

Judicial Independence and Due Process in Electoral Justice

Analysis of international principles and rules and their comparative applications

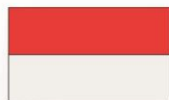
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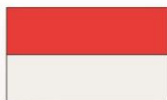
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FIFTH PLENARY ASSEMBLY OF THE GLOBAL NETWORK ON ELECTORAL JUSTICE



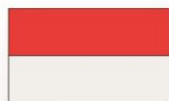
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Introduction

Objective

The purpose of this document is to analyze and systematize, with an international and comparative approach, the principles and rules of due process and judicial independence in the field of electoral justice.

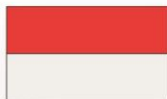
Both due process and judicial independence represent fundamental attributes to provide effective and efficient (electoral) justice to citizens and protect their fundamental (political and electoral) rights.

Due process is understood as a complex legal principle that is composed of several aspects related to the purpose of guaranteeing, through judicial action, the fundamental rights of individuals. In this sense, we can distinguish the principles that refer to the right to trial, that is, the rights connected to the requirement that the controversies be examined in a fair and public manner and within a reasonable time by an independent and impartial court established by law; and the rights in the trial, such as the right to defense, to hearing, to evidence.

Judicial independence is a fundamental aspect of the complex principle of due process and is necessary to maintain the integrity of the judiciary. On the one hand, judges must be free from external pressures to fairly evaluate the matters before them; judges who are subject to such external pressures and interests will be restricted in their powers and abilities to make decisions impartially. On the other hand, the judiciary as a whole must also be independent of the other branches of government, as a consequence of the principle of separation of powers; to this end, the various constitutional systems provide organic guarantees for judicial independence (e.g., most notably, judicial councils).

The principles of due process and judicial independence have important consequences on the electoral process and, more generally, electoral justice.

The principle of due process is particularly important in relation to electoral justice, because in this type of jurisdiction it is necessary to combine at the same time the speed of the decision, the protection of fundamental political rights, and the strong presence of



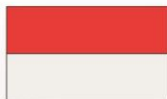
administrative authorities that regulate the electoral procedure and jurisdictional authorities that decide in case of disputes. Due process is therefore necessary for citizens and actors participating in elections to maintain their confidence not only in electoral justice, but in the electoral process as a whole.

Judicial independence, particularly that of the electoral justice systems, generates public confidence in the judiciary and in the electoral process as a whole. Judicial independence implies that the judiciary operates according to standards of fairness and impartiality and is immune from undue external or internal influence. Therefore, judicial independence can create the conditions for members of society and participants in electoral processes to receive fair and equal treatment before the law and increase their incentives to respect the results of the judicial decision. This ensures a fair electoral process, a necessary condition for the proper functioning of representative democracy and the rights of political participation.

Structure

Therefore, it is necessary both to observe how the principles and rules on the subject have been set at the international and constitutional level, and to examine how they have been concretely applied in the judicial practice of different legal systems. In order to achieve this objective, we intend to develop the previous document "Judicial Independence, Due Process, Relationship between the Powers of the State and International Standards" (Deliverable of the Judicial Independence Observatory, Fourth Plenary Assembly of the Global Network on Electoral Justice (GNEJ), October 2021), updating and completing the theoretical and international part with a more articulated definition of the relevant principles and adding a constitutional and comparative part related to the application of these principles by the national electoral justice bodies.

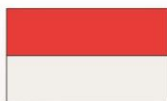
The first part will consist of the collection, analysis and systematization of the principles and rules on judicial independence and due process, particularly in relation to electoral justice. Both *soft law* documents with *hard law* sources, elaborated by global and regional international organizations, will be considered in this phase. The purpose of this phase is not so much the compilation and juxtaposition of various documents and sources, but the identification, through a comparative analysis of the relevant material, of common



principles and rules that can be considered as international standards on judicial independence and due process, particularly in the field of electoral justice.

The second part, therefore, will develop the results achieved in the first part, analyzing how the principles and individual rules at the international level have been interpreted and applied in different legal systems, in particular by the courts and tribunals. Therefore, also in this phase, the analysis will not be limited to a review of the most important decisions on the subject, but to a comparison between them that can lead to considerations on the degree of coherence between international standards and domestic application of these standards. It will also be necessary to analyze the contributions of the different national legal systems and jurisdictions that go beyond international standards and expand the guarantees in both fields. In this way, both the vertical dimension (from the international to the national level and vice versa) and the possibility of a horizontal dialogue (between different national systems) will be considered. To this end, the analysis will focus first on the countries of the Global Network on Electoral Justice, without prejudice to the analysis of relevant cases of third states that may be of outstanding utility for the understanding and application of the principles of due process and judicial independence.





Part One: International standards on judicial Independence and due process applicable to electoral justice

1.1. International principles and rules on due process of elections

1.1.1 The concept of due process

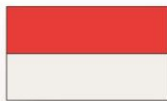
Due process is understood as a complex legal principle that is functional to the guarantee of other principles, rights and fundamental freedoms. The principles and guarantees of due process are recognized in international covenants and conventions, but also in important declarations and resolutions on human rights, as well as in several constitutional texts.

International law has recognized principles and guarantees of due process that are common to both parties to the judicial process (judges and defendants), some of which are non-derogable guarantees, i.e., they cannot be suspended, affected or limited under any circumstances.

These principles, such as the right to a prompt and effective appeal, the right to a fair trial and the right to be heard with the guarantees of a competent court, among others, emanate from consolidated supranational norms and jurisprudence at both the global and regional levels.

1.1.2 Due process in international sources

At the global level, the **Universal Declaration of Human Rights** (Article 8) establishes that "everyone has the right to an effective appeal by competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law"; and Article 10 states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" (United Nations, 1948).



The **International Covenant on Civil and Political Rights** provides in Article 2. 3, that: each State Party to the present Covenant undertakes to ensure that: (a) that any person whose rights or freedoms as herein recognized are violated shall have an effective appeal, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) that the competent judicial, administrative or legislative authority, or any other competent authority provided for by the legal system of the State, shall decide upon the rights of any person claiming such a remedy and shall develop the possibilities of judicial appeal; and (c) that the competent authorities shall enforce any decision granting such an appeal (United Nations, 1966).

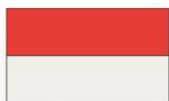
The Covenant also provides in Article 14.1 that: "All persons are equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him or of his rights and obligations in a suit at law (ibid).

At the regional level, all the main systems for the protection of rights, especially the American, European and African systems, recognize due process in various forms.

In the Inter-American system, the **American Declaration of the Rights and Duties of Man**, in Article XVIII, recognizes the right to justice, stating that "every person may apply to the courts to enforce his rights. Likewise, he should have access to a simple and brief procedure whereby he may be protected by justice against acts of the authorities that violate, to his detriment, any of the fundamental rights enshrined in the Constitution" (Organization of American States, 1948).

The **American Convention on Human Rights** (ACHR), for its part, recognizes in Article 8, paragraph 1, that "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any criminal accusation made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature" (Organization of American States, 1969).

