Council of the Judiciary (or equivalent body) regarding the careers of judges and the disciplinary proceedings against them are appealed before the same body. 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" (see *Ramos Nunes de Carvalho e Sá*, cited above, §§ 157-160) and whether the requirement of independence was complied with (ibid., §§ 161-163).

In the above mentioned *Bilgen* judgment, the ECHR had regard to the importance of safeguarding the autonomy and independence of the judiciary for the preservation of the rule of law. Accordingly, in disputes concerning decisions affecting the professional life of a judge, it had to determine whether the national judicial system ensured the protection of judges against a potentially arbitrary decision of the High Council of the Judiciary affecting their career or professional status (in this case, a transfer to a lower court – ibid., §§ 57-59, §§ 61-63). The dispute thus concerned their "right", within the meaning of the Convention, to be protected against an arbitrary transfer or appointment (ibid., § 64).

III. CRITERIA FOR ASSESSING INDEPENDENCE

In determining whether a judicial body can be considered to be "independent", the Court has had regard, *inter alia*, to the following criteria (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 190, 06/05/2003; and *Langborger v. Sweden*, no. 11179/84, § 32, 22/06/1989):

i. the manner of appointment of its members;

ii. the duration of their term of office;

iii. the existence of guarantees against outside pressures; and

iv. whether the body presents an appearance of independence.

A. Manner of appointment of a body's members

Although the assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that it was compatible with Article 6 § 1, and, in particular, with the requirements of independence and impartiality (see *Bochan v. Ukraine*, no. 7577/02, 2007, § 71, 03/05/2007). In some cases, questions have been raised as to the intervention of the Minister of Justice in the appointment and/or removal from office of members of a decision-making body (see *Sramek*, cited above, § 38; *Brudnicka and Others v. Poland*, no. 54723/00, § 41, 03/03/2005; and *Clarke*, above cited decision).

B. Duration of appointment of a body's members

The ECHR has not specified any particular term of office for the members of a judicial body, although their irremovability during their term of office must in general be considered as a corollary of their independence (see, in particular, *Guðmundur Andri Ástráðsson*, cited above, §§ 239-240). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that other necessary guarantees are present (see *Sacilor Lormines v. France*, cited above, § 67; *Luka v. Romania*, no. 34197/02, § 44, 21/07/2009).

C. Guarantees against outside pressure

Judicial independence demands that individual judges be free from undue influence outside the judiciary, and from within. Internal judicial independence requires that judges be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that

an applicant's doubts as to the independence and impartiality of a court can be said to have been objectively justified (see *Agrokompleks v. Ukraine*, no. 23465/03, § 137, 06/10/2011; and *Parlov-Tkalčić v. Croatia*, no. 24810/06, § 86, 22/12/2009).

D. Appearance of independence

Appearance may also be important when determining whether a court can be regarded as independent as required by Article 6 § 1 (see *Sramek*, cited above, § 42). In this regard, a party's point of view comes into play but is not decisive. The decisive factor is whether the concerns of the person concerned can be considered "objectively justified" (see *Sacilor-Lormines*, cited above, § 63; and *Grace Gatt v. Malta*, no. 46466/16, § 85, 08/10/2019). Therefore, there would be no question of independence where the Court is of the opinion that an "impartial observer" would see no reason to be concerned in the circumstances of the case in question (see *Clarke*, above cited decision).

IV. CONCLUSION

In its recent judgments, the ECHR highlighted the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá,* cited above, § 196; *Svilengaćanin and Others v. Serbia*, no. 50104/10 and 9 more applications, §§ 64, 12/01/2021; and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, §§ 349-353, 08/11/2021; and *Grzęda* judgment, cited above §§ 298 and 301-303). In *Grzęda* judgment, the Court considered that, given the prominent place that the judiciary occupied among State organs in a democratic society, it must be particularly attentive to the protection of members of the judiciary against measures that may threaten their independence and autonomy, not only in their adjudicating role (see *Grzęda*, cited above, § 302), but also in connection with other official functions that they may be called upon to perform that are closely connected with the judicial system (ibid. § 303). It is equally necessary to protect the autonomy of national judicial councils from encroachment by the legislative and executive powers, notably in matters concerning judicial appointments, and to preserve their role as a bulwark against political influence over the judiciary (ibid., § 346). Moreover, while the Convention does

not prevent States from taking legitimate and necessary decisions to reform the judiciary, any reform should not result in undermining the independence of the judiciary and its governing bodies (ibid., § 323).

The ECHR has also consistently stressed that the scope of the State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the respect of the authority of the courts by state authorities is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this purpose, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice, they must also be effectively incorporated into everyday administrative attitudes and practices (see *Agrokompleks*, cited above, § 136; see also *Dolińska-Ficek and Ozimek*, cited above, §§ 328-330).

JUDICIAL INDEPENDENCE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AS A SAFEGUARD OF THE RIGHT TO FAIR TRIAL

Isti Widayanti
Lia Nur Jannah
Endrizal
Aris Wahyu H.

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

JUDICIAL INDEPENDENCE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AS A SAFEGUARD TO THE RIGHT TO FAIR TRIAL

Isti Widayanti[*]
Lia Nur Jannah[**]
Endrizal[***]
Aris Wahyu H.[****]

ABSTRACT

The independence of the judiciary cannot be separated from the concept of the rule of law (rechtsstaat). One of the essential elements of the rule of law is the guarantee of judicial independence. In Indonesia, it is guaranteed under Article 24 of the 1945 Constitution. The Constitutional Court is one of the state institutions exercising independent judicial power to administer justice to uphold law and justice. Its vision is to become a modern and trusted judicial institution, which requires the Constitutional Court to carry out a fast, clean, transparent, and impartial judicial process and provide decisions that uphold the principles of justice. To provide decisions that uphold the principles of justice, judicial independence is imperative. One of the powers of the Constitutional Court is to review laws against the Constitution. Constitutional review of laws is closely related to the justices' role of interpreting the Constitution, which sometimes leads them to legal discoveries to arrive at the best decisions according to their belief. Constitutional review is intended to prevent abuse of power by any branch of state powers and to protect the citizens' constitutional rights. In examining judicial review cases, the Constitutional Court applies principles toward a fair trial.

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**** Program and Activity Planning Analyst at the Bureau of Planning and Finance of the Constitutional Court of the Republic of Indonesia.

INTRODUCTION

In a rule of law, the center of state activity is not the people but the system that binds and limits the actions of state officials. According to Bintan R. Saragih, in a rule of law, the state must be strictly regulated through statutory provisions. In general, the rule of law refers to a state where the government and the people's actions are based on law in order to prevent any part of the government and the people from carrying out arbitrary acts according to their own will.[1]

The rule of law is a modern idea with many perspectives and is consistently current. There are two concepts of the rule of law: *rechtsstaat* in the continental European tradition and the Rule of Law in the Anglo-Saxon tradition. One of the experts often referred to when discussing *rechtsstaat* is Frederich Julius Stahl. He stated that *rechtsstaat* must have the following elements: first, recognition of human rights (*grondrechten*); second, the separation of powers (*scheiding van machten*); third, government based on law (*wetmatigheid van het bestuur*); and fourth, administrative justice (*administratieve rechtspraak*).[2] The term "rule of law" is a direct translation of the term *rechtsstaat*. The rule of law is mentioned in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereafter referred to as the 1945 Constitution), which reads, "The State of Indonesia shall be a state of law."[3]

I. INDEPENDENCE OF JUDICIAL POWER

Several general principles apply in a rule of law: the protection of human rights, democratic state institutions, legal order, and free judicial power.[4] Judicial power requires freedom from all forms of influence from other state bodies, given the importance of justice in enforcing laws. Judicial independence is freedom to exercise judicial duties. Such freedom is identical to that formulated in statutory regulations, namely the freedom to exercise judicial authority.[5]

1 A. Ahsin Thohari, Hak Konstitusional Dalam Hukum Tata Negara Indonesia, Jakarta: Erlangga, 2016, p. 10.

2 *Ibid*, p. 11.

3 Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

4 Jefri Porkonanta Tarigan, Disertasi: "Independensi dan Imparsialitas Hakim Konstitusi Dalam Mengadili Perkara Pengujian Undang-Undang Mahkamah Konstitusi yang Memuat Conflict of Interest" (Semarang: UNDIP, 2022) p. 59.

5 Anwar Usman, Independensi Kekuasaan Kehakiman Bentuk-Bentuk dan Relevansinya Bagi Penegak Hukum dan Keadilan di Indonesia, Depok: Rajawali Pers, 2020, p. ix.

Judicial independence is the keyword in the implementation of the rule of law by the state. Without an independent judiciary, it is impossible for the state to reach the ideals of the rule of law.[6] The independence of the judiciary cannot be separated from the concept of the rule of law (*rechtsstaat*). One of the essential elements of the rule of law is the guarantee of judicial independence. The question is what is meant by judicial independence? It means that in carrying out justice, judges are free from interference from extra-judicial powers, both executive and legislative, and other extra-judicial powers in society such as the press, political powers, and the influence of the litigants.[7]

The Constitutional Court carries a vision of becoming a modern and trusted judicial institution. As a consequence, it must be able to carry out a judicial process that is fast, clean, transparent, impartial, and to provide decisions that uphold the principle of justice. To provide decisions that uphold the principles of justice, judicial independence is imperative. It is one of the fundamental issues in discussions regarding the position of institutions implementing judicial power. It is also the consequence of the separation of state powers. A democratic rule of law requires an independent judiciary to carry out its duties and functions to uphold law and justice as mandated by the Constitution.

In Indonesia, judicial independence is guaranteed under Article 24 of the 1945 Constitution, which reads:

(1) "The judicial powers shall be independent with the authority to organize the judicature in order to uphold law and justice."

(2) "The judicial powers shall be carried out by a Supreme Court and by its subordinate judicatory bodies dealing with general, religious, military, state administrative judicial fields, and by a Constitutional Court."[8]

According to Shimon Shetreet in *Judicial Independence: The Contemporary Debate*, there are three kinds of independence of the judiciary according to the object (judicial bodies/institutions and judges):[9]

6 *Ibid., p. 2.*
7 *Ibid., p. 151.*
8 *Ibid., p. 153.*
9 M. Guntur Hamzah, Peradilan Modern Implementasi ICT di Mahkamah Konstitusi, Depok: Rajawali Pers, 2020, p.71.

1. Collective independence, which is given to the judicial powers as a collective in relation to the other state branches. It requires that the state guarantees judicial independence, which must be respected by the government and other state institutions. Aspects of collective independence include:

   a. Constitutional guarantee for the existence and operation of judicial institutions;

   b. Clear and firm division of authority among the state powers in the constitution;

   c. The relationship and independence of the judiciary with the state powers and other state institutions;

   d. Legislation that guarantees/protects the judiciary and judges (rules/policies that harm judges are strictly prohibited).

   In the Indonesian context, collective independence is contained in Article 3 paragraph (2) of Law Number 48 of 2009 concerning Judicial Powers, which states: "Judicial bodies shall be independent institutions and must be free from intervention by other parties outside the judicial powers."

2. Personal independence, which given to judges in relation to their positions. It is divided into two:

   a. Substantive independence, which is given to judges about carrying out the function of examining and deciding cases as well as carrying out other official duties and

   b. Personal independence of judges, which is given to judges as long as they serve as judges.

   Aspects of substantive independence include (1) freedom to decide, (2) freedom from political parties, (3) neutrality, (4) avoiding conflicts of interest, and (5) guarantee of confidentiality.

   Meanwhile, aspects of personal independence of judges include (1) appointment; (2) term of office; (3) placement; (4) career; (5) dismissal; (6) welfare; and (7) security of the judges.

   In the Indonesian context, personal independence is contained in Article 3 paragraph (1) of Law Number 48 of 2009 concerning

Judicial Powers, which reads: "In carrying out their duties and functions, judges and constitutional justices shall be obliged to maintain judicial independence."

3. Internal independence, which is given to judges in dealing with their colleagues and superiors when carrying out their judicial duties. Its aspects include independence from colleagues and superiors in examining and deciding cases, in administrative procedures/management, and freedom in decision-making. In Indonesia, internal independence is contained in Article 3 paragraph (1) of Law Number 48 of 2009 concerning Judicial Powers.

II. THE CONSTITUTIONAL COURT IS AN INDEPENDENT AND MODERN JUDICIAL INSTITUTION

The Constitutional Court is one of the state institutions exercising independent judicial power to administer justice to uphold law and justice. The Constitutional Court of the Republic of Indonesia was formed through the third amendment to the 1945 Constitution. Its authority lies in Article 24C paragraphs (1) and (2) of the 1945 Constitution: to try at the first and final levels with decisions that are final to examine laws against the Constitution, to decide disputes over the authority of state institutions whose authority is granted by the Constitution, to decide the dissolution of political parties, and to decide disputes over the results of general elections. It is also obliged to decide the opinion of the House of Representatives regarding alleged violations of to the Constitution by the president and/or vice president.[10]

Apart from the authority as stated in the 1945 Constitution, based on Decision Number 85/PUU-XX/2022, the Constitutional Court has been granted the authority to decide disputes over the results of regional head elections. It held that not forming a special judicial body under it, but to give the authority to the Constitutional Court is the normative and more efficient alternative. This decision is in line with the mandate of Article 24C paragraph (1) of the 1945 Constitution because the regional head election is part of the general election, as intended under Article

10 Article 24C paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia

22E of the 1945 Constitution. Since then, disputes over the certification of vote results in the final stages of the election of governors, regents, and mayors are examined and decided by the Constitutional Court.[11]

The Constitutional Court's authority to examine laws against the Constitution is often referred to as "judicial review." However, the more apt term would be "constitutional review," referring the authority to review laws against the 1945 Constitution. According to Jimly Asshiddiqie, the concept of constitutional review is the development of the modern notion of a democratic government system based on the idea of a state, the rule of law, the principle of separation of powers, and the protection of fundamental rights. The constitutional review system includes two main tasks:[12]

1. Guaranteeing the function of the democratic system in the interplay between the executive, legislative, and judicial branches. Constitutional review is intended to prevent domination of authority and/or abuse of power by one branch of state powers;
2. To protect citizens from abuse of power by state institutions that harms their fundamental rights guaranteed in the Constitution.

Constitutional review is closely related to the justice's role of in interpreting the Constitution. When receiving, examining, adjudicating, and deciding on a case reviewing the constitutionality of a law, justices carry out a constitutional interpretation to come to a decision whether the law conflicts with the Constitution or not. This interpretation sometimes leads them to legal discoveries to arrive at the best decisions according to their belief.[13]

Constitutional review is granted by Article 24C paragraph (1) of the 1945 Constitution and regulated in Articles 50 to 60 of the Constitutional Court Law.

Article 51 of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 7 of 2020 concerning the Third

11 Constitutional Court Decision No. 85/PUU-XX/2022 on the judicial review of Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law, p. 41-42.

12 Achmad Edi Subiyanto, Pengujian Undang-Undang (Perkembangan Permohonan Perlindungan Hak Konstitusional Warga Negara Dalam Praktik), Depok: Rajawali Pers, 2020, p. 17.

13 Jefri Porkonanta Tarigan, *Op. Cit.*, p. 64.

Amendment to Law Number 24 of 2003 concerning the Constitutional Court (hereafter referred to as the Constitutional Court Law) regulates the criteria to become a petitioner. A petitioner is a party who believes that their constitutional rights and/or authority have been impaired by the enactment of a law. The following can be petitioners:[14]

a. Individual Indonesian citizens;

b. Customary law community units that live according to the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in statutory legislation;

c. Public or private legal entities;

d. State institutions.

A petitioner is obliged to describe clearly in the petition their constitutional rights and authority to argue that the formation of a law does not comply with the provisions of the 1945 Constitution and/or the substance in articles, paragraphs, or any part of the law is unconstitutional.[15] The object in such petitions can be laws and/or government regulations in lieu of laws (*perppu*). The procedure for constitutional review is further regulated in the Constitutional Court Regulation Number 2 of 2021 concerning Procedures for the Constitutional Review of Laws.

The parties in such a case are the petitioner(s), informants, and relevant part(ies). The petitioner can argue that their constitutional rights/authority have been impaired by the enactment of a law or *perppu* if:[16]

a. The petitioner's constitutional rights and/or authority are granted by the 1945 Constitution;

b. The petitioner's constitutional rights and/or authority have been harmed by the enactment of the law or *perppu* petitioned for review;

14 Article 51 of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court.

15 Article 2 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

16 Article 4 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

c. The constitutional loss is specific (unique) and actual or at least potential which, according to reasonable reasoning, will inevitably occur;

d. There is causality between the constitutional impairment and the enactment of the law or *perppu*;

e. If the petition is granted, the constitutional impairment will no longer or will not occur.

The legislative branch (the People's Consultative Assembly or MPR, the House of Representatives or DPR, and the Regional Representatives Council or DPD) and/or the President provide testimonies as informants. In certain circumstances, the Court can request information from other parties, referred to as relevant party. They can be:

a. Individuals or groups of individuals who have the same interests;

b. Customary law community units that live according to the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in statutory legislation;

c. Public or private legal entities;

d. State institutions.

The legislators provide information regarding the formation of legal norms being reviewed, including their purpose, their background, who were involved in their drafting, and so on. This information can be in the form of verbal communication, written information, as well as indirect inputs in the form of minutes and/or recordings of meetings, academic papers, research by experts invited to speak at the meetings, etc.[17]

The petitioners, informants, and/or relevant parties can have legal representation based on a special power of attorney and/or accompanied by a counsel based on a statement letter. The power of attorney is stamped and signed by the giver and recipient of the power of attorney. The petition can be filed to the Court offline and online.

17 Mardian Wibowo, AAPUU Asas-Asas Pengujian Undang-Undang, Depok: Rajawali Pers, 2020, p. 142.

In providing modern judicial administration services to the public, the Constitutional Court receives petitions filed electronically through the web-based electronic petition management information system (SIMPEL), which records submitted petitions online and in real-time, this providing easier access to justice.

Online petitions can be accessed on www.simpel.mkri.id. To use this application, the petitioner must first register to open an account. After the petitioner registers the petition, Court officers will check the completeness of the documents. A hearing will be scheduled after a petition is registered, which can be monitored through the case tracking feature. This feature provides information on the status of the petition.

After following the entire process in the system, there is an option to print and obtain proof of online petition submission. The petitioner then comes to the Court to submit the documents, which will be examined by officers at the Constitutional Court. They will then receive a list of petition requirements (DKPP) and a petition filing certificate (APPP). Through SIMPEL, accommodation costs can be cut while completing documents before submitting the hardcopy directly to the Court.[18]

SIMPEL manifests the Court's commitment to providing the best service for justice seekers and is expected to provide litigating parties with easy access, speed, and accuracy. It allows the public to file petition online, monitor the petition/case's progress, and access various features such as schedule, court summons, hearing transcripts, and decisions. It will continue to be developed and refined.

To support the litigating parties, the Court has built an information system that allows the public to see the process from the beginning to the end and the files involved called case tracking, which can be accessed at http://tracking.mkri.id/. The public can freely access it to monitor cases as well as for research and news reporting. They can also use it to find and analyze similar petitions or cases. This feature allows the litigating parties and the public to follow the development of cases in real-time, effortlessly and speedily, even on a mobile device, wherever and whenever. It also serves to provide accountability, ensuring that all judicial activities are transparent.[19]

18 M. Guntur Hamzah, *Op. Cit.*, p. 70.
19 *Ibid.*, p. 91-92.

Schedule of the hearings can be accessed through the Court's website at www.mkri.id. The hearings are open to the public and broadcasted live. These hearings include preliminary hearings, evidentiary hearings, and a ruling hearing. The preliminary hearings are presided over by a panel of three justices and comprised of:

a. Preliminary examination to hear the subject matter of the petition and check the completeness and clarity of the petition material;

b. Preliminary examination to examine revisions to the petition and validate the petitioner's evidence.[20]

In the first preliminary hearing, the Court examines the completeness and clarity of the petition material—which includes the petitioner's profile, the Court's authority, the petitioner's legal standing, the reasons behind the petition (*posita*), and the matters requested to be decided (*petitum*)—and allow the petitioner to convey the subject matter of the petition. The Court must provide advice to the petitioner to complete and/or revise the petition. The petitioner completes and/or revises the petition in no more than fourteen days since the preliminary hearing and files the revised petition only made one time before the deadline, after which the Court schedules the next hearing. Revisions to the petition are based on the panel's advice or suggestions.

The Court then holds another hearing to examine the revisions to the petition fourteen days or no later than fourteen days after the first hearing or as otherwise determined by the Court. The revisions to the petition are conveyed directly at the second hearing, at which the Court hears them and validates additional evidence.

Afterward, the panel who examines the case reports the results at a justice deliberation meeting to decide on the follow-up to the case. The evidentiary hearings are also open to the public, and presided over by all nine or at least seven justices. They include:

a. Hearing the informants' statements;

b. Hearing the relevant parties' information;

c. Hearing expert testimonies;

20 Article 40 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

d. Hearing witness statements;

e. Checking and/or validating written evidence;

f. Examine a series of data, information, actions, circumstances, and events that correspond to other evidence that can be used as a guide;

g. Examine other evidence in the form of information that is spoken, sent, received, or stored electronically with optical devices.

Before the hearings, the Court may ask informants to submit written statements and minutes of meetings relating to the object of the petition. Evidence in these cases may be in the form of letters or texts, statements, expert statements, witness statements, statements from relevant parties, other evidence, and instructions. The letters or texts may be related to the Court's authority, the petitioner's legal standing, the object of the petition, and/or reasons behind the petition, and its acquisition validity must be legally accountable.

The petitioner, informants, and relevant parties can propose experts and the Court may request to hear their statements at the hearings. If the experts are indisposed and thus cannot attend the hearings, their statements will be considered after the Court has received confirmation from the party proposing the experts.[21]

The petitioner, informants, and relevant parties can propose witnesses and the Court may request to hear their statements at the hearings. If the witnesses are indisposed and thus cannot attend the hearings, their statements will be considered after the Court has received confirmation from the party proposing the witnesses.[22]

During evidentiary hearings, the litigating parties can ask the experts and witnesses—proposed by themselves or the other parties—questions and responses on the subject matter through the hearing chairperson.[23] When the Court declares the evidentiary hearings sufficient, the litigating parties may submit written conclusions. Next,

21 Article 61 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

22 Article 62 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

23 Article 65 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

a closed justice deliberation meeting (RPH) is held to decide the case after the preliminary or evidentiary hearings are complete. The Court's decisions can be in the form of interlocutory decisions or decrees. The Court's decisions obtain permanent legal force since it is pronounced at a plenary hearing that is open to the public.[24]

The final and binding nature of the Court's decisions have great influence on everyone (*erga omnes*), not only the disputing parties. Therefore, every decision must be based on philosophical values and have binding legal certainty based on the importance of justice.[25] The Court's decisions, which have a negative legislative function, are final and binding on all parties—citizens and state institutions. Therefore, all state organs are bound to no longer apply laws or part of laws that have been annulled. The Court's decisions must be a reference for treating rights and authority.[26]

III. CONSTITUTIONAL COURT AS GUARDIAN OF CONSTITUTIONAL RIGHTS TOWARDS A FAIR TRIAL

In examining constitutional review cases toward a fair trial, the Court has fulfilled the following principles:

1. The hearings are open to the public.

This principle can be found in Article 40 paragraph (1) of the Constitutional Court Law, which reads, "Constitutional Court hearings are open to the public, except for the justice deliberation meetings." The hearings are "open" in the sense that the litigating parties can (the petitioner is even obliged to) attend them in the courtroom or other rooms used for that purpose (for example, certain rooms in the Law Faculty connected to the Court's hearings through video conferencing facilities) and follow the proceedings. The word "public" means not only the petitioner, the president, the House of Representatives, or relevant parties, but also the general public and journalists who will cover the proceedings can attend the hearings.[27]

24 Article 77 Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Legal Review Cases.

25 Mohammad Mahrus Ali dan Achmad Edi Subiyanto, Argumentum in Scriptum Kompilasi Kajian Konstitusi dan Mahkamah Konstitusi, Depok:Rajawali Pers, 2021, p. 11.

26 *Ibid.,* p. 12.

27 Mardian Wibowo, *Op. Cit*. p. 101.

2. Independent and impartial.

The principles of independence and impartiality can be found in Article 2 of the Constitutional Court Law, which reads, "The Constitutional Court shall be one of the state institutions that exercise independent judicial powers to administer justice to uphold law and justice." Freedom is a condition of being free from anyone's influence or pressure. The Great Dictionary of the Indonesian Language defines independence as free, stand-alone, and not depending on certain people or parties. When a court claims to be independent, it must also guarantee the independence of the parties related to the case, one of which is by being neutral or not taking sides with any party. Court independence is defined as the freedom to decide a case. Maruarar Siahaan, a former constitutional justice, said the freedom of justices is accompanied by professionalism in terms of (a) expertise or skill, (b) accountability, and (c) compliance with the code of ethics.

3. Simple, fast, and free judiciary.

The constitutional review requires that justice is carried out quickly and at a low cost. This principle is formulated in multiple articles, such as Article 35A of the Constitutional Court Law, which reads, "Petitions as intended in Article 30 are not burdened with court costs." The principle of "simple and fast" can be found in the general provisions of the elucidation to the Constitutional Court Law, which reads, "In administering justice to examine, hear, and decide cases, the Constitutional Court shall continue to uphold the principle of administering judicial powers, that is carried out simply and swiftly."[28]

4. The burden of proof is on the petitioner.

Evidence is a crucial issue because through evidence, the justice will construct the truth. The burden of proof is generally the responsibility of the party making the argument. Likewise, in constitutional review cases, the burden of proof falls on the party making an argument, i.e. the petitioner. This principle can be found implicitly in Article 31 paragraph (2) of the Constitutional Court Law, which reads, "The appeal as referred to in paragraph (1) must be filed together with the supporting evidence."[29]

28 *Ibid.,* p. 104-105.
29 *Ibid.,* p. 107.

5. The Constitutional Court's decisions are based on a minimum of two pieces of evidence.

Unus testis nullus testis or *una testis nulla testis* means "one witness is not a witness". This principle generally stipulates that the judge's decision/opinion regarding the truth of an event must be based on at least two witnesses. In this case, the Court's decision (which confirms the petition) must be supported by at least two pieces of evidence, which may consist of witness statements, documents, expert statements, etc.

This provision was then put into one of the principles of constitutional review in Article 45 paragraph (2) of the Constitutional Court Law, which reads, " A decision of the Constitutional Court which falls in favor of the appeal must be based upon at least 2 (two) pieces of evidence."[30]

6. The Constitutional Court's constitutional review postpones the review of norms in the Supreme Court.

Constitutional review requires that the process in the Constitutional Court postpones the process in the Supreme Court. A legal norm reviewed by the Constitutional Court could potentially be revoked/annulled, or its meaning changed. This affects the applicability of the legislation below it. Such influence is natural and is resolved by the implication of the principle of hierarchy that the repeal/change of laws results in the disappearance/change of implementing regulations. Therefore, Article 55 of the Constitutional Court Law reads, "Review of legislation under the law, which is being undertaken by the Supreme Court, must be discontinued, if the law which constitutes the basis for review of such legislation is being reviewed by the Constitutional Court, until such time as may be determined by the Constitutional Court."

However, based on Constitutional Court Decision Number 93/PUU-XV/2017, dated March 20, 2018, the ruling held that the word "discontinued" is unconstitutional and not legally binding as long as it is not interpreted " Review of legislation under the law, which is being undertaken by the Supreme Court, must be postponed, if the law which constitutes the basis for review of such legislation is being reviewed by

30 *Ibid.,* p. 109.

the Constitutional Court, until such time as may be determined by the Constitutional Court."

7. The constitutional review of laws aims to realize justice based on the belief in the One Supreme God.

Efforts to construct justice must be guided by spiritual values so that they are free from the personal interests of judges and courts. The spiritual values refer to the concept of belief in the one Supreme God. Article 48 paragraph (1) of the Constitutional Court Law, "The Constitutional Court passes its decisions in the name of Justice based on the belief in the One Supreme God." The concept of belief in the One Supreme God is none other than the first precept of Pancasila as written in the Preamble to the 1945 Constitution.[31]

8. The decision of the Constitutional Court has permanent legal force only since it is pronounced at a hearing that is open to the public.

The principle of openness to the public is regulated in Article 40 paragraph (1) of the Constitutional Court Law, which reads, "Constitutional Court hearings are open to the public, except for the justice deliberation meetings." Furthermore, Article 47 of the Constitutional Court Law reads, "A decision of the Constitutional Court shall take full legal force and effect upon its pronouncement at a plenary hearing open to the public."

This is one of the principles of constitutional review is a requirement for a Constitutional Court decision to obtain permanent legal force. The open nature of the pronouncement of constitutional review decisions has two meanings: (a) transparency, and (b) announcement to the broader public.[32]

9. The law being reviewed is considered valid until there is a decision that states otherwise.

As a process of assessing the conformity of legal norms with the 1945 Constitution, constitutional review will end with a Constitutional Court decision regarding the unconstitutionality or constitutionality

31 *Ibid.*, p. 115-116.
32 *Ibid.*, p. 117.

of said legal norms. When a legal norm's constitutionality is being reviewed, it is considered neither right or wrong before the Constitution. The choice to continue enforcing a legal norm under review is to prevent a legal vacuum. This is formulated in Article 58 of the Constitutional Court Law, which reads, "Any law, which is under review of the Constitutional Court, shall remain in full force and effect until a decision is issued declaring that this law contravenes the 1945 Constitution of the Republic of Indonesia."[33]

10. A statutory norm cannot be reviewed twice.

In justice, the principle of *ne bis in idem* means that something cannot be tried again once it has already been tried (decided). A court decision that already has permanent legal force prevents something from being tried a second time. This aims to provide legal certainty to the parties involved in a lawsuit.

The principle of *ne bis in idem* in the Constitutional Court is more straightforward because the Court do not recognize court levels and, therefore, do not recognize legal remedies. It adjudicates at the first and final level so its decisions are final and binding. Article 60 paragraph (1) of the Constitutional Court Law reflects this: "No review may be conducted again on material substance of paragraphs, articles, and/or a section of a law which has already been subjected to a review." The Petitioner can use touchstones that are different from those in similar cases that have been decided, thus avoiding *ne bis in idem*, as is shown in Article 60 paragraph (2) of the Constitutional Court Law: "The provisions as referred to in paragraph (1) can be excluded if the content contained in the 1945 Constitution of the Republic of Indonesia, which is used as the basis for the review, is different."[34]

Judges are the main actors in carrying out the functions of judicial powers because in Indonesia, judicial powers consist of the judiciary, which is carried out based on statutory laws. In implementing judicial powers, judges must be professional in performing obligations and duties that have been regulated in law. After understanding the matters within their authority, a judge is expected to apply moral values and integrity and professionally resolve cases fairly, with the guidance

33 *Ibid.,* p. 119-120.
34 *Ibid.,* p. 121-123.

of justice and their beliefs. In order to have judges with integrity, irreproachable personality, and professionalism, a transparent and open selection process is important. This reflects justice in the judicial system.[35]

For constitutional justices, independence is an essential prerequisite for realizing the ideals of the rule of law and guaranteeing law and justice. This principle must be reflected in the examination and decision-making process and is closely related to the Court's independence as an authoritative, dignified, and trustworthy judicial institution. The justices must be free from any direct or indirect intervention, persuasion, pressure, coercion, threat, or retaliation due to particular political or economic interests from the government or any political power, specific groups, or factions, with rewards or promise of rewards in the form of position, financial benefits, or others.[36]

Article 2 of the Constitutional Court Law stipulates that the Constitutional Court is one of the state institutions that exercises independent judicial powers to administer justice to uphold law and justice. Article 3 paragraph (1) of the Judicial Power Law reads, "In carrying out their duties and functions, judges and constitutional justices shall be obligated to maintain the independence of the judiciary." These norms consist of at least four elements: (a) constitutional judges, (b) obligated to maintain, (c) judicial independence, and (d) in carrying out duties and functions. The word "obligation" that follows the phrase "constitutional justices" indicates an obligation to be active, not only passive, in seeking independence. A passive attitude, for example, is refusing to communicate to litigants regarding ongoing cases. An example of an active attitude to maintain independence is strengthening the parameters of independence and supervision and only communicate cases through decisions. The elucidation to Article 3 paragraph (1) states that "judicial independence" means freedom from any interference from outside parties and freedom from all forms of pressure, both physical and psychological. The fourth element

35 Nuria Siswi Enggarani, "Independensi Peradilan dan Negara Hukum", Jurnal Law and Justice, Vol. 3, No. 3, 2018, p. 84.

36 Bagian Pertama: Prinsip Independensi dalam Deklarasi Hakim Konstitusi Republik Indonesia tentang Kode Etik dan Perilaku Hakim Konstitusi Republik Indonesia (Sapta Karsa Hutama) pada Peraturan Mahkamah Konstitusi Nomor 09/PMK/2006 tentang Pemberlakuan Deklarasi Kode Etik dan Perilaku Hakim Konstitusi.

provides the limitation that all independent activities are solely in terms of carrying out duties and functions as adjudicators.[37]

The function of a judge as an adjudicator is to decide a case. One the Court's cases in that No. 100/PUU-X/2012. The petitioner was Mr. Marten Boiliu, a former security guard at PT Sandhy Putra Makmur, who was laid off. The petitioner argued the case independently without any legal counsel. He challenged the constitutionality of Article 96 of Law Number 13 of 2003 concerning Manpower, which reads, "Any claim for the payment of the worker/laborers' wages and all other claims for payments that arise from an employment relations shall expire after a period of 2 (two) years since such rights arose." He contrasted it with the following articles of the 1945 Constitution:

- Article 28D paragraph (1): "Every person shall have the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law."
- Article 28D paragraph (2): "Everyone shall have the right to work and receive fair and appropriate compensation and treatment in an employment relationship."
- Article 28I paragraph (2): "Everyone shall have the right to be free from any discriminatory treatment on any basis and obtain protection against such discriminatory treatment."

The petitioner claimed to have had worked from May 15, 2002 to June 30, 2009. After the layoff, PT SPM had not paid his severance pay, service pay, and compensation. The Constitutional Court, in its legal opinion, stated that wages and all payments arising from the employment relationship are a worker's right that must be protected as long as the worker does not commit acts that are detrimental to the employer. Therefore, they cannot be written off because a specific time has passed because what the worker has given as *prestatie* must be balanced with wages and all payments arising from the employment relationship as *prestatie tegen*. They are personal property rights and cannot be taken over arbitrarily by anyone, either by individuals or through statutory provisions. The Court granted the petitioner's petition in its entirety. This decision was followed up by the Circular

37 *Ibid.,* p. 127-128.

Letter of the Minister of Manpower of the Republic of Indonesia Number 1/MEN/I/2015 concerning the Decision of the Constitutional Court Number 100/PUU-X/2012 on Article 96 of Law Number 13 of 2003 concerning Employment, dated January 17, 2015.

To safeguard, maintain, and improve the personal integrity, competence, and behavior of constitutional justices, there is a code of ethics and conduct which guides them and a benchmark for assessing the conduct of constitutional justices. The preparation of the code of ethics and conduct refers to "The Bangalore Principles of Judicial Conduct 2002," which has been well accepted by countries that adhere to civil law and common law, adapted to the Indonesian legal and judicial system and the ethics of national life as contained in the MPR Decree Number VI/MPR/2001 concerning Ethics in National Life, which is still in effect.

The Bangalore Principles of independence, impartiality, integrity, decency and propriety, equality, competence, and diligence, as well as wisdom in Indonesian society serves as a code of ethics for constitutional justices and are used as a reference in assessing the conduct of constitutional justices, to prioritize honesty, trustworthiness, exemplary, chivalry, sportsmanship, discipline, hard work, independence, shame, responsibility, honour, and dignity. These principles are intended to complement and not to reduce existing legal and behavioural provisions, which are binding on constitutional justices.[38] Regulations regarding the code of ethics for constitutional justices are contained in the Constitutional Court Regulation Number 09/PMK/2006 concerning the Enforcement of the Declaration of the Code of Ethics and Conduct of Constitutional Justices.

CONCLUSION

Judicial independence is crucial in implementing the rule of law. In Indonesia, it is guaranteed in Article 24 of the 1945 Constitution. The Constitutional Court is one of the state institutions exercising independent judicial powers to administer justice to uphold law and justice as mandated by Article 24C of the 1945Constitution. One of

38 Opening section in the Declaration of Constitutional Judges of the Republic of Indonesia concerning the Code of Ethics and Behavior of Constitutional Judges of the Republic of Indonesia (*Sapta Karsa Hutama*) in Constitutional Court Regulation Number 09/PMK/2006 concerning the Enforcement of the Declaration of the Code of Ethics and Behavior of Constitutional Judges.

the powers of the Constitutional Court is to review laws against the Constitution. The filing of constitutional review cases is regulated in the Constitutional Court Regulation Number 2 of 2021 concerning Procedures for Constitutional Review. As a modern and trustworthy judicial institution with a vision of upholding the Constitution, the Constitutional Court has implemented electronic justice administration services using the simple.mkri.id application.

The Constitutional Court has built an information system that provides access to the public to see in detail the process from the beginning to the end of the hearings and what files are involved, called case tracking, which can be accessed at http://tracking.mkri.id/.

The final and binding nature of the Constitutional Court's decisions means they apply to everyone, not interparty or only the parties in dispute (*erga omnes*). The Court's decisions, which have a negative legislative function, are final and binding on all parties—citizens and state institutions. Therefore, all state organs are bound to no longer apply laws or part of laws that have been annulled. The Court's decisions must be a reference for treating rights and authority.

In examining constitutional review cases, the Constitutional Court fulfils the principles of constitutional review. In deciding cases, constitutional justices are bound by a code of ethics and conduct of Constitutional Judges as stated in the Declaration of Constitutional Justices of the Republic of Indonesia concerning the Code of Ethics and Conduct of Constitutional Justices of the Republic of Indonesia (*Sapta Karsa Hutama*) in the Constitutional Court Regulation Number 09/PMK/2006 concerning the Enforcement of the Declaration Code of Ethics and Conduct for Constitutional Justices.

In Decision Number 100/PUU-X/2012, the Court declared Article 96 of Law Number 13 of 2003 concerning Manpower unconstitutional and not legally binding so the petitioner had a way to obtain his rights to receive severance pay, service pay, and compensation. Even though the petitioner argued the case independently without any legal counsel, the Court decided the case to ensure that every citizen can defend their constitutional rights. The Constitutional Court of the Republic of Indonesia as an independent judicial institution also serves as the guardian of the Constitution, which safeguards the constitutional rights of citizens through justice that is fair and free from intervention.

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JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL IN KOREA

Hanbyul Chung
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CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL IN KOREA

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1. INTRODUCTION

In this presentation, we will first outline the constitutional provisions that underpin judicial independence in Korea. We will then delve into selected case law from the Constitutional Court of Korea that interprets these provisions in the context of the institutional mechanisms supporting judicial independence.

To set the stage for our discussion, we will provide a concise explanation of judicial independence.

2. THE MEANING OF JUDICIAL INDEPENDENCE

As widely recognised, judicial independence is foundational to a modern democratic society. It ensures that justice is administered fairly and properly, with the judiciary rendering judgments based solely on the law, free from any external pressures. This independence in the exercise of judicial power is crucial for upholding the democratic order and safeguarding individual liberties and rights.

The concept of judicial independence stems from "the principle of separation of powers", which ensures checks and balances among governmental branches. It is commonly understood that judicial independence requires the judiciary's organisation and operations to be autonomous and distinct from executive and legislative powers. More fundamentally, it signifies that judges must make decisions independently, free from any commands or directives in specific cases. Judicial independence, at its core, aims for the independence of trials and the unfettered freedom of judgment.

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The Constitution of the Republic of Korea (hereinafter referred to as "**the Constitution**") upholds judicial independence as a vital constitutional principle, incorporating provisions to safeguard judicial independence.

3. STATE OF JUDICIAL INDEPENDENCE IN KOREA

3.1. Introduction

To ensure judicial independence, two fundamental elements are essential: the autonomy of courts from the executive and legislative branches in both structuring and administering the judiciary, and the independence of judges, which underpins fair adjudication and secures the independent status of judges.

Articles 101 through 110 of the Constitution, found in the "Courts" section in Chapter 5, establish this principle. Article 101, Paragraph 1, declares, "Judicial power shall be vested in courts composed of judges". Article 108 allows, "The Supreme Court may, within the scope of law, establish regulations pertaining to judicial proceedings, internal discipline, and administrative matters of the court".

Therefore, the current Constitution expressly affirms the independence of courts. In Korea, the separation of the judiciary from the legislature or the administration was achieved through a historical process of political struggle. Consequently, the present discourse in Korea increasingly focuses on the independence of judges. We will now delve into the independence of judges, including aspects related to the independence of adjudication and the independent status of judges.

3.2. Independent Adjudication

Article 103 of the Constitution guarantees independent adjudication by stating, "Judges rule independently according to their conscience and in conformity with the Constitution and the law."

This provision mandates that judges must exercise their judgment independently, solely in accordance with constitutional norms, free from both external or internal pressures. Here, independence encompasses freedom not only from litigants but also from the personal biases of other state agencies, social pressures, higher courts, colleagues, and even the judges' own preconceptions.

Nonetheless, it is currently argued that the independence of judicial decision-making is often challenged not only by public criticism, but also by the scrutiny or pressures from political entities, social organisations and the mass media. Consequently, some argue that judges must , foremost, uphold their independence from public opinion, special interest groups, and media influence.

3.3. The Independent Status of Judges

The independence of judges is underpinned by three main systems: the appointment and reassignment of judges, their terms of office and retirement, and the guarantee of their status.

The following section will detail three pivotal Constitutional Court decisions regarding judicial independence.

3.3.1. Appointment of the Justices and Judges and Reassignment of Judges

3.3.1.A. Overview

To safeguard judges' independence, the management of judicial personnel, including the appointment and assignment of judges, must be conducted objectively and fairly. For the process to be deemed objective and fair, the management should be determined through the autonomous decision-making of the judiciary.

The current Constitution states that "Qualifications for judges are determined by law" (para. 3, Article 101). It also grants the judiciary the power of appointment, as outlined in "Judges other than the Chief Justice and the Supreme Court Justices are appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices" (para. 3, Article 104). To further enhance judicial autonomy, the Court Organisation Act delineates the assignment of judges, specifying, "The Chief Justice of the Supreme Court shall assign judges to their positions" (Article 44, Court Organisation Act).

3.3.1.B. Case on the Reappointment for Judges (2015Hun-Ba331, 29 September 2016)

a. Background of the Case

Judges, with the exception of the Chief Justice and Justices of the Supreme Court, have a term of ten years, with the possibility of reappointment under conditions prescribed by law.

Article 44-2 of the Court Organisation Act (amended by Act no. 4765 of 27 July 1994, and prior to amendment by Act no. 10861 of 18 July 2011) provides, "The Chief Justice of the Supreme Court may rate the service performance of the judges and reserve judges, and reflect the results in personnel management" (para. 1) and "Matters concerning the rating of service performance as provided in paragraph (1) shall be prescribed by the Supreme Court Regulations" (para. 2, hereinafter referred to as the "**Rating Provision**").

Article 45-2 of the Court Organisation Act (amended by Act no. 7402 of 24 March 2005, and prior to amendment by Act no. 12886 of 30 December 2014, hereinafter referred to as the "**Court Organisation Act**" regardless of its amendment history) stipulates, "(2) The Chief Justice of the Supreme Court shall not issue an official order of reappointment to judges deemed to fall under any one of the following subparagraphs: 2. Where it is impossible for him to perform the normal duties as a judge due to remarkable inferiority of service records" (para. 2, hereinafter referred to as the "**Reappointment Provision**").

In December 2011, while serving as a judge, the complainant posted a message on Facebook that was in violation of the social network service review policy, using a disparaging expression against former President Lee of Korea.

In 2012, the year following, the complainant was eligible for reappointment, coinciding with the 10th anniversary of his judicial appointment. However, the Supreme Court did not reappoint him, citing a record of remarkably poor work performance.

In response, the complainant filed a lawsuit with the Seoul Administrative Court in August 2012 to "cancel the decision to drop out of consecutive terms" and lodged a constitutional complaint in September 2015 upon its rejection.

b. Summary of the Decision

(1) Considering the importance of ensuring judicial independence by minimising legislative interference with judicial authority, and the need for the judiciary, which is expert in both substantive and procedural matters, to establish the criteria for evaluating judges' work performance, delegating matters concerning judges' work performance evaluation to the Supreme Court rules is warranted.

(2) The Rating Provision does not violate the principle of prohibition of comprehensive delegation, as it allows for a clear understanding of requirements for judges' performance in their duties, encompassing judicial function and work efficiency, job competency, qualifications, and evaluation methods.

(3) The Reappointment Provision does not breach the principle of clarity, as "significantly poor work performance" can be understood as performance so deficient that it clearly indicates the outcomes of a judge's job performance evaluation.

c. Significance of the Decision

The practical guarantee of judicial independence is significant not only for ensuring that the people's right to trial, as guaranteed by Article 27 of the Constitution, is properly exercised but also because it lays the foundation for the rule of law and democracy. However, judicial independence is not an end in itself.

To truly safeguard the people's right to trial, responsibility must complement judicial independence. The second term system for judges can be seen as a mechanism that promotes judicial responsibility.

Yet, placing undue emphasis on judicial responsibility risks compromising the independence of judges. Therefore, the work evaluation system ought to be reasonably structured within the necessary realms to objectively facilitate the second term system for judges, ensuring fairness and objectivity in their duties.

3.3.2. Terms of Office and Retirement

3.3.2.A. Overview

Article 105 of the Constitution stipulates: (1) The Chief Justice's term is six years, with no possibility of reappointment. (2) Justices of the Supreme Court have a six-year term but may be reappointed as law prescribes. (3) Judges, excluding the Chief Justice and Supreme Court Justices, serve ten-year terms, with the possibility of reappointment under conditions prescribed by law. (4) The retirement age for judges is determined by law.

The retirement age is 70 for the Chief Justice and Supreme Court Justices, whereas it is 65 for other judges (Article 45 of Court Organization Act).

3.3.2.B. Case on the Retirement Age for Judges (2001Hun-Ma557, 31 October 2002)

a. Background of the Case

Article 45 of the Court Organisation Act (amended by Act no. 4765 of 27 July 1994, and prior to amendment by Act no. 10861 of 18 July 2011, hereinafter referred to as the "**Court Organisation Act**") states, "The retirement age of the Chief Justice of the Supreme Court shall be seventy years; for the Justices of the Supreme Court, sixty-five years; and for judges, sixty-three years" (hereinafter referred to as the "**Age Provision**").

A former judge, who retired at the age of 63, lodged this constitutional complaint. The complainant argued that the Age Provision, which mandates retirement at a specific age irrespective of the individual's desire, contravenes the Constitution's job security provisions for judges. Furthermore, the complainant asserted that applying different retirement ages for judges depending on their positions violates the principle of equality.

b. Summary of the Decision

In this case, the Constitutional Court confirmed the legality of the Court Organisation Act's provision setting the retirement age for judges at 63, with the following rationale:

(1) Article 105, Section 4 of the Constitution stipulates, "The retirement age of judges shall be determined by Act." Judges, serving as state agencies vested with judicial power—one of the three foundational powers of government, along with legislative and administrative powers—are mandated to adjudicate independently, guided by their conscience and in alignment with the Constitution and statutes (Article 103, the Constitution). Given the substantial constitutional safeguards afforded to preserve judicial independence (Article 106, the Constitution), it is incumbent upon legislators to account for the unique aspects of judicial duties in setting the retirement age for judges.

(2) The Age Provision specifies different retirement ages for judges based on their positions. Unlike factors such as sex, religion, or social status, age is not listed in Article 11 of the Constitution as a ground

for prohibited differential treatment. This policy does not establish a privileged caste among judges. Instead, the differentiated retirement ages for judges in different positions reflect a careful consideration of the distinct nature and demands of judicial positions, average life expectancy, and organisational order. Consequently, the differential treatment of judges by the Age Provision has a legitimate foundation and does not violate the complainant's right to equality.

