Strasbourg, 22 October 2019

CDL-JU (2019)015
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

18th meeting of the Joint Council on Constitutional Justice

Mini-Conference on

"INDEPENDENCE OF THE JUDICIARY, THE ROLE OF CONSTITUTIONAL COURTS"

Rome, Italy

24 May 2019

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

REPORT BY

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I. By way of introduction

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

That said, and given the importance of this topic, it becomes imperative to determine what is understood when we talk about an independent or impartial court, as well as state what is the scope recognised for the protection of such rights under International Human Rights Law (emphasising in this point which is provided in the European and Inter-American system), as well as in legal systems, such as the Peruvian one. In this context, and taking into account the special characteristics of Peru's history on this issue, concerns such as the ones related to the independence and impartiality of the judge have become particularly relevant, which I will try to explain hereafter.

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

A preliminary approach and what is understood as being a Court

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

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

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

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

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

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

- Decide in the exercise of their judicial powers.
- Comply with and/or abide by certain requirements.

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

What has been just said takes us to different positions to what has been stated in some constitutions, or at least, to the way in which their relevant constitutional provisions have been understood. Without any doubt, there is a broad concept of the term Court, which does not rule out the possibility that the jurisdictional body could also have administrative powers.[5] It neither rules out that an entity may be considered to be a Court even if it is not entirely composed of professional judges. However, it is stated that having professional judges on a regular basis, underpins a greater independence of the judges.[6]

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

On the other hand, when we talk about complying with certain requirements, to mention only some examples, we are thinking about guarantees (or situations which in turn can represent rights and guarantees) such as independence, impartiality or the term of office of those who

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[2] In this effect, por example, we can find what is stated by REBATO PEÑA, María Elena – La Evolución de la Jurisprudencia del Tribunal de Derechos Humanos. In: DIAZ REVORIO, Francisco Javier (compiler) – Jurisprudencia del Tribunal Europeo de Derechos Humanos. Lima, Palestra. 2004, p. 49

[3] See in this sense GARCÍA ROCA, Javier and VIDAL ZAPATERO, José Miguel – Op. Cit. p. 328-329

[4] They adopt what was established in case *Benthem vs. Holland*, on October 23, 1985.

[5] In this regard, the provisions in case Campbell and Fell vs. UK, with final judgment of June 28, 1984.

[6] By way of example, I would like to mention that the European Court of Human Rights considers as a Court, an institution comprised of officials and even, militaries. Examples of cases with courts comprised of officials are *ETH vs. Austria* of April 23, 1987; Ringeisen vs. Austria of January 16, 1997; or *Stalinher and Kuso vs. Austria* of March 24, 1997. In case of militaries, it becomes pertinent to review what was stated in case *Engel, et al. vs. Holland*, where it was decided that the Supreme Military Court of Holland, comprised by four military jurors and two non-military, not only was a court but one that could be considered as independent and impartial.

[7] This is what was admitted by the European Court of Human Rights in cases such as *Sramek vs. Austria* of October 22, 1984; or *Demicoli vs. Malta*, with final judgment dated August 22, 1991. In this last case, it was even accepted that a parliamentary chamber, the House of Representatives of Malta, be accepted as a court, since it was exercising jurisdictional functions.

are members of the Court. The aim of all this is to align perspectives that are in essence so different about this concept, such as the Anglo-Saxon or the Romanic-Germanic concepts, since both of them coexist in the current European scenario.

The longstanding idea about independence and its scope

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

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

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

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

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

And, with respect to the term of office, taking into consideration the aforementioned case of *Campbell & Fell*, the European Court opts for greater stability in the position as an aspect to assess when evaluating if there is actual independence or not. However, taking into account the text of the instant final judgment, it is not clear what are the parameters to state such initial assertion, since it is stated that an appointment for three years as a member of a disciplinary entity should be enough, for as long and to the extent it was an unpaid position. In this context, the European Court of Human Rights would add that it would be difficult to find people willing to take over such a sensitive endeavour without being paid for it. The consistency of these arguments is not the best.