Additionally, paragraph 2 establishes a series of guarantees that refer primarily to the criminal process but that are, at least in part, also relevant to the process in general: "the right to be presumed innocent until guilt has been legally established (...); the right of the accused to be assisted free of charge by a translator or interpreter, if he does not



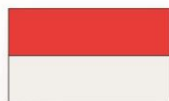
understand or speak the language of the court or tribunal; prior and detailed communication to the accused of the accusation made; granting the accused adequate time and means for the preparation of his defense; the right of the accused to defend himself personally or to be assisted by a defense counsel of his choice and to communicate freely and privately with his defense counsel; the inalienable right to be assisted by a defense counsel provided by the State, whether paid or unpaid according to domestic law, if the accused does not defend himself or appoint counsel within the time limit established by law; the right of the defense to question witnesses present in court and to obtain the attendance, as witnesses or experts, of other persons who may shed light on the facts; the right not to be compelled to testify against himself or to plead guilty, and the right to appeal the judgment to a higher judge or court" (ibid.).

Paragraphs 3, 4, and 5, add that and "The confession of the accused is only valid if it is made without coercion of any kind. An accused person acquitted by a final judgment may not be subjected to a new trial for the same facts. Criminal proceedings must be public, except insofar as necessary to preserve the interests of justice" (ibid.).

It also states in Article 25 that "everyone has the right to simple and prompt appeal, or any other effective appeal, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties" (ibid.).

In the European system, the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR) states, in Article 6, that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide any dispute concerning his rights and obligations in a suit at law or concerning the merits of any criminal charge against him" (Council of Europe, 1950).

More specifically, Article 6(1) gives every person the right to have his civil or criminal case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law. Moreover, the judgment must be made public, subject to possible exceptions justified by the safeguarding of interests of a collective order (morals, public order, national security, administration of justice) or related to the subject matter of the judgment (interests of minors, protection of the private life of the parties involved) (ibid.).



Paragraphs 2 and 3 of Article 6, on the other hand, refer to guarantees dictated specifically for persons prosecuted under criminal law. These are the presumption of innocence, which the accused enjoys until his guilt is legally established; the right to receive clear, timely and full information on the nature and grounds of the accusation; the right to have the necessary time and facilities to prepare the defense; the right to defend himself personally or through a trusted lawyer, benefiting from free legal assistance when the conditions are met; the right to examine or have witnesses examined against him and to make use of witnesses on his behalf; and the right to free assistance (ibid.).

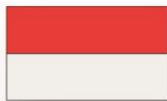
Article 13 states that "everyone whose rights or freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in the official capacity" (ibid.).

Likewise, the **African Charter on Human and Peoples' Rights**, in Article 7 holds that every individual has the right to have his or her case heard, which implies: (a) the right of appeal to competent national bodies against acts that violate his fundamental rights recognized and guaranteed by existing conventions, laws, ordinances and customs; (b) the right to be presumed innocent until proven innocent by a competent court; (c) the right to a defense, including the right to be defended by counsel of his choice; and (d) the right to be tried within a reasonable time by an impartial tribunal (United Nations, 1981).

1.1.3 Due process in electoral litigation

These documents in force in different regional systems for the protection of human rights include rules and principles applicable to various categories of judicial proceedings and, above all, the ECHR and the ACHR, to criminal proceedings. However, the respective jurisdictional bodies have tried to extend the scope of these principles and rules, either to non-criminal procedural areas or to non-judicial procedures, which is of primary importance in relation to the possible application of due process to electoral matters.

The European Court of Human Rights (ECtHR) has on several occasions affirmed the **autonomous nature of the concepts contained in Article 6 of the ECHR**, i.e. the independence of the categories used by the national legal systems of the Member States. This has made it possible to interpret autonomously, among others, the concepts of "independent and impartial court", "litigation concerning their rights and obligations in a



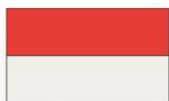
suit at law" and "prosecution in criminal matters" (European Court of Human Rights, 1982; European Court of Human Rights, 1984; European Court of Human Rights, 1997a).

However, the ECtHR itself has ruled out the applicability of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to electoral disputes because of the express reference to civil and criminal matters (European Court of Human Rights, 1997b).

Recently, this limit has been partially overcome by the Tribunal, which in its decision of *Mugemangango v. Belgium*, while confirming the inapplicability of Art. 6 ECHR to electoral disputes, derives from Article 3 Protocol 1 ECHR **the obligation to provide adequate tools for the protection of the right to vote**, including effective systems of control on the regularity of elections, which are not only impartial but also contemplate the citizens as such (European Court of Human Rights, 2020). In particular, the ECtHR defined three principles that are similar to those deriving from Art. 6 of the ECHR: the presence of guarantees of impartiality of the judicial body; the delimitation by law of its discretion; and the presence of a procedure capable of guaranteeing a fair, objective and sufficiently motivated decision.

The Inter-American Court of Human Rights (IACHR), for its part, has stated that "although [Article 8 of the ACHR] does not specify minimum guarantees in matters that concern the determination of rights and obligations of a civil, labor, fiscal or any other nature, **the list of minimum guarantees established in numeral 2 of the same precept also applies to those orders** and, therefore, in these types of matters the individual also has the right, in general, to due process that applies in criminal matters"; and that although the jurisdictional function is eminently the responsibility of the Judiciary, other public bodies or authorities may exercise functions of the same type. In other words, when the Convention refers to the right of every person to be heard by a "competent judge or tribunal" for the "determination of his rights", this expression refers to any public authority, whether administrative, legislative or judicial, which through its resolutions determines the rights and obligations of persons" (Inter-American Court of Human Rights, 2001).

With more specific reference to electoral matters, the IACHR has established that **"The decisions issued by domestic bodies in electoral matters may affect the enjoyment of political rights.** Therefore, the minimum guarantees enshrined in Article 8(1) of the Convention must also be observed in this area, insofar as they are applicable to the



respective procedure". This requirement makes it particularly necessary that "the electoral procedure that precedes the holding of elections (...) requires speed and a simple procedure that facilitates decision-making within the framework of the electoral calendar" and that "the decisions adopted by the internal organs that may affect human rights, such as the right to political participation, must be duly grounded, otherwise they would be arbitrary decisions". (Inter-American Court of Human Rights, 2005).

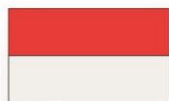
1.1.4 Due process in the codes of good practice

The applicability of the principles of due process to electoral justice is implicitly confirmed by the *soft law* documents that reflect international standards in this area. In this sense, throughout the last decades, the International Foundation for Electoral Systems (IFES), the Venice Commission and the International Institute for Democracy and Electoral Assistance (International IDEA), among other agencies, have issued recommendations and provided technical assistance to countries in electoral matters. In particular, they seek to ensure that electoral challenges are effectively resolved by the institutions in charge of national elections, thus guaranteeing the legitimacy of an electoral system.

For example, **International Foundation for Electoral Systems (IFES)** has identified seven standards in the filing of an electoral complaint, based on international electoral practices. These standards derive from the fundamental right to political participation (the right to take part in government through citizen representation), which can be summarized as follows: a) a system of means of appeal; b) specialized legislation and procedures in electoral matters; c) an impartial actor; d) a system that expedites judicial decisions; e) the burden of proof (rules for offering evidence); f) the availability of reasonable and effective remedies; and, g) the education of participants.

Specifically, on this last standard, IFES considers that civil society, political parties and citizens need to know: a) which body will be in charge of receiving and resolving their complaints or challenges; b) the process for filing a complaint; and, c) the procedural and substantive laws that govern the content of the complaint (IFES, 2011).

For its part, the **Venice Commission** integrates another scale of standards based on the guarantee of due process and access to electoral justice, as well as the maximization of substantive political rights, in what they have called: "Code of good practices in electoral matters". Among the good practices, the need to have a dispute resolution system in



charge of an electoral commission or tribunal is emphasized. This instance must be competent to annul the elections when irregularities violate the provisions of the law, to the point of determining that the electoral process is invalid.