(3) The rationale for setting specific retirement ages for judges aims to prevent the potential decline in court performance due to age-related decreases in mental and physical abilities, and to enhance court efficiency through strategic judge placement. This legislative objective is legitimate. While individual capacities may vary, it is a scientifically proven fact that mental and physical abilities generally decline with age. Allowing judges to evaluate their own capability for judicial duties would undermine this legislative objective. Furthermore, objectively assessing the deterioration of each judge's individual and subjective capabilities is challenging. Setting a specific retirement age, while considering the unique aspects of judicial work and other objective conditions, is an appropriate means to achieve these legislative goals. The retirement age defined by the Age Provision is relatively high when compared to that of other public officials and is not excessively low in comparison to retirement ages for judges in other countries that have instituted retirement age limits for judges. Thus, the Age Provision does not infringe on the freedom of occupation or the right to hold public office.

(4) This Court does not prioritise any constitutional provision over another, nor can it review a constitutional provision's constitutionality. Therefore, Article 106 of the Constitution, which guarantees job security for judges, must be interpreted in harmony with Article 105, Section 4, which sets the retirement age for judges. Accordingly, Article 106 should be understood to prevent the removal of a judge from office except through impeachment, a sentence of imprisonment without prison labour or a more severe penalty, as well as protection from suspension, salary reduction, or any other disadvantageous actions unless it is through disciplinary measures, all under the assumption that judges will retire at a prescribed age. With this interpretation,

provided legislators exercise their legislative discretion without infringing on fundamental rights of an individual, enacting a statutory provision under Article 105, Section 4 of the Constitution to establish a retirement age for judges would not contravene the Constitution. Given that the Age Provision does not violate any basic rights of the complainant, including the right to equality, freedom of occupation, and the right to hold public office, it is in compliance with Article 106, which ensures job protection for judges.

3.3.3. Guarantee of Status

3.3.3.A. Overview

A judge may only be removed from office through impeachment or if sentenced to imprisonment or a more severe penalty. Furthermore, judges cannot be suspended from office, have their salaries reduced, or face other unfavourable treatments except through disciplinary measures (paras. 1, 2, Article 106).

Impeachment proceedings serve to protect the Constitution, allowing for the president and other high-ranking public officials to be held legally accountable through a specialised process of indictment. The National Assembly initiates this process by passing an impeachment motion (Article 65, Section 1), and the Constitutional Court is then empowered to adjudicate the charges brought by the National Assembly (Article 111, Section 1, Item 2).

Ever since the inception of the First Republic Constitution, which introduced impeachment proceedings through the establishment of an Impeachment Tribunal, Korea has experimented with various institutional frameworks. The current Constitution distinguishes the roles of indictment and adjudication between the National Assembly and the Constitutional Court.

When the Constitutional Court renders a decision on impeachment, at least six Justices must concur (Article 113, Section 1). A impeachment decision is limited to removal from public office, ~~provided~~ that it does not absolve the impeached individual of civil or criminal liability (Article 65, Section 4). This marks a clear distinction from disciplinary procedures.

The regular criminal justice system and standard disciplinary proceedings often prove ineffective against high-ranking officials and other public officials whose terms are constitutionally guaranteed. Impeachment is tailored to address these challenges, ensuring accountability for violations of the Constitution or statutes.

Moreover, the impeachment process plays a role in safeguarding judges' status. The Constitution restricts impeachment grounds to instances of constitutional or statutory breaches in the performance of official duties (Article 65, Section 1) and mandates a weighted quorum for dismissal. Hence, a judge is only removed for severe misconduct or criminal liability regarding constitutional or legal violations, reinforcing their protected status.

Despite the submission of two impeachment motions against a Chief Justice and a Supreme Court Justice in the past (in 1985 and 2009), these motions were either rejected or dismissed by the National Assembly.

3.3.3.B. Case on the Impeachment of a Judge (2021Hun-Na1, 28 October 2021)

a. Background of the Case

This case represented the first-ever impeachment of a sitting judge in the country's modern history. The ruling party and its allies accused Judge Lim of the Busan High Court (hereinafter referred to as the "**respondent**") of interfering in trials assigned to other judges. Following the National Assembly's approval of the impeachment motion, the resolution was forwarded to the Constitutional Court for a trial.

However, the respondent retired upon the expiration of his term as a judge before the Court could conclude the trial.

b. Summary of the Decision

The Constitutional Court decided against the National Assembly's petition for the respondent's impeachment.

One Justice expressed an opinion to declare the case closed. In a five-to-three vote, the Court found the impeachment "legally inappropriate" as the now-retired judge could not be removed from

office due to his retirement, rendering the impeachment moot and without any beneficial purpose.

Six out of the nine Justices abstained from ruling on the constitutionality of Lim's actions, as his retirement precluded the possibility of his dismissal. Thus, the Court did not proceed to examine whether the respondent's conduct violated the Constitution.

In their opinion rejecting the impeachment, the Justices employed the following rationale: The term of office for a judge serves as a "conventional means" to ensure a balance between judicial independence and responsibility, stripping a judge of democratic legitimacy upon its expiration. In contrast, the impeachment mechanism, as a collaboration between the National Assembly and the Constitutional Court, is considered an "emergency means" for upholding the rule of law and safeguarding the Constitution.

Given that the respondent's term had expired, thus losing his position through a conventional means, the Court did not recognise any further interest in pursuing impeachment as an emergency measure.

However, three Justices believed the respondent warranted removal from office due to grave constitutional breaches but noted that his retirement nullified the possibility of dismissal.

Three Justices in favour of proceeding with the impeachment trial underscored the importance of a constitutional clarification by the Court. They argued that identifying the significance of trial independence and the constitutional responsibilities of judges could deter future violations of judicial independence.

They posited that any actions by a judge that casts doubt on the independence and fairness of the judiciary, such as interfering in another judge's trial, could be seen as an act eroding trust in judicial independence and the fairness of the trial. Ultimately, they viewed the respondent's conduct as a significant constitutional violation with the potential to severely judicial functions.

c. Significance of the Decision

The necessity for at least six Justices to consent to impeachment consent meant that the respondent was not removed from office.

This case represented the first impeachment of a sitting judge and facilitated a meaningful discussion by the Constitutional Court on the status of judges, impeachment procedures, and the balance between independence and responsibility within the judiciary.

4. CONCLUSION

The Constitution, last amended in 1987, is the result of the Korean people's persistent efforts to establish a democratic government and an advanced modern state. It ensures substantial autonomy and independence for the judiciary, seen as crucial for fostering the rule of law and protecting the fundamental rights of citizens.

The experience of many developing countries underscores that the real test lies not merely in the presence of provisions for judicial independence within a constitution but in the practical application of these principles.

We may say that the current Constitution effectively upholds judicial independence. The Constitutional Court, alongside the wider judiciary and individual judges, has actively sought to maintain this independence, exerting judicial powers and judicial review to counteract dictatorship or abuses of administrative powers.

JUDICIAL INDEPENDENCE AND IMPARTIALITY WITHIN THE FRAMEWORK OF THE CONSTITUTION OF THE REPUBLIC OF TÜRKİYE

Ayça Onural

CONSTITUTIONAL COURT OF THE REPUBLIC OF TÜRKİYE

JUDICIAL INDEPENDENCE AND IMPARTIALITY WITHIN THE FRAMEWORK OF THE CONSTITUTION OF THE REPUBLIC OF TÜRKİYE

Ayça ONURAL[*]

INTRODUCTION

An effective judicial system, bolstered by an independent and impartial judiciary, stands as a cornerstone for the rule of law and the safeguarding of human rights. Indeed, the Preamble to the Constitution of the Republic of Türkiye (adopted by Law no. 2709 of 18 October 1982, published in the Official Gazette no. 17863, dated 9 November 1982, hereinafter referred to as "the Constitution") articulates in its sixth paragraph that "*every Turkish citizen has the inherent right and power to lead an honourable life and to improve their material and spiritual well-being under the aegis of national culture, civilisation, and the rule of law, by exercising the fundamental rights and freedoms laid down in this Constitution, in accordance with the requirements of equality and social justice*". The principle of the rule of law is also enshrined in Article 2 of the Constitution, which characterises the State as "*a democratic, secular and social State governed by the rule of law*".

The President of the Constitutional Court of the Republic of Türkiye (hereinafter referred to as "the Constitutional Court" or "the Court"), Prof. Dr. Zühtü Arslan, highlighted in his opening speech at the 61st anniversary of the Constitutional Court[1] that "*the most distinctive feature of the Turkish constitutional identity is the rule of law. (…) In fact, the rest of the Constitution is, in a sense, an explanation of this statement and even of the principle of the rule of law itself,*", adding that "*the Constitutional Court has also identified the rule of law as the main principle of the Constitution.*

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1 See the President's opening speech (in English), available at https://www.anayasa.gov.tr/en/president/presidents-speeches/opening-address-ceremony-for-the-61st-anniversary-of-the-constitutional-court-of-the-republic-of-turkiye.

According to the Court, the rule of law is a principle that must be taken into consideration in the interpretation and application of all provisions of the Constitution".[2]

However, a key principle of the rule of law is the separation of powers, particularly between the political branches of government and the judiciary. The fourth paragraph of the Preamble to the Constitution defines the separation of powers as follows: "*The separation of powers, which does not imply an order of precedence among the organs of the State but refers only to the exercise of certain State powers and the discharge of duties, and is limited to civilised cooperation and division of functions; and the fact that only the Constitution and the laws have supremacy*". Central to this principle is the need for the judiciary to be independent, both in structure and in practice. Hence, the universally accepted principle is that "*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*"[3] The independence of the judiciary is, therefore, the guarantor of the democratic rule of law.

The landmark ruling in the case of *Rex v. Sussex Justices*, [1924] 1 KB 256, that "*It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*"[4], often paraphrased as "*justice must not only be done; it must also be seen to be done*", is now frequently cited in the decisions of the European Court of Human Rights[5] (hereinafter referred to as such

2 See *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 50; *Kenan Kalkan* [Plenary], no. 2018/36174, 15 February 2023, § 48, and *Cihangir Akyol* [Plenary], no. 2021/33759, 23 February 2023, § 46. See also the President's speech entitled *Protecting the Rule of Law through Constitutional Review of the Presidential Decrees: The Case of Türkiye*, delivered at the International Conference on "The Contribution of Constitutional Courts in Protecting and Strengthening Fundamental Values of Democracy, Human Rights, and Rule of Law", Pristina, Kosovo, 23 October 2023, available online at https://www.anayasa.gov.tr/en/news/news-and-events/president-of-the-constitutional-court-mr-zuhtu-arslan-and-the-accompanying-delegation-participated-in-the-international-conference-held-in-pristina-kosovo/.

3 See *United Nations Basic Principles on the Independence of the Judiciary*, Principle 1, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available online at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary.

4 See *The origins of 'Justice must be seen to be done'*, Arvind Datar, Bar and Bench, Published on: 18 April 2020, https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done.

5 See *Campbell and Fell v. The United Kingdom* , nos. 7819/77, 7878/77, § 81, 28 June 1984.

or "the Strasbourg Court") and the Constitutional Court. This ruling signifies that the mere appearance of bias or partiality is sufficient to overturn a judicial decision.

The purpose of this paper is twofold: firstly, to offer a succinct overview of the Turkish Constitution's provisions regarding the courts' independence and impartiality, and secondly, to examine how the Constitutional Court has interpreted these provisions and underlying principles through its jurisprudence. Given the recent advancements in judicial ethics in Türkiye, which are aligned with international and European standards and which undoubtedly incorporate the principles of independence and impartiality of the judiciary, addressing some preliminary considerations on these matters from the outset is essential.

I. RECENT DEVELOPMENTS IN THE FIELD OF JUDICIAL ETHICS IN TÜRKİYE

Since the beginning of the 21st century, codes of conduct for the judiciary (encompassing judges, prosecutors, and court staff) have been established at both the international and national levels.

At the international level, the most notable and recognised are the "Bangalore Principles of Judicial Conduct" (hereinafter referred to as "the Bangalore Principles"), formulated during the Round-Table Meeting of Chief Justices held in The Hague on 25 and 26 November 2002, and later presented to the Member States of the United Nations (UN), as well as relevant UN bodies and various intergovernmental and non-governmental organisations, for consideration at the 59th session of the UN Commission on Human Rights in Geneva on 23 April 2003.[6]

The Bangalore Principles enunciate six tenets: independence, impartiality, integrity, propriety, equality, competence, and diligence.

6 See UN Doc. E/CN.4/2003/65, annex; Commission on Human Rights resolution 2003/43: *Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, 23 April 2003, adopted without a vote. See Chapter XI. - E/CN.4/2003/L.11/Add.4; and see also UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, 27 July 2006, E/RES/2006/23. In this resolution, ECOSOC, firstly "*Invites Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct, annexed to the present resolution, when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary*", and, secondly, "*Emphasizes that the Bangalore Principles of Judicial Conduct represent a further development and are complementary to the Basic Principles on the Independence of the Judiciary*".

Notably, the concluding paragraph of the Preamble to the Bangalore Principles reads as follows:

> *"THE FOLLOWING PRINCIPLES are intended to establish standards for the ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge."*

It is especially noteworthy that the first two principles, "independence" and "impartiality", are defined as follows:

> "***Value 1.***
>
> ***Independence***
>
> *Principle*
>
> *Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.*
>
> *(…)*
>
> ***Value 2.***
>
> ***Impartiality***
>
> *Principle*
>
> *Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.*
>
> *(…)*".

Two decades after the adoption of the Bangalore Principles, the "Ethical Principles for International Criminal Judges" (hereinafter referred to as "the Ethical Principles") were recently introduced by

a high-level group of experts. This group, comprising presidents of international criminal courts and tribunals, alongside current and former members of such bodies, international organisations, civil society, and academia, convened under the "Ethica Project" titled "Ethica - The path to a common code of ethics for international criminal judges". Their aim was to examine ethical and deontological issues within international criminal justice, culminating in twelve of the twenty-five principles focusing on the independence and impartiality of international criminal judges during seminars held in Nuremberg on 6 February 2023 and in Paris on 15 May 2023, respectively.

The "Ethica Project" is led by the École Nationale de la Magistrature (ENM, the French National School for the Judiciary), the International Nuremberg Principles Academy (Nuremberg Academy), and the Siracusa International Institute for Criminal Justice and Human Rights. It receives support from France through financial contributions from the Ministry for Europe and Foreign Affairs and Expertise France. The "Methodology" section of the project explicitly states, "*Today, the public has ever-greater expectations regarding the ethical stance of judges, and International Criminal Judges (ICJs) are particularly exposed to public scrutiny. The Ethical Principles for International Criminal Judges are intended to provide guidance to all ICJs on ethical issues they might be faced with.*" Furthermore, it asserts that "*they are to be read in conjunction with existing codes of conduct and provisions regulating the duties and functions of judges applicable across various international criminal tribunals*", adding that "*the Ethical Principles are to be read within the broader social and historical context. They are a living document whose construction and development will be shaped by the evolution of society, technology, and the needs of international criminal justice.*"[7]

At the national level, it is noteworthy that the Turkish judiciary has consistently given priority to principles of judicial conduct, boasting a strong tradition of their implementation. In this context, the Bangalore Principles were officially adopted and integrated into the Turkish legal framework by Decision no. 305 of 27 June 2006 of the former

7 See the English version of the *Ethical Principles*, consisting of 25 ethical principles for international criminal judges, available at https://www.icc-cpi.int/sites/default/files/2023-09/Plaquette_ETHICA_A5_ENG_BD.pdf. Also available in French and Spanish at https://www.icc-cpi.int/news/icc-president-contributes-ethical-principles-international-criminal-judges.

High Council of Judges and Prosecutors, which was subsequently renamed the Council of Judges and Prosecutors (hereinafter referred to as "the Council") following the constitutional amendments of 2017 (enacted by Law no. 6771)[8], and published in the September 2006 issue of the Journal of Justice, made available free of charge to all judges and prosecutors. Furthermore, a Turkish translation of the Bangalore Principles has been made available on the websites of the Ministry of Justice of the Republic of Türkiye and the Council.

Additionally, the Bangalore Principles are incorporated into the curriculum of the Justice Academy of Türkiye, tasked with the education and training of candidate judges and prosecutors, as well as the in-service training of the nation's judges and prosecutors. In this context, a seminar on judicial ethics is offered to all prospective judges and prosecutors, featuring an exhaustive review of relevant national and international documents. In 2020, the Justice Academy of Türkiye issued a report titled "Analysis of Pre-Vocational Education and a New Model Proposal".[9] The report states that, as a result of the "Training Evaluation Survey of Candidate Judges and Prosecutors" conducted, 89.4% of the respondents[10] deemed the "Judicial Ethics and Professional Identity" course in the current curriculum necessary, whereas 5.8% did not find it necessary.

The report further elucidates that "*In order to realise the vision of a trustworthy judiciary, candidate judges and prosecutors should embrace and internalise the rules of 'judicial ethics'. Candidate judges and prosecutors who internalise the importance of judicial independence and impartiality, the need to protect the rule of law, fundamental rights and freedoms, and the primacy of fundamental values such as human dignity, integrity, and honesty, which constitute the essence of the principles of judicial ethics, strengthen public*

8 See Law no. 6771 of 21 January 2017 Amending the Constitution of the Republic of Türkiye published in the Official Gazette no. 29976, dated 11 February 2017, which entered into force following its approval in the popular referendum held on 16 April 2017.

9 See Türkiye Adalet Akademisi (Justice Academy of Türkiye), *Meslek Öncesi Eğitimin Analizi ve Yeni Bir Model Önerisi* (Analysis of Pre-Vocational Education and a New Model Proposal), Ankara, 2020, available in Turkish at https://vizyon.taa.gov.tr/sayfa/meslek-oncesi-egitimin-analizi-ve-yeni-bir-model-onerisi.

10 A total of 2925 respondents participated in the survey on a voluntary basis, of whom 35.4% (1034 respondents) were female and 64.6% (1891 respondents) were male. The respondents included 1451 judges and 788 prosecutors who were serving throughout Türkiye at the time of the survey, as well as 507 candidate judges and 1793 candidate prosecutors for the 23rd term of office. For more details on the survey, see the report cited in footnote 9, pp. 48-56.

confidence in the judiciary. An interactive lecture model should be used to explain the principles of judicial ethics. Case studies should be used to discuss the models of behaviour that judges and prosecutors should adopt in the face of various ethical problems. In the context of judicial ethics, the rules of professional conduct for lawyers should also be briefly emphasised. The procedure to be followed by the judge and the prosecutor in order to detect the violation of the rules of professional conduct should be briefly explained."[11]

In light of the above, it is evident that the Turkish judiciary has now clearly adopted ethical rules for serving judges and prosecutors, as well as for those aspiring to become judges and prosecutors, who embrace these principles and values. Furthermore, the establishment of codes of ethics for members of the judiciary was identified as one of the key objectives in the Tenth Development Plan (2014-2018), adopted by the then Council of Ministers (abolished by the constitutional amendments of 2017, which, *inter alia*, changed the parliamentary regime to a presidential regime) and ratified by the Parliament. This goal was further echoed in Türkiye's Judicial Reform Strategy. The former High Council of Judges and Prosecutors' Strategic Plan for 2012-2016 also emphasised the objective of developing codes of professional ethics to increase confidence in the judiciary.

Within this framework, the "Istanbul Declaration on Transparency in the Judicial Process" was prepared and adopted under the auspices of the Court of Cassation. On 8 December 2017, following a proposal of the Board of Presidents of the Court of Cassation, the "Court of Cassation Code of Judicial Conduct"[12] was unanimously adopted by the Grand Plenary Assembly of the Court of Cassation. This Code is designed to provide guidance to the members of the bench and to the rapporteur-judges of the Court of Cassation by establishing standards of ethical conduct. It aims to deepen understanding and garner support for the judiciary from the legislative and executive branches of the government, the legal profession, and the general public, while establishing a binding code of professional ethics for judges. This initiative reaffirms that compliance with the code of conduct is the primary responsibility of judges and also incorporates the six core principles of the Bangalore Principles mentioned above.

11 See the report cited in footnote 9, p. 109.

12 For the English translation of this Code, see https://www.yargitay.gov.tr/documents/ek1-1528371363.pdf.

Part III of this Code establishes a Judicial Ethics Advisory Committee (hereinafter referred to as "the Advisory Committee") to "*advise judges on the propriety of their contemplated or future conduct*". The Advisory Committee is composed of seven judges of the Court of Cassation (presidents or members of the bench, with at least two being women), two rapporteur-judges, one public prosecutor of the Court of Cassation, and one university lecturer who has authored academic works on ethics and has served on university ethics committees. The term of office is two years, and members whose terms expire are ineligible for re-election. The most senior member of the Court of Cassation in the committee shall serve as the chairperson, and the second most senior member shall serve as the deputy chairperson.

The members of the bench are elected by the Grand Plenary Assembly of the Court of Cassation in accordance with the procedure for electing the presidents of the chambers of the Court of Cassation. The rapporteur-judges are elected by the Board of the First Presidency from among the twenty rapporteur-judges with the longest tenure at the Court of Cassation; the public prosecutor is appointed by the Chief Public Prosecutor of the Court of Cassation from among the ten public prosecutors with the longest tenure at the Chief Public Prosecutor's Office of the Court of Cassation.

The members of the Advisory Committee, once elected, shall elect the university faculty member to the Advisory Committee by a majority vote. If no candidate is elected in the first ballot, a second ballot shall be held between the two candidates who received the highest number of votes in the first ballot. In the event of a tie, the candidate receiving the Chair's vote shall be elected. In the event of a vacancy on the Committee, the replacement member shall complete the term of office of the replaced member. Decisions are taken by majority vote. The secretariat is provided by the Deputy Secretary General of the Court of Cassation, designated by the President of the Court of Cassation.

The Advisory Committee adopts its own rules of procedure.

The duties of the Advisory Committee are as follows:

1. Judges may seek the opinion of the Advisory Committee regarding the propriety of their contemplated or proposed future conduct.

2. In giving its opinion, the Advisory Committee shall detail the facts on which it is based, citing the rules, cases, and other authorities underpinning its advice, and outline the applicable principles of judicial conduct.
3. The Advisory Committee sends the original formal opinion to the person who requested it, then prepares a version without personal data and publishes a redacted copy on the internal network (intranet) of the Court of Cassation.
4. An opinion of the Advisory Committee is not binding; it is of a recommendatory nature.

On the other hand, the Court of Cassation has also separately adopted two other codes of conduct.

The first one is the "Court of Cassation Code of Conduct for Public Prosecutors"[13], unanimously adopted on 19 October 2017 by the public prosecutors of the Court of Cassation. This Code takes into account, in particular, the "European Guidelines on Ethics and Conduct for Public Prosecutors" ("the Budapest Guidelines")[14], which are intended to serve as a guideline for their professional and private lives. The provisions concerning the Advisory Committee provided for in the Court of Cassation Code of Judicial Conduct are also applicable to this Code.

The second one is the "Court of Cassation Code of Conduct for Staff"[15], which was formulated by the staff of the Court of Cassation through broad democratic participation to establish the standards of conduct and service to be observed by the staff of the Court of Cassation, namely competence and diligence, equality, confidentiality, and propriety. This Code entered into force on 19 October 2017, following

13 For the English translation of this Code, see https://www.yargitay.gov.tr/documents/CodeofConductforPublicProsecutors.pdf.

14 Adopted with Decision no. 424 dated 10 October 2006 of the former High Council of Judges and Prosecutors.

15 For the English translation of this Code, see https://www.yargitay.gov.tr/documents/CodeofConductforStaff.pdf. All three codes of conduct of the Court of Cassation mentioned in the text can also be found in Dr. Mustafa Saldırım, Gözde Hülagü, *Court of Cassation Codes of Conduct*, prepared and published within the scope of the "Ethics, Transparency and Trust Project of the Court of Cassation", financed by the Court of Cassation and implemented by the Court of Cassation and UNDP, available in electronic form at https://www.yargitay.gov.tr/documents/CoC_CodesofConduct.pdf.

its approval by the President of the Court of Cassation. It should be noted that this latest Code stipulates that the breach or violation of any of the rules contained therein constitutes misconduct and may give rise to disciplinary measures, without prejudice to the disciplinary or judicial measures that may be taken under any law where the breach also constitutes a criminal offence.

Furthermore, it was decided to set up a structure within the Council of Judges and Prosecutors to provide advice on ethical principles in accordance with the standards of the United Nations and the Council of Europe. Indeed, providing guidance and advice to members of the judiciary facing ethical dilemmas, before disciplinary liability arises, was considered a fundamental responsibility of the Council, stemming from its founding purpose.

Under the Instrument for Pre-Accession Assistance (IPA), the "Project on the Strengthening of Judicial Ethics in Türkiye" was implemented, with the Council of Judges and Prosecutors serving as the main beneficiary. The project aimed not only to establish codes of ethics for judges and prosecutors but also to set up a commission within the Council to address ethics violations. The expected results of the project included conducting a detailed analysis of the current state of judicial ethics, defining the rules of judicial ethics, raising the awareness among Turkish judges and prosecutors about judicial ethics, bolstering the Council's capacity to enforce ethical rules, and increasing public awareness of judicial ethics and available complaint mechanisms.

Within this framework, the "Declaration of Ethics for Turkish Judiciary"[16] (hereinafter referred to as "the Declaration"), which on one hand aligns with international standards and on the other hand has been drafted in accordance with the needs of the Turkish judicial system, based on Turkish values and preserving the Turkish heritage in the history of the judiciary, with the broad participation of, in particular, judges and prosecutors, academics, bar associations, related state institutions and organisations, non-governmental organisations, and representatives of the media, was adopted by the

16 For the English translation of the Declaration, see https://www.cjp.gov.tr/Eklentiler/05062023 1600declaration-of-ethics-for-turkish-judiciarypdf.pdf.

plenary session of the Council of Judges and Prosecutors on 6 March 2019 and presented to the public. The Declaration was published in the Official Gazette no. 30714, dated 14 March 2019, entered into force on the day of its publication in the Official Gazette, and was notified to all judges and prosecutors included in the scope of the Declaration. The Declaration defines the binding ethical values and principles to guide the establishment and maintenance of public confidence in an independent and impartial judiciary.

Moreover, the ethical codes developed in the "Guidelines on the use of social media within the framework of the Declaration of Ethics for Turkish Judiciary"[17] (hereinafter referred to as "the Guidelines") aim to maintain the balance between freedom of expression and the principles of independence and impartiality of judges and prosecutors. The Guidelines have been prepared to help remove any uncertainty that judges and prosecutors may experience when using social media and networks, and to guide them in accordance with the principles of the "Declaration of Ethics for Turkish Judiciary", which states that "*(they) shall act in accordance with the ethical principles of the profession when sharing their comments or explaining their opinions in print, audio-visual or social media, within the framework of their freedom of expression.*"

Finally, a Bureau of Judicial Ethics was set up within the Secretariat General of the Council of Judges and Prosecutors, which continues to operate with the following tasks:

1. To establish the principles of ethical conduct to be respected by judges and prosecutors and to monitor compliance with these principles;
2. To receive requests, prepare reports, presentations, and other materials to make recommendations and provide advice to the Council on issues raised by members of the judiciary;
3. To carry out and support work to establish a culture of ethics in the judiciary, and to support all work carried out for this purpose, as well as to undertake operations and secretarial work.

17 For the English translation of the Guidelines, see https://www.cjp.gov.tr/Eklentiler/2710202216541-guidelines-on-the-use-of-social-media-within-the-scope-of-the-declaration-of-the-ethics-for-turkish-judiciary-8045774268-pdf.pdf.

In addition to the mere adoption of the "Bangalore Principles" and other similar principles, such as the "Budapest Guidelines" mentioned above, it should be noted that the Turkish legal system has already incorporated almost all the values and principles mentioned in the latter in the Constitution of 1982 (see, in particular, Article 9 on the judiciary, which establishes the independence and impartiality of the judiciary as a general principle; Article 36 on the right to a fair trial, which implicitly guarantees the principles of independence and impartiality of the courts; Article 37 on the principle of the lawful judge; Article 138 on the independence of the courts, etc.) as well as in various ordinary laws[18] that must comply with the Constitution.

II. CONSTITUTIONAL PROVISIONS SAFEGUARDING THE RIGHT TO AN INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW

The principles of independence and impartiality of the courts are enshrined in many international and regional human rights conventions[19], the most important regional text being the European Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (hereinafter referred to as "the Convention"), which was signed in Rome under the auspices of the Council of Europe on 4 November 1950 and entered into force on 3 September 1953. Türkiye has been a party since 1954, and the Constitutional Court systematically refers to it in its decisions.

Notably, Article 6 § 1 of the Convention guarantees the right to an independent and impartial court. The relevant parts of Article 6 § 1 of the Convention, which is entitled "*Right to a fair trial*", read as follows:

18 See, *inter alia*, Articles 4-6, 44, 46, 62, 68, 82-94 of Law no. 2802 on Judges and Prosecutors (Official Gazette: 26 February 1983, no. 17971); Articles 34-45 of the Civil Procedures Code, no. 6100 (Official Gazette: 4 February 2011, no. 27836); Articles 22-32 of the Criminal Procedure Code, no. 5271 (Official Gazette: 4 December 2004, no. 25673).

19 For detailed and practical references on international and regional standards on the independence of the judicial system, see, in particular, International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors - A Practitioners Guide* (Second Edition), Geneva, 2007, available online at https://icj2.wpenginepowered.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf.

> "*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 (…) by an independent and impartial tribunal established by law*".

There are also several constitutional provisions safeguarding the "right to an independent and impartial court established by law", which are listed in different parts of the Turkish Constitution of 1982 and interpreted in accordance with the principle of constitutional integrity.[20]

In particular, the first part of the Constitution sets out general constitutional principles. In this part, one can mention Article 9 of the Constitution, entitled "*Judicial Power*", which states in general terms that "*Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation*". It should be noted that the principle of impartiality of the courts was added to Article 9 for the first time by the constitutional amendments of 2017. Prior to this amendment, even though the principle of impartiality was not explicitly enshrined in the Constitution, the Turkish Constitutional Court had implicitly recognised it as part of the right to a fair trial, enshrined in Article 36 § 1 listed in the second part of the Constitution.

In fact, the second part of the Constitution provides for fundamental rights and duties of individuals and is considered as the "Turkish Bill of Rights". Particularly noteworthy in this part are Articles 36 and 37 of the Constitution.

Namely, Article 36, entitled "*Freedom to claim rights*", was amended by the constitutional amendments of 2001 (enacted by Law no. 4709)[21], which added the "right to a fair trial" to the first paragraph of this article. It can be read as follows:

> "*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures*".

As can be seen from the wording, the text of Article 36 of the Constitution, contrary to Article 6 § 1 of the Convention cited above,

20 The full text of the relevant provisions is included in the annex below.

21 See Law no. 4709 of 3 October 2001 Amending Certain Provisions of the Constitution of the Republic of Türkiye, published in the Official Gazette no. 24556, dated 17 October 2001.

does not explicitly mention the independence or impartiality of the courts, which are explicitly enshrined in other provisions of the Constitution. Nevertheless, the Constitutional Court has consistently held in its decisions that "*the right to be tried by an independent and impartial court established by law*", as enshrined in Article 6 § 1 of the Convention, is an implicit element of the right to a fair trial under Article 36 of the Constitution.

In individual applications[22], where necessary, these other provisions are read and interpreted in conjunction with Article 36 in accordance with the principle of constitutional integrity. In the case of *Güher Ergun and Others* (no. 2012/13, 2 July 2013, § 38), the Court stated in particular the following:

> "*The sub-principles and rights, which stem from the text of the Convention and the judgments of the European Court of Human Rights and are present manifestations of the right to a fair trial, are also, in principle, elements of the right to a fair trial stipulated under Article 36 of the Constitution. In many decisions where it carried out the examination as per Article 36 of the Constitution, the Constitutional Court refers, within the scope of Article 36 of the Constitution, to the principles and rights that are either contained within the wording of the Convention (see the Court's judgment no. E.2011/43, K.2012/10, 19 January 2012) or incorporated within the scope of the right to a fair trial through the case-law of the European Court of Human Rights by interpreting the relevant provision in the light of Article 6 of the Convention and the case-law of the European Court of Human Rights (see the Court's judgment no. E.2012/69, K.2012/149, 11 October 2012)*".

Within the framework of the individual application, the right to a fair trial under Article 36 of the Constitution is the key article accepted

22 It is noteworthy that the 2010 constitutional amendments, enacted by Law no. 5982 of 7 May 2010 Amending Certain Provisions of the Constitution of the Republic of Türkiye, introduced the individual application mechanism to the Constitutional Court, also known as the constitutional complaint mechanism. From 23 September 2012, for the Constitutional Court to assess the merits of individual applications, the rights and freedoms allegedly violated must be invoked under the joint protection of the Constitution and the European Convention on Human Rights and its additional protocols, to which Türkiye is a party. In other words, an application alleging a violation of a right that falls outside the common field of protection of the Constitution and the Convention cannot be deemed admissible (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18). However, both the Constitution and the Convention guarantee the right to a fair trial, encompassing the principles of independence and impartiality of the courts.

as the basis for the application. Sub-principles and rights that emerge from the text of the Convention and the judgments of the European Court of Human Rights as concrete manifestations of the right to a fair trial are integral to Article 36 of the Constitution. For example, rights and principles such as the right to appeal to the court, a reasoned decision, the right not to give evidence against oneself, the right to be present at the trial, the presumption of innocence, and an independent and impartial court are concrete manifestations of the right to a fair trial under Article 36 of the Constitution. In other words, Article 36, which generally guarantees the right to a fair trial, implicitly includes these sub-principles and rights.

As some sub-principles and rights are regulated in other articles of the Constitution, not listed in the second part containing the individual rights and freedoms, the Constitutional Court, in accordance with the principle of constitutional integrity, uses the guarantees and principles scattered in other articles in a supportive manner to the main article in which the right is regulated. However, these sub-rights and principles are also considered as implicit elements of the right to a fair trial guaranteed under Article 36 of the Constitution.

On the other hand, some of the sub-principles and rights are explicitly regulated in other articles of the Constitution within the second part. For example, Article 38 § 4 of the Constitution states, "*No one shall be considered guilty until proven guilty*". Therefore, the presumption of innocence is explicitly regulated separately from Article 36. When this principle regarding crimes and punishments, regulated under the part on the rights and duties of the individual, is raised during the individual application, it is directly examined for violation of the provision in Article 38 § 4.[23]

In the same vein, Article 37 of the Constitution, entitled "*Principle of the natural judge*", clearly and explicitly mandates that the court conducting the trial must be established by law, by asserting that "*No one shall be brought before a court other than the court to which he/she is legally subject*" and "*Extraordinary authorities with jurisdiction that*

23 See Prof. Dr. Sibel İnceoğlu, *Adil Yargılanma Hakkı* (Right to a Fair Trial), *Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi – 4* (Individual Application to the Constitutional Court Handbook Series – 4), Council of Europe, 2018, pp. 14-15.

have the effect of bringing a person before a court other than the court to which he/she is legally subject shall not be established". The inclusion of the guarantee of a lawful judge in the second part of the Constitution enables individuals to directly invoke Article 37 when making an individual application in this context. Since this provision is framed as a constitutional prohibition, it falls outside the scope of any limitation regime.

Regarding the other constitutional provisions on the independence and impartiality of the judiciary, these principles are enshrined in the third part of the Constitution, which regulates the fundamental organs of the Republic of Türkiye, including the judiciary.

Firstly, Article 138 of the Constitution, which expressly safeguards judicial independence, stipulates that judges "*shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law*". It further ensures that there shall be no interference with courts and judges in the exercise of judicial power, including through recommendations and suggestions, and mandates that court decisions shall be executed without delay.

Secondly, Article 139 of the Constitution, entitled "*Security of tenure for judges and public prosecutors*", aims to shield judges and prosecutors from undue pressure through mechanisms such as early retirement, dismissal, or impacting their personal rights.

Thirdly, Article 140 of the Constitution, entitled "*Judges and public prosecutors*", outlines the principles governing the magistrate profession. Specifically, paragraphs 2, 3, and 4 of Article 140 seek to curb executive power intervention by introducing the guarantee of legislative regulation in areas closely related to the independence of judges and prosecutors, such as professional advancement, disciplinary actions, and criminal investigations against them.

Fourthly, Article 142 of the Constitution regulates the establishment of courts and emphasises the necessity for courts to be "*established by law*". This provision bolsters the right under Article 37 to be tried by the court to which one is legally subject. When Articles 37 and 142 are considered together, they enable the Constitutional Court, in the course

of an individual application review, to examine the establishment and functioning of the court before which the complainant is being tried, for any violation of the laws governing its establishment, competence, and jurisdiction.

However, the principle of legality was specifically emphasised for military courts in Article 145 of the Constitution. The 2017 constitutional amendments repealed Article 145 and prohibited the establishment of military courts in times of peace. Yet, the second paragraph of Article 142 of the Constitution (added with the 2017 constitutional amendments) stipulates that "*No military courts shall be established other than military disciplinary courts. However, in states of war, military courts having the jurisdiction to try offences committed by military personnel in relation to their duties may be established*".

Finally, Article 159 of the Constitution, entitled "*Council of Judges and Prosecutors*" following the constitutional amendments of 2017, provides that "*the Council shall be established by law and shall exercise its functions in accordance with the principles of independence and tenure of judges*". It also regulates the composition, powers, structure, and financial resources of the Council, the central body responsible for the organisation of the judiciary and endowed with the power to decide on the admission, appointment, transfer, promotion, disciplinary measures, dismissal, and supervision of judges and prosecutors in Türkiye.

Pursuant to Article 159 of the Constitution, Law no. 6087 on the High Council of Judges and Prosecutors was enacted in 2010. The name of this law was changed to "*Law on the Council of Judges and Prosecutors*" by Article 208 of Decree-Law no. 703 of 2 July 2018, in line with the 2017 constitutional amendments. Pursuant to Article 46 § 6 of Law no. 6087, Law no. 2461 on the High Council of Judges and Prosecutors of 13 May 1981, and its annexes and amendments were repealed.

The Council is composed of 13 members: four appointed by the President of the Republic and the other seven by the Parliament, selected from among judges, prosecutors, lawyers, and academics. It comprises two chambers. The President of the Council, who is the Minister of Justice, is responsible for the administration and representation of the Council, but will not participate in the work of the chambers. The

relevant Deputy Minister of Justice serves an *ex officio* member. The term of office of the members is four years, offering the possibility for one re-election at the end of their term.

Over the past decade, there have been two major constitutional amendments to Article 159 of the Constitution.

The 2010 constitutional amendments, enacted by Law no. 5982,[24] introduced the possibility of judicial review of the Council's decisions regarding dismissal from the profession. The Council of State serves as the court of first instance for dismissal cases. For other decisions by the Council, there lacks a provision for external review, though an internal objection mechanism is in place. Decisions from the chambers can be challenged before the Council's plenary session, with its decisions being final.

The 2017 constitutional amendments replaced the name of the former High Council of Judges and Prosecutors, established by Law no. 2461 and later repealed by Law no. 6087 in 2010, with "Council of Judges and Prosecutors", as previously mentioned, and modified its structure to align with the principles of independence and impartiality. Additionally, the Parliament was granted the power to elect the Council's members, aiming to enhance its democratic legitimacy. However, these changes were not considered sufficient to guarantee the independence of the judiciary in accordance with the Council of Europe standards on judicial independence.[25]

24 Law no. 5982 of 7 May 2010 Amending Certain Provisions of the Constitution of the Republic of Türkiye published in the Official Gazette no. 27580, dated 13 May 2010, which entered into force following its approval in the popular referendum held on 12 September 2010.

25 In this respect, *Opinion no. 875/2017* of 11 March 2017 (Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, CDL-AD(2017)005) of the European Commission for Democracy through Law (known as the Venice Commission), together with the reports of the Commissioner for Human Rights and the Council of Europe's Group of States against Corruption (GRECO), all express concern about the 2017 constitutional amendment that changed the structure of the Council of Judges and Prosecutors (CJP) and gave the executive control over a number of structural issues related to judges, resulting in a loss of judicial independence. GRECO underlined in its report of March 2021 that "*the composition of the CJP remains in direct contradiction with the standards of the Council of Europe […], which require that at least half of the members of such self-governing bodies dealing notably with the career of judges should be judges elected by their peers*" (GrecoRC4(2020)18, Second Interim Compliance Report, published on 18 March 2021, § 37). The issue of the composition of the CJP was also addressed in the *Fourth Evaluation Round Third Interim Compliance Report on Türkiye* adopted by GRECO at its 90th Plenary Meeting (25 March 2022) and published on 23 June 2022, recalling "*its previous findings that the composition of the CJP is in direct contradiction with the standards of the Council of*

In essence, the presence of an independent and impartial judiciary hinges on the establishment of an independent and impartial judicial council. The most recent recommendation from the Council of Europe regarding judicial independence is Recommendation CM/Rec(2010)12, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, titled "Judges: independence, efficiency and responsibilities".[26] The Recommendation applies to all judges, including those sitting on constitutional courts (§ 1), as well as to lay (non-professional) judges, except where a recommendation is specifically directed at professional judges (§ 2). It characterises judicial councils as "*independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system*" (§ 26). The Recommendation elaborates on the organisation of such councils, stating that at least half of the council's members must be judges "chosen by their peers from all levels of the judiciary" (§ 27), emphasising that judicial councils must operate transparently towards judges and society (§ 28), adhere to pre-established procedures (§ 28), provide reasoned decisions (§ 28), and ensure they do not interfere with the independence of individual judges (§ 29).

In addition, the Council of Europe's Group of States against Corruption (GRECO), in its Fourth Evaluation Round Third Interim Compliance Report on Türkiye, adopted at its 90th Plenary Meeting (25 March 2022) and published on 23 June 2022, noted that following the

Europe […] as well as GRECO's practice" (GrecoRC4(2022)5, § 39). Similarly, the Parliamentary Assembly of the Council of Europe (PACE), in its Resolution 2376 (2021) on the "Functioning of Democratic Institutions in Türkiye", adopted on 22 April 2021, identified the lack of independence of the judiciary as one of the most serious issues of concern. The Assembly encouraged the Turkish authorities to introduce structural changes that would ensure the independence of the judiciary, including the revision of the composition of the CJP, which allowed the executive to have a strong influence on a number of key matters regarding the running of the judiciary (§ 19.3.3). Furthermore, the lack of sufficient procedural guarantees, including a judicial review mechanism, in the proceedings before the CJP concerning the transfer of judges and prosecutors or disciplinary sanctions imposed on them is being examined by the Committee of Ministers of the Council of Europe under the *Bilgen* group of cases (Article 6 § 1 of the Convention). The *Kozan* case (no. 16695/19) further concerns the lack of impartiality of the CJP on account of the composition of the Plenary Assembly acting as an appeal body for disciplinary sanctions, which includes members of the Chamber that had originally imposed the disciplinary sanction in question (Article 13 in conjunction with Article 10 of the Convention) (for more details on this last issue see, Part III.2, "The right to an independent court").

26 See *Recommendation CM/Rec(2010)12* and explanatory memorandum at https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d.

2017 constitutional amendments, the Council of Judges and Prosecutors evidently does not comply with the international standard that at least half of the members of self-governing judicial bodies should be elected by their peers, as outlined in the aforementioned Recommendation CM/Rec(2010)12 by the Committee of Ministers of the Council of Europe. Furthermore, GRECO highlighted that the Council continues to be chaired by the Minister of Justice, with the Deputy Minister of Justice also serving as a member.[27]

In this light, the Turkish government was provided an opportunity to present their observations on the matter. The Turkish authorities maintain their stance that the Council operates independently, as provided for in the Constitution and domestic laws. They argue that the organisation and functioning of the Council are tailored to the needs of the country and are not subject to external political influences. Yet, GRECO's report ultimately determined that the composition of the Council stands in stark opposition to the Council of Europe standards referred to in previous GRECO compliance reports as well as its established practice.[28]

Moreover, Article 159 of the Constitution, cited above, provides that "*the Council shall exercise its functions in accordance with the principles of independence and tenure of judges*". In other words, no body, authority, office, or person may give orders or instructions to the Council. The Council has its own budget and is an independent entity, separate from the Ministry of Justice. The Constitutional Court recently reaffirmed this principle in a judgment on 4 May 2023[29], ruling, in the context of a constitutional review case, that Article 1 of Presidential Decree no. 91 on the Allocation of Positions in Certain Public Institutions and Organisations, and the Allocation of Positions for the Council of Judges and Prosecutors ("the Council") in List no. I, annexed to Presidential Decree no. 91, and the inclusion of these positions in the corresponding section of List no. II, annexed to Presidential Decree no. 2, are unconstitutional with respect to competence *ratione materiae* and should therefore be annulled.

27 See GrecoRC4(2022)5, § 37, available at https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a6f760.

28 See GrecoRC4(2022)5, § 39.

29 See the Court's judgment no. E.2022/36, K.2023/84, 4 May 2023.

To determine whether the regulations establishing the positions of the inspectors and the judges of the Council may be issued by presidential decree, it must first be ascertained whether the creation of the said positions is related to the executive power.

Article 159, included in the third chapter of the third part of the Constitution entitled "Judicial Power", stipulates that the Council "*shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges*". Although it operates as an administrative body, there is no hierarchical relationship between the Council and the central administration. Furthermore, the Court noted that the Council is included in the chapter entitled "Judicial Power" and not in sub-chapter IV, entitled "Administration", of chapter two, entitled "Executive Power", of part three of the Constitution.

On the other hand, Article 159 of the Constitution not only mandates that the Council shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges but also stipulates that it shall be established in line with these principles. This requirement implies that the establishment encompasses the organisation; thus, regulations concerning the staff of the members of the judiciary who will work in the Council must adhere to the principles of independence of the courts and the security of tenure of judges. In this context, when the Constitution's provisions and principles relating to the establishment, functions, and powers of the Council, as well as its operation, are collectively evaluated, it is imperative to recognise that the members of the judiciary serving on the Council are public officials exercising judicial authority.

The creation and abolition of positions for public officials who exercise judicial power could directly impact the exercise of judicial power itself. Given the matter's tangential relation to executive power, it falls outside the purview of presidential decrees. Consequently, it is understood that the regulations establishing the positions of inspectors and judges within the Council, who are officials exercising judicial power, have been enacted in contravention of the initial sentence of Article 104 § 17 of the Constitution.[30]

30 Apart from the constitutional amendments enacted in 2017, already mentioned in the text, the 2017 amendments transitioned the governmental system from parliamentary to presidential and granted the President of the Republic the power to issue "presidential decrees" on specific

For the reasons outlined above, the Constitutional Court declared the relevant regulations unconstitutional and annulled them, with the annulment taking effect nine months following the publication of the decision in the Official Gazette.[31]

III. LANDMARK DECISIONS OF THE CONSTITUTIONAL COURT REGARDING THE RIGHT TO AN INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW

1. The Concept of a "Court Established by Law"

Before examining the merits of the case, the Constitutional Court must determine whether there exists a "*court established by law*". In this respect, the Turkish Constitutional Court, akin to the European Court of Human Rights, adopts a broad interpretation of the concept of a court.

For instance, in the case of *İsmail Taşpınar*, the Constitutional Court considered that, in the context of the right to a fair trial, the European Court of Human Rights defines a court as any body, irrespective of its designation as a court under domestic law, vested with the authority to make decisions following a specific procedure and based on legal rules enforceable by public authority if necessary. To qualify as a court, the decision-making body must also possess the authority to examine both the merits and the law of the case and the power to conclude the case definitively in a binding manner. Within the parametres of these criteria, the Constitutional Court concluded that

matters related to executive affairs. Concurrently, the Constitutional Court was endowed with the power to review presidential decrees, in addition to laws and the Rules of Procedure of the Parliament. Over the past three years, the Constitutional Court has established the framework and methodology for the judicial review of presidential decrees. Unlike laws, the Constitution limits the matters that can be regulated by presidential decrees. These limitations, based on competence *ratione materiae*, are laid down in the initial four sentences of Article 104 § 17 of the Constitution. Distinct from laws, presidential decrees are subject to a two-tier review by the Court. In the first stage, the Court examines the competence *ratione materiae* of the presidential decree in question. In this regard, the presidential decree must be related to the executive power; it must not be related to the fundamental rights, personal rights and duties, political rights and duties set forth in the Constitution; and it must not cover matters mandated by the Constitution to be regulated exclusively by law or that are explicitly regulated by law. Upon finding no violation of limitation clauses, the Court then examines the presidential decree's alignment with the Constitution in terms of content and substance (see, *inter alia*, the Court's judgments no. E.2019/78, K.2020/6, 23 January 2020, §§ 3-13; no. E.2019/31, K.2020/5, 23 January 2020, §§ 8-13; no. E.2018/119, K.2020/25, 11 June 2020, §§ 3-13; and no. E.2018/155, K.2020/27, 11 June 2020, §§ 3-13).