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

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

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

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

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

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

However, while reviewing what was established in these cases, more than stating a definition, the final judgments issued by the European Court of Human Rights, highlight the importance of this topic (*De Cubber vs. Belgium*, 1984) or gives a notion, whether in the line of understanding impartiality as absence of injury[13] or interpreting it as indifference, neutrality, or a possibility of solving according to the law and not according to personal conviction of the judge[14].

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

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

[11] Case adopted with the same number 12839/87.
[12] To this effect, GARCIA ROCA, Javier and VIDAL ZAPATERO, Jose Miguel, op. cit., 337, despite the fact that the authors clarify that more than half of the cases mentioned are related to security courts in Turkey.
[13] Is what appears from *Piersack vs. Belgium*, case resolved in 1982.
[14] In the same line of reasoning, what was resolved in case *Huber Morel vs. France*, with final judgment dated June 6, 2000.
[15] A question that could well be asked is how to verify in these cases, respect of the so-called subjective impartiality. Normally, in Europe, after recognising the issue complexity, reference is made to *case Kyprianov vs. Chipre*, with final judgment of January 27, 2004.

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

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

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

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

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

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

- When the judge acted as a prosecutor during the preliminary investigation (*Piersack vs.Belgium*).
- When investigative and judiciary functions overlap, which also include sanctions such as:
  a) The judge carried out an investigative act (*Bulut vs. Austria* 22.02.1996).
  b) A judge has rendered decisions such as pre-trial detention (*Hauschildt vs. Denmark*; *Padovani vs. Italy* of 02.26.1993; *Perote Pellón vs. Spain* of 07.25.2002., etc.).
  c) The judge issued a bill of indictment (*Castillo Algar vs. Spain* of 08.28.1998).
  d) The judge issued an opening order for trial after the prosecution report (*Saraiva de Carvalho vs. Portugal* of 04.22.1994)
  e) The judge heard pleadings at the pre-trial stage (*Saint Marie vs. France* of 12.16.1992).
- If the judges had already given their opinion about the culpability of the defendant in a different proceeding against such person (*Rojas Morales vs. Italy* of 11.16.2000; *Ferrantelli and Santagello vs. Italy* of 07.07.1996).
- Attendance of non-judges during Court deliberations:
  a) Prosecutors (*Delcourt vs. Belgium*).
  b) Government representatives (*Kress vs. France*, among others).
  c) Government authorities (*Sovtransavto Holding vs. Ucrania* of 07.26.2002).
- Courts comprised by judges who had already given their opinion about the issue (*Oberschick vs. Austria* of 05.23.1991; *Ferrantelli and Santagello vs. Italy*).

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

- Existence of ideological considerations or those related to the judge's beliefs (professional or member of a jury) who question his/her ability to judge with impartiality (*Hotm vs. Sweden*, of 11.25.1993, where political bonds between jurors and one of the parties is claimed. And in cases *Remli vs. France* of 03.30.1996, *Gregor vs.UK* of 02.25.1997, and *Sander vs.UK* of 05.09.2000 where racist claims were raised).
- Judicial impartiality and media. Media interviews of judges (*Buscemi vs. Italy* of 12.16.1999 and *Lavents vs. Letonia* of 11.28.2002).
- Media pressure on judges (*Sunday Times vs. UK* of 04.26.1999 and *Worm vs. Austria* of 08.29.1997).
- Presence on judging entities of personas with interests linked to one of the parties (*Holm vs.Sweden*, where the jury belonged to the same party of one of the parties. *Langborger vs.Sweden* of 06.22.1989, where judges had been recommended by associations which were contrary to one of the parties; *Pescador Valero vs. Spain* of 06.17.2003, where the judge was an associate professor of the college he was judging; *Sigurdsson vs. Iceland* of 04.10.2003, where the supreme judge is paid off with a debt held by his wife with a bank; *Wettsein vs. Switzerland* of 12.12.2000, where the judge was the lawyer of one of the parties in a different proceeding).
- Even in such proceedings which we will call disciplinary, despite the understanding that each State has a what ought to be understood as criminal or administrative-sanctioning, the European Court of Human Rights shall assess the judge's impartiality.(This is what happened, to quote a case, in *Demicoli vs. Malta*, where the Parliament is not objective when sentencing a journalist who had offended them).
- Work of entities with consulting and jurisdictional functions (in one case or in a controversy), in cases: *Procola vs. Luxembourg* of 09.28.1995; *Mc Gonell vs. UK* of 02.08.2000; and *Kleyn, et al. vs. Holland* of 05.06.2003.
- Military courts, especially the British ones, in cases such as *Findlay vs. UK* of 02.25.19977; or *Cooper vs. UK* of 12.16.2003).
- Turkish State Security courts, in cases *Incal vs. Turkey* of June 9, 1998 and *Ocalan vs. Turkey* of March 12, 2003.