The same Code then goes on to define in more detail the procedures for the control of elections. For example, it recommends the simplicity of election control procedures, the clear division by law of the competencies related to these activities, the definition of short deadlines for the resolution of election disputes, the broad legitimacy to appeal election results and the right to be heard by the judiciary (Venice Commission, 2002).

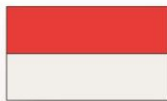
Likewise, **International IDEA** has held that access to justice must be guaranteed not only to the person, political party, actor, petitioner or plaintiff, but also to those who have an interest contrary to the former -such as the interested third party- in order for the latter to be granted the guarantee of a hearing. Thus, the system will comply with the principles of due process related to the right to defense, since all parties have the right to resort to the process with equal opportunities to urge and argue what is in their interest (International IDEA, 2013).

From the sum of *hard law* and *soft law* sources, it is clear that the principles of due process must find full applicability in the framework of the electoral litigation; in this sense, it is possible to distinguish the principles and rules that refer to the right to *a fair trial* and the principles and rules that establish the guarantees that are activated in *the trial*.

1.1.5 Electoral due process and the right to a trial

In relation to the **right to a trial**, the first point to be made is the need for the law to provide for broad legal standing to propose an appeal, which must be recognized at least for all candidates and voters. In addition, the appeal must be accessible, which requires that it be technically simple and economically bearable, and that the law regulate the ways to propose electoral appeals.

Always in relation to the right to a trial, mention must be made of the rules relating to jurisdiction. Of course, the judge who decides on electoral matters must be not only independent, but also impartial and competent; of particular importance in electoral matters is the jurisdictional nature of the body that decides on the electoral dispute; in addition, the principle of the natural judge must be respected.



1.1.6 Electoral due process and trial rights

In relation to the **rights in the trial**, all those guarantees that refer to the development of the process must be included in the first place. In this sense, the process must be carried out under the adversarial principle, which in turn requires that the right to be heard and to present evidence be guaranteed. In addition, the process must lead to a decision within a very short period of time, in order to allow the means of electoral justice to be effective. Likewise, the need for a procedure where the judge's discretion is limited and that leads to an objective and motivated decision is foreseen.

For the rights in the trial to be guaranteed, that decision must not only be objective and motivated, but it must also be effective; in this sense, the judge must have the competence to repristinate the electoral legality, and even, if this is necessary and as far as the control of the electoral results is concerned, the possibility of partially or totally annulling the elections.

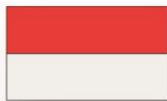
1.2 International principles and rules on electoral judicial independence

1.2.1 Separation of powers and judicial independence

It is generally accepted that a modern democratic state should be based on the separation of powers. In a democratic Rule of law State, the three branches of government must act on the basis of and within the limits established by law (Venice Commission, 2020).

In this sense, the **Inter-American Democratic Charter** establishes in Article 3 that the essential elements of representative democracy (understood in a broad sense, as a form of democratic state) are, among others, respect for human rights and fundamental freedoms; access to power and its exercise subject to the rule of law; the holding of periodic, free, fair elections based on universal and secret suffrage as an expression of the sovereignty of the people; the pluralistic regime of political parties and organizations; **and the separation and independence of the branches of government** (Organization of American States, 2001).

For example, **IFES** points out that, in all States, the interaction between the main institutions of the State is of fundamental importance. Even if it is accepted that different



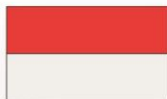
forms of separation exist, it cannot be said that the separation of powers is an "optional extra"; on the contrary, separation must exist in one form or another in order to respect the Rule of law. A government structure committed to the Rule of law must necessarily provide for a separation between the key functions of administration of the branches of government and the machinery of justice (Bradley, 2003).

Recently, and stemming from the health crisis, the **Venice Commission**, in its *Report on the measures adopted in the Member States of the European Union as a result of the COVID-19 crisis and its impact on democracy, the Rule of law and fundamental rights* (Venice Commission, 2020), established that the principle of checks and balances requires that the different branches of government be endowed with different competencies, so that none of them has a monopoly of state power, being able to check each other. In this regard, it emphasized that, as a general rule, States must ensure that changes in the distribution of power do not interfere with the separation of powers and their mutual control.

The relationship between the branches of government means that the responsibilities for public action are distributed among the different branches to prevent one branch from exercising the basic functions of another. The objective is to avoid the concentration of power, to provide for reciprocal controls among them, and to achieve a balanced distribution of public power.

In this sense, since the judiciary *is the weakest* of the three branches, it is essential to prevent the interference of the other branches of government in the administration of justice, and specifically, in the electoral jurisdictional authorities, which, in most cases, act as the last instance in the protection of political-electoral rights.

For these reasons, it is advisable that the electoral jurisdictional authorities have guarantees for the observance of the separation of powers. International law (International Covenants on Human Rights and, especially, the American Convention, among others), by contemplating the separation of powers as an indispensable element for the political stability of a country, recognizes such guarantees and principles, among which judicial independence stands out for its importance. Ensuring the independence of the electoral jurisdictional bodies against any pressure from any other power of the State or even political pressures is of vital importance for the proper functioning of a democratic and constitutional State governed by the rule of law.



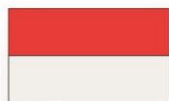
In conclusion, judicial independence is **fundamental to maintain the integrity of the judiciary and ensure the separation of powers**. Judges must feel free from external pressures to fairly evaluate the matters before them based solely on the evidence presented and the applicable law. Judges who are subject to such external pressures and interests will be restricted in their powers and decision-making abilities. Attacks on judicial independence corrupt the function of the judiciary, subject it to external pressures, and undermine the transparency of the judicial function (GJIN, 2020).

1.2.2 Judicial independence as an element of the right to due process. The right to an independent and impartial judge

Judicial independence, particularly that of electoral justice systems, generates public confidence in the judiciary and, ultimately, in the fairness of the electoral process and in democracy itself. Judicial independence **implies that the judiciary operates according to standards of fairness and impartiality and is immune from undue external or internal influence**. Therefore, judicial independence can create the conditions for members of society and participants in electoral processes to receive fair and equal treatment before the law and increase their incentives to respect the results of the judicial decision. In fact, judicial independence, as an indispensable condition for the impartiality of the judge, is also one of the cardinal aspects of the right to due process (European Court of Human Rights, 2022).

The Human Rights Committee of the United Nations (UN) has stated that an impartial and independent tribunal is "an absolute right that admits of no exceptions" (United Nations, 1992). Likewise, the **Inter-American Court of Human Rights (IACHR)** has established that, since judicial independence "is indispensable for the protection of fundamental rights," it must be guaranteed in every situation (ibid). Furthermore, the Inter-American Court has reiterated that judicial independence "constitutes one of the basic pillars of the guarantees of due process, which is why it must be respected in all areas of the procedure and before all procedural instances in which the rights of individuals are decided" (Inter-American Court of Human Rights, 2009).

In turn, the first principle of the **Bangalore Principles of Judicial Conduct** states that "judicial independence is a prerequisite of the principle of legality and a fundamental guarantee of a fair trial. Accordingly, a judge should uphold and exemplify judicial independence, both in its individual and institutional aspects" (United Nations, 2013).



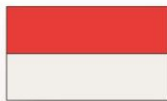
Different agencies of the United Nations, the Council of Europe and various bodies such as the International Commission of Jurists have adopted and promoted these Principles and have invited to take them into consideration for the elaboration of standards with respect to the professional and ethical conduct of members of the judiciary (*ibid.*).