31 See the Court's judgment no. E.2022/36, K.2023/84, published in the Official Gazette no. 32324, dated 29 September 2023.

the President of the District Electoral Board performs judicial activities in his role of examining and adjudicating complaints and objections related to electoral matters. Consequently, he is recognised as one of the entities referred to in Article 36 of the Constitution as a "*judicial body*", including those not forming part of the conventional judicial organisation yetperforming judicial functions.[32]

Additionally, in a constitutional review decision from 2004, the Court further recognised that arbitral tribunals embody the characteristics of a court, stating that "*the impartiality and independence of arbitral tribunals, their expert nature, and the procedures and principles governing the decisions to be taken by these tribunals should be regulated by law and not left to regulations*".[33]

Moreover, the Constitutional Court affirms the clear link between the right to a fair trial and Article 37 of the Constitution, which safeguards the guarantee of a lawful judge. It states that Article 37 underpins the "*right to be tried before a lawful, independent, and impartial tribunal*"—an integral element of the right to a fair trial as enshrined in Article 36 of the Constitution and Article 6 § 1 of the Convention. Indeed, the guarantee of a lawful judge mandates that the establishment, powers, and procedural conduct of the courts are legislated for and determined prior to the emergence of a case. This provision is considered in the Constitutional Court's decisions as a safeguard for the principle of the natural judge, ensuring individuals are informed in advance and with certainty about which court will hear their case.[34]

For instance, in the context of trying military personnel during peacetime, the Constitutional Court issued violation judgments in 2016, prior to the abolition of military jurisdictions, in the individual applications of *Mehmet Çelik (2)* and *Ahmet Zeki Üçok (2)*. In summary, these judgments found that the inaction of the Military Court of

32 See *İsmail Taşpınar*, no. 2013/3912, 6 February 2014, §§ 35-48.

33 See the Court's judgment no. E.2003/98, K.2004/31, 3 March 2004.

34 "*In other words, the principle of natural jurisdiction does not preclude the special establishment of judicial authorities or the appointment of judges after the commission of the offence or the occurrence of the dispute*" (see the Court's judgment no. E.2005/8, K.2008/166, 20 November 2008). However, in one of its judgments, the Constitutional Court did not find the change of the court authorised to try certain civil servants and public officials, including pending cases, in violation of Article 37 (see the Court's judgment no. E.2004/76, K.2008/108, 21 May 2008). The guarantee of a statutory judge "*prevents the appointment of judges according to the defendant or the parties to the case*" (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

Cassation to refer the matter to the Court of Disputes—despite encountering legal uncertainty regarding which courts would try military judges and prosecutors, and despite being informed of the case-law of other higher courts—and thereby not resolving the legal uncertainty regarding which courts would be competent to try military judges and prosecutors who had resigned (or been dismissed) after the offence date, constituted a violation of the guarantee of legality and the right to a fair trial.[35]

The Constitutional Court has also stated that there must be a remedy available to the applicant for asserting that the courts are not acting in accordance with the law regarding their jurisdiction and competence. Although not directly related to the right to a fair trial, in its examination of the right to liberty of the person (Article 19), the Constitutional Court considered the absence of a remedy by which the applicant could claim that the court deciding on the continuation of detention was not competent to review the lawfulness of the deprivation of liberty as a violation.[36]

2. The Right to an Independent Court

Numerous issues concerning the appointment, tenure, non-removal, and non-interference in the duties of judges have been brought before the Constitutional Court, both in the context of constitutionality reviews and individual applications. While it is not feasible to discuss all these cases, the question of the independence and impartiality of military courts before their abolition in 2017 stands out as particularly noteworthy.

In fact, according to Article 2 of Law no. 353 on Military Courts, which was in force at the relevant time, the military courts comprised two military judges and one officer (*subay üye, "officer member"*). The phrase "*and one officer*" in the text of this provision was annulled by the Constitutional Court in a decision of 7 May 2009, published in the Official Gazette on 7 October 2009, following an application for annulment. The Court ruled that officer members, unlike military judges, did not offer all the necessary guarantees insofar as they were

35 See *Mehmet Çelik (2)*, no. 2015/889, 17 November 2016; and also *Ahmet Zeki Üçok (2)*, no. 2015/6777, 7 December 2016.

36 See *Mehmet İlker Başbuğ*, no. 2014/912, 6 March 2014, §§ 80-86.

not exempt from their military obligations during their term of office and were subject to the authority of their superiors. In addition, the Court held that the fact that there was nothing to prevent the military authorities from appointing a different officer for each case to be incompatible with Articles 9, 138, 140, and 145 of the Constitution.[37] Consequent to this judgment, the legislation was amended to mandate that "*military courts shall be composed of three military judges*".

As a matter of fact, this judgment has also influenced the judgments of the European Court of Human Rights. The Strasbourg Court, which did not previously differentiate between military courts when they tried military personnel and did not find a violation, has changed its case-law. In *İbrahim Gürkan v. Türkiye*, the Strasbourg Court noted that the officers on the panel of the military court were actively serving in the army and subjected to military discipline, highlighted that they were appointed as judges by their superiors, and were deprived of the constitutional safeguards afforded to other military judges, thereby finding a violation of Article 6 of the Convention.[38]

Unlike military courts, individual applications submitted to the Constitutional Court on the grounds that the High Military Administrative Court was not an independent and impartial tribunal were found not in violation of the Constitution, with reference to decisions of the European Court of Human Rights in *Yavuz and Others v. Türkiye* ((dec.), no. 29870/96, 25 May 2000) and *Bek v. Türkiye* ((dec.), no. 23522/05, 20 April 2010).[39]

In these cases, the Constitutional Court found that the independence of the military judges sitting in the High Military Administrative Court was guaranteed by the Constitution and the relevant legal provisions. It was determined that nothing related to their appointment and procedural arrangements could undermine their independence, that these judges were not accountable to the administration for their decisions, and that disciplinary matters were considered and decided by the Disciplinary Board of the High Military Administrative Court.

37 See the Court's judgment no. E.2005/159, K.2009/62, 7 May 2009.

38 See *İbrahim Gürkan v. Türkiye*, no. 10987/10, § 19, 3 July 2012.

39 See *Yaşasın Aslan*, no. 2013/1134, 16 May 2013, § 29; *Kenan Özteriş*, no. 2012/989, 19 December 2013, §§ 30-40; *Bülent Karataş*, no. 2013/6428, 26 June 2014, §§ 58 *et seq.*; *Tanju Taş*, no. 2014/9052, 11 December 2014, § 27; *Gökhan Günaydın*, no. 2012/1099, 6 May 2015, §§ 35 *et seq.*; *Şevki Burak Kaya*, no. 2013/2818, 6 January 2016, § 25.

On the other hand, the fact that member officers serve for a maximum of four years, are subject to the Disciplinary Board in disciplinary matters, and are not subject to any evaluation by administrative or military authorities during their term of office has further strengthened the independence of these officers from the administration.

However, in *Tanışma v. Türkiye*, the Strasbourg Court, referring to its case-law in *Gürkan v. Türkiye*, concluded that "*(...) although the officers are subject to the same rules as the members of the [High Military Administrative Court] who are military judges, they remain in the service of the army, which governs all matters relating to their remuneration, social rights, and promotion. Their appointment is proposed by their hierarchical superiors and they do not enjoy exactly the same constitutional guarantees as the other three members who are military judges. The Court therefore concludes that the High Court which heard the applicants' case cannot be regarded as having been independent and impartial within the meaning of Article 6 § 1 of the Convention*". However, Judge Sajó, a member of the Second Chamber delivering the judgment, appended his dissenting opinion to the judgment, arguing that all the judges possessed the constitutional guarantees of independence and that there was no reason to reach a different conclusion than that of the Constitutional Court with regard to the High Military Administrative Court.[40]

In addition, in the case of *İlhan Cihaner (5)*, which was brought before the Constitutional Court in the context of an individual application, it was alleged that the (former) High Council of Judges and Prosecutors ("HCJP"), which was restructured after the 2010 constitutional amendments, was not independent and impartial. In its 2015 decision, the Constitutional Court found this allegation to be abstract and stated that its relation to the concrete case file could not be established, and therefore found the complaint to be considered manifestly ill-founded. The Constitutional Court noted:

> "*In the concrete application file, no relationship has been established between the HCJP elections in question and the HCJP's actions and the allegations that the court of first instance and the relevant chamber of the Court of Cassation are not independent and impartial. In line with the subjective or objective principles, no situation that would*

40 See *Tanışma v. Türkiye*, no. 32219/05, § 83, 2 May 2015.

render the independence and impartiality of the court of first instance and the relevant chamber of the Court of Cassation doubtful has been identified, nor has any issue been identified that the proceedings were not independent and impartial".[41]

However, the European Court of Human Rights held in its established case-law in *Kayasu v. Türkiye* (no. 64119/00 and 76292/01, § 121, 13 November 2008) and *Özpınar v. Türkiye* (no. 20999/04, §§ 84-85, 19 October 2010) that the competent authorities of the HCJP who heard the appeals of the persons concerned were not independent.

It further applied this case-law in *Kozan v. Türkiye* (no. 16695/19, 1 March 2022). In this case, the applicant, who was serving as a judge at the material time, received disciplinary sanctions for posting a news item on a closed group page on Facebook that criticised the HCJP and raised questions about its independence from political power. The Strasbourg Court observed that the six members of the Chamber of the HCJP, which imposed the disciplinary sanction on the applicant, were also members of the Plenary Assembly of the HCJP that decided on the applicant's appeal. Moreover, the applicant lacked any other remedy against the final decision of the Plenary Assembly.

Considering all these points together, the Strasbourg Court concluded that the applicant lacked a remedy under Article 10 of the Convention (freedom of expression), thereby not meeting the minimum guarantees set out in Article 13 (effective remedy).

3. The Right to an Impartial Court

Since its decision on constitutional review of 1964, the Constitutional Court has consistently emphasised the importance of impartiality in the performance of the public service of justice.[42] The Court defines impartiality in many judgments as "*the absence of any prejudice, partiality, or interest that may affect the resolution of the case and the absence of any opinion or interest in favour of or against the parties to the case*".[43] Thus, impartiality is deemed a prerequisite for a fair trial.

Although Article 36 of the Constitution does not explicitly mention the

41 See *İlhan Cihaner (5)*, no. 2013/9285, 8 September 2015, § 36.

42 See the Court's judgment no. E.1963/161, K.1964/11, 4 February 1964.

43 See, *inter alia*, *Tahir Gökatalay*, no. 2013/1780, 20 March 2014; and also *Zafer Dinç*, no. 2013/9100, 20 January 2016, § 30.

impartiality of the courts, the right to be tried by an impartial court is an implicit element of the right to a fair trial in accordance with the case-law of the Constitutional Court. Moreover, considering that the impartiality and independence of the courts are two complementary elements, it is clear that, in line with the principle of constitutional integrity, Articles 138, 139 and 140 of the Constitution should also be taken into account when assessing the right to be tried by an impartial court.[44]

Furthermore, the Constitutional Court distinguishes between subjective and objective impartiality and bases its analysis on this distinction. According to the Court, "*impartiality may also be violated if the members of the court conducting the proceedings have a close connection, material or immaterial, with one of the parties or with the subject matter of the dispute, or if their statements in the course of the proceedings give rise to a legitimate belief that they cannot be impartial, as well as if they were in a position directly connected with the case before the trial. However, the presumption of impartiality must be presumed unless and until there is evidence that the judge conducting the proceedings in a particular dispute has a prejudicial or biased attitude, a personal conviction or interest, or a personal bias towards one of the parties. In addition, the judicial authority must provide sufficient guarantees to overcome any legitimate concerns or fears as to its impartiality, which points to the objective dimension of impartiality*".[45]

In the case of *Hikmet Kopar and Others*, the Constitutional Court reiterated its stance that the loss of impartiality must be evidenced through concrete acts and behaviour directed towards the applicant. The Court maintains that judges cannot be deemed impartial merely based on decisions they have previously made in their professional capacity on matters unrelated to the application, or based on their votes in earlier cases or disputes. It asserts that it cannot be assumed that the judges concerned do not act independently and impartially for political or personal reasons, without demonstrating concrete prejudicial acts and attitudes towards the applicants, based on facts whose reality and nature cannot be established with certainty, assessments, and comments made in political debates.[46]

44 See *Tahir Gökatalay*, *ibid.*, § 60.

45 See *Zafer Dinç*, *ibid.*, § 31; see also *İzzettin Güngördü and Mehmet Şerif Güngördü*, no. 2013/5814, 15 December 2015, § 27.

46 See *Hikmet Kopar and Others* [Plenary] (dec.), no. 2014/14061, 8 April 2015, §§ 112-114.

Moreover, legal and administrative regulations pertaining to the establishment and organisation of courts should not convey an impression of a lack of objective impartiality. Institutional impartiality, instrically linked to the independence of courts, underscores that for impartiality to be ensured, not only must the prerequisite of independence be met, but there must also be an absence of any institutional structure that could suggest a lack of impartiality. In addition, the judicial authority is obligated to offer adequate guarantees to eliminate any legitimate concerns or fears regarding its impartiality.

The Constitutional Court's case-law highlights that the guarantees associated with the right to a fair trial must extend to the remedy stage as well. Consequently, the procedures and proceedings at this stage must also comply with the right to a fair trial.

In this context, to ensure the effectiveness of the remedy review and to avoid the impression that the remedy review is not conducted in accordance with the principles of objective impartiality, the judge who rendered the decision at first instance should, in principle, not be present at the remedy review of the file. However, non-compliance with this principle alone does not automatically lead to the conclusion that the remedy review is ineffective and impartial. Each case must be assessed on its own merits. In this respect, other factors, such as the number of votes of the judges involved in the previous stages, particularly in the case of tribunals sitting in panels, and the role of these members in the decision-making process, must be considered to assess whether impartiality is compromised.[47]

In the case of *M.E.*, the participation of some of the members of the panel that examined the appeal in the panel that examined the retrial request was examined in terms of impartiality before the Constitutional Court.

According to the Court, a retrial is an extraordinary remedy and is limited to the examination of whether the relevant reason(s) stated in the law have been met in the concrete case. Therefore, in the concrete case, the handling of the retrial request by the Military Court of Cassation, which conducted the appeal proceedings, and not by the

47 See *Serkan Şeker*, no. 2017/15118, 2 June 2020.

court that rendered the verdict by hearing the accused and witnesses in person and evaluating the evidence first-hand, does not constitute a contradiction in terms of ensuring impartiality and even serves as a guarantee for ensuring impartiality.[48]

CONCLUSION

The Constitutional Court of the Republic of Türkiye plays a pivotal role in upholding the rule of law and ensuring the independence and impartiality of the judiciary. Indeed, the Court has developed significant case-law with regard to the principles of judicial independence and impartiality,which are two complementary elements.

Within this scope, there are some differences between the judgments of the Constitutional Court and the European Court of Human Rights. In general, however, the Constitutional Court refers to and applies the jurisprudence of the Strasbourg Court. One can say that the two jurisdictions mutually influence each other for the further development and better protection and promotion of human rights.

In addition to the constitutional principles safeguarding the independence and impartiality of the judiciary, the adoption of codes of conduct for the judiciary, both at the international and national levels, provide guidance to all judges and prosecutors on ethical issues, including those relating to independence and impartiality, that they may face in the exercise of their functions. Nonetheless, it is incumbent upon each judge and prosecutor to determine the appropriate course of action based on the specific circumstances, in accordance with the relevant laws and the provisions of the Constitution on the independence and impartiality of the judiciary.

As the Court stated more than thirty years ago, "*the preparation of objective conditions to ensure the independence of judges will, on the one hand, help judges to make decisions free from all kinds of pressure and suspicion and, on the other hand, help citizens to believe that the judiciary will function free from all kinds of influence. No matter how honest, fair, skilful and impartial the judge may be, if there are regulations that may undermine the citizens' confidence in the judiciary, the judiciary in that country cannot be free from suspicion and shame. Therefore, while making regulations on*

48 See *M.E.*, no. 2013/2661, 9 September 2015, §§ 130-131.

the independence of the judiciary, care should be taken not only to prepare the conditions for judges to make decisions free from all kinds of external influences, but also to ensure the trust of citizens in the judiciary".[49]

In view of the above, the perception of independence and impartiality is also crucial for public trust and confidence in the judiciary. Therefore, laws and regulations governing the judiciary should also reflect this consideration. Without the independence and impartiality of judges and prosecutors, as well as all judicial officers, there can be no fair trial.

49 See the Court's judgment no. E.1988/37, K.1989/36, 8 September 1989.

ANNEX

TURKISH CONSTITUTIONAL PROVISIONS ON JUDICIAL INDEPENDENCE AND IMPARTIALITY

CONSTITUTION OF THE REPUBLIC OF TURKEY[50]

PREAMBLE

(As amended on July 23, 1995; Act no. 4121)

(…)

(…)

(…)

The separation of powers, which does not imply an order of precedence among the organs of the State, but refers solely to the exercising of certain state powers and discharging of duties, and is limited to a civilised cooperation and division of functions; and the fact that only the Constitution and the laws have the supremacy;

(…)

That every Turkish citizen has an innate right and power, to lead an honourable life and to improve his/her material and spiritual wellbeing under the aegis of national culture, civilisation, and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution, in conformity with the requirements of equality and social justice;

(…)

PART ONE
General Principles

IX. Judicial power

ARTICLE 9- (As amended on April 16, 2017; Act no. 6771) Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation.

50 Official translation published by the Grand National Assembly of Türkiye, Department of Laws and Resolutions, May 2019. Since mid-2022, the official name of the Republic of Turkey has been changed to "Republic of Türkiye". However, the term "Turkey" has been used throughout this annex as it reflects the original official translation adopted in 2019, prior to this name change.

PART TWO
Fundamental Rights and Duties

CHAPTER TWO
Rights and Duties of the Individual

XIII. Provisions on the protection of rights
A. Freedom to claim rights

ARTICLE 36- (As amended on October 3, 2001; Act no. 4709) Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.

No court shall refuse to hear a case within its jurisdiction.

B. Principle of the natural judge

ARTICLE 37- No one may be tried by any judicial authority other than the legally designated court.

Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established.

PART THREE
Fundamental Organs of the Republic

CHAPTER TWO
The Executive Power

IV. Administration
A. Fundamentals of the administration

(…)

2. By-laws

ARTICLE 124- (As amended on April 16, 2017; Act no. 6771) The President of the Republic, the ministries, and public corporate bodies may issue by-laws in order to ensure the implementation of laws and presidential decrees relating to their jurisdiction, as long as they are not contrary to these laws and decrees.

The law shall designate which by-laws are to be published in the Official Gazette.

B. Judicial review

ARTICLE 125- Recourse to judicial review shall be available against all actions and acts of administration. (Sentences added on August 13, 1999; Act no. 4446) In concession, conditions and contracts concerning public services and national or international arbitration may be suggested to settle the disputes arising from them. Only those disputes involving an element of foreignness may be submitted to international arbitration.

(Sentence added on September 12, 2010; Act no. 5982) (As amended on April 16, 2017; Act no. 6771) Recourse to judicial review shall be available against all decisions taken by the Supreme Military Council regarding expulsion from the armed forces except acts regarding promotion and retiring due to lack of tenure.

(…)

D. Provisions relating to public servants

(…)

2. Duties and responsibilities, and guarantees in disciplinary proceedings

ARTICLE 129- Public servants and other public officials are obliged to carry out their duties with loyalty to the Constitution and the laws.

Public servants, other public officials and members of public professional organisations or their higher bodies shall not be subjected to disciplinary penalties without being granted the right of defence.

(As amended on September 12, 2010; Act no. 5982) Disciplinary decisions shall not be exempt from judicial review.

Provisions concerning the members of the armed forces, judges and prosecutors are reserved.

CHAPTER THREE
Judicial Power

I. General provisions

A. Independence of the courts

ARTICLE 138- Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.

Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

B. Security of tenure of judges and public prosecutors

ARTICLE 139- Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post.

Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties because of illhealth, or those determined as unsuitable to remain in the profession, are reserved.

C. Judges and public prosecutors

ARTICLE 140- Judges and public prosecutors shall serve as judges and public prosecutors of civil and administrative judiciary. These duties shall be carried out by professional judges and public prosecutors.

Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of the tenure of judges.

The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their posts or place of duties, the initiation of disciplinary proceedings against them and the imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training, and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges.

Judges and public prosecutors shall serve until they are over the age of sixty-five. The mandatory retirement age, promotion and retirement of military judges shall be prescribed by law.

Judges and public prosecutors shall not assume any official or private occupation other than those prescribed by law.

Judges and public prosecutors shall be attached to the Ministry of Justice with respect to their administrative functions.

Those judges and public prosecutors working in administrative posts of judicial services shall be subject to the same provisions as other judges and public prosecutors. Their categories and grades shall be determined according to the principles applying to judges and public prosecutors, and they shall enjoy all the rights accorded to judges and public prosecutors.

(…)

E. Formation of courts

ARTICLE 142- The formation, duties and powers, functioning and trial procedures of the courts shall be regulated by law.

(Paragraph added on April 16, 2017; Act no. 6771) No military courts shall be established other than military disciplinary courts. However, in state of war, military courts having the jurisdiction to try offences committed by military personnel in relation to their duties may be established.

(…)

G. Supervision of judicial services

ARTICLE 144- (As amended on September 12, 2010; Act no. 5982)

Supervision of judicial services and public prosecutors with regard to their administrative duties shall be carried out by the Ministry of Justice through judiciary inspectors and internal auditors who are from the profession of judge and public prosecutor, and inquiry, inspection and investigation proceedings through judiciary inspectors. Relating procedures and principles shall be regulated by law.

H. Military justice

ARTICLE 145- (As amended on September 12, 2010; Act no. 5982) (Repealed on April 16, 2017; Act no. 6771)

(…)

III. Council of Judges and Prosecutors

ARTICLE 159- (As amended on September 12, 2010; Act no. 5982, April 16, 2017; Act no. 6771)

(As amended on April 16, 2017; Act no. 6771) Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges.

(As amended on April 16, 2017; Act no. 6771) Council of Judges and Prosecutors shall be composed of thirteen members; shall comprise two chambers.

(As amended on April 16, 2017; Act no. 6771) The President of the Council is the Minister of Justice. The Undersecretary to the Ministry of Justice shall be an ex-officio member of the Council. Three members of the Council shall be appointed among first category civil judges and public prosecutors not having lost the qualification to be reserved in the first category and one member shall be appointed among first category administrative judges and public prosecutors not having lost the qualification to be reserved in the first category by the President of the Republic; three members shall be elected among the members of the High Court of Appeals; one member shall be elected among the members of the Council of State and three members shall be elected among teaching staff working in the field of law at higher education institutions and lawyers, whose qualifications specified in law by the Grand National Assembly of Türkiye. Among the members elected from the teaching staff and lawyers, at least one member shall be a teaching staff and one member shall be a lawyer. The applications for the membership of the Council to be elected by the Grand National Assembly of Türkiye shall be made to the Office of the Speaker of the Assembly. The applications shall be referred by the Office of the Speaker to the Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice. For each membership, the Committee shall nominate three candidates with a two-third majority of total number of its members. In case the Committee fails to conclude the nomination of candidates in the first ballot, a three-fifth majority of total number of its members shall be required in the second ballot. If the candidates cannot also be nominated in the second ballot, the procedure of nomination shall be concluded by lot between the two candidates who received the highest number of votes for each membership. The Grand National Assembly shall hold separate elections by secret ballot for each membership between the candidates nominated by the Committee. Two-third majority of total number of the members shall be

required in the first ballot; in case the election cannot be concluded three-fifth majority of total number of the members shall be required in the second ballot. In case the member cannot also be elected in the second ballot, the election of the members shall be concluded by lot between the two candidates who received the highest number of votes.

(As amended on April 16, 2017; Act no. 6771) Members shall be elected for a term of four years. Members may be once re-elected at the end of their term of office.

(As amended on April 16, 2017; Act no. 6771) Election of members to the Council shall be held within thirty days before the members' term of office expires. If a vacancy arises in the Council before elected members' term of office expires, new members shall be elected within thirty days following such vacancy.

(As amended on April 16, 2017; Act no. 6771) The members of the Council other than the Minister of Justice and the Undersecretary to the Ministry of Justice shall not assume any office except those specified by law or be appointed or elected by the Council to another office during their term of office.

The administration and representation of the Council shall be carried out by the President of the Council. The President of the Council shall not participate in the works of the chambers. The Council shall elect the heads of chambers from among its members and one Deputy President from among the heads of chambers. The President may delegate some of his/her powers to the Deputy President.

The Council shall conduct the proceedings regarding the admission to the profession of judges and public prosecutors of civil and administrative courts, appointment, transferring to other posts, delegation of temporary powers, promotion, and being reserved to the first category, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office; the Council shall take final decisions on proposals of the Ministry of Justice concerning the abolition of a court, or changes in the territorial jurisdiction of a court; it shall also exercise the other functions given to it by the Constitution and laws.

(As amended on April 16, 2017; Act no. 6771) Supervising whether the judges and public prosecutors perform their duties in accordance with laws and other regulations (administrative circulars, in the case of judges); investigating whether they have committed offences in connection with, or in the course of their duties, whether their behaviour and conduct are in conformity with requirement of

their status and duties and if necessary, inquiries and investigations concerning them shall be assigned to the Council's inspectors, upon the proposal of the related chambers and with the permission of the President of the Council of Judges and Prosecutors. The inquiries and investigations may also be assigned to a judge or public prosecutor who is senior to the judge or public prosecutor to be investigated.

The decisions of the Council, other than dismissal from the profession, shall not be subject to judicial review.

A Secretariat General shall be established under the Council. The Secretary General shall be appointed by the President of the Council from among three candidates proposed by the Council from among first category judges and public prosecutors. The Council shall be empowered to appoint, with their consent, the Council's inspectors, and judges and public prosecutors to be temporarily or permanently assigned to the Council.

The Minister of Justice is empowered to appoint judges, public prosecutors, judiciary inspectors, and internal auditors having the profession of judgeship and prosecutorship, with their consent, to temporary or permanent functions in the central, subordinate or affiliated institutions of the Ministry of Justice.

The election of the members of the Council, formation of the chambers and the division of labour between chambers, the duties of the Council and its chambers, quorum for meetings and decisions, operating procedures and principles, objections to be made against the decisions and proceedings of the chambers and the examination procedure for these objections, and the establishment and the duties of the Secretariat General shall be laid down in law.

ENSURING THE RIGHT TO A FAIR TRIAL BY THE CONSTITUTIONAL COURT

Zeynab Salimbaylı

CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

ENSURING THE RIGHT TO A FAIR TRIAL BY THE CONSTITUTIONAL COURT

*Zeynab Salimbayli**

Dear participants, colleagues, ladies and gentlemen,

First of all, I would like to express our great pleasure to be in Ankara, on behalf of the Constitutional Court of the Republic of Azerbaijan and on our own behalf, we would like to express our gratitude to the staff of the Constitutional Court of Türkiye for the opportunity to participate in this prestigious event, the 11th Summer School, and we wish successful holding of this event.

This year, as every year, the Summer School is dedicated to a present-day topic - "Judicial Independence as a Safeguard of the Right to a Fair Trial."

Everyone knows that the legal status of each state is determined by its attitude to human rights, the status of human rights in that state. Democracy and human rights are inseparably linked and one completes the other. No state can be considered a democratic, legal state without recognizing generally accepted human and civil rights and freedoms.

As it is known, the Basic Law - the Constitution of every democratic state is the core, basis of the legal system and acts as a guarantee of political stability in the society.

The Constitution of the Republic of Azerbaijan reflects a number of basic principles and broadly includes the ideas and values that determine the main directions of development of a modern civilized society: respect for human personality and dignity; democratic formation of state authorities; availability of effective human rights

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protection mechanisms; ensuring pluralism in the political system; achieving social justice; commitment to universal values; adaptation of national legislation to international law and etc.

In particular, it should be noted that human and civil rights and freedoms, as well as general mechanisms for their realization, are envisaged in the Constitution in a very broad way. It is no coincidence that the third and largest chapter of the Constitution of the Republic of Azerbaijan, is devoted to the guarantee of human and civil rights and freedoms and their protection mechanisms.

The protection of human and civil rights and freedoms in the Republic of Azerbaijan is declared as the supreme goal of the state according to Article 12 of the Constitution.

At the same time, the judicial protection of rights and freedoms, which acts as one of the important mechanisms for the real implementation of the rights established in the Constitution, is expressed in a rather wide sense. Thus, according to the 1st and 2nd parts of Article 60 of the Constitution, the protection of everyone's rights and freedoms in administrative manner and judicial protection is guaranteed. Everyone has the right to be treated impartially and to have his or her case heard within a reasonable time in administrative and judicial proceedings.

It should be noted that the important aspect of the Constitution is the establishment of all relations in the society based on the principles of justice. Justice maintains the balance of social and political life. The main function of the court in any country of the world is to ensure and establish justice. Today, it is impossible to imagine the existence of effective legal protection mechanisms without justice.

The right to a fair trial is envisaged in Article 6 of the European Convention on Human Rights. Human rights are an important part of universal culture in the modern world.

Courts must ensure the fulfilment of obligations undertaken by the state based on the Convention while implementing justice. Judicial protection of human rights is considered in international law as the effective restoration of rights based on a fair trial by an independent court.

Generally, in modern times, the Constitutional Court stands in a special place in the mechanism of judicial protection of human and civil rights and freedoms. Thus, according to Article 1 of the Law of the Republic of Azerbaijan "On the Constitutional Court", the main goals of the Constitutional Court are to ensure the supremacy of the Constitution of the Republic of Azerbaijan and to protect the basic rights and freedoms of everyone. In essence, this means that the implementation of the powers of the Constitutional Court is ultimately aimed at ensuring human and civil rights and freedoms.

This constitutional guarantee includes all the necessary elements of the "right to a fair trial" envisaged in international legal documents to which the Republic of Azerbaijan is a party of. The abovementioned right is not limited with appealing to the court, but also includes justice that can effectively restore violated rights and freedoms.

It should be noted that the Constitutional Court is a constitutional control body with broad powers and its powers are directly envisaged in Article 130 of the Constitution of the Republic of Azerbaijan.

Thus, based on the request of the relevant subjects, the verification of the conformity of the normative acts of the legislative and executive authorities, municipal and judicial acts with the acts that are superior in terms of the constitution and legal force is one of the powers of the Constitutional Court.

Another important power of the Constitutional Court of the Republic of Azerbaijan is the interpretation of the Constitution and laws. The official interpretation given by the Constitutional Court enables the principles and norms reflected in the Constitution to be more correctly applied in practice. The interpretation of constitutional provisions and laws includes both the clarification of the relevant norm and the explanation of the meaning and content of these norms.

By means of the interpretation given by the Constitutional Court, the contradictions and gaps in the legislation are eliminated, and the internal hierarchy of legislative norms is determined.

When talking about the powers of the Constitutional Court, individual complaints filed by individuals and legal entities should be mentioned in particular.

After the additions and amendments to the Constitution in 2002, the new Law "On the Constitutional Court" entered into force in 2004, and the institution of constitutional appeals began to be implemented in the Constitutional Court. These amendments to the legislation raised the activity of the Constitutional Court to a new stage and created an important basis for obtaining an important tool for the protection of human rights and freedoms.

The legal positions of the Constitutional Court of the Republic of Azerbaijan are formed taking into account the principles of the Constitution, its supremacy and direct legal force, as well as international acts of which the Republic of Azerbaijan is a party.

It should be noted that the Constitutional Court always pays special attention to the study of modern practice and development trends of constitutional justice, as well as pays attention to the application of this practice in the Court's activities.

During its activity, the Constitutional Court has made a number of important decisions aimed at the restoration of violated rights and freedoms, and has issued official comments on the correct meaning and application of laws and other normative legal acts based on the requests and appeals received. In the past 25 years, a total of 545 decisions and 161 resolutions were adopted by the Plenum of the Constitutional Court. Most of these decisions and resolutions were related to the implementation of human rights and freedoms established in the Basic Law.

It should be noted that in the 404 decisions adopted by the Plenum of the Constitutional Court, references were made to international legal norms, the precedent law of the European Court of Human Rights and the experience of the constitutional justice bodies of foreign countries.

In many decisions of the Constitutional Court, the principles of rule of law, legal certainty, proportionality and balance, which are widely applied in the case law of the European Court of Human Rights, are reflected in the essence of the legal state.

I would like to bring to your attention several decisions of the Plenum of the Constitutional Court as examples.

In decision of the Plenum of the Constitutional Court "On the interpretation of Article 28 of the Administrative Procedure Code of the Republic of Azerbaijan" of April 12, 2017 and the decision "On the interpretation of Article 183.2 of the Criminal Procedure Code of the Republic of Azerbaijan in relation to Articles 142.1, 383.1, 408.3 of the Criminal Procedure Code of the Republic of Azerbaijan and Article 82.4 of the Civil Procedure Code of the Republic of Azerbaijan" of February 24, 2022 referring to Article 6 of the European Convention on Human Rights in the preamble, regulation of the right of a person whose interests have been affected by a legally binding court decision, not involved in administrative court proceedings, to appeal to the court arising from Part I of Article 60 of the Constitution of the Republic of Azerbaijan and Article 6 of the European Convention on Human Rights to the Milli Majlis (Parliament) of the Republic of Azerbaijan recommended and decided that until the issue is resolved by legislation, in Part I of Article 60 of the Constitution of the Republic of Azerbaijan and for the purpose of ensuring the right to appeal to the court provided for in Article 6 of the European Convention on Human Rights, a person whose interests are affected by a legally binding court decision, who is not involved in administrative court proceedings, in cases where his rights and interests protected by law are significantly violated, the administrative court can be involved as a third party in its proceedings.

In another Decision of the Plenum of the Constitutional Court "On interpretation of some provisions of Article 158.3, Articles 158.4 and 290.3 of the Criminal Procedure Code of the Republic of Azerbaijan" of October 10, 2011, Article 158.4 of the Criminal Procedure Code as well as provision "the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation" of Article 218.4 of this Code was considered as null and void from 1 March, 2012 in the view of discrepancy to Article 28 of the Constitution and Article 5 of the European Convention.

On this occasion, I would like to sincerely congratulate all colleagues of the Constitutional Court of Türkiye and wish prosperity to the fraternal Turkish people.

Thank you for your attention.

FAIR TRIAL STANDARDS IN ALGERIA'S CONSTITUTIONAL LITIGATION

Abbas Ammar

CONSTITUTIONAL COURT OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA

PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA CONSTITUTIONAL COURT FAIR TRIAL STANDARDS IN ALGERIA'S CONSTITUTIONAL LITIGATION

*Abbas Ammar**

INTRODUCTION

Most Algerian constitutions provide for the principle of oversight on the constitutionality of laws, with the exception of the 1976 Constitution. However, the effective installation of the institution charged with monitoring the constitutionality of laws and the exercise of its functions came only after the adoption of the 1989 Constitution, which provided for the creation of a Constitutional Council with the aim to ensure respect for the Constitution (Art. 153). Therefore, the Constitutional Council is granted wide prerogatives in the area of constitutional review on different legislations, in ruling on presidential, legislative electoral disputes as well as referendums, and the announcement of the results.

The Constitutional Council can also intervene in some cases especially before the President of the Republic decrees the exceptional situations; it can also intervene in case of vacancy of the Presidency of the Republic due to resignation, serious and lasting illness or death.

This situation continued in the Constitutions of 1996, 2016, and 2020.

The most prominent development of the Algerian constitutional judiciary came after the constitutional reforms of 2016 and 2020, enabling litigants to challenge the unconstitutionality of legislative provisions in 2016, and replacing the Constitutional Council with a Constitutional Court and reviewing its composition in 2020. This is also reflected in the rules of procedure on constitutional litigation.

The elements of judicial proceedings were not available in the constitutional litigation before 2016, with the exception of electoral

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disputes through which candidates and voters could have access to the constitutional judiciary to contest some stages of the electoral process, with the presence of parties, contradictory principle and defense. However, the control over the constitutionality of legislation, because of its abstract nature, lacked the elements of judicial proceedings, due to the lack of parties, the absence of procedural rules, defense, in addition to closed sessions, but after enabling litigants to claim the exception of unconstitutionality, the characteristics of judicial proceedings have become available in this type of constitutional litigation.

In this paper, we will focus on the fair trial standards available before the Constitutional Court when pronouncing on the dispute of the exception of unconstitutionality.

The most important of these standards are stipulated in the international conventions ratified by Algeria (the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights, Arab Charter on Human Rights) and included in the Constitution and the law regulating notification and referral procedures as follows:

- The independence of the Constitutional Court, accessibility and equality before it,
- The right to defense and the contradictory principle,
- The recusal of judges, the adjudication of the exception within a reasonable time,
- Public hearings, oral discussions,
- Secrecy of deliberations,

These standards which are available before the ordinary and administrative judiciary, when deciding on the initial case and the exception of unconstitutionality raised on its occasion are stipulated in the code of civil and administrative procedure, the penal code and the organic law which determines the procedures and modes of notification and referral before the Constitutional Court.

First: Independence and Impartiality of the Constitutional Court

The election program of President Abdelmadjid Tebboune includes a comprehensive reform of the judicial system with the aim to ensure

its independence and modernization through the introduction of digitalization (electronic justice) and to ensure its efficiency through reviewing methods of work and functioning of judicial institutions, in addition to equal treatment of all people before the law, valorising the judicial system, improving their status and role as well as protecting their independence and impartiality.

To make this commitment concrete, the Algerian Constitution provides for the independence of the judiciary in general (Article 163) considering that the judge shall be independent and shall obey nothing but the law. In the case of impingement on his independence, he shall notify the High Council of Magistracy, and the judge shall guard against anything that undermines his impartiality and independence (Article 173 of the Constitution).

In the same context, "the Constitutional Court is an independent institution" (Article 185 of the Constitution), its competences are defined in the Constitution, and it establishes its own rules of functioning (Article 185, Paragraph 3), and its own rules of procedure, thus strengthening its independence and making it immune from the influence of the legislative and executive powers.

Its independence is also embodied in its composition, two-thirds (2/3) of its members are elected out of twelve (12) members, eight (8) elected by their counterparts, six (6) professors of constitutional law, two (2) judges of the Supreme Court and the Council of State, as opposed to four (4) members appointed by the President of the Republic, including the President of the Constitutional Court (Article 186 of the Constitution), provided that they do not belong to any political party, and once elected or appointed they stop practicing any activity (Article 186 of the Constitution), they serve a single term with no renewal (Article 188 of the Constitution), they are granted immunity for acts connected with the exercise of their functions (Article 189 of the Constitution).

Second: Facilitating access to the Constitutional Court and equality before it:

The Constitution provides for the equality of citizens before the judiciary and makes it accessible to all (Article 165), it enhances the principle of equality of opportunities for the parties to the proceedings

to present their requests and means of defense through the exchange of memoranda.

Access to the constitutional judiciary became available to all litigants after the inclusion of the exception of unconstitutionality at any phase in which the case was filed, provided that it is serious in terms of the provision upon which the issue of the litigation relies and that it has not previously been declared constitutional.

Equality in constitutional dispute is embodied by the application of the same rules of procedure to parties within the trial, as well as to the intervener in the exception of unconstitutionality, whether at the level of judicial bodies or before the Constitutional Court (Articles 23 and 39 of the Organic Law No. 22-19 specifying the procedures for notification and referral).

Third: The principle of contradictory (adversarial principle)

The contradictory principle is one of the general principles of law required in all legal proceedings, and that the litigants must be familiar with each other's allegations, they should be informed of the arguments and documents submitted to the judge so that they can respond to them and defend themselves.

The Algerian legislator guarantees this principle in constitutional disputes, whether at the level of the judicial bodies before which the exception of unconstitutionality is raised, or before the Constitutional Court, which as soon as it receives the decision of referral of the exception, shall notify it to the higher authorities concerned and the parties, accompanied by petitions, written statements of the parties and supporting documents to make their observations which shall be communicated to the authorities and the parties for a written response, provided that the communication and notification are made by all means of transmission (Article 38 of the Organic Law No. 22-19 and Articles 18, 19, 20 and 21 of the Statute Establishing the Rules of Functioning of the Constitutional Court).

Both the Government representative and the parties may also present their oral observations during the hearing devoted to the deciding on the case of the exception of unconstitutionality (Article 41 of Organic Law No. 19-22).

Fourth: The Right to Defense

The right to defense is one of the guarantees of a fair trial, whether in person or through hiring a lawyer. The Algerian legislator has enabled the claimants to submit the exception by a written, separate and reasoned written statements, in person or with the assistance of a lawyer.

The Constitution provides for the right to defense which is guaranteed in criminal cases (Article 175). The Constitutional Court has ruled on two exceptions relating to the right to defense. In the first, it declared the constitutionality of the last paragraph of Article 24 of Law No.13-07 regulating the legal profession which stipulates: "*A lawyer cannot be prosecuted for his actions, declarations and statements during debates or in hearings*" considering the right to defense *"one of the most important rights contained in the Constitution because of its link and integration with the system of other rights established for the benefit of man and citizen, and on the other hand, it is a fundamental guarantee for the proper administration of justice ... and the requirements of a fair trial"* (Decision No. 01/21/D.CC/E.U/21 dated November 28, 2021), and stated, in the second, the constitutionality of Articles 905 and 906 of Law No. 08-09 dated 25 February 2008 containing the amended and supplemented Code of Civil and Administrative Procedure related to the obligation of being represented by a lawyer before the Administrative Court of Appeal and the Council of State (Decision No. 21/D.C.C./E.U/22 dated October 26, 2022).

The legal representation is mandatory in constitutional litigation in order to prove the seriousness of the claim of unconstitutionality in case of violation of rights and liberties guaranteed by the Constitution for the claimant; however, the obligation of being legally represented in raising the exception of unconstitutionality has not been stipulated with the aim to ensure easy access to constitutional justice which may be prevented because of defense costs.

Fifth: The possibility of removal or recusal of members of the Constitutional Court

The oath taken by the members of the Constitutional Court shall enshrine the exercise of their functions seriously and impartially

(Article 187 of the Constitution). Enabling the parties to the case to request the recusal of the members of the Constitutional Court for serious reasons that may prejudice the impartiality of the Court is one of the guarantees that achieve an impartial and neutral trial, provided that the request for dismissal is submitted before deliberation to the member involved in order to present his/her viewpoint, then the Court shall rule on without his/her presence. Besides, one of the serious reasons of recusal is the conflict of interests, such as the existence of family relations between the member and one of the claimants of the exception. The members of the Court may also request to recuse themselves from the adjudication of a particular exception file, if they suspect that their participation may affect their impartiality (Articles 25 and 26 of the Statute Establishing the Rules of Functioning of the Constitutional Court).

In the same context, the participation of a member of the Constitutional Court in preparing the legislative provision object of the exception which shall affect the impartiality of the Court is out of the question in Algeria because its composition does not include parliamentarians.

Sixth: Reasonable time limit for adjudication of the exception of unconstitutionality

The adjudication of the case within a reasonable time is part of the right to a fair trial, which is determined by the Algerian legislator, whether at the level of the judicial bodies or the Constitutional Court, which must decide on the exception within four (4) months from the date of reception of the exception file, and can extend this period once for a maximum period of four (4) months, based on a reasoned decision communicated to the notifying body (Article 195 of the Constitution).

To this end, the legislator has set deadlines for the authorities and parties either to submit their written observations (20 days from the date of notification) or to respond to them (10 days from the date of notification), or to submit oral observations during the public session (15 minutes).

The Constitutional Court has ruled on the exceptions referred to it before the expiry of the deadline, even when it has received more

than twenty exceptions at once on the unconstitutionality of Article 73, Paragraph 4 bis, of Law No. 90-11 dated April 21, 1990 on labour relations, as amended and supplemented (see Constitutional Court decisions from 1 to 22 / D.CC/22 dated January 26, 2022), whereas the Constitutional Council extended the deadlines to four (4) months in a case file of the exception of unconstitutionality of Paragraph 3 of Article 24 of the Law No. 13-07 regulating the legal profession which the Constitutional Court ruled on immediately after its establishment.

Seventh: Public hearings and oral discussions

Unlike the hearings of the Constitutional Court, relating to the oversight of the constitutionality of various legislations, where it meets and deliberates in a closed session, with the presence of its members only, the sessions of the Court to rule on the exception of unconstitutionality are public (Article 40 of Organic Law No. 19-22), which enables the parties to review the proceedings of the trial, and the discussions and pleadings taking until the decision is pronounced.

For this purpose, the Court has a room similar to the hearing rooms of judicial bodies, and public hearing is enhanced by the possibility of covering, recording and broadcasting these sessions, by virtue of a decision of the President of the Constitutional Court (Article 34 of the Statute Establishing the Rules of Functioning of the Constitutional Court), which allows public opinion to monitor the impartiality and neutrality of the Court, and booster's confidence in it.

Hearings, however, may be secret upon a decision of the President of the Court or at the request of one of the parties, if the public is prejudicial to public order and morals (Article 28 of Statute Establishing the Rules of Functioning of the Constitutional Court).

As for the oral discussions during the hearing, the parties and the representative of the Government may present their oral observations according to the principle of contradictory, and it happened that one of the parties presented his/her oral observations, at the hearing challenging the constitutionality of some articles of the Code of Civil and Administrative Procedure related to the obligation to be represented by a lawyer.

In order to control the submission of oral observations, a period

of fifteen (15) minutes was set for each party (Article 30 of the Statute Establishing the Rules of Functioning of the Constitutional Court).

Eighth: Secrecy of deliberations

The Constitutional Court meets and deliberates in closed sessions, and although the Secretary-General is in charge of editing the minutes of the meetings of the Constitutional Court, he leaves at the moment of deliberations (Article 48 of the Statute Establishing the Rules of Functioning of the Constitutional Court), and even a member of the Constitutional Court, who did not attend the public session devoted to deciding on the exception of unconstitutionality, cannot participate in the deliberations (Article 38 of the Statute Establishing the Rules of Functioning of the Constitutional Court).

Ninth: Motivation of Constitutional Court Decisions

The decision of the Constitutional Court on the exception of unconstitutionality shall include the names of the parties and their representatives, the visas of the texts on which the Court relied, the observations submitted to it on the legislative or regulatory provision subject to the exception, the reasoning of the decision to convince the parties, the verdict, the name and surname of the rapporteur and the names, surnames and signatures of the members of the Constitutional Court who attended the deliberations.

Tenth: The decisions of the Constitutional Court are final and binding on all authorities

Although appealing judicial rulings is one of the characteristics of a fair trial, the decisions of the Constitutional Court, just as those of the constitutional judiciary in the world, are considered final and not subject to any appeal, binding on all public, administrative and judicial bodies, and their effects result from the moment of their promulgation, with the possibility of the court determining the effective date of its decisions related to the exception of unconstitutionality (Article 198 of the Constitution), for reasons of legal security, and to give the opportunity to prepare a new legislative or regulatory ruling.

CONCLUSION

It is clear that the most important standards for a fair trial in a case of exception of unconstitutionality before the Algerian Constitutional

Court are available as stipulated in both the Constitution and the Algerian legislation and enshrined in the international and regional human rights conventions ratified by Algeria, mainly the Universal Declaration of Human Rights (Articles 10 and 11), the African Charter on Human and Peoples' Rights (Article 7) and the Arab Charter on Human Rights (Article 13).

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL IN THE JURISPRUDENCE OF THE BULGARIAN CONSTITUTIONAL COURT

Nina Delimarinova
Polina Pesheva

CONSTITUTIONAL COURT OF BULGARIA

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL IN THE JURISPRUDENCE OF THE BULGARIAN CONSTITUTIONAL COURT

*Nina Delimarinova**
*Polina Pesheva***

ABSTRACT

This report examines the jurisprudence of the Bulgarian Constitutional Court with the aim to establish understanding of the essential characteristics of the principle of judicial independence as a safeguard to the right of fair trial. It analyses the institutional independence of the judiciary, the personal independence of the individual magistrate and the requirement for factual independence (impartiality) during judicial proceedings and their importance as prerequisites for full implementation of the right to fair trial.

Key words

right to a fair trial, judicial independence, institutional independence, personal independence, factual independence

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I. INTRODUCTION

The principle of judicial independence and the fundamental right to fair trial are considered constitutional values of highest rank and receive protection under Bulgarian law. They are both enshrined into the Bulgarian Constitution[1] in Chapter Six, which concerns the establishment and functioning of the judiciary as one of the three branches of the Government. The other two, of course, being the legislature and the executive branch.