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

III. The Scenario Outlined by the Inter-American System

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

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

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

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

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

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

1. Cases in which the judges accept and comply with government regulations.
2. Use of mechanisms such as transfers or dismissals for those judges that are in conflict with the government's interests.
3. Appointments based on political criteria.
4. Lack of guarantees for the irremovability of judges.
5. Appointment of judges by military authorities.
6. Granting the police the power to issue custodial sentences.
7. Self-limitation of judicial work, especially when controlling acts decided and approved at governmental level[18].
   The Inter-American Commission also sought to make it clear that there was no need to adhere to a literal reading of the American Declaration, and therefore, the requirements of a competent court and impartial process are not limited to the criminal scope. Finally, it was specified that there was a set of concrete practices that constituted a violation to the right to an independent and impartial court.
8. Special courts, whether they are linked to military dynamics or planned to analyse certain matters in particular[19].

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

One of them is clearly based on the decision made by the Court in the case "Peruvian Constitutional Court", or the interpretation that it gives to the concept "Court". In fact, in paragraph 77 of the sentence issued in this case dated 31 January 2001, the Inter-American Court noted that:

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

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

[18] In this line is, to quote some cases, the one indicated in the Annual report 1979 · 80, in the part referred to Paraguay (more directly the fifth paragraph of its page 111), the one indicated in the Guatemala report of 1983 (and more properly in paragraphs fourteen and fifteen of its page 96); or what was said in the Annual Report 1983-1984 about Haiti (situated in the fifth paragraph of its page 111). A good synthesis of this evolution is found in O'DONNEL, Daniel. Protección lnternacional de los Derechos Humanos. Lima, Comisión Andina de Juristas, varied issues, p. 158-159

[19] In the always delicate military issue, the Commission has sustained for more than a decade that the substitution of the ordinary courts for military justice has normally meant both the subordination of the military judges to the political power as to its lesser technical preparation, a serious detriment to the guarantees that all the processes must enjoy. In this regard were, for example the report "Diez Años" (especially on its page 338); or the reports on Argentina (1980), specifically in the first paragraph of its page 745, in the case Guatemala (1983), more directly on page 103, paragraph 32; or Chile (1985), especially in paragraphs 139, 140 and 143, located between pages 199 and 200.

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

Then, a certainly remarkable difference between the Inter-American and the European models was established. Such a difference is related to the fact that the former establishes the judge and/or competent court, i.e. the one called to render justice within previously established parameters (territory, subject, degree, time, and amount) as an element to protect as well. When addressing this issue, it is necessary to note how in the scenario of the competent judge it will be common to find, for example, doctrinal or jurisprudential references to concepts such as "natural judge" or "judge predetermined by law". Moreover, in many cases they are used as synonyms. That said, it is important to note that strictly speaking, although linked together, the terms "natural judge" and "judge predetermined by law" do not mean the same thing but, in any event, we find in the court case law certain cases that relate to both, even when the processes in which the competences of the so-called "military justice" are discussed in terms of natural judge are more noticeable.

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

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

Thus, there are cases such as the case of "*Loayza Tamayo*" where, in the Court's view, military judges encroached on the competence that belonged to the ordinary judge (taking up a court case) and the powers of investigation that both the National Police and the Public

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

[21] In this regard are paragraphs 114 and 115 of the sentence issued by the Court in case "*Baruch Ivcher*")

Prosecutor have[22]. Further, the dispute related to the determination of military justice's competences, as well as a comment on “faceless” (anonymous) judges should be considered.