For its part, the **Venice Commission** has pointed out that "the independence of the judiciary has an objective component, as an indispensable quality of the judicial system as such, and a subjective component, as the right of every person to have his or her rights and freedoms established by an independent judge", so that judicial independence should be considered not as an end, but as an indispensable condition required by every democratic State (Venice Commission, 2010).

Likewise, the **Court of Justice of the European Union**, in its interpretation of the second paragraph of Article 19(1) of the **Treaty on European Union**, has established the guarantees of independence and impartiality of judges required by European Union law. According to the Court of Justice, those guarantees imply, among other things, "that there must be rules making it possible to exclude any legitimate doubt in the minds of the judiciary as to the immunity of judges to external elements, in particular to direct or indirect influences from the legislative and executive branches of government, and as to the neutrality of judges vis-à-vis the interests in dispute" (Court of Justice of the European Union, 2018).

Regarding electoral justice, it should be emphasized that there are different models with legal mechanisms and regulations for the protection of political-electoral rights in the world, and whatever the model adopted by the different States, it is essential that independence be one of the most important pillars in their decisions to ensure a judiciary with integrity and an electoral process with all guarantees.

Based on the case-law of international courts and the *soft law* developed by international organizations, three fundamental elements can be identified to ensure the independence of the judiciary: an adequate appointment process, irremovability in office, and the whole set of guarantees against external pressures.



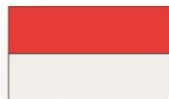
1.2.3 Guarantees of independence relating to the appointment process

A fundamental element in ensuring due process and judicial independence is the process of selection and appointment of judges. In the absence of minimum standards, the selection mechanism could affect the impartiality of the authorities, resulting in partisan bias. The *United Nations Basic Principles on the Independence of the Judiciary* state that **"persons selected for judicial office shall be persons of integrity and ability and shall have appropriate legal training or qualifications.** Any method used for the selection of judicial personnel shall ensure that they are not appointed for improper motives" and "on the other hand, it means that the judiciary and its members should use resources responsibly, professionally, with integrity and transparency" (United Nations, 1985).

Likewise, **the procedures for the appointment of judges must meet certain minimum** criteria in order to "translate into a truly independent regime that allows access to justice" (Inter-American Commission on Human Rights, 2013). The Inter-American Court of Human Rights (IACHR) has explained that: "it must be taken into account that not just any procedure satisfies the conditions required by the Convention for the proper implementation of a truly independent regime. If basic parameters of objectivity and reasonableness are not respected, it would be possible to design a system that allows a high degree of discretion in the selection of career judicial personnel, by virtue of which the persons chosen would not necessarily be the most suitable" (Inter-American Court of Human Rights, 2009).

In turn, the Venice Commission has issued several opinions in this regard. The Commission has established that a basic condition for the proper functioning of the selection of constitutional judges is to accept that **this procedure must guarantee the independence of the Constitutional Court** (Venice Commission, 1997). The specificity of constitutional justice and its implication in the ultimate guarantee of electoral rights and processes implies that the guarantees of the position and status of constitutional judges must be extreme.

This is possible on the condition that the **Constitutional Court is composed of the best jurists, whose professional position must be so competent and suitable that the protection of the Constitution and independence from political interests are a priority** for them. Thus, they should be persons of recognized competence, specialists in



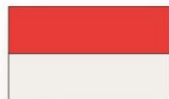
various fields, and both theoretical and practical jurists. Therefore, it would be expected that the selection process of the candidates would involve (e.g., through nomination) universities or representatives of the legal professions, such as judges, prosecutors and lawyers (Venice Commission, 2004).

On the other hand, according to the Court of Justice of the EU the fact that a judicial body, or a constitutional court, is appointed entirely by the national parliament does not automatically deprive such a body of the possibility to act independently of the political powers (Court of Justice of the European Union, 2021). In this sense, it can be affirmed that a well-designed selection process constitutes a necessary but not sufficient condition for judicial independence, taking into account, when determining the effective independence and impartiality of a judge, all the guarantees that the judge enjoys.

1.2.4 Guarantees of irremovability and removal from office

Prior to the issue of irremovability, the question of the duration of the term of office must be addressed. Appointments of judges may be of three types: for life, until retirement, or for fixed terms. The first two types tend to promote judicial independence, although at the cost of weakening judicial accountability, unless there are other mechanisms for removing an unfit judge. Fixed-term terms, on the other hand, can have the opposite effect. Particularly in the case of renewable terms, judges in office may manifest a tendency to accommodate the interests of the appointing body and bow to it in order to retain their positions. For this reason, especially in countries with a civil law tradition (IDEA, 2021), a large majority of constitutions provide for fixed-term, non-renewable terms of office for constitutional judges.

As for life terms, these are usually 'during good behavior'. Thus, the judge may hold office as long as he or she wishes, provided that no misconduct occurs that may lead to removal from office. As for the terms of office until retirement age, the central element is the setting of the mandatory retirement age. In this regard, in the absence of a consensus on the optimal retirement age, the guarantee of judicial independence requires that the fixing of the retirement age must be done by law and cannot directly affect judges already in office who would be obliged to retire under the new law. (Court of Justice of the European Union, 2019)



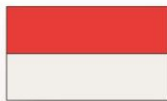
The irremovability of judges is "**a guarantee of judicial independence** which in turn is composed of the following guarantees: permanence in office, an adequate promotion process and no unjustified dismissal or free removal" and that the same "must operate to allow the reinstatement to the status of magistrate of whoever was arbitrarily deprived of it" (IACHR, 2009). As the Inter-American Commission has pointed out, stability in the position of judges "is essential to guarantee their independence in the face of political or governmental changes" (Inter-American Commission on Human Rights, 2009).

The Court has also explained that "the irremovability of judges **is closely linked to the guarantee against external pressures**, because if judges do not have the security of permanence for a given period, they will be vulnerable to pressures from different sectors, mainly from those who have the power to decide on dismissals or promotions in the Judiciary" (Inter-American Court of Human Rights, 2009).

In turn, the Venice Commission in its *Report on the Independence of the Judiciary: The Independence of Judges* states that "**judges, whether appointed or elected, are irremovable** until they have reached the mandatory age of retirement or the end of their term of office" (Venice Commission, 2010).

In addition, the Commission considers that the establishment of interim terms may undermine the independence of judges, as they may feel pressured to decide cases in a particular way. However, this should not be interpreted as excluding any possibility of appointing temporary judges. The Commission is emphatic in stating that in States where the judicial system is relatively new, it may be necessary in practice to ensure in the first instance that a judge is actually capable of performing his or her functions before any permanent appointment. If temporary appointments are considered indispensable, a "refusal to confirm the sitting judge should be based on objective criteria and accompanied by the same procedural guarantees that apply when a judge is to be recalled" (*ibid.*).

In this regard, the Commission maintains that it is above all a matter of **excluding factors that could give rise to doubts as to the impartiality of judges**: "despite the honorable objective of the desire to ensure high standards through a system of evaluation, it is particularly difficult to reconcile the independence of the judge with a performance appraisal system. If there is a choice between the two, judicial independence is the crucial value" (*ibid.*). This allows the independence of the judiciary from other branches of



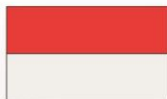
government to be respected, which allows for a separation of powers that must exist in all democratic states.