The first article of Chapter Six is Article 117 which proclaims in Paragraph 1 that the primary mission of the judiciary is "*to protect the rights and legitimate interests of all citizens, legal entities and the State*". Its second paragraph explicitly states that "*The judiciary shall be independent. In the performance of their functions, all judges, court assessors, prosecutors and investigating magistrates shall be subservient only to the law*." The third paragraph illustrates another aspect to the principle of judicial independence by adding that "*The judiciary shall have an independent budget*."

On the other hand, the Bulgarian Constitution does not contain the exact words "*fair trial*", but it does contain all the core features agreed upon by jurisprudence and academia, which are considered building blocks of the fundamental human right to fair trial. The Constitution guarantees the right to access to court (Art. 120, Paragraph 1) and the right to a court established by law (Art.119); the right to equality between parties and the right to adversarial proceedings (Art. 121, Paragraph 1); the right to a motivated judicial act (a.k.a. "reasoned decision") (Art. 121, Paragraph 4); the right to public hearings (Art. 121, Paragraph 3); the right to legal counsel (Art. 56 and Art. 122, Paragraph 1); the right to establishment of truth during judicial proceedings (Art. 121, Paragraph 2); the right to appeal (Art. 120, Paragraph 1), etc.

All these and other safeguards contained within the Constitution and other laws and regulations are not only essential principles of the establishment and functioning of the judiciary but also elements of the fundamental human rights of all persons, which are closely interrelated. Together with the principle of separation of powers they

1 Full text of the Constitution of the Republic of Bulgaria is available in English language on the webpage of the Bulgarian National Assembly: https://www.parliament.bg/en/const .

form the foundations of a state under the rule of law. Therefore, it is not surprising that through the years the Bulgarian Constitutional Court has rendered many decisions on the status and functioning of the judiciary, including on the matter of its independence, and many decisions regarding various material or procedural issues related to the right of fair trial.

II. WHAT IS JUDICIAL INDEPENDENCE ACCORDING TO THE JURISPRUDENCE OF THE BULGARIAN CONSTITUTIONAL COURT?

According to Bulgarian constitutional doctrine, judicial independence is a multifaceted issue. "*The independence of the judiciary manifests in two aspects - first, independence from other powers (the principle of separation of powers, and the interaction between them), and second, independence of the individual judge, prosecutor, investigating magistrate in the performance of their functions*." (Decision No. 17/08.11.2018 of constitutional case No. 9/2018).

The first aspect is often called "institutional independence" and is related to the ability of the judiciary to self-regulate and function as an autonomous branch of the Government. "*A guarantee for this independence is the independence of the judiciary in terms of personnel, budgetary and financial policy, which is enshrined in the Constitution*." (Decision No. 3/07.07.2015 of constitutional case No. 13/2014). Most of the regulatory and administrative powers vested within the judiciary by Constitution are granted to the Supreme Judicial Council, which include procedures for judicial appointments, disciplinary procedures, drafting budget proposals, managing expenditure and assets, etc. It is important to note that "*The Supreme Judicial Council directly serves the functioning of the judiciary and does not control it, as for example the role of the Council of Ministers in the executive branch. It has no control or supervisory powers under the Constitution in relation to judges, prosecutors, and investigating magistrates, who are independent in the performance of their functions from the other two branches as well as from the Supreme Judicial Council, and the control over their acts is exercised by the higher instance*." (Decision No. 10/15.11.2011 of constitutional case No. 6/2011).

The second aspect of judicial independence is also called "personal

independence" (a.k.a. "functional independence") and relates to the position of the individual magistrates within the system, which allows them to perform their duties free of external influence and within the boundaries prescribed by the law. "*Along with the budgetary autonomy of the judiciary and the administration of personnel issues, the personal independence of judges, prosecutors and investigating magistrates is also subject to constitutional regulation and is guaranteed by the principles of irremovability, functional immunity and incompatibility, as well as their guaranteed right of defence against acts affecting their rights and legitimate interests in this capacity*." (Decision No. 3/ 07.07.2015 of constitutional case No. 13/2014). The Constitutional court in its decisions clearly explains what personal independence means in practice: "*The judicial authority acts independently under the following conditions: when no other public authority or official can give it instructions on specific cases for their decision on the merits; when it is certain that it will evaluate the evidence according to its own internal conviction and assess which factual situations should be accepted as established; when in its activity it is subject only to the law, interpreting it not according to its internal conviction, but according to the actual content of the law. Such independence of the judicial authorities is not absolute and uncontrolled. The Constitution itself sets its limits by ensuring obedience only to the law. Therefore, a judicial authority remains independent even when it is given instructions which it must carry out, but they must relate only to the application of the law in both material and procedural terms. Only in that case, despite their binding nature, they cannot impair the judicial authority's independence*." (Decision No. 7/11.05.2021 of constitutional case No. 4/2021).

The third aspect of judicial independence is "factual independence" (a.k.a. "impartiality"). Unlike the previous two aspects, which are objective in nature that means they rely on basic principles and rules applicable throughout the entire judicial system, this one is more subjective because it pertains to the individual magistrate performing their duties. "*Along with institutional independence, the exercise of the duties of magistrates requires factual independence (impartiality). In contrast to the former, it is always concrete, linked to a real process, and is called into question whenever an otherwise hierarchically and institutionally unbound authority, by its actions, actually shows bias in favour of certain parties interested in the process. This independence is reflected in the requirement*

of judicial impartiality." (Decision No. 7/ 11.05.2021 of constitutional case No. 4/2021). This third aspect has the most direct relation with the principle of fair trial and is the most externally visible one to all parties who seek justice through judicial proceedings.

Of course, all three are interconnected and influence each other in all phases of the process. According to Bulgarian constitutional theory, the appropriate combination of these types of judicial independence contains the key to effective legal regulation in the judicial sphere[2].

III. FRAMEWORK TO JUDICIAL INDEPENDENCE

Just as it contains the major features of the principle of judicial independence, the Constitution also marks the limitations applicable to it on all levels. On institutional level, the judiciary does not exist in a vacuum but in an organized system that is the state. It derives its powers from the people's sovereignty, as Art. 118 states: "*All judicial power shall be exercised in the name of the people*." Performing its functions requires some degree of interaction with the other branches of the Government. For example, the legislative branch adopts laws which are the legal framework for judicial powers. The executive branch plays a key role in the budgetary process. Therefore, inevitably the other two branches influence the independent judiciary in one way or another. It is important to note, however, that such influence should not permeate its primary function, which is adjudication. The Constitutional Court supports this idea in its decisions. "*The independence of the judiciary is not absolute. However, it should be borne in mind that there is no working constitutional system that provides for and ensures absolute independence of any of the three authorities, because the necessary balance is achieved through mutual deterrence and interaction. Balance implies that each of the powers has the opportunity to interact with the others. Mutual deterrence also ensures their independence*." (Decision No 9/04.10.2011 of constitutional case No 7/2011).

Just like on institutional level, the independence on personal level of each individual magistrate is also not absolute. Article 117, Paragraph 2 explicitly states that magistrates should be obedient to the law. All aforementioned constitutional guarantees for their personal

2 Drumeva, Emiliya. Constitutional law. Fifth expanded and revised edition. Ciela, 2018, p. 528.

independence are intended to ensure lawful performance of their duties, hence why their personal independence is also functional in nature – "… *the functional independence of the judiciary guarantees the free formation of internal conviction, which is based on the evidence gathered in the case and on the law. Ultimately, the independence of the judge, prosecutor, and investigative magistrate in the performance of their functions, through which judicial power is exercised, is limited always and only within the framework of the Constitution and the law. It is therefore not a question of absolute independence, but of functional independence limited to the resolution of the issues in the case*." (Decision No. 3/07.07.2015 of constitutional case No. 13/2014).

This functional nature is also reflected in the rules for immunity and disciplinary responsibility for magistrates." *The constitutional regulation of judicial immunity has undergone a dynamic development over time to arrive at the current situation, according to which the said persons enjoy criminal and civil immunity for actions in official capacity and decisions issued, provided that their actions do not constitute a deliberate offence of a general nature (Art. 132, Paragraph 1 of the Constitution). The doctrine stresses the substantive nature of non-liability - it is for official acts through which basic functions are performed and decisions are taken*." (Decision No. 17/08.11.2018 of constitutional case No. 9/2018). "*The possibility of holding a magistrate liable to disciplinary action must be regulated in a way that ensures his independence - institutional and personal. This should be done by a law which clearly and comprehensively regulates both the constituent elements of disciplinary offences and the procedure for seeking disciplinary action*." (Decision No. 4/12.04.2016 of constitutional case No. 10/2015).

IV. CONCLUSION

All these and many other safeguards aim to create an environment conducive to the pressure-free and influence-free resolution of cases and investigations. By their content and scope such special regulations are intended to guarantee on constitutional level the independence of the magistrates carrying out their duties. This is important because one of the essential requirements for full implementation of the right to fair trial is access to an independent and impartial court established by the law.

V. OTHER RELEVANT DECISIONS

General attributes:

"*The independence of the judiciary is a key factor for its prestige."* Decision No. 2/21.02.2019 of constitutional case No. 2/2018

"*Only for the judiciary the Constitution proclaims independence as an immanent feature."* Decision No. 2/21.02.2019 of constitutional case No. 2/2018

"*The judiciary carries out the judicial function of the state and hence the need for constitutional guarantees for its independence."* Decision No. 12/27.07.2018 of constitutional case No. 1/2018

"*The independence of the magistrates with regard to the subject of their functions (criminal, civil or administrative proceedings), derived from Article 117 of the Constitution, understood as freedom from instructions, lawful performance of their official functions, cannot exist without ensuring their personal independence*." Decision No. 17/08.11.2018 of constitutional case No. 9/2018

"*Functional independence also covers those activities of the court which are not justice, and which are related to the performance of acts of judicial administration, consisting in granting or refusing to grant permission for usage of special intelligence means, for civil marriage between minors, for transfer of the property of incapacitated persons, etc., where the judge also owes obedience only to the applicable law*." Decision No. 3/07.07.2015 of constitutional case No. 13/2014

Judicial appointments:

"*The Supreme Judicial Council, as a personnel body, occupies an essential place among the bodies of the judiciary, which is why it must be independent and not be subjected to external pressure from the legislative or executive branches*." Decision No. 10/15.11.2011 of constitutional case No. 6/2011

"*The Supreme Judicial Council is a fundamental part of the judiciary and is established by the Constitution with the power to manage the other bodies of the judiciary*." Decision No. 17/3.10.1995 of constitutional case No. 13/1995

"*It is particularly unacceptable from the point of view of the Constitution*

for the Minister of Justice to issue orders appointing and dismissing absolutely all magistrates, including the Supreme Court judges and prosecutors of the Prosecutor General's Office. This makes him the absolute personnel center of the judiciary." Decision No. 13/16.12.2002 of constitutional case No. 17/2002

"*The direct dismissal of magistrates by the legislature (through provisions in a law) is a violation of Art. 129, Paragraph 1 of the Constitution, which empowers the SJC to appoint, promote, demote, transfer, and dismiss judges, prosecutors, and investigative magistrates. It is also a violation of the principles of separation of powers and the independence of the judiciary (Articles 8 and 117(2) of the Constitution). It is also a violation of the provisions of Article 129(2) and (3) of the Constitution concerning the term of office of the President of the Supreme Court and the irremovability of judges."* Decision No. 9/30.09.1994 of constitutional case No. 11/1994

"*Irremovability is a quality which is acquired and lost under certain conditions laid down by the Constitution. In determining by law, pursuant to Article 133 of the Constitution, the conditions and procedures for the appointment and dismissal of judges, prosecutors and investigative magistrates, the legislator is obliged to comply with the constitutional guarantee of independence*". Decision No. 8/ 15.09.1994 of constitutional case No. № 9/1994

Disciplinary responsibility and procedures:

"*It is particularly unacceptable from the point of view of the Constitution for the Inspectorate to the Ministry of Justice to also inspect the activities of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General*." Decision No. 13/16.12.2002 of constitutional case No. 17/2002

"*The personal independence of a magistrate cannot be ensured if there is a possibility for him to be scrutinized by representatives of the Bar Council for violations that are vague in their specific content...The fact that the Bar Council may, of its own motion, protect the honour and dignity of a lawyer without the lawyer having requested it, expands too much the possibilities of the Bar Council to scrutinise magistrates without there being a legitimate aim to be achieved in this way. The fact that the review body thus established has an unclear legal status but collects data of legal significance, has the power to*

request explanations from persons, including members of the judiciary, and the fact that, on the basis of its report, the Bar Council may make proposals for disciplinary action against magistrates for infringements of the rights of its members, even without the request from the lawyer concerned, is contrary to the guarantees of judicial independence required by Article 117(2) of the Constitution." Decision No. 4/ 12.04.2016 of constitutional case No. 10/2015

Budget and assets:

"*The term 'independent', used of the judiciary in Article 117(2) of the Constitution, includes independence in the management of the property vested in it*." Decision No 11/14.11.2002 of constitutional case No 18/2002

"*Due to the special place of the judiciary (of which the Public Prosecutor's Office is a part) in the constitutional system of the separation of powers, taking away the buildings used by them without asking for and giving consent contradicts the principle of the independence of the judiciary proclaimed in Article 117(2) of the Constitution*." Decision No. 4/08.07.2008 of constitutional case No. 4/2008

"*The budget of the Republic of Bulgaria must provide funds for the functioning of the state institutions established by the Constitution, including the judiciary, taking into account the principle of separation of powers and their constitutional powers. The judiciary is dependent on the budget, and the sources of funds necessary to balance the annual expenditure voted by the National Assembly are raised through the revenue side of the national budget. Therefore, where, due to the failure to raise revenue from the activities of the judiciary, a budgetary balance cannot be achieved, the legislature, represented by the National Assembly, is obliged to ensure that the shortfall can be made up either from the balances on accounts from previous years or by a direct additional subsidy from the State budget*." Decision No. 4/14.07.2015 of constitutional case No. 3/2015

"*Any law for the annual state budget of the country, which lacks funds for individual constitutionally established state institutions, can be declared unconstitutional as it paralyses the activities of these institutions*." Decision No. 17/3.10.1995 of constitutional case No. 13/1995.

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

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CONSTITUTIONAL COUNCIL OF CAMEROON

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

*Ngwonam Denis Ngwonam**
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INTRODUCTION

There is no gainsaying that the classical separation of power logically implies the liberty and autonomy of the judiciary. From this perspective, judges ought to pass judgment principally on the basis of factual analysis, law and their conscience. The term ''independence'' in legal parlance is generally used to characterize the relationship of the judiciary to other institutions or agencies[1]. David S. Law[2] defines judicial independence as ''the ability of courts and judges to perform their duties free of influence or control by other actors''. This concept according to Stephen Burbank is linked to the principle of judicial accountability and can both be described as "different sides of the same coin". In this light, judicial independence is the ability of courts and judges to perform their duties free of influence or control by other actors, thereby independently making decisions to resolve cases brought before them. It requires that courts should not be subject to improper influence from other branches of government.

This serves as a guarantor to the right of the accused to a fair trial. A fair trial is that which is conducted justly and with procedural regularity by an impartial judge such that there is a just public hearing within a reasonable time, by an independent and impartial court.

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1 Independence is an essential attribute of good judging, but it is not the only one, and nothing is gained by letting it stand for all the judicial virtues

2 Judicial independence, International Encyclopedia of Political Science, Washington University in St. Louise, paper No. 10-02-06, February 25, 2010

The selection of judges is a central factor in most theories of judicial independence[3]. Judges who are dependent in some way upon the person who appoints them, cannot be relied upon to deliver neutral, legitimate and high-quality decisions. While there is near-universal consensus on this as a matter of theory, legal systems have devised a wide range of selection mechanisms in practice, often trying to balance independence with accountability through institutional design.

One of the major challenges of the Cameroonian legal system has to do with judicial independence vis-à-vis the right of the accused to fair trial. The crux of the matter is to demonstrate whether judicial independence is a guarantee of the right to a fair trial in Cameroon. In other words, how is judicial independence a guarantor of the right to a fair trial in Cameroon? To respond to this problematic, we shall examine judicial independence as the foundation of the right to a fair trial in section one (I), and the challenges to judicial independence and recommendations in section two (II).

I. JUDICIAL INDEPENDENCE: THE FOUNDATION OF THE RIGHT TO A FAIR TRIAL

A- Judicial Independence and Its Essential Role in Safeguarding Fundamental Rights.

1. The principle of separation of power in Cameroon:

Judicial independence stems from the sacrosanct principle of separation of power, postulated by Montesquieu (the French philosopher) in his book *The Spirit of Laws* in 1748. This principle also had postulates like John Locke and Thomas Hobbes. The separation of power is based on the principle of *"trias politica"* which means separation between three powers namely; the executive, judiciary and legislative arm of government. The legislative arm votes laws, the

3 Here is a large body of literature on judicial independence and quality. See, e.g., Richard Epstein, The Independence of Judges: The Uses and Limitations of Public Choice, BYU L. Rev., at 827 (1990); Paul Fenn & Eli Salzberger, Judicial Independence: Some Evidence from the English Court of Appeal, 42 J.L. & Econ. 831 (1999); F. Andrew Hannsen, Is There a Politically Optimal Level of Judicial Independence? 94 Am. Econ. Rev. 712 (2004); Irving Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671 (1980); Daniel Klerman & Paul Mahoney, The Value of Judicial Independence: Evidence from 18th Century England, 1 Am. L & Econ. Rev. 1 (2005); William Landes & Richard Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875 (1975); J. Mark Ramseyer, The Puzzling (Independence of Courts, 23 J. Legal Stud. 721 (1994); J. Mark Ramseyer & Eric Rasmusen, Judicial Independence

executive implements laws, while the judiciary interprets the laws by creating binding precedents.

The judiciary in Cameroon prior to 1996 was relegated to the background as power was mostly exercised by the legislative and executive arms of government. This important arm of government was propelled to the rank of a power in Cameroon in 1996 by virtue of ***Law No 96/06 of 18 January 1996 as amended and supplemented by Law No 2008/001 of 14 April 2008 on the Constitution of the Republic of Cameroon***. This came as a result of pressure from the international community and civil society organizations requesting the government of Cameroon to comply with duly ratified international conventions such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples Rights and a plethora of other international treaties and conventions advocating for separation of power. The Cameroon legislative responded by making provisions in Article 37(2) of the 1996 Constitution which stipulates; ***"judicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals. The judicial power shall be independent of the executive and legislative power. Magistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience".***

It should be noted that the constitution is the highest norm of the land as postulated by Hans Kelson in his book the *Pure Theory of Law,* wherein, he opined that the constitution stands at the apex of all legal norms and gives validity to them, and that no norm can derogate from the constitution, not even an international treaty. This separation of power is therefore manifested in Cameron through several instruments such as Law No 2016/007 of 12 July 2016 relating to the Cameroon Penal Code which stipulates in its *Section 126* captioned "by executive and judiciary reciprocity" that " ***whoever being the representative of the executive authority issues order or prohibition to any court, or being a legal or judicial officer issues any order or prohibition to any executive or administrative authority shall be punished with an imprisonment of from 6 months to 5 years".*** A perusal of this section of the law clearly demonstrates the resolve of the Cameroon Government to secure judicial independence.

Furthermore, ***Decree No 2008/377 of 12 November 2008 to lay down the attributes of administrative authorities and their functioning in*** **Cameroon,** empowers Governors, Senior Divisional Officers and Divisional Officers to exercise control over all government services within their area of competence except those of the judiciary. This clearly demonstrates that the judiciary is independent of the other arms of government, thus giving judges unfettered powers to administer justice using just the law and their conscience. The Presiding Magistrate or Judge is therefore called upon to safeguard the right to a fair trial without any interference.

In fact, in criminal matters, ***Section 310(1) of Law No 2005/007 of 27 July 2005 to lay down the Criminal Procedure Code in Cameroon*** stipulates *mutatis mutandis* just as ***Section 5 of Decree No 95/048 of 1995 revised in 2012 on the Statute of Magistracy*** stipulates that; ***"the judge is guided in his decision by the law and his conscience"***. He/she is therefore prohibited from using his personal knowledge of facts, or being influenced by a third party when rendering justice.

The above facts boil down to one thing: **the independence of the Cameroon judiciary**. This independence has grown over time to witness the prosecution and/or conviction of top-ranking government officials most especially for misappropriation of public property. Such cases include;

- ***The People of Cameroon and the Ministry of Defence vs Edgar Alain Mebe Ngo'o,***
- ***The People of Cameroon and SONARA vs Charles Metouck,***
- ***The People of Cameroon and the Ministry of Basic Education vs Haman Adama and 11 others.***

2. The constituent elements of a fair trial:

The notion of a fair trial is so fundamental in the field of justice in that a justice system is said to be laconic if it can't uphold the tenets of a fair trial. In the Cameroon judicial system, the right to a fair trial is of utmost importance, as the legislator has strived to a greater extent to safeguard same. The Criminal Procedure Code (CPC) and the Preamble to the Cameroon Constitution consecrates a plethora of fundamental

rights which guarantee a fair trial. This is seen in the aspect of the **presumption of innocence**.

It stems from a Latin maxim ***"actori incumbit probation onus probandi incumbit et qui decit"*** which signifies "impute no guilt until guilt has been proven". The principle is consecrated in the Preamble to the Cameroon Constitution and in **Section 8(1) of the CPC** which stipulates that; ***"any person suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defence".*** The suspect defendant or accused therefore has no burden bestowed on him by the legislator. This is justified by the fact that the burden of prove in Law lies on he who alleges and not he who denies (***eit incumbit probation qui agit et non qui negat***).

Criminal proceedings are instituted by the legal department (prosecutor) as per Section 60 of the CPC, thus making it mandatory for them to prove that an accused is guilty. In fact, under Cameroonian law, this obligation is non-negotiable as the legislator of the ***CPC in Section 307*** makes it clear that; ***"the burden of prove shall lie on he who institutes criminal actions".*** No iota of doubt must therefore be in the mind of the judge when sentencing as every doubt goes to the benefit of the accused person. ***Section 395(2) of the CPC*** stipulates; ***"In case of doubts, the accused shall be discharged and acquitted…".*** This is a clear demonstration by the Cameroon legislator to uphold the sacrosanct principle of the presumption of innocence. The fact that the CPC gives room for the accused, to prove his/her innocence before being sentenced, is a clear indication that the Cameroon judiciary is independent and thus passes its judgement based on the law, evidence and conscience without any interference from a third party, regardless of their social status.

3. The independence of the Cameroon Constitutional Council:

The Constitutional Council does not fall within the ordinary law courts. It is a special jurisdiction created by the Cameroon Constitution. Its rulings are binding on every citizen and every institution of the state. This is seen in the fact that its decisions are not subject to any form of appeal. This is in line with **Law No 2012/015 of 21 December**

2012 to Amend Law No 2004/004 of 21 April 2004 to lay down the Organization and Functioning of the Constitutional Council in its Section ***4 (2)*** which states that ***"Its rulings shall enter into force upon pronouncement and shall not be subject to appeal".*** Section 15(3) of the above-mentioned law provides that ***"they shall be binding to all public, administrative, military and judicial authorities, as well as on all-natural persons and cooperate bodies".***

Furthermore, the members of the Constitutional Council enjoy immunities, benefits and privileges which guarantee their independence. These members enjoy an inviolable mandate which runs for a period of 6 years renewable. According to the law, a member of the Constitutional Council may not be harassed, prosecuted, arrested, detained or tried on account of his/her opinion expressed or vote cast in the discharge of his/her duties.

B. Analysis of the Principles and Safeguards Necessary to Ensure Judicial Independence.

1. The principles of impartiality of the judge and recusal of judges:

Judicial independence is characterized by the inviolable principle of the impartiality or neutrality of the judge. This internationally recognized principle is echoed in the Latin maxim *"nemo judex in causa sua or nemo judex in re sua"* which signifies you cannot be a judge in your own case. The judge who is guided by the law and his conscience must refrain from putting his interest before that of litigants or treating litigants with some sort of discrimination. The symbol of justice represented by *Themis*, the Greek goddess and personification of justice whose eyes are tied with a band, a sword on her right hand and a scale of balance on the left hand all indicating impartiality, the law and equality must be emulated by all judges.[4] In the Cameroonian judicial system, the individual independence of the judge goes with the principles of impartiality and neutrality.

The legislator has therefore given litigants the possibility to challenge magistrates of the bench through the recusal procedure

4 R Ellet; 'Judicial Independence Under The APRM: From Rhetoric to Reality', South African Institute of International Affairs, 2015; SAIIA Occasional Paper 212, at 6

provided for in criminal matters for example in Section 591 *et seq* of ***Law No 2005/007 of 27 July 2005 on the Criminal Procedure Code in Cameroon (CPC).*** **Section 591 of the CPC** stipulates; ***" any magistrate of the bench or a judge may be challenged for any of the following reasons: (a) where he or his spouse is a relative, guardian, or relative by marriage up till the degree of uncle, nephew, first cousins or the child of the first cousins of one of the parties; (b) where he or his spouse is employer, employee, next of kin, creditor, debtor, companion of one of the parties or director of an enterprise or company involved in the case; (c) where he has previously taken part in the proceedings or he has been an arbitrator or counsel or witness; (d) where he or his spouse is a party in a case which shall be tried by one of the parties;(e) where he/his spouse is involve in any incident tending to show friendship or hatred towards any of the parties or likely to cast a doubt on his impartiality".***

The Government of Cameroon in her striving to constantly attain judicial independence, works in strict compliance with the basic principles of judicial conduct. These principles have been domesticated in our national laws. Magistrates are therefore called upon to respect the said principles in the administration of justice. Before analysing these principles, it is important for us to throw light on the structural organization of the magistracy in Cameroon.

The nomenclature of the magistrate changes depending on the jurisdiction the said magistrate is called upon to mount or serve. Inspiration is therefore drawn from **Law No 2006/015 of 29 December 2006** as amended and supplemented by **Law No 2011/027 of 14 December 2011 on Judicial Organization in Cameroon**. At the level of the bench of the Court of First Instance, we have the President, Presiding Magistrates and Examining Magistrates. At the High Court, the nomenclature changes to judges (Section 17 of the above sited law on judicial organisation illustrates this). At the level of the appellate courts like the Court of Appeal and the Supreme Court, the magistrates are known as Lord Justices, while the Heads of Courts are known as Chief Justices. This is in contrast with magistrates of the Legal Department who go by the nomenclature State Counsel and Deputy State Counsel for the Court of First Instance and High Court, the Procureur General,

Advocate General, Deputy to the Procureur General and attaché at the level of the Procureur General's chambers at the Court of Appeal and Supreme Court. These magistrates are grouped into a hierarchy ranging from first scale, second scale, third scale, fourth scale, super scale group two and super scale group one. From the first to the fourth scale, there is a gap of 6 years.

The Higher Judicial Council is the principal organ in charge of the promotion and career of magistrates in Cameroon. It is governed by Law No 82/014 of 26 November 1982 to lay down the organization and functioning of the Higher Judicial Council in Cameroon. This institution is headed by the President of the Republic and assisted by the Minister of Justice. It has the Secretary General and Members appointed by the President of the Republic, following proposals from certain institutions. The peculiarity of this organ lies in the fact that it has a monopoly in the domain of appointment of magistrates/judges to the bench of the various courts in Cameroon. The Higher Judicial Council is equally in charge of the discipline of magistrates of the bench once they violate the rules governing their profession or infringe on the rights of third parties.

In addition, the career of magistrates is managed by the Ministry of Justice, headed by a Minister of Justice. This ministry ensures judicial independence and the respect for fundamental rights, most especially through its department of Human Rights and International Cooperation. The system put in place permits nationals and internationals resident in Cameroon, or any victim of injustice by the courts in Cameroon to lodge a complaint or file a petition against the said judicial or legal officer who instigated or perpetrated the said violation of the individual's rights to a fair trial.

The Ministry of Justice has a disciplinary council for magistrates of the legal department who violate fundamental norms and fair trial rights (see Article 46 *et seq* of Decree No 95/048 of 8 March 1995 on the Statute of Magistracy as revised in 2012). The sanctions applicable to defaulting magistrates ranges from warnings, reprimand … revocations etc.

2. Security of tenure of office:

Judicial independence is further guaranteed by security of tenure of bench magistrates or judges. The 1995 Decree on the Statute of Magistracy makes it mandatory for the mandate of bench magistrates to be respected, through their non-removal from office arbitrarily within a short period of time. Magistrates at the bench of the Court of First Instance and High Court have a security of tenure of at least 3 years, while those of the Court of Appeal have a tenure of at least 5 years, and those of the Supreme Court, a tenure of at least 8 years.[5] During this period the magistrate of the bench cannot be removed from office or arbitrarily transferred. This of course is in tandem with the Bangalore Principles of Judicial Conduct. This prevents a situation where the executive not being satisfied with the judgment of the judge may decide to remove him from office or transfer him arbitrarily.

II. CHALLENGES TO JUDICIAL INDEPENDENCE AND RECOMMENDATIONS

Challenges to judicial independence in criminal matters encompass various factors that can undermine the impartiality and autonomy of judges when adjudicating criminal cases. These challenges may arise from internal or external sources and can have significant implications for the fairness and integrity of the criminal justice system.

A- Challenges to Judicial Independence as a Safeguard to a Fair Trial in Cameroon

Cameroon judiciary is no stranger to such interferences**.** Some instances of executive interference include:

1. Method of selection of judges:

There have been allegations that the executive plays a role in the appointment and promotion of judges. This can undermine the merit-based selection process and compromise the independence of the judiciary.[6]

5 V Z Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice' The British Institute of International and Comparative Law,2015, p. 57

6 L S Eposi; 'The Problem of Systemic Violation of Civil and Political Rights in Cameroon: Towards A Contextualized Conception of Constitutionalism', PhD Thesis, (2013), University of Warwick, School of Law; at p. 159

In Cameroon, the executive influence on judicial appointments in the Constitutional Council compromises the independence of the judiciary. This is because its President is not elected, but rather appointed by a presidential decree. Besides, their tenure of office is renewable. This makes them subject to the executive in expectation of being reappointed. This is governed by **Law No 2012/015 of 21 December 2012 to Amend Law No 2004/004 of 21 April 2004 to Lay down the Organization and Functioning of the Constitutional Council in its Section 7(2)** which states that ***"The constitutional council shall comprise 11(eleven) members designated for a renewable term of 6 years…"***

2. Delays in judicial appointments:

The executive branch has the authority to delay or withhold the appointment of judges, which can lead to understaffed courts and contribute to case backlogs. Such delays can be seen as a means to exert control over the functioning of the judiciary.

3. Political pressure on judicial decisions:

There have been reports of political pressure being exerted on judges to deliver verdicts in line with the government's interests or to target political opponents. This undermines the impartiality and integrity of the judicial process.

4. Interference in high-profile cases:

There have been instances where the executive branch has been accused of interfering in high-profile cases, either through direct intervention or through exerting influence on the prosecutors or investigators. This interference can compromise the fairness and independence of the judicial proceedings.

5. Limited judicial review of executive actions:

The judiciary's ability to review and scrutinize executive actions, particularly those related to human rights violations or abuses of power, has been questioned. Restrictions on judicial review can limit the judiciary's role as a check on executive power.

B. Recommendations

Addressing executive interference in judicial powers requires a commitment to upholding the principles of an independent judiciary. Some potential measures to mitigate executive interference include:

1. Strengthening judicial appointment processes:

Implement transparent and merit-based procedures for judicial appointments to reduce political influence and ensure the selection of qualified and impartial judges.

2. Safeguarding judicial tenure:

Establish legal protections to ensure security of tenure for judges, preventing arbitrary removal or transfer based on political considerations.

3. Enhancing judicial independence:

Implement legal and institutional reforms to insulate the judiciary from political pressure, allowing judges to make decisions based solely on the law, conscience and evidence presented in court.

4. Securing the financial autonomy of the judiciary:

The judiciary should be financially autonomous, so as to avoid its dependence on the executive. This can be done by allocating a special budget for the judiciary, such that it can function without relying on the Ministry of Finance.

5. Strengthening accountability mechanisms:

Establish effective mechanisms for handling complaints against judges and ensuring fair investigations, while safeguarding against abusive or politically motivated complaints.

6. Encouraging international cooperation:

Seek support and collaboration from international organizations and human rights bodies to promote and protect judicial independence, and to provide guidance on best practices.

CONCLUSION

From the above analysis, it has been discovered that the issue of judicial independence is not a novelty as far as law is concerned. This

concept had been raised by legal minds in the 19th century, and has evolved with the passage of time. It is thus considered as a universal challenge and the preoccupation of the entire legal system. Nevertheless, should the above recommendations be taken into consideration, it will go a long way to ameliorate the status quo and give an absolute free hand to judges wherever they are to deliver judgments based on the law and their conscience.

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

Helena Olivari

CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL CROATIAN LEGAL SYSTEM AND PRACTICE OF CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Helena Olivari[*]

INTRODUCTION

The principle of independence of the judiciary is derived from the fundamental principle of rule of law, especially the principle of separation of powers. According to the principle of the separation of powers, the executive, legislative and judicial powers represent three separate and mutually independent branches of the government. That mutual independence of the different parts of the state power means that no situations are allowed for one branch of the government to encroach on the jurisdiction and powers of the other. Respecting the principle of separation of powers is a key principle of efficient democracy.

I. GENERAL PRINCIPLES

One of the fundamental human rights is a right to a fair trial. The right to a fair trial requires that a case be heard by an "independent and impartial tribunal". Although the impartiality of tribunal is not the theme of this article, it is hard to talk about the independence without mentioning the impartiality. This is because there is no watertight division between these two concepts. Due to their close connection, these two concepts are often examined together (the concept of "independent court" has an objective character while the concept of "impartial court" has a subjective character).

The Constitution of the Republic of Croatia (the Constitution), as the highest state act, contains provisions that enable the implementation

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of the principle of judges' independence and impartiality. Namely, Article 115 of the Constitution provides that judicial power is exercised by courts, and it is autonomous and independent. Article 116 of the Constitution provides that the Supreme Court of the Republic of Croatia, as the highest court, ensures the uniform application of laws and equal justice to all; and that the establishment, jurisdiction, composition and organization of courts and court proceedings are regulated by law. Lastly, the Constitution provides that judicial office shall be vested in judges personally (Article 118), judges shall enjoy immunity following the law (Article 119), and they have life tenure (Article 120).

Furthermore, the right to an independent and impartial court is guaranteed by Article 29 §1 of the Constitution ("Everyone shall be entitled to have his/her rights and obligations, or suspicion or accusation of a criminal offence, decided ... by an independent and impartial court ...").

Apart from the Constitution, the acts that regulate the conduct of courts as well as mechanisms to eliminate reasons for judges' bias are: The Courts Act, The National Judicial Council Act, The Court Rules, The Civil Procedure, The Law on Criminal Procedure and others. All of the proceedings - civil, criminal, administrative, misdemeanor have (if not the same) very similar mechanisms to ensure judicial independence (and impartiality).

The holder of legislative power in the Republic of Croatia is the Croatian Parliament. In the Croatian Parliament, there is a special committee for the judiciary that discusses issues related to the judiciary. This includes both the debate on legislative proposals concerning the judiciary and the debate on the state of the judiciary itself.

II. THE CONCEPT OF "INDEPENDENT" AND "IMPARTIAL" TRIBUNAL

a) The concept of an "independent" tribunal

The concept of an independent tribunal refers to independence *vis-à-vis* the other powers (the executive and legislative powers) and also *vis-à-vis* the parties. When it comes to tribunals' independence from the executive and legislative powers, this independence is not

absolute, bearing in mind that, inter alia, those powers provide material (especially financial) and other means necessary for courts' work. However, those two powers do not have any influence on the basic functions of the courts - the decision-making process. Yet, in reality, by affording sufficient financial resources, the executive and legislative powers influence the status of the judiciary; because by providing better material conditions and sufficient number of judges and other court personnel, the executive and legislative powers can ensure that the judiciary perform its work more efficiently. On the other hand, the courts have the possibility of taking the initiative to propose laws; they can put remarks and proposals on the draft laws which executive power proposes; and they can submit legal remedies for the protection of the Constitution and laws (so-called *exeptio ilegalis* - Article 37 of the Constitution).

Not only does judicial independence demand that individual judges be free from undue influence outside the judiciary, but judicial independence also requires that individual judges be free from undue influence from inside, meaning that judges must be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court such as the president of the court or the head of a department (division) in the court.

In the decision-making process, judges are bound by the Constitution and law, and there must be no form of influence on a judge especially any use of public authority, media or any form of public appearance in general to influence the course and the outcome of the proceedings.

In determining whether a court can be considered to be "independent", the Constitutional Court considers, *inter alia*, the following criteria: a) the manner of judges' appointment b) the duration of their term of office; c) the existence of guarantees against outside pressures (for example media); and d) whether the body presents an appearance of independence.

In Croatia, judicial power is exercised by courts, such as regular (municipal and county courts) and specialized courts (commercial and administrative courts, The High Commercial, Administrative, Criminal and Misdemeanor Courts) in two instances and, the Supreme Court as

the highest court in the country, whose constitutional task is to ensure the uniform application of laws and equal justice to all. Judges in the Republic of Croatia are appointed by the State Judicial Council. The State Judicial Council is an autonomous and independent body which ensures the autonomy and independence of the judicial power in the Republic of Croatia. It autonomously decides, in conformity with the Constitution and law, not only on appointment, but also promotion, transfer, dismissal and disciplinary accountability of judges and presidents of courts (except in the case of the Supreme Court of the Republic of Croatia). The State Judicial Council also participates in the training and professional development of judges and other judicial personnel. The State Judicial Council is not competent to *ex officio* initiate disciplinary proceedings against judges. Those proceedings are initiated by a request to conduct disciplinary proceedings - it there are grounds for suspicion that a judge has committed a disciplinary offence, the president of the court, or the person authorized to perform court administration tasks at the court in which the judge performs his or her judicial office, minister responsible for justice, president of the immediately higher court, president of the Supreme Court or the council of judges may review the work of judges.

In the first-instance court proceedings, decisions are usually ruled by a single judge while in the higher instances (county courts and Supreme Court) by the trial chamber. When the court sits as a trial chamber, the president of the council has a position of "first among equals" and he is not authorized to give binding instructions to other members. All judges of the trial chamber are professionals and all of them have a right to submit dissenting opinions. These rules apply to the judges of the Constitutional Court of the Republic of Croatia (hereinafter referred to as the Constitutional Court) as well. As it is well known, the court practice is of great importance in judging, and even though the Croatian legal system is not a system based on precedents, decisions of the higher courts are binding on the courts of lower instances. Yet, they are binding by the force of legal argument which also constitutes and guarantees the consistency of the case law (as one of the aspects of a fair trial). The second-instance decision is not binding on the court of the first instance, yet the courts of the first and second instances are bound by the Supreme Court's decision which is, according to the

Constitution (Article 116), the highest court in Croatia. Yet, a judge of the first-instance court is bound to undertake all procedural acts and discuss all the relevant issues the second-instance court referred to in its decision. The courts' judicial departments (civil and criminal) may issue a common position which is binding for all judges of that judicial department. So, even though Croatian legal system is not based on precedents, the case law is, let say, informal source of law.

Each court, including the Constitutional Court, has a Records and Documentation Centre, so its role and influence can impose influence on the work of judges.

Lastly, to determine whether a tribunal can be considered to be independent as required by Article 29 § 1, appearances may also be of importance. The standpoint of a party is important but not decisive; what is decisive is whether the fear of the party concerned can be held to be "objectively justified".

The independence of the Constitutional Court's judges

The Constitutional Court guarantees compliance with and application of the Constitution of the Republic of Croatia. Its work is based on provisions of the Constitution of the Republic of Croatia and the Constitutional Act on the Constitutional Court of the Republic of Croatia. The Constitutional Act regulates conditions and procedure for the election of judges of the Constitutional Court and termination of their office, conditions and terms for instituting proceedings for the review of constitutionality and legality, procedure and legal effects of its decisions, protection of human rights and fundamental freedoms guaranteed by the Constitution and other issues of importance for the performance of duties and functions of the Constitutional Court.

The independence of the Constitutional Court derives from Article 2 of the Constitutional Act which reads as follows:

"Article 2

(...)

(2) The Constitutional Court shall be independent of all state bodies, and shall independently distribute the assets approved in the state budget for the functioning of the activities of the Constitutional Court, in accordance with its annual budget and the law.

(3) The internal organization of the Constitutional Court shall be regulated in the Rules of Procedure of the Constitutional Court of the Republic of Croatia (hereinafter: Rules).

(4) The President of the Constitutional Court shall be in charge of the application of the Rules. The Rules shall be interpreted by the Constitutional Court."

As to the judges of the Constitutional Court, their independence is ensured by the Constitution and Constitutional Act. The Constitutional Act contains provisions regarding: (1) their mandate (the mandate lasts for a period of 8 years, judges can be reelected as the Constitutional Act does not set forth exact duration of mandate), (2) their functional immunity (that is a judge of the Constitutional Court cannot be liable to criminal responsibility, arrested or punished for expressing an opinion or voting in the Court, or he/she cannot be detained and criminal proceedings cannot be initiated against him/her without Court's approval unless he/she was caught while committing a criminal act punishable by a prison sentence of more than five years) and, (3) incompatibility of the duties of a constitutional judge (the same applies to any judge) with certain other duties (for example, they cannot perform any other public or neither professional duty, nor they can be a member of a political party. Nor they can show personal favoritism towards any political party by their behavior or actions).

b) The concept of "impartial" tribunal

The concept of "impartial tribunal" denotes the absence of prejudice or bias. In the Croatian legal system, impartiality is ensured by the procedure of disqualification of the judges. The existence of impartiality must be determined based on the following tests (*Denisov v. Ukraine* [GC], 2018, §§ 61-65): i. a subjective test, where regard must be had to the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also, ii. an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. Applying the objective test means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may

raise doubts as to the impartiality of the body itself. In applying the subjective test, the Constitutional Court has consistently held that "the personal impartiality of a judge must be presumed until there is proof to the contrary. In principle, a judge's animosity against a party is a compelling reason for disqualification. In practice, the Constitutional Court often assesses this question utilizing the objective approach.

The Constitutional Act does not recognize the procedure of disqualification of a constitutional court judge in proceedings before the Constitutional Court. Yet, the impartiality is ensured through the judge's abstention from voting. The same rules of subjective and objective tests apply, meaning that in case of existence of any reasons for their disqualification, the President of the Constitutional Court will appoint another judge who will replace the judge who announced that he will recuse himself from voting in a certain case. The disqualification of individual judges of the Constitutional Court is a common practice since the composition of the Court often includes former members of the Parliament who passed laws inconsistency of which with the Constitution is decided, or officials of the executive powers or lawyers.

As to the Constitutional Court's legal advisers (who process the cases and write draft of the decisions) they are not judges and therefore they have no right to judicial independence. In other words, they are not independent from the judges they work with and in that role, they must follow the instructions of the judges.

III. THE CONSTITUTIONAL COURT'S CASE LAW

Constitutional judicature was introduced in the Republic of Croatia in 1963 and the Constitutional Court began to work in 1964.

Constitutional judicature in the Republic of Croatia is divided in two historical periods:

- constitutional judicature in the former Socialist Republic of Croatia (hereinafter: SR Croatia) from 1963 to 1990 - the period when Croatia was one of the six federal units (republics) of the former Socialist Federal Republic of Yugoslavia (hereinafter: former SFRY);

- constitutional judicature in the Republic of Croatia after 1990 - the period after the Republic of Croatia gained independence and sovereignty.

After 1999, there are various jurisdictions of the Constitutional Court but for the purpose of this article it is worth to mention two:

- the proceedings in which the Constitutional Court reviews the constitutionality of a law, and the constitutionality and legality of another regulation (including the one who have lost their legal force), and

- the proceedings in which the Constitutional Court decides on constitutional complaints against the individual decisions of the state bodies (courts), which are lodged by individuals in order to protect their human rights and fundamental freedoms.

When it comes to the question of independence, the Constitutional Court's case shows that question of independence arose more in the cases of abstract review (the proceedings to review the constitutionality of the law and the constitutionality and legality of other regulations of law) rather than in the cases filed through the individual constitutional complaint.

Here are some examples the Court has dealt with, the:

- the case concerning the challenged provisions which provides that common position of the Supreme Court and courts departments of the higher courts are obligatory; the existing mechanism of horizontal and vertical harmonization of judicial practice, in general, was challenged and thus the independence of judges (U-I-6950/2021, 12.4.2021.) - the Constitutional Court did not repeal the challenged provisions because it ascertained that the lack of such a mechanism would lead to violation of the right to a fair trial;

- the case in which provisions of the Court Rules regarding the formation of the Records and Documentation Centre of the High Commercial Court of the Republic of Croatia and its effect on the judge's ruling in a particular case were challenged (U-II-1171/2018, 12.4.2022.) - the Constitutional Court did not repeal the challenged provisions because it ascertained that the Court Rules were adopted by the competent body to implement the law (The Courts Act);

- the case in which the Constitutional Court repealed some provisions of the Act on Salaries of Judges and Other Judicial Officials - the case

considered a unilateral determination of the basis for salaries of judges by the executive power, in the absence of any firm and clear objective criteria. The Constitutional Court emphasized that the manner of determining the salaries of judges, together with the manner for the regulation of certain allowances for them and their pensions, ensures their material independence, which is an inherent part of the guarantee of their overall individual independence. What happened was that the legislator delegated its constitutional power to determine the basis for judicial salaries by the challenged provision to the Government, leaving it to the Government to freely regulate this issue through its decisions and thus breached the principle of separation of powers;

- The permanent transfer of a judge is a question of the organization of the judiciary and does not represent the influence of the executive power on the independence of the courts (U-I-5134/2016, 23.4.2018., U-I-248/2019, 9.4.2019.; The National Judicial Council Act),

- the case of the security clearance of appointed judges as direct interference of executive powers in the judiciary (U-I-2215/2022, 7.2.22.); the Constitutional Court revoked certain provisions of the Courts Act which allowed Security and Intelligence Agency (SOA) to undertake a security clearance of appointed judges. The Constitutional Court ascertained that it is not its task to determine whether security clearance of appointed judges are acceptable in a democratic society but rather to review whether there were provided sufficient reasons for such measure despite already existing mechanism to ensure the integrity of the judicial system (challenged provisions did not pursue a legitimate aim).

Regarding the impartiality, in the Croatian legal system, as it has already been said, impartiality is ensured by the institute's disqualification of the judges. The Constitutional Court has repeatedly emphasized that courts are not immune to criticism and control. Therefore, judges, while performing judicial duties, can be subject to wider personal criticism than ordinary citizens. This is especially important in cases when one of the parties of the proceedings insults the judge (U-III-3373/2018, 23.1.19. - the constitutional complaint of the party to the civil proceedings is rejected).

Here are some examples of the disqualification of the judges:

- the exercise of both advisory and judicial functions in the same case;

- the exercise of both judicial and extra-judicial functions in the same case;

- the exercise of different judicial functions;

- situations of a personal nature (where the judge has a personal interest in the case, namely, the existence of a link between a case being decided by the Constitutional Court and the husband of one of the three judges sitting on the bench, see *Croatian Golf Federation v. Croatia*, 2020, §§ 129-132.)

Here are some cases in which the Constitutional Court did not find any ground for disqualification:

- the fact that a judge has blood ties with a member of a law firm representing a party to a case does not automatically mean that there has been a violation,

- the fact that judges know each other as colleagues or even share the same offices is not in itself sufficient to conclude that any concerns as to their impartiality are objectively justified,

- it is not *prima facie* incompatible with the requirements of impartiality if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined.

IV. CROATIAN JUDICIARY - PROBLEMS

Unfortunately, it is precisely in the implementation of the principle of independence of the judiciary that the most difficulties can be found in Croatian legal reality. Various irregularities, cases and scandals led to the fact that the problematic situation in the Croatian judiciary is apostrophized in the reports of foreign organizations, which is why the international reputation of Croatia as a democratic state and a state of the rule of law is falling. It seems that compared to all other aspects of the right to a fair trial, the issue of the right to an independent judge is by far the weightiest. As a consequence of this systematic failure, other

malformations occurred in the judiciary. Namely, irregularity in the establishment, operation and work of the State Judiciary Council and the resulting negative selection of judges, constant political pressure on the autonomous organization of judges, the trend towards moral and political suitability versus professional integrity and reputation in the legal community as criteria for recruitment and advancement in the judicatory, failures and delays in the implementation of the reform, and, generally, the impossibility of individualizing judges' responsibility (and merits) for the quality of judging.