With regard to "military justice", even before the judge's decision in the well-known case of "*Genie Lacayo*", with a sentence dating bach to 29 January 1997, it is not seen as opposed to the Convention[23]. Something that would certainly be considered a violation of this treaty is to subject civilians to military courts[24] or, even in case of military courts, not limiting such courts' work to military crimes[25], even if the intention is to judge human rights violations[26] or, finally, if a former or retired military man is prosecuted[27].

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

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

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

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

It is along this line of thought that we interpret the assertion issued by the Inter-American Court, which considers that the idea of an independent court is preserved by a correct system of appointments, or by securing tenure in office as a way to guarantee that the judge is free from pressure, especially of an external nature[29]. That fully coincidies with the arguments of the European Court of Human Rights in cases such as *Findlay vs United Kingdom*, a Judgment dated 25 February 1997[30].

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[22] In that vein is paragraph 61 of the sentence "*Loayza Tamayo*", dated September 17, 1997.
[23] We recommend seeing what paragraph eighty-four of the sentence for case "*Genie Lacayo*").
[24] Recognized in sentences issued in cases "*Castillo Petruzzi*", dated April 30, 1999 (especially its whole paragraph 128); "*Cantoral- Benavides*", dated August 18, 2000 (with special emphasis in its section 112), or "*Las Palmeras*", dated December 6, 2001 (and more exactly, in its paragraph 52).
[25] It is advisable to review what is mentioned in *'Durand y Ugarte'*, with sentence dated August 16, 2000, and more specifically in Paragraph 117; "*Cantoral-Benavides*", specially its paragraph 113; or "*Las Palmeras*", especially what is mentioned in its paragraph 52.
[26] In that sense is resolution for case "*Durand and Ugarte*", especially in paragraph 118.
[27] A good example of this topic is found in case "*Cesti Hurtado*", with sentence dated September 26, 1999, and more specifically in its paragraph 151
[28] Here we recommend reviewing the paragraph of the sentence issued in case "*Castillo-Petruzzi”*).
[29] We recommend reviewing the information provided in paragraph 133 of "*Castillo Petruzzi*".
[30] And more specifically what is mentioned in paragraph 73 of said sentence and in accordance with the criteria affirmed by, among others, SALADO OSUNA, Ana. The Peruvian cases at the Inter-American Court of Human Rights. Trujillo. Normas Legales, especially p. 298.

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

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

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

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

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

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

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

Here, as in Europe, the personal impartiality of the judge is presumed to be *iuris tantum*, and the relevance of facing impartiality is recognised, a concept that, in this case, due to its inaccuracy, generates the same qualifications already expressed in the analysis of the

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[31] In this regard, what is mentioned by the Inter-American Court of Human Rights in cases "*Castillo Petruzzi*", basically in its paragraph 129, or "*Baruch Ivcher*", especially in its paragraph 112.
[32] Review what is mentioned, among others, in paragraph 130 of case "*Castillo Petruzzi*"
[33] This is mentioned in paragraph 78 of the sentence to which we have just referred.
[34] We refer here to SALADO OSUNA, Ana Op. Cit - Loc. Cit.

European system. In this context, the practical use of the two ways to evaluate the impartiality of the judge, the so-called "subjective evaluation" and "objective evaluation" becomes undeniable[35].

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

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

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

An incomplete development in the regulation of these subject matters

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

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

[35] In the same line, SALADO OSUNA, Ana. Op. Cit- Loc. Cit.

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

Something similar could be said about concepts such as the independent judge, the competent judge and the impartial judge. Even the Provisional Statute of 1821, passed by Mr José de San Martín, contained pronouncements such as the one shown below:

Section Eight - Article 1

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

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

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

- The requirement to observe due process and jurisdictional protection, and subsequently, to incorporate aspects related to the judge predetermined by law and/or the natural judge (subsection 3).
- The acknowledgment of the independence in the exercise of the jurisdictional function, and subsequently, to specify a series of situations in which it is understood that the independence of judges could be undermined (subsection 2).