Strictly linked to security of tenure is the issue of the modalities of removal from office. Three main methods of removal of judges can be found in the constitutions in force. Removal by judicial ruling or internal disciplinary process; removal by political actors, generally based on a request from the legislature for reasons deemed sufficient by the legislature; and impeachment, which combines political and legal decisions. Given the variety of methods for removing a judge from office, the element that seems most capable of protecting the independence of the judiciary is the involvement, at least at one stage of the procedure, of the judiciary itself, through the judicial council, a disciplinary tribunal, or a higher instance.

1.2.5 Guarantees against external pressures. Disciplinary regime and judicial immunity

One of the main mechanisms for protecting the judge from outside pressure, particularly from the parties to the proceedings, is judicial immunity. Judicial immunity consists of the absence of civil or criminal liability of a judge for acts committed in the exercise of his or her office. This means that a judge cannot be sued or punished, for example, for judging a matter in a certain way. Such immunity may be absolute, as in the United Kingdom, or limited in cases where a judge's acts are attributable to malice, negligence or ignorance. In most national laws, immunity also does not cover situations where a judge or official is caught in the act of committing a criminal offense. Judges may also be protected from public criticism either by the constitution, by law or by treaty rules. Such rules are intended to protect the independence and neutrality of the judiciary by separating law from politics. On the other hand, immunity clauses, if interpreted too broadly, may encourage the creation of a corporate spirit among judges by hindering the accountability of judges. Therefore, the guarantee of judicial independence does not require absolute judicial immunity, but rather that the acts that may trigger the criminal or civil liability of the judge should be an exhaustive list, with factual assumptions clearly defined by law, and the effective application of disciplinary sanctions should be limited to exceptional cases (Court of Justice of the European Union, 2021).

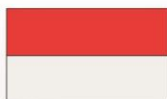
Strictly linked to the issue of judicial immunity is the issue of the disciplinary regime for judges. According to Recommendation CM/Rec(2010)12 of the Council of Europe, disciplinary proceedings against judges are possible if judges "do not perform their duties



efficiently and properly". They must be conducted by an independent authority or by a court, and the judge must have the right to a fair trial as well as the right to challenge the decision. The personal liability of a judge for a decision that is overturned or modified by a higher court is also excluded.

In the jurisprudence of the Inter-American Court, the guarantees against external pressures are also declined in the sense of including guarantees for the security and personal immunity of judges in the context of generalized violence against public officials (IACHR, 1998). This same aspect, given the different social context, does not seem to receive the same attention in European doctrine and jurisprudence.





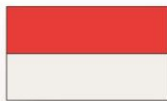
Second Part: Comparative Analysis of the application at the national level of international standards on judicial independence and due process

2.1. The interpretation and application of international standards on due process in the case-law of domestic and international tribunals

2.1.1. Access to the judge

A first relevant aspect in terms of due process relates to access to the judge. The general principle is that States have a certain margin of discretion as long as they do not establish limits capable of restricting access in such a way that the right in question is affected in its substance (ECHR Airey v. Ireland, 1979). The possibility of foreseeing preventive non-judicial phases is not excluded, provided that the decision of the administrative authority is subsequently examined by a judicial body with full jurisdiction (ECtHR Smautzer v. Austria 1995). In addition, guaranteeing access to a judge also implies the obligation of States to equip themselves with the means to specifically allow the interested parties to exercise their rights under equal conditions. Hence, for example, the need to provide the possibility of enjoying free legal assistance (ECHR Andronoicou Against Cyprus 1997), or, in general, not to place unnecessary obstacles or excessively burdensome procedures to access the trial. The execution phase of the ruling is also part of the fair trial, since the right of access to the judge would be illusory if the domestic legal system allowed a final and binding judicial ruling to be without effect (ECHR Immobiliare Saffi v. Italy 1999).

The issue of access to the judge is most relevant in systems that do not include judicial control of elections, such as parliamentary verification systems. In this context, recently, the Italian Constitutional Court, ruling on the system for challenging acts of the preparatory electoral procedure, has stated that "if it is true that the effective protection of rights requires access to a judge (article 24 of the Constitution: among many, ruling n° 182 of 2014 and n° 119 of 2013), it is even more evident that judicial protection must protect an inviolable right, such as the one now being examined. In short, the existence of an inviolable right and the guarantee of appeal to the judge to ensure its protection must coexist and support each other" (Constitutional Court, ruling no. 48/2021).

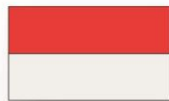


Even in systems that establish judicial control of elections, on several occasions problems have been raised regarding access to the judge facing acts of the preparatory electoral procedure. The need to limit the dispute before the elections has led many systems, especially European ones, to assign the definition of possible electoral disputes to the administrative authorities; however, in case-law, attempts have been made to guarantee access to the judge also in this phase of the electoral procedure.

The French Constitutional Council, in this sense, has affirmed that "the mission entrusted to the Constitutional Council is exercised habitually, in accordance with the provisions of articles 32 to 45 of the ordinance of November 7, 1958, relative to the organic law of the Constitutional Council, examining the controversies raised against the results obtained in the various electoral districts." However, it has added that when "the disputed facts (...) put in doubt (...) the regularity of all electoral operations, it [is] necessary for the Constitutional Council to take a stance before the first vote to fulfill the mission entrusted to it by article 59 of the Constitution" (Ruling n° 81-1 ELEC of June 11th, 1981).

The Spanish Constitutional Court, for its part, has affirmed that "It is true that, as we have repeatedly declared, the right to effective judicial protection prohibits the legislator from, in absolute and unconditional terms, preventing the indicated rights and legitimate interests from accessing the process. This prohibition is reinforced by the provisions of art. 106.1 of the Constitution when it comes to judicial control versus administrative action (thus, SSTC 197/1988, of October 24; 18/1994, of January 20, and 31/2000, of February 3). Contradicting the premise of the generality of judicial protection, not exempt from exceptions, art. 21.2 of the L.O.R.E.G. establishes in absolute and unconditional terms that against certain rulings of the Electoral Boards "there is no administrative or judicial appeal" except in cases in which the Law itself "provides for a specific judicial review procedure." In this way, with the exclusion of any judicial control over certain actions of the Electoral Boards, a sector of administrative immunity is created that is not compatible with either of the two constitutional precepts referred to in STC 103/1996" (STC 149/2000, of October 22).

More generally, in electoral matters, it is frequent, whether in the preparatory electoral procedure or in the electoral procedure *stricto sensu*, that controversies are subject to evaluation by administrative authorities, who in carrying out this task may impose electoral or other types of sanctions. This practice, as for instance the National Electoral Chamber

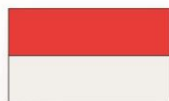


of Argentina has recalled, is in accordance with the principles of due process, considering that "the power granted by law to the administrative authority to judge and repress violations does not violate the guarantee of defense in court, as long as the defendant is granted the opportunity to appear before the judicial body so that any decision of said authority is subject to subsequent control." It adds that "the guarantee of due process is not exclusive to the criminal sphere" (National Electoral Chamber of Argentina, Incident of incompetence of negative dispute with federal court No. 1 - Electoral Secretariat).

Relations between administration and electoral jurisdiction have also been the subject of a ruling by the Constitutional Chamber of Costa Rica, which, in the face of a conflict of powers raised by the Supreme Electoral Tribunal, ruled that the authority to judge breaches of the duty of integrity and, in general, of the Higher Audit System of the Public Treasury in Costa Rica is exclusive to the Supreme Electoral Tribunal, in such a way that the judgment of these infractions must be in the hands of a judge of the republic Supreme Electoral Tribunal and not in the hands of a body of the administration, such as the Office of the Comptroller General of the Republic (ruling 2009-08920).