V. CONCLUSION

It can be said that the right to an independent and impartial court is a fundamental institutional guarantee of the right to a fair trial. Consequently, the independence of the court and judges is essential prerequisite for a fair, legal and objective trial. Recognizing and promptly eliminating any doubt (risk) in independence (and impartiality) must be the professional standard of each court and every judge. Thus, there is no justification for a restrictive interpretation and application of the right to a fair trial, and judges are obliged to make sure that this right is applied during the entire proceedings.

The Constitutional Court with its case law is oriented to penalize the consequences of the violation of the right to a fair trial, yet only with the ability to resolve difficulties within the institutional boundaries of the domestic legal system will make the Republic of Croatia to be able to assert itself as a mature democratic state in which the rule of law is valued and respected by those who alone have the right to judge the law.

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL: LEGAL FRAMEWORK AND PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

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CONSTITUTIONAL COURT OF GEORGIA

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL: LEGAL FRAMEWORK AND PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

Nika Pirvelashvili[*]
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"Justice should not only be done, but should also be seen to be done"- Lord Hewart

I. INTRODUCTION

The realization and safeguarding of constitutional rights, notably the right to a fair trial, are intricately reliant on the presence of an independent judiciary within a democratic framework. This underscores the pivotal role the independent judiciary holds in both the establishment and sustenance of a democratic state.

According to the Constitutional Court of Georgia, "An independent judiciary is an essential component of the realization of the right to a fair trial. The constitutional principle of the independence of the judiciary implies that the court must have a real opportunity to administer justice independently of any interference. From this perspective, any unjustified attack on the court or individual judges would be incompatible with the constitutional guarantee of the independence of the judiciary". [1]

From the aforementioned judgment, it is clear that judicial independence has two interconnected links: institutional independence of the judiciary and the independence of individual judges. Both

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1 Judgement no.1/4/1394 of the Constitutional Court of Georgia dated July 27, 2023, on the case of "Zviad Kuprava v. the Parliament of Georgia".

components are equally important, and without them, judicial independence cannot be sufficiently guaranteed.

Judicial independence is not a self-objective. As mentioned above, in addition to safeguarding the right to a fair trial, it plays a crucial role in the checks and balance system and in achieving and maintaining democracy in a state. As the Constitutional Court has interpreted: "The judge represents the state official who administers justice. Therefore, the existence of democracy and the rule of law and the realization of these objectives in any state are highly dependent on whether the judge performs their functions impartially, independently, and with high professionalism".[2]

After regaining sovereignty from the Soviet Union, ensuring judicial independence became one of the main challenges for Georgia. Over the last 30 years, various governments have implemented several comprehensive legislative reforms in that direction with the collaboration of the Venice Commission and other European institutions.[3]

As a result, the judicial system of Georgia is now empowered with comprehensive guarantees that ensure its independence. These guarantees are expressed in legislation, with some of them being dictated by the judgments of the Constitutional Court of Georgia. At the same time, it should be noted that securing and maintaining judicial independence represents an ongoing and continuous endeavor. Consequently, Georgia remains committed to the ongoing process of reforms aimed at ensuring an independent judiciary.

The objective of this article is to overview the guarantees that ensure the independence of judicial system of Georgia. Primarily, an analysis will be conducted on legislative guarantees of judicial independence,

2 Judgement no. 2/5/658 of the Constitutional Court of Georgia dated November 16, 2017, on the case of "Citizen of Georgia Omar Jorbenadze v. The Parliament of Georgia".

3 See for example, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013) 11/03/2013; Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014); Urgent Opinion on the selection and appointment of Supreme Court judges, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 16 April 2019, endorsed by the Venice Commission at its 119th Plenary (Venice, 21-22 June 2019); Opinion on the December 2021 amendments to the organic Law on Common Courts, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022).

followed by an examination of the case-law within the Constitutional Court of Georgia.

II. LEGISLATIVE GUARANTEES OF THE JUDICIAL INDEPENDENCE

1. CONSTITUTION

Legislative guarantees of judicial independence are provided by various laws. General guarantees are reflected in the Constitution, while more detailed prescriptions are outlined in organic laws on General Courts and the Constitutional Court. Moreover, some of these guarantees are also reinforced in other sectoral legislations, such as the Criminal Code of Georgia.

The general idea of the independence of the judiciary from external influence is expressed in Paragraph 3 of Article 4 of the Constitution, which states: "State authority shall be exercised based on the principle of the separation of powers". This means that the judiciary should be independent from the influence of legislative and executive branches.

This general idea is further elaborated in a separate chapter of the Constitution where the institutional independence of the court and the individual independence of judges are emphasized. According to the Constitution: "Judicial power shall be independent and exercised by the Constitutional Court of Georgia and the Common Courts of Georgia" (Art. 59 of the Constitution). "A judge shall be independent in their activity and shall only comply with the Constitution and the law. Any pressure upon a judge or any interference in their activity in order to influence their decision-making shall be prohibited and punishable by law. No one shall have the right to demand an account concerning a particular case from a judge. All acts restricting the independence of a judge shall be null and void" (Art. 63 of the Constitution).

In order to achieve internal and external independence within the judiciary, the Constitution creates the politically neutral and independent body, the High Council of Justice, which plays an important role in the functioning of the common court system. Among other responsibilities, the High Council of Justice takes part in the selection process of judges.

2. ORGANIC LAWS

2.1. Organic Law on Constitutional Court of Georgia

The Organic Law on the Constitutional Court of Georgia includes crucial provisions designed to safeguard the institutional independence of the Court. Among them is the election of the President and Vice-presidents directly by the members of the Court. In particular, the President and Vice-Presidents of the Constitutional Court shall be deemed elected if they are supported in a secret ballot by at least five members of the Constitutional Court (Art. 10(5)).

In addition, integral to ensuring judicial independence is the assurance of the inviolability of judges within the Constitutional Court. According to the organic law, a member of the Constitutional Court shall enjoy personal inviolability. Criminal prosecution, arrest or detention of a Court member, search of his/her dwelling, car, workplace or his/her personal search shall be inadmissible without the consent of the Constitutional Court. Exception from this shall be catching the member in *flagrante delicto*, of which the Constitutional Court must be immediately notified. If the Constitutional Court fails to give its consent, an arrested or detained member of the Constitutional Court must immediately be released (Art. 15).

An essential safeguard for the court's independence lies in the exhaustive enumeration, within the organic law, of circumstances warranting the premature termination of a Constitutional Court member's powers (Art. 16). The expansion of the delineated grounds is expressly prohibited. Furthermore, it is noteworthy that the organic law defines the guarantees of social protection of the member of the constitutional court which significantly contribute to safeguarding the independence of the judiciary.

In summary, it can be asserted that the legislative framework encompasses mechanisms aimed at securing both the individual and institutional independence of judges within the Constitutional Court of Georgia.

2.2. Organic Law on General Courts

The Organic Law on General Courts encompasses provisions aimed at securing safeguards that uphold the independence and impartiality

of judges within the common court system. According to the organic law, the judge shall assess facts and make decisions only according to the Constitution of Georgia, universally accepted principles and standards of international law, other laws and by his/her inner conviction. A judge may not be requested to report, or instructed as to which decision to make on a particular case (Art. 7(1)). From a procedural standpoint, a fundamental protective guarantee for judges is the prohibition against their arbitrary removal from adjudicating a given case. In particular, according to the organic law, withdrawal of a judge from hearing cases, his/her dismissal from post or transfer to another position shall be permissible only in the cases defined by this Law (Art. 7(2)).

It is imperative to highlight that the legislation explicitly prohibits governmental interference in the operations of the court, thereby safeguarding its institutional autonomy and independence (Art 8). Regarding the assurance of the individual independence of judges, it is noteworthy to underscore that the organic law extensively governs the protocols and procedures pertaining to communication with judges within the general court system (Chap. XII[1]).

The comprehensive regulation within the organic law concerning disciplinary proceedings involving judges merits particular attention, as arbitrary disciplinary actions pose a substantial risk to the fundamental tenet of judicial independence. From this perspective, the organic law extensively addresses a spectrum of concerns related to the judge's disciplinary responsibility, encompassing elements such as the foundations underlying disciplinary accountability, diverse categories of disciplinary misconduct, procedural timelines in disciplinary proceedings, the array of measures that constitute disciplinary consequences, the procedural rules governing disciplinary hearings, as well as the procedures for appealing disciplinary decisions (Chap. XIII[1]).

The legislation also encompasses provisions aimed at ensuring legal and social safeguards for judges. As per the organic law, to ensure the independence of judges, the State shall create dignified living and working conditions, and protect the safety of judges and their families (Art. 68 (2)).

An additional aspect pertinent to this discourse is the assurance provided by the aforementioned statutes, wherein they safeguard the financial autonomy of the judiciary, ensuring its independence from external influence.[4]

III. CASE-LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

1. Judgement of the Constitutional Court of Georgia №3/5/768,769,790,792 of December 29 of 2016

Issue: The constitutionality of the procedure for the election of the President and Deputy Presidents of the Constitutional Court.

The Facts: The members of the Parliament of Georgia and the citizens of Georgia challenged the constitutionality of the regulations of the Organic Law of Georgia on the Constitutional Court of Georgia. Pursuant to the disputed regulations, it was established that "a person may not be elected as President or Deputy President of the Constitutional Court if he/she has previously held the same position". Additionally, a candidate for President of the Constitutional Court should be nominated by an agreed proposal of the President of Georgia, the Chairperson of Parliament of Georgia and the President of the Supreme Court of Georgia. The complainant argued that the disputed provisions disproportionally limited the right to hold public office. Furthermore, in view of the complainant, the competence of the Constitutional Court was narrowed by the disputed norms as the Court was obliged to elect a president from the proposed candidates. The claimant also stated that the participation of other branches of the Government in the election procedure of the President violated the principle of separation of powers.

The Judgement of the Constitutional Court of Georgia: The Constitutional Court of Georgia pointed out that the members of the Constitutional Court not only had the right to be elected as the President of the Court during the entire term of office but also had the right to freely elect the President of the Constitutional Court. While examining the functions of the President and Vice-presidents, the Constitutional Court noted that the above-mentioned officials performed important

4 See, Article 67 of the Organic Law of Georgia "on General Courts" and Article 3 of the Organic Law of Georgia "on the Constitutional Court of Georgia" at: https://www.matsne.gov.ge/.

judicial and administrative functions in the Constitutional Court. Furthermore, the effective fulfilment of these functions was the crucial prerequisite for independence and effective functioning of the Court. Taking into account all the above-mentioned, the Constitutional Court concluded that the restriction, prescribed by the challenged provisions, would be justified only by a significant public interest.

The Constitutional Court of Georgia did not accept the respondent's argument that the impugned regulations were justified by the legitimate aim to grant all members of the Constitutional Court the opportunity to occupy the position of the President and Vice-presidents. Particularly, the Court explained that the disputed norms imposed an artificial restriction on the right of the members of the Constitutional Court to elect the President freely. The Court indicated that the rotation of judges should not be carried out artificially, at the expense of suppressing the will of the judges. Based on the above, the Constitutional Court of Georgia ruled that the right to hold public office was violated.

The Constitutional Court also emphasized that, according to the Constitution of Georgia, 3 members of the Constitutional Court of Georgia were appointed by the President of Georgia, 3 members were elected by the Parliament of Georgia and 3 members were appointed by the Supreme Court of Georgia. The aforementioned constitutional provision established the legitimacy of the President, the Parliament and the Supreme Court of Georgia to participate in the formation of the Constitutional Court of Georgia through the appointment/election of 3 members. The Constitution of Georgia did not grant legitimacy to the President of Georgia, the Chairman of the Parliament and the President of the Supreme Court to interfere in the process of formation of the Court in any other way and to participate in the election of the President of the Constitutional Court.

The Constitutional Court underlined the importance of the institutional independence of the Constitutional Court and noted that an important guarantee of the institutional independence of the Court was its ability to independently elect its President. In this instance, the disputed norm divested the judges of the Constitutional Court of the opportunity to put forward candidacy for the presidency of the Constitutional Court at their own discretion, and their election of the

President of the Constitutional Court was bounded by the candidacy selected by the President of Georgia, the Chairman of the Parliament of Georgia and the President of the Supreme Court of Georgia. The members of the Constitutional Court seemed to have a diminished role in the court's formation when such limits were imposed.

The Constitutional Court also pointed out that according to the Constitution of Georgia, the judicial power was independent and exercised only by courts. Accordingly, any unjustified and illegitimate interference in the activities of the judiciary, and in its formation, directly contradicted the aforementioned constitutional provision. The Constitutional Court, as a judicial body of constitutional control, ensured the protection of the supremacy of the Constitution, the principle of separation of powers and human rights. Consequently, the independence of the Constitutional Court had an immanent character for the existence of this constitutional institution.

Based on the foregoing argumentation, the Constitutional Court ruled that the disputed provisions unconstitutionally restricted the freedom of the Constitutional Court to elect its President. This kind of regulation represented the unjustified, illegitimate interference of other branches of the Government in the formation of the Constitutional Court, which resulted in breach of Article 82(3) of version of the Constitution of Georgia that was in force until 16 December 2018.

2. Judgement of the Constitutional Court of Georgia №3/1/1459,1491 of July 30 of 2020

2.1. Judgement

Issue: The constitutionality of the procedure of selecting candidates for the position of a judge of the Supreme Court of Georgia by the High Council of Justice of Georgia.

Facts: According to the disputed provisions, the decision of the High Council of Justice of Georgia regarding the nomination of judges of the Supreme Court of Georgia to the Parliament was made through a secret ballot procedure and did not require substantiation.

According to the arguments of the Public Defender of Georgia, such procedure was not constrained by criteria such as integrity and competence of a candidate. Therefore, there was a loophole, which

created a risk that instead of the candidates with the highest competence and good faith, the nominees for the Supreme Court judges would be chosen in a biased way.

The complainant explained that only a court, established and staffed on the basis of the relevant procedures stipulated by the Constitution has constitutional legitimacy. The court can be considered independent and impartial when the sole criteria of the selection of Judges are their competence and good faith. The disputed norms, which did not preclude partial and unreasonable conducting of the selection process, called into question the constitutional legitimacy of the Court and was contrary to the constitutionally guaranteed rights to holding public office and a fair trial.

According to the decision of the Constitutional Court, the power to select and appoint members of the Supreme Court was shared by the High Council of Justice (the judiciary) and the representative political power (Parliament), and the final decision was made by the political authorities.

When making a decision, the Parliament, as well as the members of the High Council of Justice, were bound by the constitutional requirement - the candidate be selected based on good faith and competence criteria. Furthermore, the Court pointed out that the participation of the two constitutional bodies in the process of selection and appointment of judges of the Supreme Court of Georgia, their functions, purpose, and status, in combination, ensured staffing of the Supreme Court in accordance with the requirements of the Constitution - with conscientious judges having appropriate competence.

The Constitutional Court additionally emphasized that, in accordance with the Constitution of Georgia, the exclusive competence to nominate suitable candidates for the position of a judge rested with the High Council of Justice of Georgia. The decision made by this body was deemed legitimate, grounded in the legal assurances governing the staffing procedure and activities of the High Council of Justice. Consequently, a procedural model wherein a decision by the Board was determined through a vote of its members without necessitating supplementary written justification did not impugn the quality and credibility of the decision in question.

Further, the Court clarified that the right to hold public office was also not violated by the rule of secrecy of decision-making, as the confidentiality of the vote primarily functioned to facilitate an objective and equitable decision-making process, safeguarding the independence and shielding each member of the Council from external or other forms of influence.

In light of the aforementioned considerations, given that the contested norms upheld the composition of the Supreme Court in conformity with the standards outlined in the Constitution of Georgia, the Constitutional Court determined that no infringement upon the right to a fair trial had occurred.

2.2. The dissenting opinion of the Judges of the Constitutional Court of Georgia - Teimuraz Tughushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili

According to the dissenting opinion, the will of the Constitution is unequivocal that in the process of selecting judges, decisions based on expediency characteristic of the political process should be minimized. The dissenting authors assert that the authority to make decisions without providing justification is, in essence, tantamount to decisions guided by expediency or desire (in this case, the desire of the members of the High Council of Justice).

According to the rationale presented in the dissenting opinion, the principle of democracy necessitates that crucial state decisions be founded on legal considerations rather than expediency.

Based on the analysis of the relevant norms of the Organic Law of Georgia "On Common Courts", the authors of the dissenting opinion considered that the first stage of the selection process did not allow council members to evaluate candidates adequately and objectively and did not even consider the minimum elements of the requirement of justification. In addition, according to the authors of the dissenting opinion, the secrecy of the vote further reduced the transparency of the decisions made by the members of the Council and the degree of their accountability.

In assessing the right to a fair trial in the impugned norms, the authors of the dissenting opinion explained that the personal and

professional characteristics of the judges directly exercising judicial power are crucial for the practical realization of this right. Thus, the procedure for selecting judges of the Supreme Court was to ensure the appointment of qualified, conscientious judges in accordance with the requirements of the Constitution, and to build public confidence in the process.

The stages of selection of judges, according to the authors of the dissenting opinion, did not meet the above-mentioned constitutional requirements, in particular, it did not allow for a full evaluation of the candidate for a judge and thus the council was deprived of the opportunity to make a thoughtful decision based on the objective criteria. Moreover, the procedure did not provide a mechanism for substantiating the decision made by the council at each stage, which, in the absence of a connection between the candidates' results of their secret vote and their evaluation scores, made the logic of the decision completely incomprehensible.

Due to the above-mentioned reasons, the authors of the dissenting opinion considered the disputed procedure unconstitutional.

3. MECHANISM OF RECUSAL

The nexus between judicial independence, impartiality, and the right to a fair trial is also manifest in the procedural mechanism of recusal, wherein a member of the Constitutional Court refrains from participating in the proceedings.

According to Article 46 of the Organic Law of Georgia on the Constitutional Court of Georgia:

If the member of the Constitutional Court has a direct or indirect interest in the outcome of a case, or if there are other circumstances that raise doubts about the impartiality of the member of the Constitutional Court, a party shall have the right to raise an issue of recusal of a member of the Constitutional Court participating in the proceeding as well as a member of the Constitutional Court shall have the right to abstain from participating in the proceeding.

According to the case law of the Constitutional Court of Georgia, the Independence and Impartiality of the judges are closely related to

the right to a fair trial and contribute to the formation of public trust in the court. For that reason, the trial court should not only be factually objective (subjective impartiality) but should also be perceived as such by the public (objective impartiality).

The fact of whether there is a necessity for the recusal of a member of the Constitutional Court from participating in the proceeding should be established case-by-case basis. So far there have been several cases, where the Court discussed the impartiality of the members of the Constitutional Court and established some important standards.

For instance, the Court established that:

1) The mere fact that the judge was previously part of the collegial body (for instance, parliament) that adopted the disputed law at the Constitutional Court cannot, by itself, serve as a sufficient basis for removing the judge from considering a case.[5]

2) The mere fact that the trial judge "loved"/made "heart emotion" a Facebook post criticizing the amendments related to a judiciary, which later became a subject of dispute at the Constitutional Court, cannot, by itself, be considered a sufficient basis for removing the judge from considering a case.[6]

In contrast,

3) The participation of a Constitutional Court member in a competition for the selection of judges for the Supreme Court is sufficient grounds for their removal from considering a case related to checking the constitutionality of provisions regulating this competition.[7]

IV. CONCLUSION

As previously noted, the judiciary and its pursuit of independence have traversed a considerable historical trajectory in Georgia. Currently, the independence of the judiciary in Georgia is legislatively guaranteed, closely aligning with the recommendations of the Venice

5 Ruling no. 1/1/1334 of the Constitutional Court of Georgia dated January 28, 2019, on the case of "N(N)LE "The Georgian Democracy Initiative" v. High Council of Justice of Georgia".

6 Ruling no. 3/1/1693,1700 of the Constitutional Court of Georgia dated November 24, 2022, on the case of "Eka Areshidze, Ketevan Meskhishvili, Madona Maisuradze, Mamuka Tsiklauri, Tamar Khazhomia and the Public Defender of Georgia v. the Parliament of Georgia".

7 Ruling no. 3/1/1459 of the Constitutional Court of Georgia dated November 27, 2019, on the case of "The Public Defender of Georgia v. the Parliament of Georgia".

Commission. Nevertheless, as highlighted earlier, ensuring and perpetuating judicial independence remains a persistent and ongoing endeavor.

Simultaneously, it is imperative to underscore, as demonstrated by the aforementioned cases, that the Constitutional Court of Georgia, serving as the guarantor of constitutional rights, including the right to fair trial, assumes a crucial role in safeguarding the independence of the judiciary.

The Constitutional Court of Georgia possesses the jurisdiction to address matters pertaining to the independence of both the general court system and the constitutional court system. Moreover, in the jurisprudence of the Constitutional Court of Georgia, there have also been cases where the court has considered issues directly linked to the independence and impartiality of judges.

Hence, in addition to legislative safeguards, as an integral part of the judicial system, the Constitutional Court of Georgia dedicates considerable attention to ensuring the independence of the judiciary, a fundamental prerequisite for safeguarding the right to a fair trial.

НЕЗАВИСИМОСТЬ СУДЕЙ И ПРАВО НА СУДЕБНУЮ ЗАЩИТУ В КАЗАХСТАНЕ

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НЕЗАВИСИМОСТЬ СУДЕЙ И ПРАВО НА СУДЕБНУЮ ЗАЩИТУ В КАЗАХСТАНЕ

*Bekturov Serik**
*Asset Balgyntayev***

Добрый день! Уважаемые участники, организаторы Международной летней школы, тема которой является актуальной и значимой не только для органов конституционного контроля, но и в целом для судей и судов.

Во-первых, хотелось бы поблагодарить организаторов, Конституционный Суд Турции за приглашение, предоставление возможности выступить, поделиться опытом и обменяться мнениями.

Тема летней школы посвящена двум фундаментальным категориям, без которых в современном обществе не представляется функционирование судов, это независимость судей и право на справедливое судебное разбирательство. Руководство Казахстана уделяет большое внимание этим вопросам, что можно видеть, в том числе из программных документов правового характера.

Свой доклад я бы хотел поделить на 3 части:

1) деятельность Конституционного Суда Казахстана;

2) правовые основы независимости судей в Казахстане;

3) права на судебную защиту в правовых позициях.

1) Согласно статье 1 Конституционного закона «О Конституционном Суде Республики Казахстан» от 5 ноября 2022

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года (далее – Конституционный закон) Конституционный Суд Республики Казахстан обеспечивает верховенство Конституции Республики Казахстан на всей ее территории. Свою деятельность Конституционный Суд начал с 1 января 2023 года.

Исторически сложилось, что еще на заре независимости в начале 90-х годов прошлого столетия в Казахстане действовал Конституционный Суд (1992-1995 г.), который в последствии был заменен Конституционным Советом Республики Казахстан (1995-2022 г.).

Новый Конституционный Суд был образован (действует с 1 января 2023 г.) по итогам конституционной реформы в 2022 году и состоит из 11 судей, включая Председателя и его заместителя. Одним из новел в деятельности Конституционного Суда является расширение субъектов обращения. Теперь, в Конституционный Суд могут обращаться граждане, Президент, Председатели Палат Парламента, депутаты Парламента, Премьер-министр, Уполномоченный по правам человека, Генеральный прокурор и суды.

Ранее граждане не могли на прямую обращаться в орган конституционного контроля, такое право было предоставлено опосредовано через общие суды. Предоставление права гражданам на прямую обращаться в Конституционный Суд стало важнейшим этапом развития правозащитных механизмов в обеспечении конституционных прав и свобод граждан. Кроме того, также новыми субъектами обращения стали Уполномоченный по правам человека и Генеральный прокурор Республики Казахстан.

В соответствии со статьей 45 Конституционного закона Конституционный Суд по обращению граждан рассматривает на соответствие Конституции Республики Казахстан нормативные правовые акты Республики Казахстан, непосредственно затрагивающие их права и свободы, закрепленные Конституцией Республики Казахстан.

Конституционный порядок и сроки рассмотрения обращений установлены Конституционным законом. Так, в статье 53 Конституционного закона отмечается, что Конституционный Суд рассматривает обращение и выносит по нему итоговое решение в течение месяца со дня принятия обращения к конституционному производству. При этом итоговое решение

по обращениям граждан выносится в течение трех месяцев со дня принятия обращения к конституционному производству. С учетом сложности обращения и необходимости более полного исследования всех обстоятельств указанные сроки могут быть продлены Конституционным Судом на разумный срок, о чем уведомляются заинтересованные лица.

По требованию Президента Республики Казахстан, изложенному в письменной или электронной форме, срок для принятия итогового решения по направленному им обращению может быть сокращен до десяти календарных дней, если вопрос не терпит отлагательства.

В случае объединения Конституционным Судом в одно конституционное производство связанных между собой обращений срок, предусмотренный настоящим Конституционным законом для вынесения итогового решения, исчисляется со дня поступления последнего обращения.

Конституционный порядок рассмотрений обращений включает:

1) предварительное изучение обращения, переданного Председателем Конституционного Суда судьей (судьями) Конституционного Суда. Результаты докладываются в заседании Конституционного Суда (статья 48);

2) заседание Конституционного Суда, где обсуждается и решается вопрос принятия или отказа в принятии обращения к конституционному производству (статья 48);

3) в случае отказа в принятии принимается мотивированное постановление Конституционного Суда, о котором уведомляются заявители;

4) в случае принятия обращения к конституционному производству выносится постановление о принятии;

5) после принятия обращения к конституционному производству распоряжением Председателя Конституционного Суда определяется судья – докладчик (как правило, это судья, который предварительно изучал обращение и докладывал на заседании) и срок подготовки материалов;

6) судьей – докладчиком совместно с аналитиком

КонституционногоСуданаправляютсязапросывзаинтересованные государственные органы и организации, научные учреждения, вузы. При необходимости определением судьи могут быть назначены эксперты в соответствующей области;

7) при необходимости судья докладчик может производить опрос государственных органов по предмету обращения;

8) за 10 дней до заседания судьей – докладчиком совместно с аналитиком Конституционного Суда готовятся материалы конституционного производства;

9) распоряжением Председателя Конституционного Суда определяется дата заседания Конституционного Суда, о чем уведомляются участники конституционного производства, иные лица и органы, привлекаемые при рассмотрении обращения;

10) заседание Конституционного Суда по рассмотрению обращения;

11) удаление Конституционного Суда в совещательную комнату;

12) оглашение итогового решения Конституционного Суда;

13) уведомление участников конституционного производства, государственных органов об итоговом решении Конституционного Суда, размещение его на интернет-ресурсах (статья 65).

По итогам рассмотрения обращений о проверке конституционности законов и иных правовых актов Конституционный Суд принимает одно из следующих нормативных постановлений:

1) о признании закона или иного правового акта либо отдельных их положений соответствующими Конституции Республики Казахстан;

2) о признании закона или иного правового акта либо отдельных их положений соответствующими Конституции Республики Казахстан в данном Конституционном Судом истолковании;

3) о признании закона или иного правового акта либо отдельных их положений не соответствующими Конституции Республики Казахстан.

По состоянию на сентябрь 2023 года в Конституционный Суд поступило более 4 тыс. обращений граждан. Вынесено 27

нормативных постановлений Конституционного Суда Республики Казахстан.

В свою очередь Конституционный закон возлагая на Конституционный Суд обеспечение верховенства Конституции предусмотрел законодательные гарантии деятельности судей Конституционного Суда. К ним относятся следующие принципы:

- независимость судей Конституционного Суда;

- неприкосновенность судей Конституционного Суда;

- равенство прав судей Конституционного Суда;

- обеспечение прав судей Конституционного Суда;

- материальное и социальное обеспечение судей Конституционного Суда.

Данные гарантии в совокупности создают необходимые условия для обеспечения независимости судей Конституционного Суда.

В свою очередь воссоздание Конституционного Суда Республики Казахстан должно послужить новым этапов в развитии конституционализма, идеи верховенства Конституции и прав человека.

2) Для общих судов, которые рассматривают дела по существу создана законодательная база, позволяющая осуществлять правосудие на основе принципов и идеи судебной власти.

Правовую основу обеспечения независимости судей в Республике Казахстан образуют Конституция Республики Казахстан и Конституционный закон Республики Казахстан от 25 декабря 2000 года «О судебной системе и статусе судей Республики Казахстан». Так, в Основном законе стране содержится целый раздел, посвященный судам и правосудию (Раздел VII). Согласно статье 77 судья при отправлении правосудия независим и подчиняется только Конституции и закону. Какое-либо вмешательство в деятельность суда по отправлению правосудия недопустимо и влечет ответственность по закону. По конкретным делам судьи не подотчетны.

Таким образом, Конституция Казахстана гарантирует независимость судей.

Следует отметить, что судебную систему Казахстана образуют

Верховный Суд, местные (областные и приравненные к ним суды (городской суд столицы республики, городские суды городов республиканского значения), районные и приравненные к ним суды (городской суд, межрайонный суд).) и другие суды. К другим судам закон относит специализированные суды.

Дальнейшее проецирование основных принципов независимости судей находит свое отражение в Конституционном законе Республики Казахстан «О судебной системе и статусе судей Республики Казахстан». Данный закон содержит статью 25, где отмечается: «1. Независимость судьи защищается Конституцией и законом. При осуществлении правосудия судьи независимы и подчиняются только Конституции Республики Казахстан и закону. 2. Никто не вправе вмешиваться в осуществление правосудия и оказывать какое-либо воздействие на судью и присяжных заседателей. Такие действия преследуются по закону. 3. Судья не обязан давать каких-либо объяснений по существу рассмотренных или находящихся в производстве судебных дел. Тайна совещательной комнаты должна быть обеспечена во всех без исключения случаях. 4. Финансирование судов, материальное и социальное обеспечение судей, а также предоставление им жилья производятся за счет средств республиканского бюджета в размерах, достаточных для полного и независимого осуществления правосудия».

Между тем, в статья 26 этого же закона установлено, что гарантии независимости судьи обеспечиваются путем предусмотренной законом процедурой осуществления правосудия, установлением законом ответственности за осуществление вмешательства в деятельность судьи по отправлению им правосудия, а также за проявление неуважения к суду и судьям, неприкосновенностью судьи, установленными Конституцией Республики Казахстан, настоящим Конституционным законом и Законом Республики Казахстан "О Высшем Судебном Совете Республики Казахстан" порядком избрания, назначения на должность, прекращения и приостановления полномочий судьи, правом судьи на отставку, а также предоставлением судьям за счет государства материального содержания и социального обеспечения, соответствующих их статусу, а также запретом на его ухудшение.

Кроме того, законодательство Казахстана предусматривает

административную и уголовную ответственность на какое-либо вмешательство и посягательство в деятельности судей и судей Конституционного Суда. Наличие правовых основ для обеспечения независимости судей предполагает постоянного реагирования государства и общества на различные риски, в том числе связанных с бурным развитием информационно-коммуникационных технологии и др.

В этой связи Конституционный Суд Республики Казахстан в своем нормативном постановлении отмечал, что государство обязано обеспечить такие условия отправления правосудия и организации судебной власти, при которых исключались бы любые возможности неправомерного воздействия на судью, препятствующие свободному принятию им решений, основанных на Конституции, законах и внутреннем убеждении. Основания и процедуры прекращения или приостановления полномочий судей должны обеспечивать реализацию конституционного принципа независимости судей (нормативное постановление от 6 декабря 2023 года № 36-НП).

3) Право на доступ к правосудию в международно-правовом контексте закреплено в статье 8 *Всеобщей декларации прав человека*, где говорится, что «каждый человек имеет право на эффективное восстановление в правах компетентными национальными судами в случаях нарушения его основных прав, предоставленных ему конституцией или законом».

В статье 14 *Международного пакта о гражданских и политических правах* также закреплено данное право:

В статье 14 Международного пакта о гражданских и политических правах от 16 декабря 1966 года, ратифицированного Республикой Казахстан Законом от 28 ноября 2005 года, говорится о равенстве перед судами и трибуналами, праве на справедливое и публичное разбирательство дела компетентным, независимым и беспристрастным судом (статья 14). Эти права должны соблюдаться и в судебных процедурах, и в процедурах, являющихся судебными по своему характеру *(Замечание общего порядка Комитета по правам человека Организации Объединенных Наций № 32, CCPR/C/GC/32 от 23 августа 2007 года к статье 14: Равенство перед судами и трибуналами и право каждого на справедливое судебное разбирательство).*

В пункте 2 статьи 13 Конституции Республики Казахстан закреплено: «Каждый имеет право на судебную защиту своих прав и свобод».

Пунктом 1 статьи 75 Конституции правосудие в Республике Казахстан осуществляется только судом.

Судебная власть осуществляется посредством *гражданского, уголовного и иных установленных законом форм судопроизводства*. В случаях, предусмотренных законом, уголовное судопроизводство осуществляется с участием присяжных заседателей *(пункт 2 статьи 75 Конституции)*.

Подпунктом 6) пункта 3 статьи 61 Конституции Парламент вправе издавать законы, которые регулируют важнейшие общественные отношения, устанавливают основополагающие принципы и нормы, касающиеся вопросов судоустройства и судопроизводства.

В статье 1 Конституционного закона Республики Казахстан «О судебной системе и статусе судей Республики Казахстан» отмечается, что:

«Каждому гарантируется судебная защита от любых неправомерных решений и действий государственных органов, организаций, должностных и иных лиц, ущемляющих или ограничивающих права, свободы и законные интересы, предусмотренные Конституцией и законами республики.

Никто не может быть лишен права на рассмотрение его дела с соблюдением всех требований закона и справедливости компетентным, независимым и беспристрастным судом.

Право каждого на судебную защиту носит комплексный характер, так как является предметом регулирования отраслевого законодательства (посредством административного, уголовного, гражданского судопроизводства), которое было неоднократно предметом рассмотрения Конституционным Советом, а также являются предметом рассмотрения Конституционным Судом Республики Казахстан.

1. Так, разъясняя пункт 2 статьи 13 Конституции, Конституционный Совет, указал, что право на судебную защиту, закрепленное в пункте 2 статьи 13 Конституции, является основной гарантией защиты прав и законных интересов граждан.

2. Норма пункта 2 статьи 13 Конституции Республики Казахстан «Каждый имеет право на судебную защиту своих прав и свобод» означает право любого человека и гражданина обратиться в суд за защитой и восстановлением нарушенных прав и свобод. Реализация этого права осуществляется на основе и в порядке, установленном законом *(Постановление Конституционного Совета Республики Казахстан от 29 марта 1999 года № 7/2);*

3. Устанавливая в пункте 2 статьи 13 Конституции право человека, гражданина на судебную защиту своих прав и свобод, Конституция Республики предполагает возможность каждого обратиться в суд за защитой и восстановлением нарушенных прав и свобод. При этом Конституция не определяет порядок реализации этого конституционного права. Из статьи 75 и подпункта 3) пункта 3 статьи 77 Конституции следует, что этот механизм устанавливается в законах Республики, регламентирующих вопросы организационно-правового построения судебной системы и отправления правосудия *(Постановление Конституционного Совета Республики Казахстан от 5 мая 1999 года № 8/2);*

4. Из пункта 2 статьи 13 Конституции не следует, что каждый человек может лично обращаться в суд независимо от возраста, психического состояния, по собственному усмотрению выбирать способ и процедуру судебной защиты. Реализация закрепленного в пункте 2 статьи 13 Конституции права на судебную защиту осуществляется на основе и в порядке, установленном законом. Конституционный Совет уже указывал на это обстоятельство в своем постановлении от 29 марта 1999 года № 7/2 «Об официальном толковании пункта 2 статьи 13, пункта 1 статьи 14, пункта 2 статьи 76 Конституции Республики Казахстан». В частности, нормы процессуального законодательства Республики, обеспечивая реализацию права на судебную защиту каждого человека, устанавливают особые правила для несовершеннолетних и лиц, признанных недееспособными *(Постановление Конституционного Совета Республики Казахстан от 1 ноября 2000 года № 19/2);*

5. Как следует из постановления Конституционного Совета от 10 июля 2000 года № 14/2 эта конституционная гарантия предполагает охрану прав и свобод каждого от всякого рода произвола посредством обращения в суд в порядке, установленном

законом. При этом согласно пункту 2 статьи 76 Конституции суду подведомственны все дела и споры, возникающие на основе Конституции, законов, иных нормативных правовых актов, международных договоров Республики *(Постановление Конституционного Совета Республики Казахстан от 20 декабря 2000 года № 21/2);*

6. Гарантированное пунктом 2 статьи 13 Основного Закона право каждого на судебную защиту своих прав и свобод реализуется только в судах, созданных и осуществляющих правосудие в соответствии с Конституцией и конституционным законом.

Механизм реализации этого конституционного права «устанавливается в законах Республики, регламентирующих вопросы организационно-правового построения судебной системы и отправления правосудия» *(Постановление Конституционного Совета от 5 мая 1999 года № 8/2).* При создании судов должны соблюдаться требования пункта 1 статьи 14 Конституции о равенстве всех перед законом и судом *(Постановление Конституционного Совета Республики Казахстан от 14 апреля 2006 года № 1*);

7. Указанное право, вытекающее из пункта 2 статьи 13 Конституции о праве каждого на судебную защиту своих прав и свобод, в совокупности с положениями раздела VII Основного Закона «Суды и правосудие» дополняет институт защиты прав и свобод человека и гражданина в уголовном судопроизводстве. Как отмечается в Указе Президента Республики Казахстан от 4 декабря 2001 года № 735 «О дальнейших мерах по реализации Стратегии развития Казахстана до 2030 года», возникновение у подсудимого права на рассмотрение его дела судом с участием присяжных заседателей либо коллегией судей «является дополнительной гарантией защиты прав человека в судебном процессе». Вопросы же придания обратной силы закону, устанавливающему или расширяющему процессуальные права человека, подпунктом 5) пункта 3 статьи 77 Конституции не регулируются.

8. Гарантируя человеку право на признание правосубъектности, Конституция наделяет его возможностью защищать свои права и свободы всеми, не противоречащими закону способами (пункт 1 статьи 13).

9. Закрепленные в разделе II «Человек и гражданин» Конституции

Республики основные права и свободы человека и гражданина, в числе которых право на признание правосубъектности (пункт 1 статьи 13), право на жизнь (пункт 1 статьи 15), право на личную свободу (пункт 1 статьи 16), право на неприкосновенность достоинства (пункт 1 статьи 17), свобода слова (пункты 1 и 2 статьи 20) и другие, являются прирожденными, признаются абсолютными и неотчуждаемыми (пункт 2 статьи 12), а права и свободы, предусмотренные пунктом 1 статьи 13, пунктом 1 статьи 15, пунктом 1 статьи 16 и пунктом 1 статьи 17, кроме того, – не подлежащими ограничению ни в каких случаях (пункт 3 статьи 39 Конституции) *(Постановление Конституционного Совета Республики Казахстан от 27 февраля 2008 года № 2*);

10. Право на судебную защиту относится к процессуальному праву и используется лицом в качестве главного средства защиты его нарушенных прав и свобод *(Постановление Конституционного Совета от 11 мая 2001 года № 5/2).*

Вместе с тем сама по себе подача жалобы на решение, вступившее в законную силу, не влечет его обязательного пересмотра (постановление Конституционного Совета от 24 февраля 1997 года № 1/2).

Согласно *нормативного постановления Верховного суда Республики Казахстан* «О праве доступа к правосудию и правомочиях Верховного Суда Республики Казахстан по пересмотру судебных актов» от 15 января 2016 года № 1 отметил, что при реализации конституционного принципа о праве каждого на судебную защиту своих прав и свобод следует исходить из разъяснений постановлений Конституционного Совета Республики Казахстан от 29 марта 1999 года № 7/2 и от 1 декабря 2003 года № 12 о том, что:

норма пункта 2 статьи 13 Конституции Республики Казахстан означает право любого человека и гражданина обратиться в суд за защитой и восстановлением нарушенных прав и свобод, с реализацией этого права на основе и в порядке, установленном законом;

принцип равенства перед законом, гарантированный пунктом 1 статьи 14 Конституции, означает, что именно в законах определяются конкретные условия и обстоятельства, позволяющие реализовать права и свободы человека и гражданина;

Вопросы связанные с реализацией права на судебную защиту продолжает иметь высокую актуальность являются основанием для обращения граждан в Конституционный Суд на предмет соответствия пункту 2 статьи 13 Основного Закона.

Таким образом, следует отметить, что независимость судей как гарантия на справедливое судебное разбирательство является важным и безусловным атрибутом отправления правосудия.

Спасибо за внимание!

ENSURING JUDICIAL INDEPENDENCE IN KOSOVO: THE CONSTITUTIONAL COURT'S ROLE AND THE RIGHT TO A FAIR TRIAL AS AN INTEGRAL PART OF JUDICIAL INDEPENDENCE

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CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

ENSURING JUDICIAL INDEPENDENCE IN KOSOVO: THE CONSTITUTIONAL COURT'S ROLE AND THE RIGHT TO A FAIR TRIAL AS AN INTEGRAL PART OF JUDICIAL INDEPENDENCE

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1. INTRODUCTION

The independence of the judiciary is a cornerstone of any liberal democracy and a fundamental principle of the rule of law. An independent judiciary, by ensuring that the executive and legislative branches do not abuse their powers, plays a crucial role in safeguarding the fundamental rights and freedoms of citizens. In the context of new democracies, the principles of separation of powers and human rights are regarded as pivotal for the functioning of the state. In this regard, the right to a fair trial is intrinsically linked to the presence of an independent and impartial court established by law. This presentation focuses specifically on the independence of the judiciary as a critical guarantee of a fair trial in the Republic of Kosovo, highlighting its status as a nascent democracy. The focus will centre on (i) the concept of judicial independence; (ii) the principal constitutional provisions safeguarding the independence of the judiciary; and (iii) the case-law of the Constitutional Court of the Republic of Kosovo in upholding judicial independence, by elaborating on landmark cases of the Court that have addressed this vital issue.

2. THE JUDICIARY'S INDEPENDENCE: GUARANTEEING THE RIGHT TO A FAIR TRIAL

The independence of the judiciary is one of the most prevalent concepts in European constitutional law, intrinsically linked to the rule

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of law.[1] An independent judiciary is a prerequisite for ensuring a fair trial and for making impartial decisions on the rights and responsibilities of citizens.[2] Many scholars emphasise that an independent judiciary is crucial for the protection of individual rights and freedoms.[3] According to the Venice Commission, the independence of the judiciary is a key component in guaranteeing the protection of fundamental human rights and freedoms. Without an independent judiciary, there can be no legal enforcement of human rights and freedoms. In this regard, the independence of the judiciary is not a personal privilege of the judge but a necessity to fulfil their mission as the guardian of rights. The judicial system should be designed in such a way as to enable the election of professional judges and ensure that they are not subject to external influences.[4] The Venice Commission has stressed that the independence of the judiciary means that judges are free from external pressure, and courts are not subject to influence or manipulation, especially by the executive power; the financial aspect is crucial to guarantee judicial independence from other state institutions, ensuring that the judiciary can perform its duties with integrity and effectiveness, thus enhancing public trust in justice and the rule of law. Moreover, reducing the budget for the judiciary may constitute interference and pressure on the justice system.[5] The independence of the judiciary also means that the justice system is separate from the executive and legislative powers, and there is no organic link between these powers. The judiciary and judges must perform their duties and responsibilities independently from the influence of the executive power and any other authority. Thus, an independent judicial system ensures respect for the law and prevents abuse of power.[6] According to the Court of Justice of the European Union, the concept of judicial independence entails

1 Rafael Bustos Gisbert, *Judicial Independence in European Constitutional Law*, European Constitutional Law Review, 18 (2022), p. 591.

2 Consultative Council of European Judges (CCJE), *Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, Opinion No. 1 (2001), p. 3.

3 Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, Faculty Scholarship at Penn Carey Law, (2003), Vol. 64, p. 324.

4 European Commission for Democracy through Law, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, Study No. 494 / 2008, Strasbourg, 16 March 2010, p. 3.

5 Rule of Law Checklist (CDL-AD(2016)007-e), adopted by the Venice Commission at its 106th Plenary Session on 11-12 March 2016, p. 20.

6 European Commission for Democracy through Law, *Compilation of Venice Commission Opinions and Reports Concerning Judges*, Strasbourg, 18 July 2023, pp. 5-6.

that the body in question exercises its judicial functions completely autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without receiving orders from any source, ensuring it is independent from external interference or pressures that could impair the independent judgment of its members and influence their decisions.[7]

In this regard, the independence of the court is measured by several factors: (i) the manner in which the members of the court are appointed; (ii) the duration of their mandate; (iii) guarantees against external interference; and (iv) whether the court appears to be independently operating.[8] The impartiality of the judges, on the other hand, also plays an important role. In this context, impartiality means that the members of the court must not harbour any subjective prejudice against the parties to the proceedings and, from an objective standpoint, they must provide sufficient guarantees to exclude any legitimate doubts in this respect. In a democratic society, it is important for the court to inspire confidence both in the public and the parties involved in a dispute. Therefore, it is required that the court demonstrates impartiality. Impartiality is considered subjective when judges do not exhibit prejudice towards the parties to the proceedings. Conversely, objective impartiality means that judges exhibit no legitimate doubts about their impartiality.[9]

3. THE KOSOVO CONSTITUTION AND INTERNATIONAL INSTRUMENTS

The Constitution of the Republic of Kosovo stipulates that the judicial power in Kosovo is exercised by courts that are unique, independent, impartial, and ensure access for all citizens.[10] Courts decide based on the Constitution and the law, while judges are independent and impartial in the exercise of their function.[11] The Constitution guarantees everyone's rights "*to a fair and impartial public hearing regarding the determination of one's rights and obligations or any criminal charges within a reasonable time*

7 European Court of Justice (ECJ), ECJ-2018-003.
8 ECtHR, Case of *Findlay v. the United Kingdom*, Judgment of 25 February 1997, para. 73.
9 ECtHR, Case of *Kyprianou v. Cyprus*, Judgment of 15 December 2005, para. 118.
10 Constitution of the Republic of Kosovo, Article 102.
11 *Ibid*.

by an independent and impartial tribunal established by law".[12] Furthermore, Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution of Kosovo provides that human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, and are directly applicable in the Republic of Kosovo, including, among others, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Furthermore, Article 53 [Interpretation of Human Rights Provisions] of the Constitution states that all institutions must interpret human rights provisions based on the ECtHR case-law.

In this regard, the European Convention on Human Rights, in its Article 6, establishes that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]*".[13] The Covenant on Political and Civil Rights provides that "*... everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law*".[14] The Universal Declaration of Human Rights recognises the right of everyone to be heard by an independent and impartial tribunal in the determination of their rights and obligations and any criminal charge against them.[15] The United Nations (UN) standards regarding the independence of the judicial system provide that "*everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures [...]*".[16]

4. CASE-LAW OF THE CONSTITUTIONAL COURT OF KOSOVO

The Constitutional Court of the Republic of Kosovo, in several cases, has addressed the concept of judicial independence as a fundamental prerequisite for a fair trial. In case *KO12/17*[17], with the Ombudsperson as the applicant and the judgment delivered on 9 May

12 *Ibid*, Article 31.

13 European Convention on Human Rights, Article 6.

14 International Covenant on Civil and Political Rights, Article 14 (Adopted by the General Assembly resolution 2200A (XXI), 16 December 1966).

15 Universal Declaration of Human Rights, Article 10 (The Declaration was proclaimed by the UN General Assembly in Paris on 10 December 1948, General Assembly resolution 217 A (III)).

16 Basic Principles on the Independence of the Judiciary, Article 5 (Endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

17 Case KO12/17, Applicant: *The Ombudsperson*, Judgment of 9 May 2017.

2017, the Court examined whether Minor Offence Bodies, acting as administrative entities, could be considered "*independent tribunals*". In this case, the Court emphasised that decisions made by administrative authorities must undergo subsequent review by a "*judicial body with full jurisdiction*". This authority encompasses the power to entirely quash decisions based on questions of fact and law. Furthermore, the Administrative Matters Department of the Basic Court in Pristina has full jurisdiction to review all facts and legal aspects relevant to the case at hand and to quash decisions made by the Administrative Bodies for Minor Offences in their entirety, regarding both fact and law. Consequently, it is recognised as a "*judicial body with full jurisdiction*", fulfilling the criteria to be deemed an "*independent and impartial tribunal*", which is essential for the right to a fair and impartial trial.[18]

In case *KO203/19*, with the Ombudsperson as the applicant and the judgment delivered on 30 June 2020, the Court decided on the constitutionality of the Law on Public Officials and its implications for the independence of the judicial system. The Law allowed the Government to, among other things, issue sub-legal acts affecting civil servants within the public administration, including court and prosecution officials, concerning their appointment, dismissal, disciplinary actions, and other violations. The Court assessed that this law violated the organisational independence of the judicial system, emphasising that judicial bodies should possess the autonomy to establish internal regulations related to their internal functioning and organisational structure.[19] More specifically, the Court stressed that "*by applying the same rules on employment, classification of positions, recruitment criteria, and employment-related aspects for civil servants, and more importantly, by allowing the Government to issue sub-legal acts regulating employment in entities outside the executive branch—without taking into account the separation of powers and the independence of institutions and courts—this arrangement interferes with the definition of their organisational structures and various matters related to civil servants of these institutions*".[20]

18 *Ibid,* paras. 97-104.