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

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

- The existence of a trend to expand the scope of action and protection of the right to due process in general, as well as of some of the aspects that compose it in particular.

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

- The understanding that impartiality and judicial independence are closely related concepts, although it does not always seem to be sufficiently clear the way in which this linkage materialises.
- The additional concern for categorising the issue of legal jurisdiction, especially if having to deal with particularly sensitive matters, such as, for example, those related to the so-called "military justice".

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

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

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

A first comment on the subject cannot disregard the fact that at the doctrinal and jurisprudential level, a broad understanding of the right to due process has taken shape in Peru, thereby turning towards the North American formulation of the concept, where the term "due" does not only refer to a compliance of guidelines and/or procedures, but involves a commitment to act in accordance with certain values, among which justice stands out or seeks to stand out. Here, on the other hand, the term "process" is not limited to a judicial process, but covers all acts of authority, especially - but not exclusively - when that authority (judicial, administrative or corporate among individuals) resolves conflicts. Finally, the term "of law" does not only imply submission to the congress laws, but goes further, demanding whoever holds authority to always act according to the law, understood as the legal order of a State (and even a supranational one, if we submit sovereignly to it)[38].

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

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

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

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

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

There is more, however. The most recent case law matter in the Constitutional Court of Peru is related to a concern about how to establish clearer parameters on Judicial Independence: scope, required budget to materialise it, purpose and relations with another concept of as much importance as the one of impartiality, just to mention some. I will discuss this, as well as the greater or lesser fortune of the task we have assumed right away.

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

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

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

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

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

Later on, the Court itself tries to explain, in more detail, the concept of independence, noting that said independence involves a mandate for all political powers (whether they are part of our institution or not) and even individuals to respect the autonomy of the judiciary or ordinary courts in the development of their functions[41]. Here, without a doubt, it is more precise and is referring to both internal and external independence.

Independence is reached if certain assumptions are obtained or materialised, among which we could mention the existence of an adequate and sufficient financial cover - which is a true guarantee for the autonomy of the judiciary and the judges' independence[42] - or the separation of powers, also invoked as support for judicial impartiality, in line with the proposals made in Europe by the European Court of Human Rights[43]. And, since we are discussing guarantees, said judicial independence, now seen as indispensable for building trust in the courts[44], does not only claim previous conditions (assumptions), but also requires

[40] Affirmation extracted from STC 0023-2003-AI / TC, and more properly from its substantiation number 28.
[41] In this sense, what is indicated in case "*Jorge Barreto*" (file 2465-2004-AA / TC), and mainly in its substantiation seven.
[42] Assertion made in, among other pronouncements, the forty-first substantiation of STC 004-2004-CC / TC.
[43] The content of substantiation thirty-four of the STC 004 2004-CC /TC points in that direction. It is in the same line, we insist, of the proposals of the Court of Strasbourg, because it presupposes independence (in this case, basically external), which results in impartiality, fundamentally in its objective dimension.
[44] Affirmation included in the thirty-third substantiation of sentence 004-2004-CC / TC, citing *Piersack vs Belgium*,

certain guarantees, necessary and timely measures to ensure that the institutions that render justice, as well as the people who form part thereof, do their work in strict compliance with the law and the Constitution, thus avoiding the interference of strangers (other public or social "powers", and even other entities of the same judicial body) when defining and interpreting the sector of the legal order that they wish to apply[45]. The permanence in the service is undoubtedly one of them, in spite of the limits that are recognised in Peru[46].

It is worth mentioning that the Peruvian Constitutional Court itself admits that, when referring to permanence in the service, we are facing a situation the development of which must occur within certain constitutionally established limits. The first one is of an internal nature, and refers to the fact that only one whose conduct lacks any personal or professional suitability in line with his/her position and functions. The second is one of a rather temporary type, since service in the position is rarely considered eternal. That is why the appointment is now for a given period or until the person reaches a given age.