Other actors that can have functions of electoral justice and therefore can cause problems in terms of access to the judge and due electoral process are political parties, especially regarding control over the regularity of the parties' internal decisions. In this sense, it has been affirmed in a ruling of the Superior Electoral Tribunal of Brazil that it is "paradoxical to conceive the existence of fields that are outside the scope of judicial review, subject only to the exclusive jurisdiction of the respective party group. An isolation of such degree is capable of compromising the very regularity of the political-electoral process, and, in the extreme, the proper functioning of democratic institutions" (PRESTAÇÃO DE CONTAS ANUAL Nº 0000167-52.2016.6.00.0000 – BRASÍLIA – DISTRITO FEDERAL).

It is important to note that the intervention of the judge in the electoral process not only serves as a means of guaranteeing individual rights, but also the regularity of the electoral process and respect for electoral regulations in general. In this sense, for example, the National Electoral Chamber of Argentina has affirmed that "judicial intervention guarantees the validity of the acts that constitute the legal cause of legitimacy with respect to the titles of the candidates who are elected, through strict compliance with what has been called the "due electoral process", as an unnamed guarantee of political representation or electoral rights that serve as the legal basis of representative



democracy” (National Electoral Chamber of Argentina, Appeal of Alianza Consenso Federal C.F. List 504 A List 504 B List 504 B in documents Alliance Consensus Federal C.F. and others w/o proclamation of candidates, primary elections).

In addition to the formal aspects of access to the judge, an element of interest is represented by the interpretation that judges make of the procedural requirements to access guardianship, frequently interpreting it in a flexible way so that the effective protection of individual rights is guaranteed.

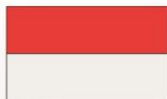
Thus, for example, the Spanish Constitutional Court has stated that “[the] flexibility must be even greater, if possible, in a procedure such as the appeal for electoral protection (...), in which the peremptory nature of the deadlines requires a non-formalist processing of the causes, provided that the basic principles of the constitutional process are respected” (STC 106/1991, of May 13).

In the same sense, even though the French electoral law establishes that the appeal against elections must indicate the effects that are intended to be achieved by means of said appeal, the Council of State of France has accepted to decide also in cases of generic contestations, as for example in appeal cases where it was demanded that “the election be verified in all its forms” (EC 13 juill. 1966, Municipal Elections of Saint-Laurent-d’Olt, Rec. T. 982).

However, the flexibility and lack of formalism can also lead to an overload of work for electoral judges and the presentation of frivolous issues. For this reason, some courts, such as the Federal Constitutional Court of Germany, have decided on some occasions to sanction appellants who abuse the means of appeal (BVerfGE 79, 173).

2.1.2. The Guarantee of the Adversarial

The adversarial principle as a guarantee must be understood in a horizontal and egalitarian sense. According to the case-law of the European Court, the adversarial of a vertical type, characteristic of administrative procedures whose purpose is private participation in the process to reconcile private and public interests, is not sufficient to guarantee compliance with Article 6 of the ECHR. On the contrary, there is a need for a horizontal type of adversarial that places all parties on the same level in terms of the use



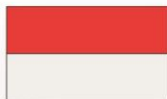
of procedural instruments. In the case-law of the ECHR, the horizontal adversarial is functional, in the first place, for the correct assessment of the facts when these are in dispute (which implies a contrary situation that when the facts are not in dispute, the horizontal adversarial may be subject to some exceptions). To guarantee the verification of historical facts through the adversarial and therefore a horizontal type of adversarial, the ECHR has established some rules: the public, oral, and accessible hearing when there is a dispute about the facts (ECHR Grande Stevens cit.); knowledge of all procedural documents and ability to defend oneself against them (ECHR Lilly v. France 2022); right of access to the file on equal terms with the parties involved, right to know all the evidence, and right to participate in the oral examination (ECHR, Messier. v. France, 2009); obligation of the judge to proceed to the effective examination of the means of argumentation and evidence of the parties, after verifying their relevance for the purposes of the decision (ECHR Van de Hurdado v. Netherlands 1994); right of the parties to cross-examine witnesses (ECHR Grande Stevens cit.; ECHR Popov v. Russia).

In the European systems of electoral justice, the adversarial principle seems to be applied, but sometimes in a weak way. Normally, the possibility of presenting arguments and evidence under equal conditions is foreseen, but often oral hearings are not, favoring written forms of contradiction instead, as is the case in Spain.

In France, however, the Constitutional Council, with its rulings, has progressively opened up the possibility of hearing the parties. The possibility for the parties to request to be heard was introduced with Ruling No. 95-74 ORGA of June 28th, 1995. With the subsequent Ruling n° 2013-126 ORGA of February 22nd, 2013, the possibility that the Council itself requests *ex officio* to hear the parties was foreseen.

In Germany, there is also a limited possibility of an oral hearing, which is carried out, according to the rules that regulate the operation of the Constitutional Court, only if it is necessary for further progress in the process.

In systems that do not provide for judicial control of elections and where there are parliamentary control systems, the adversarial process is sometimes carried out in a stronger way to try to compensate for the lack of jurisdictional protection with the incorporation of para-jurisdictional guarantees in the verification process of elections before parliamentary bodies. In Italy, for example, the contentious procedure that

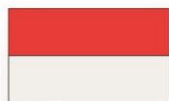


characterizes the challenge of the election before the Electoral Boards of the Chambers begins with the setting of the public hearing, a functional act for the constitution of the parties and for them to present documents and deductions and see the deposited material. The public hearing opens with the presentation of the speaker, who summarizes the facts and issues without making judgments; this is followed by the intervention and possible reply of the parties. The hearing is characterized by a series of elements to guarantee the correct development of the case: on the one hand, the publicity of the hearing, established through the possibility of public access and the drafting and publication of a record of the session, and, on the other hand, the singularity of the audience itself, which implies the concentration of the audience in a single session.

In Latin American systems, the adversarial principle and the right to a hearing are applied in a clearer and stronger way and are also extended to the administrative level. This substantive vision is based on the fact that the right to a hearing and the adversarial principle are not limited to a judicial body, but to all state decision-making bodies that have the power to carry out acts that restrict rights. The possibility of applying the principles of due process also to administrative procedures has the clear and substantial reason that the acts of the administrative authorities will limit the political right to vote or to be voted for.

In this sense, for example, the Electoral Tribunal of the Federal Judiciary of Mexico has established that, in a verification procedure of candidates carried out by the National Electoral Institute, “the fact of having indicated that the now actor had incurred in irregular conduct, without having given him the opportunity to defend himself with respect to such accusations and provide the means of proof that he deems appropriate to oppose such assertions, constitutes a clear violation of due process” (SUP-JDC-186/2018 AND ITS ACCUMULATED SUP-JDC-201/2018).

Likewise, the National Election Board of Peru has decided that the fact that “the DNROP issued a statement without complying with the procedure established in the second paragraph of article 133 of the ROP Regulations (see SN 1.6.) (...) violates the right to due process (see SN 1.3.)” (Ruling No. 0105-2022-JNE).



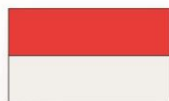
2.1.3. The Motivation

The European Court requires that rulings set out sufficiently clearly the reasons on which they are based. The motivation is linked to the protection of the adversarial, since it shows that the parties have been heard and forces judges to base their reasoning on objective arguments (ECHR *Taxquet v. Belgium* 2010). In this way, the protection against arbitrariness that protects the entire conventional system is ensured (ECHR 2005). The motivation also constitutes a guarantee for the appeal of the ruling and a guarantee of transparency, since the public and the parties can understand the reasons for the ruling (ECHR *Suominen v. Finland*, 2003). However, the scope of the obligation to state these reasons may vary depending on the nature of the ruling and must be examined in the light of the circumstances of each specific case (ECHR *Ruiz Torija v. Spain* 1994). On the one hand, the courts are not required to give a detailed answer to all the arguments raised (ECHR *Van de Hurk v. Netherlands*), but on the other hand, the text of the decision must show that the essential issues of the case have been analyzed (ECHR *Boldea v. Romania* 15.2.2007).