19 Case KO203/19, Applicant: *The Ombudsperson*, Judgment of 30 June 2020, paras. 105-112; 153-164.

20 *Ibid*, para. 111.

In case *KO219/19*, with the Ombudsperson as the applicant and the judgment delivered on 30 June 2020, the Court addressed the Law on Salaries in the Public Sector, which established payment levels for all employees in this sector, including those within the justice system. The Law empowered the Government to regulate all matters related to basic payments and other allowances for all institutions, excluding the Assembly but including the judiciary. The Court found that the Law improperly restricted the judicial system's ability to independently regulate salary allowances through internal acts, contradicting the Constitution.[21] The Court held that the Government must not intrude upon the internal organisational matters of the judiciary, recognising these bodies as independent constitutional institutions. According to the Court, the judiciary's independence is intricately linked to its financial and budgetary autonomy, and the Government is constitutionally obliged to uphold this independence.[22] The challenged Law was deemed to severely undermine the independence of the judicial power by eliminating any self-regulatory authority over "functional, organisational, and budgetary" aspects, including judge salaries and additional payments for the staff. Furthermore, the judiciary and other independent institutions were left without any self-regulatory competence to assert their "institutional, organisational, structural, and budgetary" independence concerning internal organisation and staff management. Thus, the legal regulation, by completely excluding the self-regulatory competencies of the judiciary, has undoubtedly created an imbalance in the separation of powers, which neither the spirit nor the letter of the Constitution aspires to. Such a legal regulation, if confirmed as constitutional, would have the potential to create "interference" of the executive power with the power of the judiciary and "dependence" and "subordination" of the power of the judiciary to the executive, because the former would have to depend on the will of the latter in terms of internal regulations for staff and functional, organisational, budgetary, and structural aspects of work.[23]

In cases *KI187/18*[24] and *KI06/18*,[25] the applicants complained that in

21 Case KO219/19, Applicant: *The Ombudsperson*, Judgment of 30 June 2020, paras. 274-283.
22 Case KO73/16, Applicant: *The Ombudsperson*, Judgment of 16 November 2016, paras. 81-90.
23 Case KO219/19, *cited above*, paras. 280-282.
24 Case KI187/18 and KI11/19, Applicant: *Muhamet Idrizi*, Judgment of 29 July 2019, paras. 65-69.
25 Case KI06/12, Applicant: *Bajrush Gashi*, Judgment of 9 May 2012, paras. 36-52.

the resolution of their case, the same judge had participated in two instances of decision-making, in the first instance and in the third instance. The Court assessed that the participation of the judge in both instances contradicted the objective impartiality of the court, which requires the removal of any legitimate doubt regarding its impartiality. According to the Court, the impartiality of the court was therefore deemed questionable, and the applicants had legitimate fears in this regard.

On the other hand, the Court ruled that in certain cases, non-judicial bodies can fulfil the criteria of an independent "tribunal". In this context, in cases *KO127/21*[26] and *KI33/16*[27], the Court assessed that the Independent Oversight Board of Kosovo, which has the competence to resolve conflicts between civil servants and state institutions, enjoys the status of a "*tribunal established by law*" because it (i) is an institution established by the Constitution; (ii) is independent from the executive; and (iii) has established legal jurisdiction, and its decisions are binding, although subject to judicial review.

5. CONCLUSION

Recognition of fundamental human rights and freedoms within the text of the Constitution is not sufficient if there are no mechanisms to implement those rights in practice. The judicial power serves as one of the main mechanisms that enable the implementation of human rights and freedoms, while also ensuring that the executive and legislative powers function within their constitutional competencies. However, the judiciary, as a third power, has no constitutional powers to propose laws. Therefore, the executive and legislative branches should pay special attention to any legal regulation that could potentially interfere with the institutional, functional, and organisational independence of the judiciary.

Apart from the protection of the independence of the judiciary by state constitutions, international acts also proclaim the independence of the judiciary as one of the guarantees for a fair trial. One of the most significant is the European Convention on Human Rights, which

26 Case KO127/21, Applicant: *11 deputies of the Assembly of Kosovo*, Judgment of 9 December 2021, paras. 85-88.

27 Case KI33/16, Applicant: *Minire Zeka*, Judgment of 6 July 2017, paras. 56-59.

provides for the right to a fair trial by an independent and impartial court established by law. The European Court of Human Rights has played a crucial role in interpreting and establishing important principles regarding the independence of the judiciary as a guardian of the right to a fair trial. In the case of Kosovo, the Constitution foresees and protects the independence of the judiciary from the interference of other powers and recognises the right to a fair trial by independent and impartial courts established by law. The Constitution of Kosovo has adopted the highest standards in the field of human rights, incorporating the European Convention within the text of the Constitution and obliging that human rights be interpreted in accordance with the case-law of the European Court of Human Rights. The Constitutional Court of the Republic of Kosovo, in its case-law, has interpreted judicial independence and the right to a fair trial in full harmony with the principles and practice of the European Court of Human Rights. Since its establishment, the Constitutional Court has played a pivotal role in protecting the independence of the judiciary as a guarantor of the right to a fair trial. The Constitutional Court, in some cases mentioned above, has protected the independence of the judiciary from the interference of the executive and legislative powers, especially in matters affecting the organisational and functional independence of the courts as independent constitutional institutions.

Независимость и беспристрастность суда в контексте обеспечения права на справедливое судебное разбирательство

Chyngyz Shergaziev
Aisuluu Tokoeva

CONSTITUTIONAL COURT OF THE KYRGYZ REPUBLIC

Доклад делегатов из Конституционного суда Кыргызской Республики в работе 11-Летней школы на тему:

Независимость и беспристрастность суда в контексте обеспечения права на справедливое судебное разбирательство

Уважаемые участники 11-Летней школы!

Chyngyz Shergaziev[*]
Aisuluu Tokoeva[**]

Мы очень рады, что имеем честь принять участие в работе этой важной и вдохновляющей площадки, где мы можем обсуждать актуальные вопросы права, разрабатывать новые идеи и получить лучшие апробированные опыты наших коллег из различных стран.

Спасибо организаторам за их усилия в организации на ежегодной основе работы этой площадки, а участникам Летней школы желаем, чтобы эта площадка стала источником знаний, новых дружеских связей и незабываемых моментов в нашей профессиональной жизни.

Хотелось бы начать наш доклад с известной с известной пословицы, которая гласит на турецком: «Hekimsiz, hâkimsiz memlekette oturma», то есть не живи в той стране, где нет ни врага, ни судьи. Смысл этой пословицы глубоко содержателен и бесценен и непосредственно касается тематику нашего доклада, поскольку в любом правовом государстве, государство гарантирует всем право на справедливое судебное разбирательство, которое обеспечивается органом судебной власти.

Именно поэтому, независимая судебная власть является абсолютно необходимой составляющей демократического, правового государства, провозглашающего верховенство права. Благодаря лишь эффективно выстроенной системе институциональной независимости органов правосудия в целом и независимости судей в частности, судебная власть способна

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гарантировать права и свободы человека, а также обеспечить режим законности в стране.

При этом независимость и беспристрастность суда – это фундаментальные принципы, неотъемлемые от права на справедливое судебное разбирательство, как они определены во Всеобщей декларации прав человека и Международном пакте о политических и гражданских правах.

В соответствии с Международным пактом о политических и гражданских правах, каждый человек имеет право на суд, который создан на основании закона и функционирует независимо. Это означает, что судебные органы должны быть защищены от внешних влияний, таких как политическое вмешательство или давление, и иметь полную свободу принимать решения на основе закона и справедливости.

Кроме этого, суд должен рассматривать каждое дело без какого-либо предвзятого отношения к сторонам. Все стороны в судебном процессе должны иметь равные возможности защищать свои интересы, и суд должен принимать решения исключительно на основе доказательств и закона, а не на основе каких-либо предварительных убеждений.

Независимость судов служит средством предотвращения злоупотреблений властью. В демократическом обществе важно, чтобы суды могли независимо проверять действия исполнительной и законодательной власти. Это создает систему взаимного контроля, которая помогает избегать нарушений прав граждан и сохранять баланс в государстве.

Кроме этого, независимость судов играет значительную роль в укреплении демократических ценностей. Она обеспечивает справедливость, защиту прав и свобод граждан, а также предотвращает злоупотребления властью. Демократическое общество, основанное на верховенстве закона и уважении прав человека, невозможно без независимой судебной власти.

Обеспечение независимости и беспристрастности суда является ключевым аспектом права на справедливое судебное разбирательство. Эти принципы способствуют доверию к судебной системе и обеспечивают соблюдение прав и свобод человека. Без независимых и беспристрастных судов нет гарантий справедливости и правосудия.

Так, Конституция Кыргызской Республики закрепляет принципы независимости, неприкосновенности и особом правовом статусе судей, подчинении их только Конституции и законам, запрете на требование от судьи отчета по конкретному судебному делу и на любое иное вмешательство в деятельность по осуществлению правосудия.

В данном контексте, Конституционная палата Верховного суда Кыргызской Республики в своем решении от 21 октября 2020 года отметила, что суть принципа независимости судей состоит в обязанности государства обеспечить такие условия, при которых они имели бы реальную возможность свободно принимать решения, подчиняясь только Конституции и законам Кыргызской Республики, действовать свободно, без постороннего воздействия, влияния, давления, угроз, вмешательства, прямого или косвенного, с чьей бы стороны они не исходили. Причем, гарантии независимости судьи не могут быть отменены, либо снижены ни при каких обстоятельствах, чем это предусмотрено Конституцией и международными договорами, участницей которых является Кыргызская Республика.

Вместе с тем, для того чтобы реализовать эти принципы, государства-участники международных договоров, таких как Всеобщая декларация прав человека и Международный пакт о политических и гражданских правах, должны уделять особое внимание независимости судов и обеспечивать их беспристрастность. Это важно для поддержания демократии, правового государства и уважения к правам человека.

Право на судебную защиту по своей правовой природе носит фундаментальный характер. Являясь универсальным правовым средством, оно позволяет обеспечить, а в случае необходимости, восстановить все другие права и свободы человека и гражданина, гарантированные Конституцией Кыргызской Республики. Этим и объясняется непоколебимое и скрупулезное отношение Основного закона к вопросам правосудия. По основополагающему смыслу конституционно-правового регулирования правосудие может быть эффективным и справедливым только в условиях независимости судебной власти и судей – носителей этой власти.

Судебная власть является одной из главных ветвей государственной власти и играет решающую роль в справедливости и правопорядке в обществе.

В решении Конституционной палаты от 15 февраля 2017 года Верховного суда Кыргызской Республики выражена правовая позиция, согласно которой независимость судебной власти и судьи, как носителя судебной власти, не должна рассматриваться как личная привилегия судьи. Она является гарантией против всякого вмешательства в деятельность судьи по осуществлению правосудия, и оправдана необходимостью дать судьям возможность выполнять возложенную на них обязанность по защите прав и свобод человека. Независимость судьи служит также средством защиты публичных интересов, прежде всего интересов правосудия, и не только не исключает, но, напротив, предполагает повышенную ответственность судьи за выполнение своих профессиональных обязанностей, соблюдение законов и правил профессиональной этики судей.

Таким образом, независимость и беспристрастие являются необходимыми условиями в реализации права на справедливое судебное разбирательство. В другом своём решении от 24 апреля 2019 года орган конституционного контроля нашей страны отметил, что для эффективного выполнения своих непосредственных функций судебная власть должна быть независимой. Степень независимости судебной власти ввиду ее социальной и правовой природы должна быть выше по сравнению с другими ветвями государственной власти, поскольку в демократическом, правовом государстве высшей властью является власть закона. Соответственно, судебная власть, обеспечивающая верховенство закона, должна быть свободна от чьего бы то ни было влияния, чтобы иметь возможность быть объективной и беспристрастной.

В заключение, независимость и беспристрастность суда играют ключевую роль в обеспечении права на справедливое судебное разбирательство. Эти принципы являются фундаментальными для демократических обществ и способствуют доверию к судебной системе, защите прав и свобод граждан, предотвращению злоупотреблений властью и укреплению демократических ценностей. Соблюдение независимости и беспристрастности суда является обязанностью всех государств, стремящихся к укреплению правового государства и уважению прав человека.

Благодарим за внимание!

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

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FEDERAL COURT OF MALAYSIA

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

*Azman Mustapha**
*Mahyudin Mohmad Som***

ABSTRACT

The principle of judicial independence is an indispensable requirement of a free society and is regarded as a hallmark of a modern democratic state. The importance of the principle is such that it has been the sustenance of justice and fairness, which necessitates its preservation and protection at all times. In Malaysia, the existence of a supreme constitution serves as living proof as to the independence of the judiciary. In the administration of justice, the protection of fundamental rights and liberties of individuals, as enshrined under the constitution has always been paramount to the Malaysian judiciary, with an unequivocal emphasis consistently being placed on the right to a fair trial. This paper attempts to discuss the concept of judicial independence and its aspects, at both the institutional and individual judge's levels, from the Malaysian perspective. It further attempts to explore the judicial approach embarked on by the Malaysian judiciary that pertains to the protection of individuals' fundamental rights and liberties, with a particular emphasis on the right to a fair trial.

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INTRODUCTION

[1] Judicial independence is an indispensable cornerstone of a democratic society which ensures the separation of the judiciary from the executive and legislative branches of government. It refers to the principle that the judiciary should be free from any external influences, interferences or pressures in the exercise of its duties, which in turn enables members of the judiciary to make decisions impartially and in accordance with the law. In broad sense, the concept of the independent judiciary has been described by Lord Bingham of Cornhill, Lord Chief Justice of England as follows[1]:

"Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision-making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of parliamentary opinion, or decide cases with a view to either earning parliamentary approbation or avoiding parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever."

[2] An independent judiciary plays a pivotal role in upholding the rule of law, protecting individual rights and maintaining public trust in the judicial system. It is also crucial for preventing any abuse of power and ensuring fairness and justice for all. The following observation was thus made by Lord Woolf in his article "Rule of Law and a Change in the Constitution"[2]:

"One of the most important of the judiciary's responsibilities is to uphold the rule of law, since it is the rule of law which prevents the government of the day from abusing its powers. Ultimately, it is the rule of law which stops a democracy from descending into an elected dictatorship. To perform its task, the judiciary has to be, and seen to be, independent of government, unless the public accepts that the judiciary is independent, they will have no confidence in the honesty and fairness of the decision of the courts."

1 Lord Bingham of Cornhill, Lord Chief Justice of England: Judicial Independence: Judicial Studies Board Annual Lecture (1996)

2 Paper presented at Squire Centenary Lecture, University of Cambridge (2004)

[3] It must be further highlighted that the judiciary must not only be independent, but it must also appear independent. In this regard, public perception cannot be ignored because it reflects the measure of confidence that the public has in the judiciary[3]. In fact, it is the public confidence in the independence of the judiciary, the integrity of its judges, and the impartiality and efficiency of its processes that sustain the judicial system of a country[4].

[4] The judicial independence must be found at both the institutional level and the individual judge's level. The relationship between these two aspects of judicial independence has perhaps been best described and elaborated in the following words:

"Judicial independence is, therefore, both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's independence in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence.[5] *The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence, but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.*[6]*"*

[5] It is imperative that judicial independence at both the institutional and individual levels are intimately connected and must concomitantly co-exist. If judicial independence is secured at the institutional level but not at the individual level, individual judges can be pressured to obey the wishes of the leadership of the judiciary, which may result in a less than wholehearted enforcement of the rule of law. On the other hand, if judicial independence is only ensured at the individual level, individual judges will find themselves at liberty to pursue their individual preferences, which raises the likelihood of abuse of power and in effect results in inconsistency and instability of the law[7].

3 Tun Arifin Zakaria: The Rule of Law and Judicial System (2012)

4 United Nations Office on Drugs and Crime: Commentary on the Bangalore Principles of Judicial Conduct (2007)

5 *Supra.*

6 *Valente v The Queen*, Supreme Court of Canada [1985] 2 SCR 673

7 David S. Law: Judicial Independence (*https://www.britannica.com/judicial-independence*)

[6] In the same vein, the importance of this two-pronged modern understanding of judicial independence cannot be underrated, as it maintains public trust and confidence in the judicial system and contributes to overall stability and cohesion of the society.

THE INDEPENDENCE OF THE JUDICIARY FROM THE MALAYSIAN PERSPECTIVES

Judicial Independence at the Institutional Level

[7] The independence of the judiciary at the institutional level in Malaysia can be observed from the constitutional framework established by the provisions of the Federal Constitution of Malaysia ("the Malaysian Constitution"). The Malaysian Constitution came into force in 1957, initially as the Constitution of the Federation of Malaya, and was later amended in 1963 to form the Malaysian Constitution. It is the supreme law of Malaysia and any law enacted which is inconsistent with the Malaysian Constitution shall be void[8].

[8] Part IX of the Malaysian Constitution specifically deals with matters relating to the judiciary wherein its power and functions are secured and alienated from the other functionaries of the government. Under the Malaysian Constitution, the independence of the judiciary is secured and guaranteed in the following regards:

(a) Judicial Power

[9] The Malaysian Constitution confers judicial power to the judiciary as provided under Article 121(1) of the Malaysian Constitution. Article 121(1) states: *"There shall be two High Courts of co-ordinate jurisdiction and status, ... and such inferior courts as may be provided by federal law, and the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law."*

[10] It is worth to note that the words "judicial power" no longer form part of the provision of Article 121(1) of the Malaysian Constitution and were in fact deleted from the original text of the said Article by the Constitution (Amendment) Act 1988 effective on 10 June 1988. For the sake of clarity, the pre-amended Article reads: *"the judicial power of the*

8 Article 4(1) of the Malaysian Constitution: "*This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*"

federation shall be vested in two High Courts of co-ordinate jurisdiction and status, ... and in such inferior courts as may be provided by federal law." By the said amendment and with the removal of the words "judicial power" from the said Article, it was argued then that the jurisdiction and powers of the judiciary are limited and as only those conferred by the federal laws.

[11] However, the recent decisions of the Malaysian apex court i.e. the Federal Court, have turned the tides which made it clear that the legal implication of the amendment to Article 121(1) of the Malaysian Constitution extends well beyond such a proposition. It was observed that judicial power is central to the doctrine of the separation of powers between the executive, the legislature and the judiciary, which is a fundamental feature of the Malaysian Constitution. Consequently, the removal of such power from the inherent jurisdiction of the judiciary would render it subordinate to Parliament, a result which breached the basic structure of the Malaysian Constitution. The recent judicial pronouncements made by the Malaysian courts have indicated that in the view of the doctrines of basic structure and separation of powers, the exclusivity of judicial power must necessarily reside in the judiciary, and that such power could not be curtailed or limited, even by a constitutional amendment.

(b) Constitution of the Superior Courts

[12] The establishment and constitution of the superior courts, namely the Federal Court, the Court of Appeal and the High Court are also provided under the Malaysian Constitution.

[13] The Federal Court is established by virtue of Article 121(2) of the Malaysian Constitution. It is the final appellate court in both civil and criminal matters. The Federal Court is headed by the Chief Justice. Currently, there are 13 Federal Court Judges including the Chief Justice, the President of the Court of Appeal and the two Chief Judges of the High Courts.

[14] Besides exercising its appellate jurisdiction, the Federal Court performs three other functions as follows:

(i) Exclusive original jurisdiction i.e. to determine any question as to whether a law drafted by Parliament or by the legislature of any

of the 13 states in Malaysia is invalid on the ground that it makes provision with respect to matter to which the Parliament or, as the case may be, the legislature of the respective state, has no power to make laws; and to determine disputes on any other question between the states or between the federation and any state;

(1)

(ii) Referral jurisdiction i.e. to determine any question arises before any court as to the effect of any provision of the Malaysian Constitution; and

(2)

(3)

(iii) Advisory jurisdiction i.e. to give an opinion, upon a reference made by the King, on any question as to the effect of any provision of the Malaysian Constitution which has arisen or appears to His Majesty likely to arise.

[15] It is to be noted that there is no dedicated Constitutional Court in Malaysia. Nevertheless, the Federal Court as the apex court performs dual responsibility, first as the interpreter of the Malaysian Constitution and secondly, as the highest appellate tribunal.

[16] Existing in parallel with the Federal Court is the Special Court. It is established pursuant to Article 182 of the Malaysian Constitution and vested with the jurisdiction to hear any actions, civil or criminal, instituted by or against the King or any of the nine Malay Rulers. It consists of the Chief Justice, who shall preside as the Chairman, the Chief Judges of the High Courts, and two other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

[17] The Court of Appeal is established by virtue of Article 121(1B) of the Malaysian Constitution which confers upon the jurisdiction to determine appeals from the decisions of the High Courts. The Court of Appeal is the second highest court in the judicial hierarchy after the Federal Court. It is headed by the President of the Court of Appeal.

[18] The Court of Appeal was established in 1994 as part of the hierarchical reforms made on the structure of the appellate tier in

Malaysia after the appeals to the Privy Council in the United Kingdom were abolished in 1985. At present, there are 28 Court of Appeal Judges sitting in the Court of Appeal.

[19] Article 121(1)(a) and (b) of the Malaysian Constitution establishes two High Courts of co-ordinate jurisdiction and status, namely the High Court of Malaya and the High Court of Sabah and Sarawak. The High Court of Malaya and the High Court of Sabah and Sarawak are headed by the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak respectively. Currently, there are 72 High Court Judges and 32 Judicial Commissioners in Malaysia.

[20] The High Court is vested with unlimited civil jurisdiction to determine actions involving claims which exceed RM1 million, other than actions involving motor vehicle accidents, landlord and tenant disputes and distress. Matters which fall within the jurisdiction of the High Court include injunctions, specific performance or rescissions of contracts; the validity or dissolution of marriage (divorce) and matrimonial causes; guardianship or custody of children; grants of probate, wills and letters of administration of estates; bankruptcy and matters relating to the liquidation of companies; and judicial review.

[21] The High Court also has the jurisdiction to determine all criminal matters punishable by death such as murder, drug trafficking, firearms and kidnapping. It also adjudicates on appeals originating from the Subordinate Courts.

[22] While every proceeding in the High Court is heard and of before a single judge, the proceedings in the Federal Court and the Court of Appeal are heard and disposed of by a panel of at least three judges, or such greater uneven number of judges as the Chief Justice and the President of the Court of Appeal may in any particular case determine[9]. This is to ensure finality and to avoid any possible risk of compromise in the decision-making process at the appellate levels.

(c) Appointment of Superior Court Judges

[23] Judges of the superior courts are not public servants. Their appointment is governed under Article 122B of the Malaysian Constitution. They are appointed by the *Yang di-Pertuan Agong* ("the

9 Sections 74 and 38 of the Courts of Judicature Act 1964.

King"), acting on the advice of the Prime Minister, after consulting with the Conference of Rulers and the Chief Justice.

[24] In 2009, the judicial appointment process was improved with the foundation of a statutory body known as the Judicial Appointment Commission ("the JAC"), which was established under the Judicial Appointment Commission Act 2009. The JAC is headed by the Chief Justice and its members include the President of the Court of Appeal, the two Chief Judges of the High Court of Malaya and Sabah and Sarawak, a Federal Court Judge and four other eminent persons, who are not members of the executive or other public service.

[25] The JAC's functions are among others to select suitably qualified persons who merit appointment as a judge of the superior court; to formulate and implement mechanisms for the selection and appointment of judges; and to review and recommend programmes for the improvement of the administration of justice and the judiciary.

[26] Since its establishment, it was reported that the recommendations on the selection of superior judges were mostly unanimous and the decisions were respectfully accepted by the government.

(d) Security of Tenure of Office

[27] Article 125(1) of the Malaysian Constitution secures the tenure of office of superior judges until the attainment of the age of 66 years, and by extension, of a further 6 months if the King may approve. Conversely, a superior judge could not be removed from office otherwise than by a tribunal specially constituted by the King for that purpose and such removal is only confined to the ground of breach of any provision of the code of ethics or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions required by his office.

[28] However, when a judge has breached any provision of the Judges' Code of Ethics, which in the opinion of the Chief Justice does not warrant a referral to a tribunal, the Chief Justice may, according to Article 125(3A), refer the judge to a body constituted under federal law, namely the Judges' Ethics Committee Act 2010, to address such a breach.

[29] In any case, it is imperative that the disciplinary procedure involving superior judges as prescribed under the Malaysian Constitution and the relevant law must be strictly followed and adhered to[10].

(e) Remuneration of Superior Court Judges

[30] The remuneration of superior court judges is secured by Article 125(6) and (7) of the Malaysian Constitution. The remuneration and other terms of office of superior judges, including pension rights and other benefits, are indicated in the Judges' Remuneration Act 1972. They are charged on the Consolidated Fund and could not be altered to the judges' detriment.

(f) Judicial Immunity

[31] Judges are afforded with substantial level of protection from civil or criminal liability in the discharge of their judicial functions. Section 14 of the Courts of Judicature Act 1964 provides judicial immunity to judges from being sued in any civil court for any judicial act done in the exercise of his or her judicial capacity[11]. A similar protection is accorded under Section 107 of the Subordinate Courts Act 1948 to judicial officers at the subordinate levels.

(4) **(g) Rules of no criticism and subjudice**

(5)

(6) [32] Article 127 of the Malaysian Constitution places a restriction on a Parliamentary discussion of the conduct of the superior judges save on a substantive motion supported by a sufficient number of members of Parliament.

(7)

10 In *Haris Fathillah Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam Baki & Ors* [2023] 3 CLJ 653, it was held that in light of the doctrine of judicial independence, criminal investigations against serving judges are subject to a higher standard. If an investigation or prosecution against a serving judge is found to have been commenced for collateral purposes, the courts are entitled, when reviewing them, to set them aside or pass any other remedy that counts as suitably moulded relief, depending on the facts and circumstances of the case.

11 In *Tai Choi Yu v Ian Chin Hon Chong* [2002] 2 CLJ 259, a written judgment delivered by a judicial officer who held a position as a Senior Assistant Registrar, was held to be an exercise of judicial function. In view of the immunity conferred by Section 14(1) of the Courts of Judicature Act 1964, it was held that the plaintiff's suit for an alleged libel contained in the judgment was unsustainable and doomed to fail right from the outset.

(8) [33] In addition, the application of subjudice rule serves to safeguard the sanctity of court proceedings, which invariably extends the power to the court to commence committal proceedings, as provided under Article 126 of the Malaysian Constitution and Section 13 of the Courts of Judicature Act 1964[12], in the event any party offending such rule.

(9)

(10) [34] In February 2021, a Malaysian news site, MalaysiaKini was found guilty of contempt and fined RM500,000 by the Federal Court over the comments posted by readers on an article published by the website. The contempt proceeding was initiated by the Attorney General over comments posted on the article which implied that the judiciary committed wrongdoings, was corrupt and lacked integrity. The offensive comments also included criticism against the judiciary over the acquittal of a chief minister from multiple corruption and money-laundering charges, despite the fact that the said acquittal was the result of the withdrawal of all the charges by the prosecutor. While acknowledging the concerns that the case and its verdict might have a chilling effect on freedom of press, the Federal Court however emphasized that contempt of court is impermissible in law as it undermines the justice system and therefore urged Malaysians to use their discretion when posting on the internet.

(11)

(12) **(h) Institutional Separation of the Judicial Branch**

(13)

(14) [35] The independence of the Malaysian judiciary as an institution is also guaranteed by the doctrine of separation of powers. The concepts of judicial independence and separation of powers are critical and form a part of the fundamental features of the basic structure of the Malaysian Constitution. Thus, any infringement on the

12 Article 126 of the Malaysian Constitution and Section 13 of the Courts of Judicature Act 1964 contain similar wordings which reads :*"The Federal Court, the Court of Appeal and the High Court shall have the power to punish any contempt of itself."*

sanctity of the doctrine of separation of powers would violate the basic structure of the constitution. The important concepts of separation of powers, exclusivity of judicial power and preservation of judicial independence have been reinforced through judicial pronouncements of the courts which affirmed the inviolability of such principles as embedded in the Malaysian constitutional framework.

Judicial Independence at the Individual Level

[36] Judicial independence at the individual level requires judges to observe, maintain and uphold high standards of conduct, both in and out of court. In this relation, it is important that judges respect and honour judicial office within the context of public trust and conduct themselves in such a manner to preserve the dignity of their office and the impartiality and independence of the judiciary.

[37] To this end, the codification of judicial conduct has been widely accepted and considered as a part of essential feature of the judicial system in most countries. Whilst there is no uniformity as to the standard of judicial codes of conduct in every jurisdiction, there is at least some commonality which tends to prescribe certain standards of appropriate judicial conduct which feature judicial independence and impartiality[13].

[38] In the local context, the Malaysian Judges' Code of Ethics 2009 was formulated pursuant to Article 125(3B) of the Malaysian Constitution to prescribe the ethical standards of a judge in his personal and professional roles. The Code came into operation on 1 July 2009, replacing the earlier Judge's Code of Ethics of 1994, with more extensive procedures for complaint and investigation, and the prescribed sanctions that may be imposed other than removal from office.

[39] The Judges' Code of Ethics 2009 is applicable to all judges throughout the period of their service. The Code among others stipulates that a judge shall uphold the integrity and independence of the judiciary, perform judicial duties fairly and efficiently and avoid conflicting with judicial obligations while conducting extra-judicial activities.

13 Neo, Jaclyn L and Whalen-Bridge, Helena: A Judicial Code of Ethics: Regulating Judges and Restoring Public Confidence in Malaysia (2016)

[40] Upon ascending the bench, every judge of superior courts in Malaysia, as with judges in other jurisdictions, takes an oath to discharge his judicial duties honestly and impartially to the best of his ability and to uphold the rule of law and defend the independence of the judiciary. Committing to the principles, judges are under the obligation to exercise their judicial functions fairly, efficiently and independently, without regard to any external influence, pressure, threat or interference and must always strive for the promotion of the independence of the judiciary.

[41] Stemming from the principles of independence and impartiality, a judge has an ethical obligation to disqualify himself or herself, or in any other case, upon the objection of either party, from hearing a case due to the presence of conflict of interest and in order to prevent the perception of bias or prejudice. This is especially so, if a judge knows that for such reasons, he or she is not able to act fairly, independently and impartially in the course of the judicial process. In the latter case, the party who seeks for a recusal must however meet the high threshold of the established test and such application, as viewed by the Malaysian courts, must not be allowed too readily as it could be inversely tantamount to a serious allegation as to the personal integrity of the judges and the independence of the entire institution of justice[14].

[42] Among the circumstances where judges in Malaysia have conscientiously stepped aside from hearing matters which might give rise to the apprehension of bias were due to the political association of judges' close family members; judge's long friendly relationship with a defendant; and past history of employment, where the legal firm of which judges had previously practiced as a lawyer represented a party in the case before him.

PROTECTION AND PRESERVATION OF THE RIGHT TO A FAIR TRIAL

[43] Having observed the aspects of judicial independence from the Malaysian perspective, we shall now discuss the role and significance of the judiciary, as an independent institution in Malaysia, in safeguarding the essential right to a fair trial. Along the way, we will

14 *Deleum Primera Sdn Bhd v Mazrin bin Ramli & Ors* [2021] 4 AMR 435.

also explore a few recent cases decided by the Malaysian courts in the context of the present subject.

[44] The principle of judicial independence is essential for the protection and preservation of the fundamental rights and freedoms of individuals. In the context of the Malaysian Constitution, such rights include the rights against the deprivation of life and personal liberty[15], rights of equality and for equal protection of the law[16], prohibition of banishment and freedom of movement[17], freedom of speech, assembly and association[18], freedom of religion[19], rights in respect of education[20] and the right to property[21].

[45] In this regard, an independent judiciary acts as a bulwark against any transgression, suppression or violation affecting such rights. In the determination of such rights, in any criminal prosecution or likewise in civil proceedings, every person is entitled to the right to a fair trial before a competent, impartial and independent court of law.

[46] It must also be remembered that an independent judiciary capable of ensuring fair trial proceedings is not only of importance to those rights and freedoms accorded to individuals, but is likewise essential to other legal persons, including economic entities, which often depend on courts of law to regulate and resolve disputes of various kinds[22].

[47] In Malaysia, as in any other democratic society, the right to a fair trial is widely regarded as a fundamental principle of justice. In this respect, Article 5(1)[23] of the Malaysian Constitution fundamentally guarantees the right to a fair trial. This is encompassed in the words "save in accordance with law" contained in the said Article, which refers to a system of law that incorporates those fundamental rules

15 Article 5, Malaysian Constitution.
16 Article 8, Malaysian Constitution.
17 Article 9, Malaysian Constitution.
18 Article 10, Malaysian Constitution.
19 Article 11, Malaysian Constitution.
20 Article 12, Malaysian Constitution.
21 Article 13, Malaysian Constitution.
22 Human Rights in the Administration of Justice: a Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, New York and Geneva (2003).
23 Article 5(1) of the Malaysian Constitution provides "*No person shall be deprived of his life or personal liberty save in accordance with law.*"

of natural justice. Apart from that, the principle of fair trial has also been long-established in the common law practice and the inviolability of such principle has been well recognized in the decisions of the Malaysian courts.

[48] It must be added that central to the right to a fair trial is the concept of judicial independence, which ensures that judges remain impartial and free from any external pressure, interference or influence. In dispensing justice, judges must cast aside any irrelevant considerations such as political interference, racial sentiments, religious convictions or personal bias so as to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

[49] In this regard, public perception cannot be ignored but at the same time, the paramount duty of the court is to determine the rights of the parties based on the facts presented before it and the applicable law, no matter how unpopular a decision it would be.

[50] It is beyond argument that a judicial decision which is unpopular, but sound in law and fair on the justice of the case, is better than for it to be popular, but decided based on an ulterior motive to meet a certain extraneous objective. The significance of the difference between the two, as described in the words of the Rt. Hon. Tun Tengku Maimun Tuan Mat, the Chief Justice of Malaysia, *"the former unpopular decision stands the test of time while the latter crumbles to dust at the earliest opportunity, but not before wreaking havoc along the way"*[24].

[51] The decision of the Federal Court in 2018 in the case of *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals*[25] caught the public eye and was heavily criticized by a certain quarter of the community when the conversion of three children to Islam was set aside by the Federal Court. In a country with a diversified, multi-racial and multi-religious society, like Malaysia, such reactions are notably inevitable.

[52] In this case, the appellant, who was the mother of the children underwent a Hindu marriage ceremony with the sixth respondent ("the husband") in 1993. Their marriage was registered

24 Speech delivered on the occasion of the Opening of the Legal Year 2023
25 [2018] 3 CLJ 145

under the civil law. The husband subsequently embraced Islam in 2009 and unilaterally converted their three children to Islam without her knowledge and consent. Certificates of conversion were then issued by the State Director of Religious Department and the children were registered as Muslims by the Registrar of Muallaf. The appellant applied to the High Court for an order of certiorari to quash the certificates of conversion for non-compliance of the provisions of the Administration of the Religion of Islam (Perak) Enactment 2004. Her application was successful on the grounds that the children were not present before the Registrar to utter the clauses of affirmation of faith and that the act of the husband to convert the children without her consent was unconstitutional, illegal, null and void. The High Court's decision was, however, overruled by a three-judge panel of the Court of Appeal, who had in a majority judgment reinstated the children's conversion to Islam. On further appeal to the Federal Court, a unanimous decision was delivered in favour of the appellant, voiding the children's certificates of conversion.

[53] From the legal standpoint, the case involved jurisdictional issues between the civil courts and the shariah courts, which was then rightly approached and strictly decided by the Federal Court within the context of the constitutional perspective, rather than of the religious point of view. Zulkefli Ahmad Makinuddin, PCA (as he then was) therefore found it worthy to mention in his concurrent judgment of the reasoning and approach taken by the Federal Court in the determination of the case:

"I would like to state here that in deciding the issue before us, as judges, we are not swayed by our own religious convictions and sentiment over the issue."

"It may be so that looking at the issue purely from the viewpoint of the Shariah law and its precepts, that the decision may lean in favour of the party who argues from that perspective of the law. In the present case, in upholding the rule of law, we have to decide on the issue strictly on the basis of the relevant laws, case authorities and the provisions of both the State and the Malaysian Constitution governing the particular issue."

[54] It is to be noted that the right to a fair trial encompasses both procedural and substantive fairness. In this relation, the judiciary plays

an important role in interpreting laws and assessing their compatibility with the constitution and acts to safeguard fundamental rights by ensuring that legislations are fair both on points of procedure and substance. It prevents the government or other entities from using the judiciary as a tool to advance their own interests which are damaging to the fundamental rights of individuals. In the exercise of its duty, the judiciary, in exceptional circumstances, is empowered to strike down laws that violate constitutional rights and to prevent any unlawful encroachment of such rights.

[55] Back in 1998, the Federal Court in *Muhammad bin Hassan v Public Prosecutor*[26] ruled that the application of double presumptions under sections 37(d) and 37(da) of the Dangerous Drugs Act 1952 was harsh and oppressive, in that the provisions allowed for a presumption of trafficking to be invoked upon another presumption of possession in proving drugs trafficking offence.

[56] After that case, there was difficulty in getting convictions of drug traffickers. This did not sit well in Parliament which prompted the Parliament to insert section 37A into the Act in order to facilitate the invocation of the two presumptions. Subsequent to that, almost every case was decided in that way.

[57] In 2019, the case of *Alma Nudo Atenza v Public Prosecutor & Another Appeal*[27] presented the occasion to reconsider the issues on the application of the two presumptions. Having scrutinized the essential ingredients of drugs trafficking offence, the imposition of a legal burden, the standard of proof required in rebuttal and the cumulative effect of both presumptions, the Federal Court observed that the provision constituted a substantial departure from the general rule which cannot be justified and found it disproportionate to the intended objective of the legislation. Accordingly, the Federal Court held that the provision was unconstitutional as it violated the requirements of fairness and undermined the presumption of innocence embedded in Article 5(1) and Article 8(1) of the Malaysian Constitution and as such, the provision was struck down.

26 [1998] 2 CLJ 170
27 [2019] 5 CLJ 780

[58] While Parliament has since not made any changes to the Act, the decision has significantly altered the landscape of drugs law and as it presently stands, is the precedent in drugs trafficking cases in Malaysia.

[59] In relation to procedural fairness, the right to a fair trial has also been emphasized and fully recognised by the Malaysian courts through the exercise of judicial power by ensuring the compliance of procedural laws that purport to strengthen the guarantee of a fair trial. Such examples are the enforcement of the procedural requirement for the supply to the accused person or his counsel of a copy of any document which would be tendered by the prosecution as part of its evidence in trial[28] and the right to recall and re-examine any witness during trial, in circumstances where a charge is altered or added[29], or whose evidence appears to be essential for the just decision of the case[30].

[60] In addition, the right to a fair trial is so fundamental that it cannot be abrogated or compromised in any way, or by any means. Any actions or inactions which impact the fairness of a trial constitutes a miscarriage of justice, thereby entitling the court to provide any appropriate measures for its redressal.

[61] In *Yahya Hussein Mohsen Abdulrab v Public Prosecutor*[31]case, the Federal Court has emphatically recognised that the right to be represented by a competent counsel is a crucial aspect of the right to a fair trial. In this case, it was observed that the flagrant incompetence of the trial counsel had affected the outcome of the trial by depriving the appellant of a fairly open opportunity of acquittal. As such, the conviction was rendered against the appellant that warranted an order of acquittal and discharge.

[62] Besides that, the judiciary, being a separate and independent entity, acts as the last bastion to keep the executive and legislature in check. In this regard, the judiciary serves to protect individuals from any excessive, unjust or arbitrary exercise of powers that infringe

28 Section 51A of the Criminal Procedure Code
29 Section 162 of the Criminal Procedure Code
30 Section 425 of the Criminal Procedure Code
31 [2021] 9 CLJ 414

their fundamental rights, or against any legislative attempt affecting individuals' right to have a fair hearing in court.

[63] In another landmark case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case*[32], sting of unfairness was observed in the provisions of the Land Acquisition Act 1960 concerning the determination of compensation to be awarded in compulsory acquisition in land reference proceedings, in that the High Court is disempowered to disagree with the valuations made by the assessors[33] and that the decision of the assessors is not appealable[34], which ultimately left an aggrieved landowner without any recourse.

[64] The matter went up to the Federal Court and one of the issues for consideration was the constitutionality of section 40D of the Act which empowers the assessors to make a final determination on the amount of compensation to be awarded in compulsory acquisition and whether such a provision contravenes Article 121(1) of the Malaysian Constitution which confers judicial power to the courts.

[65] The Federal Court observed that the provision of section 40D of the Act which imposed on the judge a duty to adopt the opinion of the assessors amount to usurpation of power of the court. It effectively undermined the judicial power vested to the judiciary and impinged on the basic features of separation of powers and judicial independence propounded under the Malaysian Constitution. As a result, the impugned provisions were held *ultra vires* under the Malaysian Constitution and consequently struck down.

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32 [2017] 5 CLJ 526

33 Section 40D of the Land Acquisition Act 1960:

(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items of the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

(2) Where the assessors have each arrived at a decision which differs from each other than the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.

(3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.

34 Section 49(1) of the Land Acquisition Act 1960:

"Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted may appeal against a decision of the Court to the Court of Appeal and to the Federal Court: Provided that where the decision comprises an award of compensation there shall be no appeal therefrom."

[66] In outlining the importance of the concepts of separation of powers, judicial power and judicial independence, the Federal Court remarked:

"The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.

The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus, an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limits."

[67] In *Semenyih Jaya*[35], the Federal Court also emphasised the need for the role of the assessors to be redefined and outlined certain other considerations to be undertaken in the determination of compensation in land acquisition proceeding. The case was ordered to be remitted to the High Court for determination in accordance with the deliberation made by the Federal Court on the issues. In the upshot, a judge is at liberty to depart from the opinion of the assessors and hence the sanctity of judicial power is preserved. The opinion of the assessors, consonant with their role and competence as advisors as envisaged under the Act, is recognised and given due regard. The affected party is afforded with ample opportunity to ventilate his concern in the matter.

[68] The decision in *Semenyih Jaya*[36] demonstrates the sense of justice and fair play. It has a wide-ranging implication in terms of the role of the judiciary in upholding the rule of law and giving effect to the right to a fair trial, and the decision is an affirmation of the independence of the judiciary.

[69] It bears repeating that an independent judiciary is vested with the inherent authority to examine and review a law or an executive

35 Supra.
36 Supra.

action, or when there is a breach of fundamental rules of law. In this respect, the judiciary retains the authority to invalidate a law, to set aside a decision or act, or instruct an action to be taken in a specific way if it feels the provision of the law or the conduct to be unlawful or inconsistent with the law. The aim of having the court to review any decision or action of the authority is to safeguard a citizen's rights and to ensure that a person is given fair and reasonable treatment in the decision-making process[37].

[70] Malaysian case laws are replete on the subject of judicial review, with decisions of which demonstrate that the court would readily interfere with the decisions of the authorities on a variety of grounds, including illegality, irrationality and unreasonableness, and for infringement of rules of natural justice. For instance, in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors*[38], the Federal Court held that the decision of the Attorney General to prefer criminal charges against a former High Officer, despite being fully aware of the latter's legal immunity status, was tainted with illegality and as such amenable to judicial review and ought to be quashed.

[71] In appropriate cases, the supervisory power of the court to invalidate the constitutionality of legislation or the legitimacy of executive actions is not precluded via ouster clauses. Notwithstanding the constraints imposed by ouster clauses, as seen in most security legislations in Malaysia, recent jurisprudence tends to suggest that the courts have now adopted a more proactive stance to uphold civil liberties against any form of abuse and ensure that every person is afforded the access to a fair trial.

[72] Therefore, in the case of *Dhinesh Tanaphll v Lembaga Pencegahan Jenayah & Ors*[39], the Federal Court held that the use of ouster clause in the provision of the Prevention of Crime Act 1959, which purports to immunise all decisions made by the executive body under the Act and to prevent recourse to judicial review, is an infringement of fundamental liberties and a breach of natural justice, and in consequence, the provision was held unconstitutional, void and of no effect.

37 Ho Peng Kwang, Assoc. Prof. Dr. Johan Shamsuddin Sabaruddin, Dr. Saroja Dhanapal: Judicial Review in Security Offence Case: The Malaysian Experience [2017] 10 CLJ
38 [2021] 6 CLJ 199
39 [2022] 5 CLJ 1

[73] The decisions of the Malaysian courts which have been alluded to remarkably illustrate the manifestation and unwavering commitment on the part of the Malaysian judiciary in upholding and promoting the rule of law, with much emphasis being given on the right to a fair trial. Beyond mere judicial exercise, the decisions also signify an affirmation of the independence of the Malaysian judiciary.

CONCLUSION

[74] The Malaysian judiciary would continue to strive and reinvigorate its commitments to preserve the independence of the judiciary and uphold the rule of law. This commitment had been firmly expressed by the Rt. Hon. Tun Tengku Maimun Tuan Mat, the Chief Justice of Malaysia in her speech on the occasion of the Opening of Malaysia's Legal Year 2023, where her Ladyship delivered the following inspiring words:

"As any new legal year begins, my thoughts turn to the principles at the heart of our legal system – in particular, judicial independence and the Rule of Law. These are not just ideals, but are the core principles of our judicial and legal system which protect the public from harm and guarantee the principle of equity for all that underpins confidence in our Judiciary. Judicial independence acquires greater significance in times of political, social, and economic upheaval. As the great philosopher Montesquieu once said, "[I]t is necessary from the very nature of things that power should be a check to power." In this nation, where a keen instinct for justice is woven into the very fabric of our beloved country, it is important that the law is tested and seen by the people themselves to be serving their greatest good so that domestic legal order is assured.

When I took office, I swore to uphold the Rule of Law and to defend the independence of the judiciary – it is a promise that I take extremely seriously. This important occasion serves as a reminder of the unwavering commitment of the courts to do right fearlessly."

[75] In the upshot, the Malaysian judiciary will remain resilient and steadfast in its firm footing as an independent institution that dispenses justice, having regard to the principles of the rule of law and the protection of individual rights, which of necessity includes the right to a fair trial.

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

Maria Struela
Iulia Vartic

CONSTITUTIONAL COURT OF MOLDOVA

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL THE CONSTITUTIONAL COURT OF MOLDOVA

*Maria Strulea**
*Iulia Vartic***

To begin with, we must specify that the judicial system in the Republic of Moldova consists of three levels: the courts, Courts of Appeal; Supreme Court of Justice.

The Constitution of the Republic of Moldova provided for a centralized model of constitutionality review, vesting the Constitutional Court with the power to invalidate laws it considers unconstitutional. However, being the only institution in the state that exercises constitutionality review, the Constitutional Court is not part of the judicial system. Its central purpose is to defend the supremacy of the Constitution within the legal order of a state. It is composed of six judges, appointed for a term of six years, and its judgments are final and cannot be appealed.

According to Article 114 of the Constitution, the administration of justice is incumbent on the courts. Judges of all courts enjoy independence. However, the Constitutional Court, in its case-law, mentioned that the independence of the judge is not an end in itself, nor a personal privilege, but it aims to ensure the opportunity to exercise judges' role as protectors of the rights and freedoms of citizens. The role of guaranteeing the independence of the judicial authority rests with the Superior Council of Magistracy.

In a state governed by the rule of law, the principle of judicial independence comes with several guarantees, vital for institutional and individual judicial independence and without which the effective

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and fair functioning of the courts would be impossible. When assessing compliance with the guarantees of the judge's independence, the Court relies on the case-law of the European Court of Human Rights and the provisions of the European Convention to which the Republic of Moldova is a party.