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

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

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

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

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

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important sentence of the European Court of Human Rights to which we have already referred in the present work.

[45] That is in general what is set forth in sentences such as the one issued with file 0321-2004-AA /TC (mainly in twenty-eighth and twenty-ninth substantiations). It should certainly be noted that in most of these cases the requirements are usually raised to the officer, and could be addressed to other important officers.

[46] Here, the concepts mentioned in file SSTC-2209-2002-AA/TC (tenth substantiation) and 0321-2004-AA/TC (third substantiation).

[47] We recommend seeing paragraph eighty-four of the sentence for case "Genie Lacayo").

[48] In this regard, what is indicated in case "*Jorge Barreto*" (file 2465-2004-AA / TC), and mainly in its seventh substantiation.

[49] See STC 2465--2004-AA/TC, ninth substantiation.

[50] Neutrality and prudence are discussed (see in this respect STC 7465 2004 AC/TC, substantiation 21).

[51] With this respect, STC 2465-2004-AA/TC, and mainly in its twelfth substantiation.

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

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

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

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

The fact that military courts are mostly made up of "active officers" violates the principles of independence and impartiality of the jurisdictional function, in addition to the principle of the separation of powers. On the one hand, those who make up the various instances of military jurisdiction are officials of such military institutes; and on the other, because, in principle, it is incompatible for people subject to the principles of hierarchy and obedience, such as professional military men or women who exercise jurisdictional functions, to be both independent and impartial"[54].

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

In summary, we can see how, with undeniable common areas with regard to what is proposed in Europe[56], but also with certain particularities. In Peru, impartiality has been

[52] Information taken from various pronouncements of the supreme authority of the Peruvian Constitution, pronouncements among which file STC2465-2004-AA/TC stand out, particularly in its eleventh, twenty-third and twenty-fith substantiations.
[53] In this regard, see 45th substantiation of STC 010-2002-AA/TC.
[54] This is mentioned in the substantiation fourty-two of STC 003··2003-AA/TC.
[55] Answers given in sentences such as STC 1013-2003-HC/TC or 1076-2003-HC/TC were of this kind, among many others.
[56] Moreover, even in some cases, the Peruvian constitutional court, citing *Piersack* and *De Cubber*, endorse two elements very typical of the treatment given to impartiality in Europe: the presumption of the impartiality of a

approached as very closely linked with judicial independence; however, let me make some remarks before concluding.

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

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

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

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

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

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

It will also be said that this predetermined judge could operate as a guarantee for independent and competent judges, but mainly to prop up impartial judges. This follows a parameter established by the Italian Constitutional Court in its Order 521/199159.521/1991[59]. As the sentence issued in file 1013-2003-HC / TC says, guaranteeing the impartiality and independence of the judges also acts as a counterweight to the configuration of the predetermination of those judges[60].

Much more could undoubtedly be said about the concept of the competent judge, a subject that we are bound to return to in our future work. I would like to conclude with this section of

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judge and the existence of appearance of impartiality. Regarding this, for example, see the tenth substantiation of sentence 2465-2004--AA/TC.

[57] In this regard, see STC 1076- 2003-HC/TC, especially substantiation four.

[58] Review at this point file STC 1076-2003 HC/TC

[59] In this respect is file STC 0290-2002-HC/TC, substantiation eight.

[60] In this regard, see substantiation six of STC 013-2003-HC/TC. However, and as the Peruvian constitutional court case law affirms, neither the judge predetermined by law, nor the independence or the judicial impartiality are affected if, by administrative resolution, the existence of a sub-specialization of criminal courts required by law (files 1320-2002- HC/TC and others) is specified.

the present text referring to an additional concern of our Constitutional Court: to propose a series of guarantees that some guidelines promoted by the Inter-American Commission on Human Rights in this regard, seek to ensure that a court, in addition to being competent, independent and impartial, should be fair.

Among such guarantees are

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

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

V. Final remarks

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

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

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

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

[61] This can be seen in cases such as "*Tineo Silva y otros*"(file 010 -2002-AI/TC), and mainly its substantiation one hundred one.