In European countries that carry out judicial forms of control of elections and where the competent bodies are normally the constitutional courts, the form of motivation follows the general rules and practices of constitutional litigation.

However, even in this case there are some peculiarities connected with the requirement to guarantee a balance between the obligation to state reasons and the requirement to adopt the ruling in a limited timeframe. Thus, for example, in Germany, the electoral law provides that “The Federal Constitutional Court may communicate its decision without any motive. If so, the reasons will be communicated separately to the complainant and the Federal Electoral Committee.”

Also in parliamentary control systems of elections, always in the perspective of implementing para-jurisdictional guarantees in the field of non-judicial control systems, the duty to motivate decisions is clearly guaranteed. For example, in Italy, the decisions of the Electoral Boards of the Chambers are the subject of a report, which contains the reasons for the decision, as well as information on the acts of investigation carried out and the evidence and documents collected.



In the Latin American systems, also regarding the motivation of rulings the principle seems to be interpreted in a stronger way than what is observed in the European context and is generally extended to the administrative procedure.

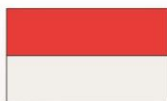
The Electoral Tribunal of the Federal Judiciary of Mexico has established, for instance, that “another reason for unconstitutionality and unconventionality that [may] directly affect due process is that the authority failed to establish and motivate in a substantial, objective, and reasonable manner (...), that is, to prove in a reinforced way, that the action of the authority is not arbitrary, frivolous, or based only on merely formal aspects” (SUP-JDC-186/2018 AND ITS ACCUMULATED SUP-JDC-201/2018).

In the same sense, the National Jury of Elections of Peru has affirmed that “no pronouncement can obviate the adequate and complete expression of the reasons for which it reaches certain conclusions and resolves a specific case through a logical and orderly sequence of the issues in controversy. Allowing the opposite would mean endorsing a direct impact on due process that entails, among other things, the defenselessness of the affected procedural subject (...). Consequently, the JEE must collect, as far as possible, suitable means of proof that confirm whether the DJHV format did or did not allow to discern or choose the year declared with respect to the income in the public and private sectors of the candidate” (Ruling No. 0267-2021-JNE).

2.2. The interpretation and application of international standards on judicial independence in the case-law of domestic and international tribunals

2.2.1 Separation of powers and judicial independence

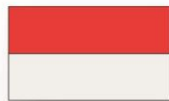
First off, it should be underlined that the separation of powers implies that jurisdictional functions are exercised exclusively by the judiciary. According to the Inter-American Court, the possibility of attributing materially jurisdictional functions to public bodies and authorities outside the judiciary without violating the principle of separation of powers is subject to the condition that the procedures before these authorities adequately guarantee the right to an independent judge, and as long as their resolutions are in accordance with the guarantees of due legal process (IACHR, 2009). In this sense, the Inter-American Court evidences the nature of the institutional guarantee of due process and judicial independence, capable of projecting its effects even outside the judiciary.



One of the aspects of the relationship between separation of powers and judicial independence that has been most developed in national and international case-law is the financial autonomy of judges. First, it should be noted that the separation of powers does not necessarily imply a constitutional guarantee of the financial autonomy of the judiciary, since the executive and legislative branches influence the financial management of public resources, which includes the matter of the salary of judges (CJEU, 2018). At the same time, affirms the Constitutional Chamber of the Costa Rican Supreme Court of Justice, this competence is limited to the preparation, discussion, and approval of the national budget, when all those involved must submit their needs and requirements so that the executive and legislative powers may evaluate them and make the decision they deem appropriate, in accordance with the law and their respective powers of political direction (SCTS, 2012). However, once the budget is approved and already in the execution phase, the executive cannot pretend to impose its criteria on the judiciary regarding the specific execution of a budget authorization, since this not only contravenes the autonomy and independence of this constitutional power, but also contradicts the will of the legislator embodied in the approved budgetary instrument, thus violating the separation of powers.

Especially in the European framework, it is common to ensure the independence of the judiciary and its separation from political powers through the creation of a judicial council. In its European configuration, the judicial council is an autonomous constitutional body with the power to decide on all aspects of the career of ordinary judges. For the Venice Commission, the existence of a judicial council is the general criterion proposed to guarantee the independence of the judiciary, without prejudice to the particularities of the old democracies (VC, 2010). The Commission maintains that "the council must have a pluralistic composition, with a substantial part, if not a majority, of members who are judges." If parliament elects a part of the members, the Venice Commission has underlined the importance of providing for qualified majorities to guarantee a broad agreement, but it has also warned of the risk of blockage. The Commission has also drawn up some criteria referring to the objective requirements of eligibility of members and the transparency and openness of the selection process. The objective is to limit as much as possible the discretion of parliament in the appointment of the members of the council and thus promote their independence and the separation of powers.

Referring specifically to electoral justice, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica has indicated how the Supreme Electoral Tribunal is a



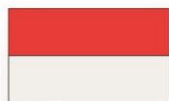
constitutional body specialized in electoral matters, which enjoys the same independence as the other powers of the state in the exercise of its powers; that is, it has full autonomy to organize, direct, and monitor electoral processes and all acts related to suffrage, with the independence and rank of a state power (SCTS, 2012). This would also imply, according to the Costa Rican Supreme Electoral Tribunal, that the supreme body of electoral justice is the only one competent for interpreting the norms related to electoral matters (SCCSJC, 2009), even above the Constitutional Court itself (TSEC 2016).

The primacy of electoral justice in the interpretation and application of the norms related to the electoral process extends its effects even to the legislative power. In particular, according to the Argentine National Electoral Chamber, the final result of the elections, as well as the certificates that confirm the status of legislator, can only be issued by the electoral justice system after resolving the disputes that may have been presented and after carrying out the corresponding proclamation (CNE, 2001). On the contrary, the Court of Justice of the European Union has affirmed that the European Parliament, and not the national electoral authority, is the competent body to decide on the acquisition and loss of MEP status (CJEU, 2019).

2.2.2 Judicial independence as an element of the right to due process. The right to an independent and impartial judge

Before reviewing the institutional guarantees of judicial independence, it is necessary to consider judicial independence from the subjective point of view, that is, as an element of the right to an independent and impartial judge, which in turn is one of the essential aspects of the right to due process.

In the first place, it should be noted how the guarantee of judicial independence postulates the existence of rules — especially regarding body composition, member appointment, mandate duration, and causes of member inhibition, recusal, and dismissal — that allow the exclusion of any legitimate doubt in the minds of the defendants regarding the impermeability of said body against external elements and its neutrality with respect to the interests in dispute. This doctrine, known as the 'appearance of independence,' has been developed by the European Court of Human Rights (ECHR, 1984) and subsequently reaffirmed by the Court of Justice of the EU on several occasions (for example, CJEU, 2021a). In accordance with this consolidated European doctrine, the violation of the right



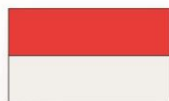
to an independent judge must be evaluated specifically, considering all the factual and legal circumstances; it is not possible to affirm the violation of the right to an independent and impartial judge solely due to the lack of one of its components.