Thus, the first guarantee of respecting the independence of the judge is his/her appointment according to the law. At the same time, Article 20 of the Constitution, which guarantees the right of free access to justice, establishes that the right of free access to justice must be exercised in accordance with the law, to ensure compliance with the requirement of a "tribunal established by law". Any deviation from this standard is considered a violation of the right to a fair trial. This approach is in line with a European Court of Justice key case on the independence of judges - *Guðmundur v. Iceland* [GC], 1 December 2020).

Until 2021, the Constitution prescribed that judges were appointed for an initial term of 5 years, then after the expiration of this term, judges were appointed until reaching the age limit. However, the organic law regulated a procedure for evaluating the judge's performance, and his/her appointment up to the age limit was conditional on the submission of his/her candidature by the Superior Council of Magistracy. The Court considered that this discretionary right of the Council to appoint judges for an initial term of five years, and then until reaching the age limit, makes plausible the fear that they will guide their actions to win the indulgence of the Council, sometimes to the detriment of justice.

Balancing the competing interests, the Court held that the independence of the judiciary prevails over the competence of the Superior Council of the Magistracy to evaluate judges in relation to their appointment until reaching the age limit. The Court specified in its case-law that, without a free and independent judiciary, empowered to review and balance the exercise of power by public authorities, it cannot be imagined a truly democratic society. An independent judiciary is an indispensable condition for the survival of democracy and the guarantee of its governing principles (see JCC no. 38 of 7 December 2021).

By an amendment to the Constitution that came into force in 2022,

the original five-year term for appointing judges until reaching the age limit was excluded. Being notified to approve the draft law amending the constitution, the Court held that the exclusion of the five-year term for the appointment of judges aims to ensure the stability of the judges' term until the mandatory retirement age. The Court observed that the international instruments in this matter establish that ordinary courts' judges must be appointed with a permanent title, until retirement. Establishing trial periods for judges in office would raise problems from the point of view of their independence (see Opinion no. 2/2020).

The independence of the Judiciary is a problem often analyzed in the case-law of the Constitutional Court. In the exercise of his / her duties, the judge benefits from functional and personal independence. Functional independence means, on the one hand, that judges are not influenced by the executive or legislature, and, on the other hand, that courts are not subject to interference by the legislative power, the executive power or the litigants.

Personal independence is expressed through the way judges are recruited; the duration of the appointment; immovability; determining a fixed salary for judges by law; judges' freedom of expression and the right to form professional organizations, aimed at defending their professional interests; incompatibilities.

For example, in its case-law, the Court found that the independence of the judiciary is affected by the failure to respect the guarantees of the financial independence of the judge, such as:

- non-adjustment of judges' salaries to the inflation rate - JCC no. 21 of 6 December 2022;
- reduction of judges' social guarantees - elimination of the judge's special pension - JCC no. 25 of 27 July 2017.

In its analysis, the Court starts from the thesis that the independence of the judge is the guarantee of the administration of justice. As the holder of judicial authority, the judge must be able to exercise his/her function in full independence in relation to all constraints of a social, economic and political nature, even in relation to other judges and in relation to the judicial administration.

This thesis is also the basis of the current judicial reform in our country. The reform involves the adoption of laws that establish a mechanism for checking the members in the administrative bodies of judges (pre-vetting) and of judges (vetting) regarding their ethical and financial integrity. These laws were the subject of opinions of the Venice Commission and were subject to constitutionality review at the Constitutional Court.

In essence, this reform included the creation of a mechanism for the extraordinary evaluation of judges by an Evaluation Commission created especially for this purpose. The commission is composed of members elected by the Parliament and members proposed by the "development partners" of the Republic of Moldova (international organizations and missions involved in judicial reform). In vetting proceedings, the Verification Commission conducts an investigation and issues a report regarding the verified judge which is later submitted to the Superior Council of the Magistracy. The latter adopts a final decision regarding the judge in question and can possibly dismiss him/her. The decisions of the Council can be appealed to the Supreme Court of Justice, and the case will be examined by a specialized panel.

One of the problems which the Court has dealt with regarding the implementation of this reform concerned the composition of the specially composed panel of judges that has the competence to examine the appeals of the evaluated candidates. The law vested the President of the Republic, who is an exponent of the executive power, with the power to accept and reject the candidacies of judges appointed by the President of the Supreme Court of Justice to examine appeals against the Evaluation Commission.

In this context, the Court noted that the interference of an institution outside of the judiciary in the administrative issues of the judiciary is unacceptable from the perspective of the principles of the separation of powers and the good administration of justice.

Moreover, in the Court's opinion, such a legislative solution does not comply with the principle of independence of judges either. From the point of view of an independent observer, the examination of appeals against the decisions of the Evaluation Commission by a panel

of judges consisting only of judges who have been confirmed by the President of the Republic could raise doubts about the independence of the judges. Such a mechanism could create the perception that the judges confirmed by the President of the Republic act under his/her authority (see JCC no. 9 of 7 April 2022, § 70).

Another issue with which the Court was referred regarding this specialized panel concerned its competence. The law only granted it the power to examine substantive matters, without addressing procedural matters, and the power to confirm the decision of the SCM or to refer the case for a new examination to the Commission. It should be noted that this appeal is the only legal remedy that the candidate under evaluation can apply.

Thus, the Court analyzed whether this judicial remedy complies with the criteria, principles of fair process, in particular, the right to compare before a court with full jurisdiction.

The Court concluded that the remedy does not ensure that the non-promoted candidates will benefit from a "sufficient examination" of the main issues of the appeals formulated before the special panel of the Supreme Court of Justice. Therefore, given the limited nature of judicial review, the Constitutional Court established that the law affects the right of access to a court with full jurisdiction of the judge subject to the evaluation and found a violation of the free access to justice (see JCC no. 5 of 14 February 2023).

We could say that the Court's analysis intersected two important aspects of fair process. On one hand, the Court noted that the speedy selection of members in the judges' self-administration bodies aims to safeguard the principle of judiciary independence, which is a guarantee of a fair trial. At the same time, the limitation of judicial review to serious procedural errors of the Evaluation Commission in the evaluation proceedings, affects the fairness of the evaluation procedure.

In conclusion, without respecting the procedure for appointing judges, it is not possible to respect the right to a court established by law and, thus, the right to a fair trial.

JUDICIAL INDEPENDENCE AND THE RIGHT TO A FAIR TRIAL IN THE ROMANIAN LEGAL SYSTEM – A BRIEF CONSTITUTIONAL APPROACH

Claudia-Margareta Krupenschi
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CONSTITUTIONAL COURT OF ROMANIA

JUDICIAL INDEPENDENCE AND THE RIGHT TO A FAIR TRIAL IN THE ROMANIAN LEGAL SYSTEM – A BRIEF CONSTITUTIONAL APPROACH

Claudia-Margareta Krupenschi[*]

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1. CONSTITUTIONAL FRAMEWORK

According to the very first article of the Romanian Basic Law, Romania is a democratic and social state, governed by the rule of law, where human dignity, citizens' rights and freedoms, free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed.

The rule of law and justice are concepts requiring the existence of a legislative framework that ensures the conduct of trials in conditions of complete fairness, so that the litigants and the society, as a whole, have the certainty that justice will achieve its goal in the most correct way. That is why the Romanian Constitution enshrines in Article 21 Paragraph (3) the right to a fair trial, solved within a reasonable time.

Although the right to a fair trial was constitutionalized only in 2003, on the occasion of the amendment to the Romanian Constitution, it began to be valued in the Romanian legal system right after the fall of the communist regime in December 1989 and the adoption, in 1991, of the democratic Constitution. It was incorporated in criminal and civil procedural norms, due to the fact that, in 1994, Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, so the right to a fair trial became a fundamental principle, has been respected and protected at the national level as a consequence of Romania's status as a member state of the Council of Europe and a party to the forementioned Convention.

The independence of the Judiciary and the right to a fair trial are fundamental, inherent and inseparable values, indispensable for

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ensuring the rule of law in a democratic society. In a recent decision, rendered in 2022, the Constitutional Court of Romania emphasized that the right to a fair trial involves the establishment, throughout the judicial trial, of a set of procedural rules intended to achieve a balance between the parties involved in the trial and the manner of the administration of justice, balance that would be able to guarantee the independence and impartiality of the judge[1].

The independence of the judiciary has a double meaning in Romania, being analyzed both from a personal and an institutional perspective. Thus, Article 124 Paragraph (3) of the Constitution guarantees personal independence, at the individual level, stating that *"judges are independent and subject only to the law"*. The institutional independence of the judiciary - which also includes the functional independence of judges - is also recognized by the Basic Law of Romania, which enshrines, by Article 133 paragraph (1), the role of the Superior Council of the Magistracy as guarantor of the independence of the judiciary. Institutional independence derives from the principle of separation of powers in the state – legislative, executive and judicial. This last principle is expressly enshrined in Article 1 Paragraph (4) of the Constitution and prevents the other two powers – legislative and executive powers - from intervening in the activity of rendering justice, an activity that represents the exclusive prerogative of the judiciary, as Article 126 Paragraph (1) of the Constitution states that *" Justice shall be carried out by the High Court of Cassation and Justice and the other courts of law set up by the law "*. Considering the topic of the present summer school, it is particularly relevant that the Basic Law of Romania also states, in Article 124 paragraph (2), that:

"Justice shall be a single one, impartial, and equal for all."

The uniqueness of justice means that, in Romania, justice is carried out through the same system of organs, namely the courts, regardless of the subject of the litigation.

Impartiality cannot exist without independence. Together, they are crucial to a fair adjudication of trial cases. In this sense, it is imperative that the judge be fully equidistant towards all the parties involved in

1 Decision no. 418 of September 22, 2022, paragraph 25, published in the Official Gazette of Romania, Part I, no. 197/March 9, 2022.

the process, not to favour any of them, not to be influenced by any kind of external factors that, in various ways - from psychological injunctions to possible material temptations -, to tend to alter the correctness of judgment. Likewise, the judge must not allow his own feelings, subjective perceptions or prejudices to distort the accuracy of legal reasoning and the rigor of rational thought. In other words, the judge must meet, through his or her entire conduct and through the quality of the reasoning of the solutions pronounced, the requirements of impartiality and independence, viewed both from an objective and subjective perspective. In several decisions[2], the Constitutional Court of Romania ruled that judges enjoy the constitutional presumption of impartiality, this being attached to their professional status. This presumption can, however, be overturned with regard to each individual judge, whenever the lack of subjective or objective impartiality of the judge is demonstrated. On the other hand, the Court emphasized that the provisions of the Constitution regarding the independence of judges do not have a declarative character, but on the contrary, they are mandatory for the Parliament, which has the duty to legislate the establishment of appropriate mechanisms meant to ensure the real independence of judges, or else the rule of law cannot be conceived.[3]

As regards the equality of justice, it represents an application in the judicial field of the generous principle of equality of rights, enshrined in Article 16 paragraph (1) of the Constitution, according to which *"Citizens are equal before the law and public authorities, without any privilege or discrimination"* and Article 16 paragraph (2) which states that *"No one is above the law"*.

These are, at the same time, criteria through which the fairness of the trial is assessed. Therefore, the constitutional provisions thus

2 Decision no. 558 of October 16, 2014, published in the Official Gazette of Romania, Part I, no. 897/December 10, 2014, paragraphs 19, 20, 25 and 26; Decision no. 169 of March 24, 2016, published in the Official Gazette of Romania, Part I, no. 353/May 9, 2016, paragraphs 17-24; Decision no. 625 of October 26, 2016, published in the Official Gazette of Romania, Part I, no. 107/February 7, 2017, paragraph 19; Decision no. 278 of April 26, 2017, published in the Official Gazette of Romania, Part I, no. 882/November 9, 2017, paragraphs 51 and 52; Decision no. 776 of November 28, 2017, published in the Official Gazette of Romania, Part I, no. 58/January 19, 2018, paragraph 18 et seq.

3 Decision no. 33 of January 23, 2018, published in the Official Gazette of Romania, Part I, no. 146/February 15, 2018.

give expression to the unbreakable link between the independence of judges and the fairness of the judicial trial.

The major importance of the independence of the judiciary in the Romanian system is also emphasized by the provisions of Article 152 paragraph (1) of the Constitution, which establish the intangible character of the constitutional provisions regarding the independence of the judiciary, that cannot be the object of any amendment to the Romanian Basic Law. Therefore, the independence of the judiciary is an absolute value in Romania, part of the indestructible core of the Constitution, protected as so by what one calls eternity clause[4].

2. THE LEGAL INFRA-CONSTITUTIONAL FRAMEWORK AND THE CASE-LAW OF THE CONSTITUTIONAL COURT

The independence of justice enshrined by the Constitution becomes effective and efficient thanks to specific infra-constitutional legislation, which regulates the status of judges, the organization and functioning of the courts of law, as well as the procedural rules that govern judicial activity.

Very recently, towards the end of 2022, the Romanian Parliament adopted a package of new laws concerning this domain and thus "the Romanian judicial system was modernized, by aligning it with European values and principles"[5]. It is about Law no. 303/2022 on the status of judges and prosecutors, Law no. 304/2022 on judicial organization and Law no. 305/2022 on the Superior Council of the Magistracy.

The principle of independence of judges and the general obligation to respect it, imposed on all subjects of law, as well as impartiality, as a defining feature of the activity carried out by judges, are supreme values inherent to a fair justice, being proclaimed in the beginning of

4 Article 152 of the Romanian Constitution provides the limits of revision: *'(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.*
(2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.
(3) The Constitution shall not be revised during a state of siege or emergency, or in wartime.'

5 The statement of Prime Minister Nicolae Ciucă, available at https://www.digi24.ro/stiri/actualitate/politica/ciuca-prin-noile-legi-ale-justitiei-sistemul-judicial-din-romania-se-aliniaza-la -European-values-and-principles-2152767.

Law no. 303/2022 [Article 2 para. (3) and (4): *"(3) Judges are independent and subject only to the law. Judges solve cases based on the law, respecting the procedural rights of the parties, without constraints, influences, pressures, threats or direct or indirect interventions from any person or authority. (4) Any person, organization, authority or institution is obliged to respect the independence of judges"*].

Along with these three special organic laws that regulate the judicial system in Romania, the Code of Civil Procedure and the Code of Criminal Procedure constitute the frame law for the rules of procedure that govern trials of any nature. They are designed in such a way as to ensure the main purpose of justice, namely the adjudication of disputes between individuals - natural or legal persons - or/and state authorities, in trials that meet the features of a fair trial.

Throughout more than 30 years of existence of the Constitutional Court of Romania, the independence of the judiciary and the right to a fair trial have been topics of analysis and reflection, always challenging in the perpetual changing of social realities and subject to constant improvement. Through its decisions, the Constitutional Court clarified the meaning of fundamental rights and principles, its jurisprudence becoming a genuine source of law.

One of the very first decisions issued by the Constitutional Court of Romania, more precisely decision no. 6/1992[6], represents one of the earliest examples of finding a case in which the Parliament disregarded the principle of separation of powers in the state as a result of an interference in the activity of carrying justice. As part of the *a priori* review of constitutionality, the Constitutional Court declared unconstitutional the provisions of the law regulating the legal situation of some buildings passed into the ownership of the state after August 23, 1944, which provided for the *ex officio* suspension of trials of any nature regarding the assets that are subject to that law, as well as the execution of the final court decisions pronounced regarding such assets. The Court considered that this violated the principle of separation of powers in a state of law and was considered an unconstitutional interference of the legislative power in the judicial activity. The

6 Decision no. 6 of November 11, 1992, published in the Official Gazette of Romania, Part I, no. 48/March 4, 1993.

Constitutional Court stated that the Parliament, as legislative power, has the right to establish the rules according to which the judicial activity is carried out, but this right can only be exercised by respecting the authority of the *res judicata*.

Considering the same principle of separation and balance of powers in the state, the Constitutional Court of Romania ruled[7] that no public administration authority can control, annul or modify a decision of a court of law or an order given by a court or a judge in relation to the judicial activity. In that case, the Constitutional Court found that giving the bodies of the Ministry of Public Finance the competence to solve appeals against the manner the court has established the judicial stamp duty, is contrary to the principle of the separation of powers in the state and, directly, to the provisions currently contained to Article 126 Paragraph (1) of the Constitution, according to which justice is administered through the High Court of Cassation and Justice and through the other courts established by law.

Analysing the concept of independence of the judiciary, enshrined in Article 124 paragraph (2) of the Constitution, the Romanian Constitutional Court noticed in its case-law[8] that the principle of independence of the judge has two aspects, namely functional independence and personal independence. Functional independence requires, on the one hand, that the adjudicating bodies do not belong to the executive or the legislature, and on the other hand, that the courts are independent, not subject to interference from the legislative power, the executive power or the litigants. Personal independence refers to the status that must be legally ensured to the judge. Mainly, the criteria for assessing personal independence are: the way judges are recruited; the duration of the appointment; immovability; fixing the salary of judges by law; the freedom of expression of judges and the right to form professional organizations, intended to defend their professional status; incompatibilities; prohibitions; continuous professional training; reasoning of decisions; the responsibility of judges.

The considerations mentioned above, extracted from the case-law

7 By Decision no. 127 of March 27, 2003, published in the Official Gazette of Romania, Part I, no. 275/April 18, 2003.

8 Decision no. 872 of June 25, 2010, published in the Official Gazette of Romania, Part I, no. 433/ June 28, 2010.

of the Constitutional Court, express in a very concentrated manner the sources of the independence of the judiciary. The present paper will briefly present the content of these elements, as they are outlined in the Romanian legislative system.

As for *the recruitment of judges*, it is the result of an official exam. In Romania, admission to the judiciary and initial professional training for the position of judge (and also for the position of public prosecutor) are carried out through the National Institute of Magistracy. Also, people who have worked for at least 5 years in various legal professions (lawyers, public notaries, legal advisors etc.) have the chance to enter the magistracy, on the basis of an admission contest.

The two years period of apprenticeship is ended by an exam and the appointment to the position of definitive judge is made by the President of Romania, upon the proposal of the Superior Council of the Magistracy. From that moment on, the judges acquire immovability [Article 125 paragraph (1) and Article 134 paragraph (1) from the Constitution of Romania]. In relation to this attribution of the President, the Constitutional Court established that it represents a way for the President of Romania to participate in the establishment of the judicial authority and it is consistent with the principle of the balance of powers in the state, enshrined in Article 1 paragraph (4) of the Romanian Constitution, without affecting in any way the independence of judges[9].

The prerogative of appointing judges, which the Constitution granted to the President of Romania, does not imply, in the current normative framework in Romania, his or her possibility to refuse the appointment, although the previous law provided for another legislative solution, according to which the President could refuse one proposal of appointment. Regarding this variation of legislative optics, the Court pointed out[10] that this power of the President is a related one, in the sense that issuing the appointment decree is the natural consequence and result of the proposal initiated by the Superior Council of the Magistracy, without being able to decisively reject the

9 Decision no. 551 of April 9, 2009, published in the Official Gazette of Romania, Part I, no. 357/ May 27, 2009.

10 Decision no. 45 of January 30, 2018, published in the Official Gazette of Romania, Part I, no. 199 / March 5, 2018.

proposal. The possibility to refuse the appointment proposal only once was based on an element of courtesy, of consultation and collaboration between the executive and judicial authorities, being regulated *extra legem* and not *contra legem*, so that the elimination of this attribution of the President of Romania did not infringe the constitutional norms regarding the independence of judges.

Security of tenure of judges is meant to be a protection measure of their independence and it is guaranteed at the constitutional level [Article 125 paragraph (1)]. Due to the immovability, judges cannot be moved from the office on the basis of transfer, delegation, secondment or even promotion, except with their consent, and they can be suspended or released from office only under the conditions provided by law [Article 2 paragraph (2) of Law no. 303/2022].

Regarding the issue of *fixing the salary by law*, as a guarantee of the independence of the judge, by decision no. 872/2010, cited above, the Court ruled on the legislative measure consisting in reducing the amount of the salary/indemnity of the judges by 25%, in the context of the major economic crisis during that period. On that occasion, the Court established that the principle of judicial independence cannot be linked only to the amount of judges' remuneration established by legislation, given that there are several factors that compete at the same time and in different proportions to achieve the independence of justice and none of these should be disregarded or absolutized. Therefore, a complex and systemic evaluation is necessary in terms of compliance with this principle, considering the special conditions in which Article 53 of the Romanian Constitution allows the restriction of the exercise of certain rights or freedoms[11]. The Court held that the remuneration of judges is not the only factor that ensures the independence of the judicial system. Thus, its reduction meant to last for a determined period of time, in compliance with the conditions provided by Article 53 of the Constitution, did not create a threat to the independence of

11 According to Article 53 of the Romanian Constitution, *"(1) The exercise of certain rights or freedoms may only be restricted by law, and only if it is necessary, as the case may be, for: the defense of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.*
(2) Such restriction shall only be ordered if they are necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom."

the judicial system. In addition, the decrease in salaries amount was introduced with regard to all categories of budgetary personnel, on the background of a serious economic crisis in 2009. The Court found that the independence of judges is a guarantee offered to citizens, and the judge must carry out his daily activity based on the ethical responsibility of the important position he or she holds. An absolutization of the rights of a certain socio-professional category must also be seen in the context of the principle of equality, namely the intangibility or increase of benefits granted to a group automatically means worsening the material condition of another group of employees.

The *continuous professional training* of judges (and prosecutors) is also a strong guarantee of independence and impartiality. Continuous training is both a right and a duty for judges and prosecutors. It has to be carried out so that it takes into account the dynamics of the legislative process. It consists, mainly, in deepening the knowledge regarding the national legislation, the European and international documents to which Romania is a party, the case-law of the Romanian High Court of Cassation and Justice and of the Romanian Constitutional Court, but also the case-law of the European Court of Human Rights and of the Court of Justice of the European Union, in a multidisciplinary approach of innovative institutions [Article 81 of Law no. 303 /2022].

The periodical evaluation to which judges are subjected and the possibility of promotion in the magistrate career, as well as the procedures corresponding to these essential elements of the judges' status, are also legal mechanisms having an essential role in ensuring the independence of the judiciary and the right to a fair trial and which aim, finally, to increase the quality of the judicial activity (Chapters V and VI of Law no. 303/2022).

An important provision, being able to contribute to ensuring the independence of judges, is the one comprised in the Law no. 303/2022, according to which judges and prosecutors in-office or those retired have the right to be provided with *special protection measures against threats, violence or any acts that endanger their life of physical integrity, their families or their property*. The special protection measures, the conditions and the manner of their implementation are established by Government decision, upon the proposal of the Ministry of Justice

and the Ministry of Internal Affairs, with the approval of the Superior Council of the Magistracy (Article 207 of Law no. 303/2022). Also, judges and prosecutors, including retired ones, are entitled to compensation offered from the budget of the High Court of Cassation and Justice, the Public Ministry, the Superior Council of Magistracy or the Ministry of National Defence, as the case may be, if their life, health or assets are affected in the exercise of their duties or in connection with them (Article 208 of Law no. 303/2022).

The immunity regime established for judges is also included in the category of special protection measures. These measures have in mind, on the one hand, the protection of the freedom of expression and the independence of the judge, in the sense that he or she benefits, also after leaving office, of irresponsibility for the opinions expressed and the votes granted in the judicial activity. Against decisions of the court, the parties concerned and the Public Ministry may exercise ways of appeal, in accordance with the law[12]. So, the disagreement regarding the decision rendered in their duties as judges can be expressed by legal means of appeal against the respective jurisdictional acts.

In what concerns the legal protection of the judge's office, the law provides for the benefit of inviolability, in the sense that the *custody, arrest, detention or referral to a court*, as criminal procedural measures, take place under special conditions. Thus, in the case of ordinary jurisdictions, the search, detention or arrest of judges can be carried out – except in cases of *flagrante delicto* - only with the approval of the Section for judges of the Superior Council of the Magistracy - the constitutional guarantor of the independence of the judiciary (Article 267 of Law no. 303/2022). Also, the material competence to try the judges, regardless of whether the criminal acts are committed in connection with the office duties, is a special one, according to the professional quality of the person. For crimes committed by the judges of the High Court of Cassation and Justice, the criminal investigation and referral to court are carried out only by the Prosecutor's Office attached to the High Court of Cassation and Justice, and the judicial competence belongs to the High Court of Cassation and Justice. Regarding the judges of inferior courts, jurisdiction belongs to the court of appeal (Article 3 of

12 Article 129 of the Constitution.

Law no. 49/2022 and Article 38 of the Code of Criminal Procedure).

The Constitutional Court ruled also on the status of the constitutional judges in terms of the *immunity regime, as a guarantee of their independence*, in a decision from 2018, performing the *a priori* review of constitutionality over a law by which the provisions of the Law of the Constitutional Court were modified (Law no. 47/1992 on the organization and operation of the Constitutional Court) in what concerns these special measures to protect the constitutional mandate[13]. The Court held that the purpose of procedural immunity is to "ensure the independence of the holder of the mandate against any external pressure or abuses, which may occur during resolving criminal cases, including during the investigation of facts that are not directly related to the exercise of the office of constitutional judge. If the legal norm is meant to limit the incidence of immunity only to the criminal acts committed by the judges of the Constitutional Court in connection with the exercise of their office, the purpose for which this institution was created would only be partially achieved, since the pressures, acts of fraud or abuses could be generated by the investigation within criminal prosecution of acts unrelated to the duties that the office of a judge entails, but in order to produce effects on the way of fulfilling these duties, aiming at affecting the independence of the judge".

The inviolability protects the constitutional judge against possible pressures or abuses that would be committed against his or her person via preventive measures with a high degree of intrusion into the right to private and family life or restriction of individual freedom. That is the way to ensure his or her independence, freedom and security in the exercise of the rights and obligations that belong to him or her, according to the Constitution and the laws. The Court ruled, however, that the extension, by the new law subject to constitutionality review, of the constitutional judge's procedural and criminal prosecution immunities violates the fundamental principle of equal rights and non-discrimination, because this measure is reserved, directly by the Constitution, exclusively for the protection of the office of the President of Romania and for that of a member of the Government, and this

13 Decision no. 136 of 20 March 2018, published in the Official Gazette of Romania, Part I no. 383/4 May 2018.

protection cannot be extended by law to the office of the constitutional judge. That is because the capacity of judge of the Constitutional Court cannot, by itself, constitute an objective criterion of differentiation in the matter of the inviolability regime. The constitutional status of this public office and the independence of the judge of the Constitutional Court cannot be invoked as objective and reasonable criteria that justify the creation of a privileged legal regime of this magistracy, in terms of immunity. On the contrary, its rank and constitutional place oblige the just and fair application of the forms of protection of the constitutional mandate. Since the privilege thus created concerns the conduct of a judicial procedure, the Court also found a violation of the provisions of Article 124 paragraph (1) and (2) of the Constitution, which enshrine a single, impartial and equal justice for all, carried out in the name of law.

Consequently, the law subject to control was amended by the Parliament in accordance with the decision of the Constitutional Court, so that, at present, the criminal investigation and the sending to trial of the constitutional judges are carried out only by the Prosecutor's Office attached to the High Court of Cassation and Justice, and the adjudication competence belongs to the High Court of Cassation and Justice; as regards the search, detention, arrest and prosecution of constitutional judges, these are allowed only with the prior consent of the plenary session of the Constitutional Court (vote of 2/3 of the total of 9 members), at the request of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice (Article 66 of Law no. 47/1992 on the organization and operation of the Constitutional Court).

Returning to the guarantees intended to ensure the independence of all judges, it is necessary to mention the *incompatibilities and prohibitions* specific to the career as a magistrate, aimed to preserve their independence and impartiality, so that the demands of the fair trial are met in all the cases that they adjudicate. Thus, according to Article 125 paragraph (3) of the Constitution, the position of judge is incompatible with any other public or private position, except for teaching positions in higher education. At the same time, judges are obliged to refrain from any activity that presupposes the existence of a

conflict between their personal interests and the public interest, likely to influence the impartial and objective performance of their duties established by the Constitution or by other normative acts [Article 227 paragraph (2) of Law no. 303/2022]. More specifically, judges are prohibited from carrying out commercial activities, directly or through persons interposed, from carrying out arbitration activities in civil or other disputes or from being associate or member in the management, administration or control bodies of companies, credit or financial institutions, insurance/reinsurance companies, national companies or autonomous governments. [Article 231 of Law no. 303/2022].

Likewise, judges cannot be a member of political parties, nor do they have the right to carry out or participate in activities of a political nature. They are obliged to refrain from expressing or manifesting, in any way, their political beliefs in the exercise of their duties. [Article 232 of Law no. 303/2022]. Moreover, considering their status, judges and prosecutors are not allowed to simultaneously be part of the judicial authority, executive or legislative power [Article 227 paragraph (3) of Law no. 303/2022]. Following the same purpose of maintaining independence in the exercise of their function with full impartiality and objectivity, which are essential for fair trials, the Law on the Status of Judges and Prosecutors provides that judges cannot publicly express their opinion regarding ongoing trials. For the same reason, judges cannot give written or verbal advices on litigious issues, even if the respective processes are pending in other courts than those in which they exercise their function, and they cannot perform any other activity that, according to the law, is carried out by a lawyer [Article 233 of Law no. 303/2022].

It should be mentioned, at the same time, that a strong guarantee of the independence of the judge resides in the fact that the review of judicial decisions is carried out only by the higher courts, not by any of the other powers in the state (legislative or executive), which would amount to an intrusion in the activity of judges, contrary to the independence of justice and the principle of separation of powers.

In its case-law, the Constitutional Court ruled with regard to the institutional component of judicial independence, that also implies the existence of a financial security, which, along with the certainty of salary

income during the activity, also implies a social guarantee, such as the pension of the magistrates. As such, the Court found that the principle of judicial independence protects the service pension of magistrates, as an integral part of their financial stability, to the same extent as it protects the other guarantees of this principle. The constitutional statute of the magistrates requires the granting of service pension as a component of the independence of justice, guarantee of the rule of law, provided by Article 1 paragraph (3) from the Constitution[14]. Regarding the establishment of the basis for calculating the service pension of magistrates, by decision no. 900 of December 15, 2020, the Court ruled that the legislator is bound to respect the principle of judicial independence, in terms of the financial security of magistrates, which requires the provision of pension incomes close to those that the magistrate had benefited of during the period where he or she was active (paragraph 143). At the same time, the Court set the benchmarks of a constitutional nature in the matter of the service pension of magistrates, limiting the margin of appreciation of the legislator in the legislative process: the principle of judicial independence is a corollary of the principle of the rule of law and includes a series of incompatibilities and prohibitions, as well as the responsibilities and risks involved in the exercise of this profession, and requires the granting of service pension to this professional category. That being the case, any regulation related to the remuneration and pensions of magistrates must respect the principle of judicial independence and the rule of law, the current constitutional framework underpinning the financial security of magistrates.

In a very recent decision no. 467 of August 2, 2023, paragraphs 116-118, the Court showed, however, that the independence of the judiciary does not *eo ipso* requires the preservation and perpetuation *ad aeternum* of the set of regulations in the magistrates' retirement system. This system knows both constants and variables in terms of the elements it includes. The constants are the effective length of service and the calculation basis. The effective length of service is dimensioned at

14 Decision no. 900 of December 15, 2020, cited above, paragraph 124, Decision no. 873 of December 9, 2020, published in the Official Gazette of Romania, Part I, no. 50/January 15, 2021, and Decision no. 20 of February 2, 2000, published in the Official Gazette of Romania, Part I, no. 72/18 February 2000.

a level of 25 years of activity (without assimilated periods), and the calculation base must be related to the gross income from the moment of opening the right to service pension, in order to reflect a level as close as possible to the income related to the position, professional degree and seniority considered at the date of retirement.

It is worth mentioning a decision with a strong legal and social impact, rendered by the Constitutional Court of Romania in 2018, where the constitutional court found a violation of the right to a fair trial through the prism of the requirements of independence and objective impartiality that must characterize any court[15]. This decision was pronounced in solving a legal conflict of a constitutional nature between the Parliament of Romania, on one hand, and the High Court of Cassation and Justice, on the other hand, generated by the way the High Court of Cassation and Justice carry out the drawing of lots for the appointment of the members of the Panels of 5 judges (which are one of the structures within the High Court). Thus, through its own way of interpreting some legal norms in this matter, as well as by postponing the application of a new law in the same matter, the Governing Board of the High Court of Cassation and Justice issued, starting in 2014, administrative decisions by which established, contrary to the law, that for the establishment of Panels of 5 judges, only 4 of them should be selected by drawing lots, the 5th member being introduced "by right", in the person of a judge with a leadership position within the High Court of Cassation and Justice, who automatically became the president of the Panel. The Constitutional Court found that this mechanism circumvents the law, which did not provide for the existence of legal members, thus altering the random designation of the respective panels. This illegal way of constituting the trial panels gave rise to justified suspicions regarding the lack of independence and objective impartiality of the court, which directly affected the right to a fair trial. As a result of this decision, the interpretation contrary to the content of the legal norm regarding the composition of the supreme court was removed from the legal order, which means that all members of the panels of 5 judges must be appointed by drawing lots.

15 Decision no. 685 of November 7, 2018, published in the Official Gazette of Romania, Part I, no. 1021/November 29, 2018.

The present paper tried to very briefly present some theoretical and jurisprudential aspects related to the vast topic of the independence of the judiciary in relationship with the fundamental right to a fair trial, as it is enshrined in the Romanian Constitution and implemented in our national legal system. Far from exhausting the rich and diverse case-law of the Constitutional Court on this matter, this contribution intended to underline the most significant issues in this field and put a light on its importance in the Romanian democratic society.

RIGHT AND FREEDOM OF PUBLIC ASSEMBLY: LEGAL NORMS AND CONTEXT IN THAILAND

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CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND

JUDICIAL INDEPENDENCE AND FAIR TRIAL: A FOCUS ON THAILAND'S CONSTITUTION AND CONSTITUTIONAL COURT

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I. INTRODUCTION

Judicial independence stands at the core of modern constitutionalism, under which the judiciary shall be free from any interference when exercising its powers. Nonetheless, the concept is as ambiguous as others in the understanding and implementation of constitutionalism. While some constitutional texts of several countries attempt to focus more on the protection of judges and justices in making independent decisions, others emphasize the preservation of an independent judicial bureaucracy. With a focus on Thailand, a country with gradual political development, judicial independence can also be examined in its constitutional system. Thanks to the nation's recent successful constitutional reforms, the Constitutional Court of the Kingdom of Thailand, firstly established by modernized Constitutions, also enjoys its independence as safeguarded in many relevant laws for the sake of protection of people's rights and liberties, including a right to a fair trial.

This paper will, therefore, begin to investigate the evolution of the said principle in the country's Constitutions. Once judicial independence is well underpinned in Thailand's constitutional studies, how many facets of such independence there are and how they support the Constitutional Court of the Kingdom of Thailand to safeguard a right to a fair trial will be examined. Touching upon several constitutional cases and legal reasoning provided by the Court, this study will argue in favor of the role of the Constitutional Court

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because such independence not only promotes fairness in the judicial proceedings, but also the Court itself can safeguard and ensure a fair and transparent trial through its decision to standardize Thai judicial procedures.

II. ARCHITECTURE OF JUDICIAL INDEPENDENCE: A CONSTITUTIONAL PERSPECTIVE

The origin of the principle of judicial independence is somewhat controversial. It is widely assumed that such a concept emerged as early as the birth of democracy. It is, however, difficult to absolutely ascertain that democratic ideology was originally conceptualized along with judicial independence. Indeed, liberal democracy has established the principle of the '*separation of powers'* that fosters and reinforces the independence of the judiciary. The doctrine of such separation allows all the three sovereign institutions; notably the Legislature, the Executive, and the Judiciary, to correlate with each other by checking and balancing their roles and influences. With a focus on the judiciary, this heart of the constitutional framework is argued by many scholars to enable such sovereignty to perform its roles effectively, fearlessly, and -- more importantly -- independently. The doctrine entails a sharp sensitivity towards interference with any branch's fundamental role under the constitution.[1]

To define '*judicial independence*' within Thailand's constitutional context as this paper's spotlight, one of the very first questions can be raised: what the identification of such principle in the constitutional scheme of Thailand is.

As mentioned earlier, the origin of a democratic regime advocating judicial independence can be questionable to some extent. The separation of powers as a spirit of constitutional ideology to stabilize a legal system and overhaul a check-and-balance system away from authoritarianism can without a doubt fortify judicial independence at any rate in terms of a constitutional perspective. Therefore, a constitutional architecture of the independence of the judiciary in Thailand ought to be further examined.

1 Kaufman, Irving R. (1980). *The Essence of Judicial Independence*. **Columbia Law Review**, Vol.80(4), pp. 671-701.

The conception of the separation of powers was initially introduced in the Kingdom of Thailand when the country's governance was transformed from an absolute monarchy to a constitutional one on 24th June 1932. Despite the recognition of the check-and-balance system with the Act on Interim Charter for Public Administration of Siam, B.E. 2475 (1932), which is widely accepted among Thai constitutional scholars to be the very first constitution of the country due to its supreme legal hierarchy, the concept of judicial independence remained ambiguous in such document. The Act, announced on 27th June 1932, consisted of only 39 sections, one of which merely mentioned the court and defined its role as the dispute settlement.[2] One of the most underlying reasons for this was the revolutionists' haste to make a demand for macro-political and social changes in the nation. It is, hence, unsurprising that some judicial doctrines, including the independence of the judiciary, were missed out during the three-day gap of the first constitutional proclamation.

The doctrine of judicial independence, along with the separation of powers, was stated more explicitly in the Constitution of the Kingdom of Siam, B.E. 2475 (1932). As this legislation allowed judges to adjudicate their cases independently,[3] it is said to be the first state-of-the-art constitutional scheme of Thailand to ensure such judicial principle. Afterward the independence of the judiciary has been well recognized and developed in a series of Thai Constitutions. Aside from legal stipulation for the Thai courts to exercise their duties in accordance with the laws and in the name of the King, the first constitutional provision of the Chapter on the Courts in the current Constitution of 2017 provides that "judges and justices shall be independent in deciding matters before them impartially in a swift and fair manner in accordance with the Constitution and laws."[4] It can be seen that such significant doctrine is precisely rooted in the constitutional framework of the country.

Given that such a central principle of judicial administration has been laid down to underpin constitutional philosophy in Thai legal supremacy for numerous decades, it is also applied within a broader

2 Act on Interim Charter for Public Administration of Siam, B.E. 2475 (1932), s 39.
3 Constitution of the Kingdom of Siam, B.E. 2475 (1932), s 60.
4 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 188 para two.

context of judicial best practice and implementation. To say it more specifically, the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), provides that all the judicial organs; namely the Courts of Justice, the Administrative Court, and the Constitutional Court, with an exception of the Military Court, shall have their own secretariats which are independent in staff administration, budget and other activities, with a head of each office as a superior official directly responsible to the President of each Court.[5] The essence of this provision was initially prescribed in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)[6] and also the Constitution of the Kingdom of Thailand, B.E. 2550 (2007),[7] aiming for both staff administration and resource management of the secretariat offices of the said Courts to fully enjoy their judicial power. In the case that the court administration had been guided by the Executive, whose power was concentrated mostly in public administration, the Judiciary might have been controlled by the government, resulting in an adverse impact on judicial independence and trial proceedings eventually.

With respect to the correlation between the judicial institutions as prescribed in the current Constitution of Thailand, it has been well established in the legislation -- particularly reflecting the roles and independence of the Courts of Justice and the Constitutional Court. In the application of a provision of law to any case, if a court of justice by itself is of the opinion that, or a party to the case raises an objection with reasons that, such provision of law falls within the Constitution and there has not yet been a decision of the Constitutional Court pertaining to such provision, the court shall submit its opinion to the Constitutional Court for a decision. During that time, the court of justice shall proceed with the trial, but shall temporarily stay its decision until a decision is made by the Constitutional Court.[8] Even though the Constitutional Court's decision shall apply to all cases, it shall not affect final judgments of the courts of justice. However, this practice shall be invalid in a criminal case where it shall be deemed that a person who has been convicted of a crime under a provision

5 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 193 para one.
6 Constitution of the Kingdom of Thailand, B.E. 2540 (1997), s 275.
7 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), s 222.
8 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 212 para one.

of law declared by the Constitutional Court as unconstitutional never committed such offence, or where such person is still serving the sentence, he or she shall be released.[9] One of the main grounds for this constitutional provision is the protection of final judgments of the courts of justice based upon the independence of each judicial organ. The decisions or rulings of the Constitutional Court shall exert any particular effects only on pending cases. However, any Constitutional Court's rulings shall be unable to change the judgments of the courts of justice pronounced prior to such Constitutional Court decisions owing to their own independence of trial and verdict. More importantly, an exception is made for such a principle. In other words, according to the rule of law, any legislation shall have no retroactive effect, or it is said under the doctrine of '*ex post facto laws*'. Nevertheless, if the unconstitutionality of any statutory provisions concerning criminal penalty is decided by the Constitutional Court, such a ruling should be considered as an exception as it will have a positive effect on an inmate as he or she will be deemed innocent and shall be released finally.

Along with the constitutional evolution in Thailand, the principle of judicial independence has continuously advanced as the present Constitution of Thailand provides a broader and deeper sense of such doctrine within the context of the separation of powers and the rule of law. As far as a sharp focus on the aforementioned provisions of the Constitution is concerned, the independence of the judiciary can be divided into two dimensions: '*institutional*' and '*decisional*' independence. As a consequence, another two questions for this study will be worth being investigated: what '*institutional*' and '*decisional*' independence of the judiciary is; and how those categories of judicial independence promote a fair trial with a focus upon the Thai Constitutional Court's context?

III. 'INSTITUTIONAL' AND 'DECISIONAL' INDEPENDENCE & FAIR TRIAL

As examined earlier, the concept of judicial independence derives from the separation of powers as a check against the abuse of power between the legislature, the executive, and the judiciary under the

9 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 212 para three.

sphere of respect for each other. To what extend the judiciary enjoys such a role entails two dimensions of its independence -- 'institutional' and 'decisional' -- which are also laid down in the current Constitution of the Kingdom of Thailand.

A. Institutional Independence

Institutional independence seems to be a necessary component of the separation of powers because it provides the judiciary with insulation from the other branches of government. Judges and justices, including those who are constitutional court members, are allowed to carry out their duties and exercise their powers effectively. Not only does it assist judges and justices in a proper delineation of their roles, but also it permits them to guard themselves from being drawn into a political sphere. Such principle of institutional independence, guaranteed in the Thai Constitution, authorizes the Constitutional Court to establish its independent secretariat under the direction of the President of the Constitutional Court. This constitutional recognition has contributed to the enactment of the Act on the Office of the Constitutional Court, B.E. 2542 (1999), which delegates powers to the board of the Justices of the Thai Constitutional Court to pass any rules and regulations relevant to general administration, human resources management, finance and property allocation and so forth.[10] All the staff members of the Office of the Constitutional Court hold their official status under their organization as an independent secretariat in accordance with the relevant law supervised by the Secretary-General, whose performance is directly supervised by the President of the Court.[11] Although the law on the civil servant committee shall be applied *mutatis mutandis* in order for promotion and salary awards of such staff members, they are not in the service of the Office of the Civil Servant Committee. Nonetheless, the said Act provides that the term "civil servant" shall refer to the board of the Justices of the Constitutional Court instead.[12]

With regard to the Justices of the Thai Constitutional Court, an efficient selection process may help ensure the institutional independence of the Court. According to the Organic Act on

10 Act on the Office of the Constitutional Court, B.E. 2542 (1999), s 6.
11 Act on the Office of the Constitutional Court (No.2), B.E. 2562 (2019), s 9.
12 Act on the Office of the Constitutional Court, B.E. 2542 (1999), s 7.

Procedures of the Constitutional Court, B.E. 2561 (2018), the Justices shall be selected from three Supreme Court justices, two Supreme Administrative Court judges, two former high-ranking government officials and two experts on law and political science each.[13] In addition to the qualifications they need to acquire for selection, they shall not be currently prohibited from holding a political position.[14] They shall not be a member of either the upper or lower Houses, a local assembly, or a political party; otherwise they shall relinquish such positions prior to the selection for at least 10 years.[15] The spirit of this law reflects the necessity for those who are willing to be in the selection process of the Justices of the Constitutional Court solely on the basis of their self-reliance and impartiality free of any political interference.

Having asserted such institutional independence pursuant to the mentioned legislation, Thailand's Constitutional Court is able to conduct a fair trial. As the principle of judicial independence can be a milestone for justice and fairness, the Court can protect itself from any undue interference and pressure, especially imposed by the other branches of sovereignty: the legislature and the executive. In other words, the Constitutional Court of the Kingdom of Thailand has its specific secretariat to administer its own resources as well as non-engagement in any political realm of potential candidates for the post of Justices of the Constitutional Court. Thereby, the Court is capable of avoiding partiality that might result from political impediments. Supposed that each project and activity of the Thai Constitutional Court, including the Office of the Constitutional Court, had to await budgetary allocation repeatedly by the Ministry of Justice, an executive branch, it would be unable to provide a fair trial to society -- particularly to handle constitutional cases related to political party dissolution -- because of a considerable degree of financial pressure from the government. As a result, it is undeniable that institutional independence of the judiciary is related to a fair trial of the Constitutional Court, which plays a vital role in dealing with many political crises.

13 Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018), s. 8.
14 Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018), s. 10 (14).
15 Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018), s. 10 (18)-(19).

B. Decisional Independence

The other facet of judicial independence focuses more on the role of the judiciary in decision-making and adjudication than its organizational management. Decisional independence means the ability to render judgments on the legal and factual grounds of cases before judges and justices free of undue external pressure regardless of its source -- politicians, the public, and the media--. That is to say, this segment of judicial independence allows the judiciary to make its decisions freely without being swayed by concern for political consequences or public backlashes. However, it does not mean that judges and justices should be indifferent to public opinion. Yet, they must explain to the public the legal reasoning behind their decisions and rulings.

Decisional independence has promoted fair and transparent adjudication of the Thai Constitutional Court since its establishment in 1998. The Court has ruled on many unconstitutional cases to safeguard constitutional supremacy and the legal foundation of the country. Meanwhile, it upholds a democratic regime in society and protects individual rights and liberties. As far as a public hearing is concerned as one of the aspects of a right to a fair trial, it is recognized in the International Covenant on Civil and Political Rights (ICCPR), which states that "…everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…"[16] A major reason for a public hearing is to provide others with an opportunity to examine judicial proceedings and build up public trust. In its Ruling No. 4/2556 (2013), the Constitutional Court of the Kingdom of Thailand took into consideration that a provision of the Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992), was a constitutional question because of defendants being bound by evidence obtained in a foreign court's examination. Even though the admissibility of such evidence was subject to the Criminal Procedure Code of Thailand by allowing a Thai court to exercise caution in cases where defendants had no chance of cross-examination, this rule was not an absolute prohibition. With its breach of the ICCPR, especially defendants' right to a fair trial, such law of Thailand was, thus, ruled unconstitutional.[17]

16 International Covenant on Civil and Political Rights, art. 14.
17 Constitutional Court Ruling No. 4/2556 (2013), dated 13th March 2013.

Nevertheless, in Ruling No. 30/2554 (2011), the Constitutional Court examined the objection of a defendant before the Criminal Court in Bangkok whose trial was carried out *in camera* according to the Criminal Procedure Code. With an exemption clause consistent with the ICCPR,[18] the Constitutional Court laid down the principle that in some criminal cases, a non-public hearing did not cause any unfair trials on the grounds of morals, public order (*ordre public*), national security in a democratic society, or the interest of the private lives of the parties.[19] Consequently, it shall be decided by the judiciary to conduct a trial *in camera* in order to protect the rights and liberties of the parties and others.

More interestingly, not only does such independence helpfully offer an opportunity to the Constitutional Court of Thailand to put both applicants and respondents in its fair trials, but also the Court itself can be independent in standardizing just and transparent trials and procedures to the society. For instance, the Thai Court has annulled an executive decree that has postponed the enforcement of four critical articles within the Act on Prevention and Suppression of Torture and Enforced Disappearance. Such provisions of law mandate state officials to maintain continuous audio and video surveillance of suspects, document grounds for arrest or detention, and permit the withholding of information from the public if it compromises privacy or hampers investigations.

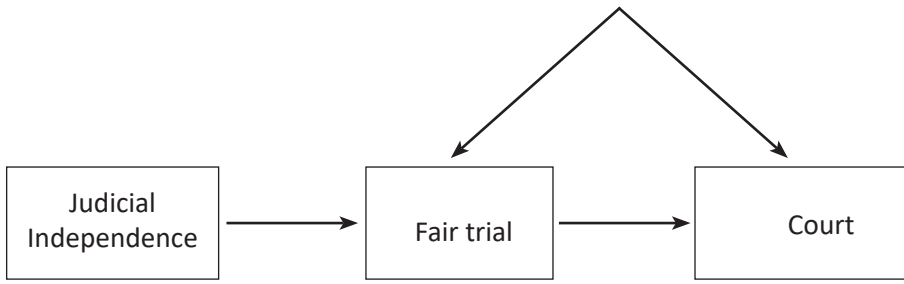
The Thai Government's delay of the enforcement of such law drew criticism from many experts in Thailand and international organizations, including the United Nations Human Rights Council (UNHRC). Having accepted the application of the opposition Members of the House of Representatives questioning the constitutionality of the said decree, the Constitutional Court considered that the Anti-Torture and Enforced Disappearance Act was an important step in combating human rights abuses in the country. Its ruling has nullified the postponement, making the Act fully enforceable.[20]

18 International Covenant on Civil and Political Rights, art. 14.
19 Constitutional Court Ruling No. 30/2554 (2011), dated 11th May 2011.
20 Constitutional Court Ruling No. 7/2566 (2023), dated 18th May 2023.

The Constitutional Court's decision signifies a victory for human rights advocates who have long called for stronger measures against torture and enforced disappearances in Thailand. It is now crucial for the government to ensure that law enforcement agencies comply with the Act and take necessary steps to prevent human rights violations.

After having investigated some examples of the Thai Constitutional Court rulings, it appears that judicial independence -- both institutional and decisional -- can safeguard the right to a fair trial since the Court, which is organizationally free from any other governments, is capable of performing its role in rendering decision and judgment independently. It is, moreover, noticeable that the Court itself does not only enjoy just and transparent hearings in accordance with the Constitution, international human rights instruments and other relevant laws, but also more importantly, the judiciary can establish and standardize the right to a fair trial for the public *vice versa* as shown in the diagram below. As seen in its landmark decision concerning the anti-torture and enforced disappearance law, the Constitutional Court of Thailand has markedly shielded such human rights regime. The statute is, arguably, irrelevant directly to a court proceeding but an arrest and inquiry process, indeed. However, "if the first button is buttoned wrong, the rest shall be crooked." That is to say, any party shall be impossible to enjoy their right to a fair trial before the court once they are abused even in the foremost step of the judicial processes.

Diagram: The correlation between judicial independence, fair trial, and the Constitutional Court



IV. CONCLUSION

Even though the doctrine of judicial independence is still controversial, the separation of powers can be taken into account to conceptualize the self-determination and impartiality of the judiciary. Since the country pronounced the very first Constitutions, Thailand under a constitutional monarchy has continuously recognized the said spirit of constitutionalism that ascertains, respects, and reserves the right to a fair trial as one of the most solid pillars of civil rights protection in the country.

The Constitutional Court of the Kingdom of Thailand, one of the judicial organs established by the Constitution, also enjoys independence -- both institutional and decisional -- for the sake of just and transparent trial proceedings. On account of such impartiality and non-interference of any political pressure, the Court is able to adjudicate on its constitutional cases freely as the other branches of sovereignty cannot interfere with its system in terms of aspects concerning management and adjudication. Most of all, the judiciary can also pave a milestone of justice and fairness in judicial proceedings through its constitutional reasoning and landmark decisions.

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JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

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SUPREME COURT OF THE TURKISH REPUBLIC OF NORTHERN CYPRUS

JUDICIAL INDEPENDENCE AS A SAFEGUARD OF THE RIGHT TO A FAIR TRIAL

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The subject of this publication is the independence of the judiciary in terms of protecting the right of fair trial, which is the most important element of a constitutional state.

In order for us to be able to talk about the rule of law in a country, judicial independence must be fully guaranteed.

The Turkish Republic of Northern Cyprus is a secular republic based on the principles of democracy, social justice and the supremacy of law.

On this occasion, I would like to provide you with a brief summary about the current situation in our country regarding the independence of the judiciary as a guarantee for the protection of fundamental rights, freedoms and safeguard of the right to a fair trial.

Article 6 of the TRNC Constitution states that judicial power shall be exercised on behalf of the people of the Turkish Republic of Northern Cyprus by independent courts.

What is the structure of the courts in TRNC ?

The judiciary in North Cyprus is composed of a two-tier court structure.

The lower courts known as district courts and the higher court known as the High Court or the Supreme Court.

North Cyprus is divided into 6 districts and each district has its own court.

- (Lefkoşa, Gazimağusa, Girne, İskele, Güzelyurt, Lefke)

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There are also Assize Courts in 3 districts.

- (Lefkoşa, Gazimağusa, Girne)

The Supreme Court is located in the capital city of TRNC which is Nicosia.

The Supreme Court of the Turkish Republic of Northern Cyprus has one President and seven judges.

The mandatory retirement age for high court judges is 65, and the retirement age for district court judges is 60.

The Supreme Court acts as the Appeal Court in both criminal and civil cases and also as the Administrative Court and the Constitutional Court.

The legal system in the TRNC is based on the Anglo-Saxon system which in effect means that the judge listens to the arguments of both sides verbally in open court and decides accordingly and not on the documents prepared by the lawyers or the report of an expert.

According to the Constitution of the TRNC, international agreements duly put into effect have the force of law.

Article 90 (5) of the Constitution of the TRNC which concerns the Ratification of International Agreements states that international treaties which have been duly put into operation shall have the force of law.

The European Convention on Human Rights is part of the domestic law of the TRNC and the Supreme Court has clearly emphasized this position in various cases that have come before it.

The Constitutional Court stated in its decision 3/2006 that the European Convention on Human Rights (ECHR) is part of the TRNC's domestic law.

The Court also emphasized that the constitution should be interpreted in compliance with the ECHR.

The Constitution of TRNC contains every element for the protection of the right of a fair trial.

The Constitution of TRNC (Article 17 *Rights Relating to Judicial Trials)* states that:

(1) No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or special courts under any name whatsoever is prohibited

(2) Every person shall, in the determination of his civil rights and obligations or of any criminal charge against him, be entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law. Judgment shall be reasoned and pronounced in public session.

(3) The press and the public may be excluded from all or any part of the trial upon a decision of the court in cases where it is in the interest of national security or constitutional order or public order or public safety or public morals or where the interest of juveniles or the protection of the private life of the parties so require or, in special circumstances where, in the opinion of the court, publicity would prejudice the interests of justice.

(4) Every person has the right

(a) to be informed of the reasons why he is required to appear before the court;

(b) to present his case before the court and to have sufficient time necessary for its preparation;

(c) to adduce or cause to be adduced his evidence and to demand that witnesses are directly examined according to law

(d) to have the services of a lawyer chosen either by him or by his relatives and where the interests of justice so require to have free legal assistance as provided by law ;

(e) to have free assistance of an interpreter if he cannot understand or speak the language used in court.

The rights and freedoms of individuals can only be limited in accordance with the laws and constitutional regulations.

The Constitutional Court judgement 1/2001 states that;

"The independence of the judiciary forms the basis of the principles of 'democracy' and 'Republic' expressed in Article 1 of the Constitution. The independence of the judiciary is synonymous with the concepts of "independence of the courts" or "independent courts", and the assurances of judges are an integral part of these concepts…

In addition to the natural meanings of the concepts of "independence of the courts" and "judicial guarantees", it would not be wrong to consider them separately within the concept of the rule of law."

The Criminal Code (Laws of Cyprus Chapter 154) and the Criminal Procedure Law (Chapter 155) are the key pieces of legislation governing the regulation of Criminal Justice.

The Criminal Code (Laws of Cyprus Chapter 154) contains definitions, details and punishments for various kinds of offences whereas the Criminal Procedure Law (Laws of Cyprus Chapter 155) lays down the procedures to be followed during arrests, investigations and proceedings.

In applications for detention made under Chapter 155 of the Code of Criminal Procedure, the courts have to evaluate the testimony in detail and provide the police force with the necessary opportunity to conduct the investigation properly.

However, in doing so, a detention order should only be issued if it is deemed that there is sufficient reason to issue the requested detention order, without unduly restricting the fundamental human rights and freedoms that are protected by the TRNC Constitution. (Article 16)

After the initial detention order issued by the Courts/Judge, the suspect must be brought before the Court at the earliest opportunity after the arrest and in any case not later than 24 hours in order to protect the right to a fair trial.

If there is a prima facie indication that the suspect has a connection with the crime alleged to have been committed, and if the investigation has not yet been completed, and if there is a possibility that the suspect's release may negatively affect the course of the investigation, the period of detention will not exceed 3 days at first, then a maximum of 8 days at a time. The suspect can only be detained for a period of 3 months in total. (TRNC Constitution Article 16)

Once the investigation is completed and the suspect is linked to the crime and there is no longer any possibility of adversely affecting the course of the investigation, the courts need to decide the conditions of bail. At this stage the Courts take the necessary measures to ensure

that the suspect will be present before the court during the future trial phase, pursuant to the relevant article of the Criminal Procedure Code. (Chapter 155, Article 23(A)).

The Supreme Court judgement 67/2002 states that; the issue of detention is an issue that concerns personal freedoms and human rights. For this reason, defendants should not be arrested unless necessary or detained for longer than necessary.

The rights and freedoms of individuals can only be limited in accordance with the laws and constitutional regulations.

The question to be asked at this stage is how is the independence of the judiciary ensured in the TRNC?

The existing articles in the Constitution strictly protect the independence of the judiciary and prevent interference from external factors.

Appointment of judges by an independent board makes a significant contribution in ensuring the independence of the judiciary and establishing the rule of law.

In the Turkish Republic of Northern Cyprus, the appointment of judges is made by the Supreme Council of Judicature, which is a completely independent institution.

According to Article 18 of the Courts Act, without prejudice to Article 160 of the Constitution, the presidents of the District Court, the senior judges of the District Court and the Judges of the District Court are appointed by the Supreme Council of Judicature, in accordance with the Constitution and the relevant legal rules and in accordance with the procedure determined by the Supreme Council of Judicature.

The TRNC Constitution, which came into force on May 7, 1985, regulates the Establishment and Functioning of the Supreme Council of Judicature. (Article 141)

The Supreme Council of Judicature consists of twelve members: The President of the Supreme Court and its seven members, one member each appointed by the President and the Assembly of the Republic, the Chief Public Prosecutor and one member elected by the Bar Association.

As stipulated by the relevant article of the Constitution and the Law No. 35/85 on the Supreme Council of Judicature, this board has two main duties.

a) Taking necessary measures for the smooth functioning of the judiciary, the regular conduct of its affairs, the continuity of duties for the judges and public officials affiliated with the courts, the efficient execution of tasks, the professional development of judges, and the preservation of the dignity and honour of the profession.

b) To make definitive decisions regarding the appointment of judges, their career progression, temporary or permanent changes to their duties or assignments, termination of their duties, and disciplinary matters.

Administrative and disciplinary matters regarding judges are decided by the Supreme Court and the Supreme Council of Judicature, depending on the type of issue in question.

The independence of the Courts, which is the most important element of a constitutional state, is guaranteed by the Constitution and the Courts of Justice Law no. 9/76.

Article 136 of the TRNC Constitution (Independence of Courts) and Article 4 of the Courts of Justice Law no. 9/76 stipulates that Judges shall be independent in their duties.

Judgments delivered have to be in accord with the Constitution, the laws, legal principles and the judge's conscience.

Judges are permanent members of the judiciary, no orders or instructions can be given to judges, no circulars can be sent to them and no recommendations or suggestions can be made.

I am truly happy to say that this is very closely safeguarded rule in my country.

The Legislative and Executive organs and the administrative authorities of the State shall comply with court decisions.

Such organs and authorities cannot in any way change court decisions or delay their execution.

The guarantees of the judges are regulated by Article 137 of the TRNC Constitution.

Judges cannot be suspended from their duties except in cases stipulated by law, they cannot be forced to retire before the age specified in the Constitution unless they wish to, they cannot be deprived of their acquired rights even if the Court or their position is abolished, and they cannot be prosecuted for their words or actions during the course of their judicial duties.

As a result, we believe that the independence of the judiciary is guaranteed by the Constitution, the relevant laws and the current structure of the Supreme Council of Judiciary, which has the exclusive authority to appoint or dismiss judges.

Finally, we thank you for giving us the opportunity to speak on such an important topic and to such a distinguished gathering.

As members of the judiciary of the Turkish Republic of Northern Cyprus, we hope that such meetings which contribute to the development of law will continue and that we will have the opportunity to exchange views and information about the different systems that prevail in other countries.

FAIR TRIAL IN UKRAINE: CONSTITUTIONAL REVIEW, EUROPEAN PRACTICE AND MEANS OF ENSURING

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CONSTITUTIONAL COURT OF UKRAINE

FAIR TRIAL IN UKRAINE: CONSTITUTIONAL REVIEW, EUROPEAN PRACTICE AND MEANS OF ENSURING

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1. INTRODUCTION

This report focuses on some aspects of constitutional review in Ukraine aimed at ensuring the right to a fair trial in Ukraine, including the use of the European Court of Human Rights case law, and the means of ensuring it.

According to the Ukrainian legislation, the Constitutional Court of Ukraine is a body of constitutional jurisdiction, which ensures the supremacy of the Constitution of Ukraine, decides on the conformity of laws of Ukraine to the Constitution of Ukraine and other acts in the cases provided for by the Constitution of Ukraine, provides official interpretation of the Constitution of Ukraine, as well as exercises other powers under the Constitution of Ukraine[1].

The Constitutional Court of Ukraine considers the rule of law, in particular, as a mechanism to ensure control over the use of power by the state, as well as to protect persons from arbitrary actions of state power, which is a guarantee of ensuring basic human values.

Therefore, today the Constitutional Court of Ukraine, as a body of constitutional jurisdiction, through the constitutional review mechanisms defined at the constitutional level, exercises constitutional jurisdiction, forms official constitutional doctrine, provides and develops its legal positions based on the basic values of the Constitution

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** Academic Consultant, Patronage Office of a Constitutional Court Judge.
1 On the Constitutional Court of Ukraine: Law of Ukraine No. 2136-VIII on July 13, 2017. URL: https://zakon.rada.gov.ua/laws/show/2136-19#Text [in Ukrainian].

of Ukraine, the European Convention on Human Rights, and other international treaties ratified by the Parliament of Ukraine (the Verkhovna Rada of Ukraine). **Constitutional review in Ukraine is carried out on the basis of the doctrine of friendly attitude to international law**, according to which the practice of interpretation and implementation of human rights provided in international treaties is applied while adopting decisions by the Constitutional Court of Ukraine.

2. THE USE OF ECHR PRACTICE BY THE CONSTITUTIONAL COURT OF UKRAINE IN THE IMPLEMENTATION OF THE RIGHT TO A FAIR TRIAL

In particular, in **Decision No. 2-рп/2007 on June 12, 2007** in the context of the restriction of human and civil rights and freedoms, the Constitutional Court of Ukraine drew attention to the fact that "*restrictions on human and civil rights and freedoms are recognised as permissible if they are carried out in accordance with applicable law and comply with the rule of preservation of the fundamental essence of rights and freedoms"*[2] (The judgment of the ECHR in the case of Rekvényi v. Hungary of 20 May 1999 was applied[3]).

Issues related to restrictions on rights and freedoms were considered by the Constitutional Court of Ukraine in the context of the expediency of the imposed restrictions related to the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 in Ukraine (**Decision No. 10-p/2020 on August 28, 2020**). In considering this issue, the Constitutional Court of Ukraine stressed that *„restriction of the constitutional human and civil rights and freedoms is possible in cases specified by the Constitution of Ukraine. Such a restriction may be established only by law – an act adopted by the Verkhovna Rada of Ukraine as the only legislative body in Ukraine. Establishing such a restriction by a bylaw contradicts Articles 1, 3, 6, 8, 19 and 64 of the Constitution of Ukraine"*[4].

2 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 70 MPs of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the provisions of part one of Article 10, paragraph 3 of part two, parts five, six of Article 11, Article 15, part one of Article 17, Article 24, paragraph 3 of Section VI „Final Provisions" of the Law of Ukraine "On Political Parties in Ukraine" (case on the formation of political parties in Ukraine) No. 2-рп/2007 on June 12, 2007. URL: https://zakon.rada.gov.ua/laws/show/v002p710-07#Text [in Ukrainian].

3 The judgment of the ECHR in the case of Rekvényi v. Hungary on 20 May, 1999 (Application no. 25390/94) URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58262%22]}.

4 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the

The Constitutional Court of Ukraine has repeatedly had to consider issues related to the protection of human and civil rights and freedoms, in particular, by the court (in international practice – the right to a fair trial (protection by an independent and impartial tribunal), access to court).

The Constitutional Court of Ukraine in the **Decision No. 5-рп/2013 on June 26, 2013** took into account the practice of the European Court of Human Rights, which, in particular, in its judgment in the case of Shmalko v. Ukraine of July 20, 2004[5], stated that «*execution of a judgment given by any court must therefore be regarded as an integral part of the „trial" for the purposes of Article 6*»[6].

In its **Decision No. 4-p/2019 on June 13, 2019**, the Constitutional Court of Ukraine noted that „the state has the right to establish certain restrictions on the right of persons to access to court; such restrictions must pursue a legitimate aim, not infringe the very essence of that right, and there must be a proportional relationship between that aim and the measures imposed"[7] (the ECHR judgment in the case of „Ashingdane v. the United Kingdom" of 28 May 1985[8], judgment in the case of „Krombach v. France" of 13 February 2001[9]).

Supreme Court regarding the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Resolution of the Cabinet of Ministers of Ukraine „On the establishment of quarantine to prevent the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2, and the stages of easing anti-epidemic measures", the provisions of parts one and three of Article 29 of the Law of Ukraine „On the State Budget of Ukraine for 2020", paragraph nine of clause 2 of section II „Final Provisions" of the Law of Ukraine «On Amendments to the Law of Ukraine „On the State Budget of Ukraine for 2020"» No. 10-p/2020 on August 28, 2020. URL: https://zakon.rada.gov.ua/laws/show/v010p710-20#Text [in Ukrainian].

5 The judgment of the ECHR in the case of Shmalko v. Ukraine on 20 July 2004 (Application no. 60750/00) URL: https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-61926%22]}.

6 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the National Bank of Ukraine on the official interpretation of the provisions of Article 86, part two of Article 89 of the Constitution of Ukraine, part two of Article 15, part one of Article 16 of the Law of Ukraine „On the Status of People's Deputies of Ukraine" (case on the appeal of people's deputies of Ukraine to the National Bank of Ukraine) No. 5-rp/2003 on March 5, 2003. URL: https://zakon.rada.gov.ua/laws/show/v005p710-03#Text [in Ukrainian].

7 Decision of the Constitutional Court of Ukraine in the case on the constitutional complaint of Viktor Mykolaiovych Hlushchenko on the compliance with the Constitution of Ukraine (constitutionality) of the provisions of part two of Article 392 of the Criminal Procedure Code of Ukraine No. 4-p/2019 on June 13, 2019. URL: https://zakon.rada.gov.ua/laws/show/v004p710-19#Text [in Ukrainian].

8 The judgment of the ECHR in the case of Ashingdane v. the United Kingdom on 28 May, 1985 (Application no. 8225/78) URL: https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Ashingdane%20v.%20the%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57425%22]}.

9 The judgment of the ECHR in the case of Krombach v. France on 28 May, 1985 (Application no. 29731/96) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59211%22]}.

1. The Constitutional Court of Ukraine in its **Decision No. 1-рп/2012 on January 18, 2012** emphasized that the defendant's opportunity to inspect the case file for five days is adequate time in this case within the meaning of paragraph 3(b) of Article 6 of the Convention[10] (ECHR judgment in the case „Gavazhuk v. Ukraine" of 18 February 2010[11]).

In its **Decision No. 2-p(II)/2023 on March 1, 2023**, the Constitutional Court of Ukraine noted that in the case law of the European Court of Human Rights, one of the components of the broad concept of a fair trial is „the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent"[12] (judgment in Nadtochiy v. Ukraine dated May 15, 2008[13]).

2. We would also like to draw your attention to the **provisions applied by the Constitutional Court of Ukraine to differentiate guarantees of protection of honour, dignity or business reputation of ordinary citizens and officials.** In the reasoning part of **Decision No. 8-рп/2003 on April 10, 2003** (case on the dissemination of information) the Constitutional Court of Ukraine emphasised that *„the limits of admissible information on officials and servants may be wider than the limits of the same information on ordinary citizens. Therefore, if officials act without legal grounds, they must be prepared for critical response from society*". In view of this, in the operative part of the relevant Decision, the Constitutional Court of Ukraine stated that *„…the statement in*

10 Decision of the Constitutional Court of Ukraine in the case on constitutional petitions of 47 and 50 MPs of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of parts six and seven of Article 218 of the Criminal Procedure Code of Ukraine (case on familiarization of the accused and defense counsel with the criminal case materials) No. 1-рп/2012 on January 18, 2012. URL: https://zakon.rada.gov.ua/laws/show/v001p710-12#Text [in Ukrainian].

11 The judgment of the ECHR in the case of Gavazhuk v. Ukraine on 18 February, 2010 (Application no. 17650/02) URL: https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-97343%22]}.

12 Decision of the Constitutional Court of Ukraine (Second Senate) in the case on the constitutional complaint of Pleskach Viacheslav Yuriiovych regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of part one of Article 294, part six of Article 383 of the Code of Administrative Procedure of Ukraine (regarding the equality of the parties during judicial control over the execution of a court decision) No. 2-p(II)/2023 on March 1, 2023. URL: https://zakon.rada.gov.ua/laws/show/v002p710-23#Text [in Ukrainian].

13 The judgment of the ECHR in the case of Nadtochiy v. Ukraine on 15 May, 2008 (Application no. 7460/03) URL: https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-86253%22]}.

letters, applications, complaints to the law enforcement body of information cannot be considered as dissemination of information that tarnishes honour, dignity or business reputation or harms the interests of these persons"[14] (ECHR judgments in the cases „Nikula v. Finland"[15], and „Janowski v. Poland"[16]).

3. SUBJECT OF CONSTITUTIONAL REVIEW IN CASES ON CONSTITUTIONAL COMPLAINTS: PROBLEMS OF CONSTITUTIONALITY AND APPLICATION OF THE LAW BY THE COURT

Article 55 of the Constitution of Ukraine is formed in such a way that it allows to divide: general principles of judicial protection (part one); guarantees of the right to appeal in court decisions, actions or inaction of state authorities, local self-government bodies, officials and officers (part two); the guarantee of the right to file a constitutional complaint with the Constitutional Court of Ukraine on the grounds established by this Constitution and in the manner prescribed by law (part four).

The peculiarity of the powers of the Constitutional Court of Ukraine to consider a constitutional complaint is to refer to the actual circumstances of the case (legal dispute), and to assess the constitutionality of the relevant legal norm, which was the basis for the resolution of this dispute. Thus, in accordance with Article 151-1 of the Constitution of Ukraine, the Constitutional Court of Ukraine resolves the issue of conformity with the Constitution of Ukraine (constitutionality) of the law of Ukraine upon a constitutional complaint of a person who is convinced that the law of Ukraine applied in the final court decision in his case contradicts the Constitution of Ukraine.

As a result, a regulatory model of a constitutional complaint has been introduced in Ukraine, which is related to the consideration of a specific case in the courts of the judicial system of Ukraine.

14 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of citizen Valeriy Serdyuk on the official interpretation of the provisions of part one of Article 7 of the Civil Code of the Ukrainian SSR (case on dissemination of information) No. 8-рп/2003 on April 10, 2003. URL: https://zakon.rada.gov.ua/laws/show/v008p710-03/print [in Ukrainian].

15 The judgment of the ECHR in the case of Nikula v. Finland on 21 March, 2002 (Application no. 31611/96) URL: https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-60333%22]}

16 The judgment of the ECHR in the case of Janowski v. Poland on 21 January, 1999 (Application no. 25716/94) URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58909%22]}

The appeal of individuals with constitutional complaints regarding the laws that were applied in the final court decision in their case, not only implements the possibility of a judicial review of a person's case under exceptional circumstances, in connection with the recognition of the applied provisions of the law as unconstitutional (protection of a person's private interest), but also it can become an effective mechanism on the way to improving the legislation of Ukraine, bringing it into line with constitutional principles and guarantees (ensuring public interest)[17].

The law gives the Court the right to refuse to open a constitutional proceeding by declaring a constitutional complaint inadmissible if the content and requests of the constitutional complaint are clearly unfounded or there is an abuse of the right to file a complaint.

An analysis of the Court's practice regarding assessments of constitutional appeals, in particular so-called '*refusal decisions'*, allows us to identify certain criteria of explicit unfoundedness, in particular:

1) statements regarding disagreements in judicial practice, expressing disagreement with court decisions in a case, incorrect application by courts of the norms of substantive law or violations of procedural law, etc.;

2) inadequate legislative regulation or its absence, the need to fill gaps in normative legal acts, inconsistency of legislative acts among themselves (except for cases of legislative omission);

3) assumptions of the subjects of the right to a constitutional complaint;

4) citing the provisions of the Constitution of Ukraine, the content of the provisions of the laws of Ukraine, other normative legal acts, legal positions of the Court and decisions of ECtHR without arguing the inconsistency of the Constitution of Ukraine and the violation of specific constitutional rights by the disputed provisions of the law, in particular, the lack of argumentation as the law itself (its individual provisions) limits or violates a specific constitutional right.

17 Stavniichuk M. I., Yezerov A. A., Zaporozhets v. I. and others. Constitutional complaint in the activity of a lawyer. Kharkiv: Factor, 2019. P. 19 [in Ukrainian].

During the administration of justice, **the rule of law is an indisputable guideline for the implementation of the proper legal order** in a democratic and legal state. However, to a certain extent, a rhetorical question arises regarding the possibility of avoiding this situation within the framework of judicial proceedings, in particular, civil: "*the court concludes that a law or other legal act contradicts the Constitution of Ukraine, the court does not apply such a law or other legal act, but applies the norms of the Constitution of Ukraine as norms of direct action. In such a case, the court, after passing a decision in the case, turns to the Supreme Court to resolve the issue of submitting to the Constitutional Court of Ukraine a submission on the constitutionality of a law or other legal act, the decision on the constitutionality of which falls under the jurisdiction of the Constitutional Court of Ukraine*" (Part 6 of Article 10 Civil Procedure Code of Ukraine[18]).

The mentioned norm enshrines the direct actions of the judge, that is, not in his authority or duty, to apply the provisions of the Constitution of Ukraine, which actually creates the replacement of the body of constitutional jurisdiction and introduces the presumption of illegal law with the use of the appropriate non-procedural (quasi-procedural) method[19].

In this aspect, an important detail should be emphasized: the court applies to the Supreme Court after passing the decision, that is, without applying in accordance with Article 150 of the Constitution of Ukraine (1) a law or other legal act of the Verkhovna Rada of Ukraine; (2) an act of the President of Ukraine; (3) a legal act of the Verkhovna Rada of the Autonomous Republic of Crimea; and exclusively the Constitution of Ukraine. That is to say, returning to the provisions of Part 2 of Article 10 of the Civil Procedure Code of Ukraine, we emphasize the construction: "the court hears cases in accordance with the Constitution of Ukraine, international treaties, the consent to the bindingness of which has been given by the Verkhovna Rada of Ukraine".

The doctrine contains many different approaches to the formation

18 Civil Procedure Code of Ukraine. Law No. 1618-IV on March 18, 2004. URL: https://zakon.rada.gov.ua/laws/show/1618-15#Text [in Ukrainian].

19 Berestova I. E. Theoretical principles of protection of public interests in civil proceedings and constitutional proceedings: monograph. Kyiv: FOP Maslakov, 2018. P. 69–70 [in Ukrainian].

of the concept "law that cannot be applied by the courts for being contrary to the Constitution": from the absolute nullity of the law to the exclusive contestability of its individual provisions by the subject of private law when applying the law within the context of ensuring the common good (public interest); the statement (conclusion) of the court in the judicial decision that the law contradicts the Constitution according to the current procedural legislation actually turns the law into a contested one, and therefore it is not applied only if this is substantiated by the party to the dispute and the judge takes into account the position of the party, since its arguments and motives of the court (that are based on the internal conviction of the court) coincide; or the court independently reaches the above stated conclusion[20].

Please note that if the Constitutional Court of Ukraine, considering a case based on a constitutional complaint, recognized the law of Ukraine (its provisions) as being in accordance with the Constitution of Ukraine, but at the same time found that the court applied the law of Ukraine (its provisions), interpreting it in a way that did not corresponds to the Constitution of Ukraine, the Constitutional Court indicates this in the operative part of the decision (Part three of Article 89 of the Law of Ukraine "On the Constitutional Court").

4. INTERACTION OF CONSTITUTIONAL JURISDICTION AND JUSTICE

The principle of separation of powers, in addition to its influence on the establishment and development of a democratic and legal society, allows the mechanism of legal regulation to function properly at its final stage.

First, let's turn to the institutional guarantees of the judicial power, which ensures justice. Thus, the Constitutional Court of Ukraine used the conclusions of the European Commission for Democracy through Law (Venice Commission) and approved the position that during the adoption of a new constitution, its transitional provisions should not be

20 Rybachuk A. I. Application by courts of the norms of the Constitution of Ukraine as norms of direct effect (based on the practice of courts of administrative, economic and civil jurisdictions). Diss. Ph.D. ... 081 – Law. Kyiv: Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Sciences of Ukraine, 2022. P. 214–215 [in Ukrainian].

used as a way to terminate the powers of the persons elected or appointed under the previously valid constitution; dismissal of all judges, except in exceptional cases, such as violation of the constitutional duty, does not meet European standards and the principle of the rule of law; it is impossible to replace all judges without harming the continuity of the administration of justice (para 3 of **Decision No. 2-p/2020 on February 18, 2020**[21]).

By its legal nature, the highest instance of the judicial branch of power must ensure the unity and stability of the judicial practice of all courts that are part of the judicial system of Ukraine, and therefore its constitutional status consists in the continuity of the exercise of powers since the adoption of the Basic Law of Ukraine.

That is why, the Law of Ukraine "on the Liquidation of the District Administrative Court of the City of Kyiv and the Formation of the Kyiv City District Administrative Court" No. 2825-IX on December 13, 2022 established that before the Kyiv City District Administrative Court (newly established court) begins its work, cases subject to the District Administrative Court, the territorial jurisdiction of which extends to the city of Kyiv, are considered and decided by the Kyiv District Administrative Court (the existing court) (subpar three, para 2 of Section II "Final and Transitional Provisions"[22]).

Secondly, justice must be guaranteed by the stability of the legal status of the judge. According to the legal position of the Constitutional Court of Ukraine:

- the Basic Law of Ukraine *establishes an exhaustive list of grounds for dismissing a judge from office*, which makes it impossible to expand or narrow this list by law (the first sentence of the third subparagraph of paragraph 3.1 of point 3 of the motivational part of the **Decision No.**

21 The decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of the Supreme Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of clauses 4, 7, 8, 9, 11, 13, 14, 17, 20, 22, 23, 25 of Chapter XII „Final and transitional provisions" of the Law of Ukraine „On the Judiciary and the Status of Judges" on June 2, 2016 No. 1402-VIII No. 2-p/2020 on February 18, 2020. URL: https://ccu.gov.ua/docs/3033 [in Ukrainian].

22 On the Liquidation of the District Administrative Court of the City of Kyiv and the Formation of the Kyiv City District Administrative Court. Law of Ukraine No. 2825-IX on December 13, 2022. URL: https://zakon.rada.gov.ua/laws/show/2825-IX#Text [in Ukrainian].

10-рп /2013 on November 19, 2013[23]).

- reduction in the level of guarantees of the independence of judges contradicts the constitutional requirement of unwavering provision of independent justice and the right of citizens to the protection of rights and freedoms by an independent court, as it leads to a limitation of the possibilities of realizing this constitutional right, and therefore, contradicts Article 55 of the Constitution of Ukraine (the second sentence of the paragraph of the second clause of the 3rd part of the motivational part of the **Decision No. 3-рп/2013 on June 3, 2013**[24]).

- one of the *constitutional guarantees of the independence of judges is a special procedure for court financing*; the established *system of guarantees of independence of judges is not a personal privilege*; the constitutional status of a judge provides for *sufficient financial support for a judge both during the exercise of his powers (judicial remuneration) and in the future in connection with reaching the retirement age (pension)* or as a result of the termination of powers and the acquisition of the status of a retired judge (monthly lifelong monetary maintenance); guarantees of *the independence of judges are an integral element of their status, apply to all judges of Ukraine and are a necessary condition for the administration of justice by an impartial, impartial and fair court*; the judge's remuneration is a guarantee of a judge's independence and an integral component of his status; a reduction by the legislative authority in the amount of the official salary of a judge leads to a decrease in the amount of the judge's remuneration, which, in turn, is an encroachment on the guarantee of the independence of the judge in the form of material support and a prerequisite for influencing both the judge and the judiciary as

23 The decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of the Supreme Court of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with Articles 103, 109, 131, 132, 135, 136, 137, subparagraph 1 of clause 2 of Chapter XII „Final provisions", paragraph four of clause 3, paragraph of the fourth item 5 of Chapter XIII „Transitional Provisions" of the Law of Ukraine „On the Judiciary and the Status of Judges" No. 10-рп/2013 on November 19, 2013. URL: https://ccu.gov.ua/docs/667 [in Ukrainian].

24 The decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Supreme Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of Article 2, Paragraph Two of Clause 2 of Section II „Final and Transitional Provisions" of the Law of Ukraine „On Measures for Legislative Support of Reforming the Pension System", Article 138 of the Law of Ukraine „On the Judiciary and the Status of Judges" (case concerning changes in the terms of payment of pensions and monthly life support of retired judges) No. 3-рп/2013 on June 3, 2013. URL: https://ccu.gov.ua/docs/660 [in Ukrainian].

a whole (the first sentence of the third paragraph of paragraph 2 of the motivational part of the **Decision No. 6-рп/99 on June 24, 1999**[25], the first sentence of the paragraph of the sixth subparagraph 2.2 of paragraph 2 of the motivational part of the **Decision No. 3-рп/2013 on June 3, 2013**[26], the second sentence of the paragraph of the sixth subparagraph 3.2, paragraphs twenty-seven , thirty-third, thirty-fourth sub-item 3.3 of item 3 of the motivational part of the **Decision No. 11-p/2018 on December 4, 2018**[27]).

5. CONCLUSION

Thus, in exercising constitutional review, the Constitutional Court of Ukraine uses the legislatively established mechanisms for its implementation, in particular, the requirements of the normative model of a constitutional complaint. Recognition of laws or their individual provisions as unconstitutional on the basis of constitutional complaints provides for further review of a person's case in exceptional circumstances. A person needs to clearly argue the inconsistency of the disputed provisions, for which the constitutional complaints themselves cite the positions of the European Court of Human Rights (as a source of law), as well as the Venice Commission and other international institutions whose activities are aimed at resolving related issues (as a soft law). Subsequently, the Constitutional Court of Ukraine assesses the relevant arguments and conclusions provided by state bodies and academic organizations and sets them out in its

25 The decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Supreme Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of Articles 19, 42 of the Law of Ukraine „On the State Budget of Ukraine for 1999" (case on court funding) No. 6-рп/99 on June 24, 1999 URL: https://ccu.gov.ua/docs/402 [in Ukrainian].

26 The decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Supreme Court of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of Article 2, Paragraph Two of Clause 2 of Section II „Final and Transitional Provisions" of the Law of Ukraine „On Measures for Legislative Support of Reforming the Pension System", Article 138 of the Law of Ukraine „On the Judiciary and the Status of Judges" (case concerning changes in the terms of payment of pensions and monthly life support of retired judges) No. 3-рп/2013 on June 3, 2013. URL: https://ccu.gov.ua/docs/660 [in Ukrainian].

27 The decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Supreme Court of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the provisions of parts three and ten of Article 133 of the Law of Ukraine „On the Judicial System and the Status of Judges" as amended by the Law of Ukraine „On Ensuring the Right to a Fair Trial" No. 11-p/2018 on December 4, 2018. URL: https://ccu.gov.ua/docs/2453 [in Ukrainian].

legal positions. The rule of law is an indisputable guideline for courts during solving cases. Constitutional complain is not the next instance or stage in the trial. The Fair Trial in Ukraine ensures by the institutional guarantees of judicial power and judge's status stability. Despite these fundamental provisions, the practice of the courts may be erroneous, but such 'illegal activity' (according to complainer's opinions) is not subject to constitutional review.

Summarizing the above, we state that the only body of constitutional jurisdiction in Ukraine, in order to protect the constitutional rights and freedoms of humans and citizens, has been quite active in using international experience in matters of the greatest public interest and which are fundamental for further work towards the protection of human values. There are such positions in which the relevant developments were applied: the protection of human rights and freedoms by the court; the right to liberty and personal integrity; freedom of own views and beliefs expression; the protection of private property rights; the limits on the application of restrictions on rights etc. The further application of this practice as an additional argument in the decisions of the Constitutional Court of Ukraine will only contribute to the consolidation of its legal positions with the views of the international community.

CLOSING REMARKS
by
The President of the Constitutional Court of the Republic of Türkiye

19 September 2023, Ankara

Distinguished Guests,

Esteemed Participants,

First of all, I would like to extend you all my most sincere greetings.

I would like to express my great pleasure to see you among us at the 11th International Summer School event.

We have been already organising this event in our capacity as the Center for Training and Human Resources Development, one of the three permanent secretariats of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). Every year, our guests from different parts of the world participate in these events where they could find the opportunity to exchange knowledge and experience with each other.

A total of 52 representatives from the constitutional/supreme courts of 25 countries and the European Court of Human Rights (ECHR) have participated in this year's program. I would like to express my gratitude to all participants for their valuable contributions.

Distinguished Guests,

As you know, every year within the scope of this program, we address an important issue related to the jurisdiction of our courts. This year's topic is "*Judicial Independence as a Safeguard of the Right to a Fair Trial*".

This title should not mislead us. Judicial independence is not merely a safeguard of the right to a fair trial. As reiterated in the decisions of the Turkish Constitutional Court, judicial independence is the primary

and most effective safeguard of all other fundamental rights and freedoms, as well as the right to a fair trial.[1]

In the absence of an independent and impartial judiciary, there will not exist even a State, let alone a State governed by the rule of law. That is because, State is, by definition, the organised form of the society based on legal rules. The legitimacy of the State, holding the monopoly of violence, depends on law. The application of law by securing justice and in pursuit of fundamental rights and freedoms of individuals is conditional upon the existence of an independent judiciary.

Besides, judicial independence is a necessary consequence of not only the rule of law, but also the principle of separation of powers. The latter requires the judiciary to be free from any interference by the legislature and the executive. Otherwise, the rights and freedoms will be rendered ineffective.

So, what is judicial independence that is of vital importance for a democratic state governed by the rule of law, and what does it entail? In fact, the answers for this question may be found in all democratic constitutions. For example, Article 138 of the Turkish Constitution, titled "*Independence of the courts*", addresses this question.

The said provision imposes respective obligations on courts/judges and on non-judicial actors. First of all, judicial independence, seeking to ensure the impartiality of the judiciary, refers to the ability of judges to make decisions in accordance with their personal conviction without being influenced. In the words of the Constitutional Court, independence entails "*the judge's ability to decide freely, without fear or hesitation, or in the absence of an external influence other than the requirements of the law*". In this sense, judicial independence "*aims to ensure justice without direct and indirect influences, pressures, manipulations and doubts*".[2]

As a matter of fact, judicial independence is a prerequisite for ensuring the impartiality of the judge. As also stated in the judgments of the ECHR and the Constitutional Court, the impartiality of the judge refers to the absence of the judge's prejudice or bias in favour of or against the parties.[3]

1 The Court's decision no. E.2021/83, K.2022/168, 29 December 2022, § 11.

2 The Court's decisions no. E.2016/144, K.2020/75, 10 December 2020, § 26, and no. E.2022/72, K.2023/3, 05 January 2023, § 24.

3 *Piersack v. Belgium*, no. 8692/79, 1 October 1982, § 30; *Hikmet Kopar and Others* [Plenary], no.

Distinguished Participants,

It is vital that the parties are convinced about the judge's impartiality. For this, the judge must act meticulously and hold the scales of justice with the precision of a jeweller. Hz. Umar, the second of the "Four Caliphs" of Islam, stated in his letter to Abu Musa, who was appointed by the former as a judge to hold office in Basra, that the judge must issue a decision, *acting equally towards parties of the case before him even in terms of his glances at them.*

The objective in ensuring equality in terms of glances is to eliminate any doubt about the judge's justice and to avoid any misunderstanding. As a matter of fact, the letter goes on to state that with the judge's equal treatment, the noble will not expect him to be partial and the humble will not despair of justice from him.[4]

Besides, Article 138 of the Constitution contains clear and precise phrases warning and imposing certain obligations on non-judicial actors to ensure judicial independence. The foremost of these is the negative obligation to refrain from interference. Accordingly, no organ, authority, office or individual may give orders or instructions, even make recommendations or suggestions, to courts or judges in the exercise of judicial power.

The Turkish Constitution contains a specific provision on the prohibition of interference on the part of the legislature, which provides that no questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power regarding a pending case.

The positive obligation constitutionally imposed on those exercising public power in terms of judicial independence is to ensure the effective execution of the court decisions. This obligation is a complementary of judicial independence. Accordingly, the legislative, executive and administrative authorities shall execute court decisions without any alteration or delay.

Perception is also of great importance as regards the independence

2014/14061, 8 April 2015, § 110; and *Çetin Doğan (3) [Plenary]*, no. 2021/30714, 15 February 2023, § 232.

4 For the full text of the letter, see Muhammed Hamidullah, "*Halife Hz. Ömer Devrinde Adlî Teşkilat- Ebu Mûsâ el-Eş'arî'ye Gönderilen Kazaî Talimatnâmeler*", trans. by F. Atar, M. Hamidullah, *İslâm Anayasa Hukuku*, ed. by V. Akyüz, (İstanbul: Beyan Yayınları, 2015), pp. 309-311.

and impartiality of the judiciary. It is not enough for courts and judges to be independent and impartial, and this must also be known to the public. Therefore, as a requirement of the rule of law, behaviours likely to tarnish the independence and impartiality of the judiciary should be avoided.

Distinguished Participants,

Consequently, in order for the independence and impartiality of the judiciary, which is a precondition for protecting rights and freedoms, to be fully ensured, a number of obligations must be fulfilled. However, the realisation of such a principle requires first and foremost that members of the judiciary have an untainted and unshackled conscience.

This is of course not easy, as none of us live in a sterile world. However, the profession of judge requires ensuring justice with a clear conscience in such an environment.

German philosopher Nietzsche says that no one has more of a right to our respect than the one who is fair, since all virtues are inherent in him. According to him, "the hand of the just man who is competent to sit in judgment no longer trembles when it holds the scales".[5]

With these feelings and considerations, I would like to once again extend you all my sincere regards, and I wish that the 11th Summer School programme be successful and fruitful.

I would like to thank everyone who have contributed to the programme and wish you all healthy and peaceful days ahead in a more just world.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional
Court of the Republic of Türkiye

5 Friedrich Nietzsche, *On the Advantage and Disadvantage of History for Life*, trans. by Peter Preuss, (Cambridge: Hackett Publishing Company, Inc., 1980), p. 32.

PHOTOGRAPHS FROM THE 11TH SUMMER SCHOOL

Prof. Dr. Zühtü Arslan
President of the Constitutional Court of Türkiye
Closing Ceremony of the 11th Summer School

Prof. Dr. Zühtü Arslan
President Arslan delivering the closing remarks of the 11th Summer School

Family photo at the Grand Tribunal Hall of the Turkish Constitutional Court

The executive committee comprised by the Turkish Constitutional Court

Participants delivering their presentations during the academic programme

Participants delivering their presentations during the academic programme

Participants delivering their presentations during the academic programme

Family photo at the end of the academic programme

Dinner hosted by Mr. Kadir Özkaya, Vice-President of the Turkish Constitutional Court, in honour of the guests

Cappadocia tour to Fairy Chimneys

Tour of the Devrent (Dream) Valley

Cappadocia local carpet weaving tour

Lunch in one of the local restaurants in Avanos

Cappadocia ceramics and traditional pottery studio tour

Executive Committee of the 11th Summer School Programme

Constitutional Court of the Republic of Türkiye

Name-Surname	Title
Dr. Murat Şen	Secretary General
Mr. Yücel Arslan	Deputy Secretary General
Mr. Fatih Çağrı Ocaklı	Director of the Department of International Relations
Mr. Korhan Pekcan	Officer at the Department of International Relations
Mr. Yunus Tekindemir	Officer at the Department of International Relations
Ms. Gizem Tezyürek	Translator - Interpreter at the Department of International Relations
Ms. Gökçen Sena Kumcu	Translator - Interpreter at the Department of International Relations
Ms. Tuğçe Kılıç	Translator - Interpreter at the Department of International Relations

Participants of the 11th Summer School Programme
(In alphabetical order)

Constitutional Court of Angola

Name-Surname	Title
Mr. Abbas Ammar	Member of the Court
Mr. Ameldine Boulanouar	Magistrate

Constitutional Court of the Republic of Azerbaijan

Name-Surname	Title
Ms. Hajar Gurbanova	Chief Adviser of the Department of International Law and International Cooperation
Ms. Zeynab Salimbayli	Adviser of the Department of International Law and International Cooperation

Supreme Court of Bangladesh

Name-Surname	Title
Mr. Ruhul Amin	District and Sessions Judge
Mr. Shah Muhammad Jakir Hasan	Chief Judicial Magistrate

Constitutional Court of Bosnia and Herzegovina

Name-Surname	Title
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Mr. Lucija Ćorluka	Judicial Associate in the Office of the Registrar

Constitutional Court of Republic of Bulgaria

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Ms. Polina Pesheva	Chief Expert at the International Relations and Protocol

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European Court of Human Rights

Name-Surname	Title
Mr. Ali Bozkaya	Lawyer

Constitutional Court of Georgia

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Ms. Nino Doluashvili	Legal Advisor at the Department of Legal Provision and Research

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Ms. Isti Widayanti	Head of Finance Department
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Mr. Aris Wahyu Hajianto	Staff Member

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Mr. Serik Bekturov	Chief Consultant

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Ms. Daseul Jang	Rapporteur Judge

Constitutional Court of the Republic of Kosovo

Name-Surname	Title
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Mr. Dardan Berisha	Constitutional Legal Advisor

Supreme Court of the Kyrgyz Republic

Name-Surname	Title
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Ms. Aisuluu Tokoeva	Leading Specialist of the Department of Personnel Management and Documentation Support

Federal Court of Malaysia

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Mr. Mahyudin Mohmad Som	Deputy Registrar High Court of Kuala Lumpur Office of the Chief Registrar

Constitutional Court of Moldova

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Ms. Iulia Vartic	Judicial Assistant

Constitutional Court of Mongolia

Name-Surname	Title
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Mr. Davaajav Badamragchaa	Information Technology Officer
Mr. Ulziibat Dorjgotov	Information Technology Engineer

Constitutional Court of the Russian Federation

Name-Surname	Title
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Constitutional Court of the Republic of Tajikistan

Name-Surname	Title
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Ms. Dilrabo Salimova	Leading Specialist of the Department of International Relations

Constitutional Court of the Kingdom of Thailand

Name-Surname	Title
Mr. Pitaksin Sivaroot	Constitutional Court Academic Officer
Mr. Sakunphong Treesomphong	Constitutional Case Academic Officer

Supreme Court of the Turkish Republic of Northern Cyprus

Name-Surname	Title
Mr. Mesut Mesutoğlu	Senior Judge
Ms. Hazan Aksun	Judge

Constitutional Court of the Republic of Türkiye

Name-Surname	Title
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Constitutional Court of Ukraine

Name-Surname	Title
Mr. Volodymyr Kochyn	Scientific Advisor
Mr. Makar Marchuk	Scientific Advisor

Constitutional Court of the Republic of Uzbekistan

Name-Surname	Title
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Mr. Khasan Abdurakhmanov	Senior Expert

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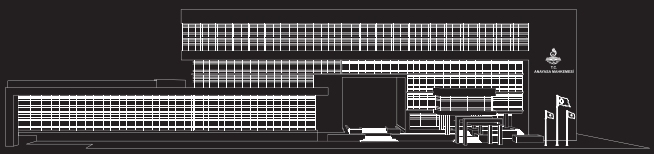

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