The application of this doctrine by national judges of states of the European Union has produced divergent results. For example, in the execution of a European arrest warrant, the Irish High Court has held that the extensive powers of the Polish Minister of Justice over the payroll, promotion, and discipline of Polish judges, even if accompanied by guilty pleas of a defendant, are not sufficient to affirm the violation of the latter's right to an independent judge. On the other hand, in rulings on European arrest warrants, regional courts in Germany (OLG, 2020) and the Netherlands (IRK, 2020) have considered that these broad powers of the Polish Minister of Justice did not allow the defendant's right to an independent judge to be considered as adequately guaranteed.

The content of the right to an independent judge seems instead to be more established in the scope of the Inter-American Convention on Human Rights. In particular, the Inter-American Court of Human Rights has made a distinction between the institutional aspects of judicial independence, that is, the aspects identified in the first part of this document and which will be developed below; the personal aspects, that is, those associated with the relationship between the individual judge and the parties to the process; and the appearance of independence, a notion that refers to the need for the judiciary to inspire legitimacy and trust not only in the defendant but also in all citizens of a democratic society (IACHR, 2009). In disagreement with the EU Court of Justice, the Inter-American Court has frequently emphasized the fundamentality of judicial independence as one of the "basic pillars" of the guarantees of due process, requiring the presence of all its guarantees in every kind of process in which rulings on fundamental rights are made (IACHR, 2002).

2.2.3. Guarantees related to the appointment process

The fundamental goal of each judicial appointment system is, as recalled in the first part, to limit the discretion of political bodies in the selection of judges. However, international case-law has interpreted this requirement in such a way that it cannot be concluded that any participation of political bodies in the appointment of judges undermines judicial independence.



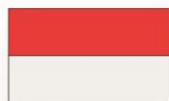
The Court of Justice of the European Union has repeated on several occasions that the mere fact that some judges are appointed by the president of the republic (CJEU, 2021a), a legislative assembly (CJEU, 2020), or another political body (CJEU, 2021c) is not in itself sufficient to establish a situation of dependence between judges and those who appoint them, nor to raise doubts as to their impartiality if, once appointed, the judges are not subject to any pressure and do not receive instructions in the exercise of their functions (CJEU, 2021a).

However, the Court of Justice of the European Union has also indicated that it is still necessary to ensure that the material conditions and the procedural rules governing the adoption of appointment decisions prevent legitimate doubts from being raised in the minds of the defendants regarding the impermeability of judges against external elements and their neutrality, once appointed, before the interests in dispute, and that to this end it is important, in particular, that these conditions and rules are conceived in such a way that not only any direct influence, in the form of instructions, can be excluded, but also the more indirect forms of influence that could guide the decisions of judges (CJEU, 2021a).

In particular, according to the CJEU, an effective way of limiting political influence in judge appointment decisions would be the participation of a judicial council that is itself independent from political powers (CJEU, 2021b). Another effective way of limiting the discretion of political bodies in the appointment is the provision — better if it is of constitutional rank (CJEU, 2021b) — of professional experience requirements that candidates for judicial office must meet. Regarding the possibility for candidates to appeal adverse appointment decisions in court, the lack of this possibility does not seem, in general, to undermine the independence of those appointed (CJEU, 2021b).

The violation of the rules that govern the appointment procedure is also mirrored on the right to a court previously established by law, and therefore on the right to due process. It is interesting to note that the European Court of Human Rights does not affirm that the violation of the norms related to the appointment automatically violates judicial independence, affirming more forcefully that a manifest violation of the procedural norms deprives judges of their legitimacy (ECHR, 2022).

Within the framework of the Inter-American Convention, the Court has elaborated a series of detailed principles that each appointment procedure must comply with in order to satisfy



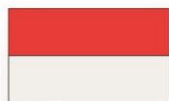
the guarantees of judicial independence (IACHR, 2009). These principles are focused on the personal qualities of the candidates, as well as the transparency and fairness of the procedure, as instruments to limit the degree of discretion in the selection of judicial staff. It has also been highlighted that the right to an independent judge is affected when the appointment does not depend on the professional competence and suitability of the judge, or when he or she does not have legal training.

However, on some occasions, the Inter-American Court has also stopped to analyze the institutional aspects of the appointment process. In the case *Castillo Petruzzi and others against Peru* (IACHR, 1999), it considered that the independence of the judges was undermined by a law that established that the appointment of the members of the highest body within military justice be made by the corresponding minister, when this collegiate body was, in turn, competent to determine promotions, professional incentives, and the assignment of functions to military judges. In this sense, the recent ruling of the Court of Justice of the European Union in *A.B.*, in which it affirms the violation of the principle of judicial independence caused by the method of selection of the members of the Polish judicial council, seems perfectly aligned with its inter-American precedent.

2.2.4 Irremovability and removal from office

The principle of irremovability requires, first, that judges may remain in the exercise of their functions as long as they have not reached the compulsory retirement age established by law. In the case of renewable mandates, the principle of irremovability simply requires the security of remaining in office until the natural fulfillment of the mandate.

Although not absolute, this principle can only be subject to exceptions when there are legitimate and compelling reasons that justify the exception, provided that the principle of proportionality is respected. Considering the case-law of the European Court of Human Rights, this threshold seems difficult to reach, since it ruled that the removal of the President of the Hungarian Supreme Court — contained in a transitory constitutional provision and justified with the change of name and functions of the body that he presided over — violated the principle of judicial independence. In any case, the ECHR specifies, the possibility for the removed judge to appeal the dismissal decision must be guaranteed if there are no compelling reasons of national interest to exclude the appeal (ECHR, 2016).



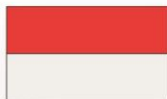
The Court of Justice of the European Union's position on the matter seems somewhat more nuanced. This court generally admits that judges can be dismissed if they do not meet the conditions of aptitude to continue in the exercise of their functions due to incapacity or serious misconduct, provided that procedures previously established by law are observed (CJEU, 2019a). However, a legal measure that lowers the retirement age of judges and is applied to current members of the judiciary is not compatible with the principle of irremovability (CJEU, 2019a).

Finally, the Inter-American Court, regarding the causes of removal, affirms that a judge can be removed for misconduct or incompetence. The Court has limited itself to specifying that this does not mean that the dismissal can find its only justification in the fact that a jurisdictional decision has been revoked by a higher judicial body, since this would negatively affect the independence and impartiality of the judge, who would be pressured to adapt to the doctrine of the higher courts (IACHR, 2008). Finally, it is significant to note how both the European regional courts and the Inter-American Court have focused more on the substantive guarantees of the impeachment procedure, apparently ignoring the procedural guarantees that have been illustrated in the first part of the document.

2.2.5. Guarantees against external pressures. Disciplinary system and immunity of judges

As for the disciplinary system, the fundamental objective of the rules that comprise it is to avoid any risk that it may be used as a system of political control of judicial decisions, thereby affecting the independence of the judge. It is therefore necessary to establish regulations that define both the behaviors that constitute disciplinary infractions and the specific sanctions applicable. These regulations should also provide for the intervention of an independent body in accordance with a procedure that complies with all the guarantees of the right to due process, especially with respect to the right of defense, the possibility of judicial appeal against the decisions of the disciplinary bodies.

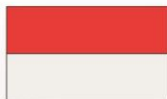
At the same time, given that the mere prospect of opening an investigation can put pressure on those who have the mission of judging, it is also essential that the competent body to initiate an investigation and exercise disciplinary action act objectively and impartially in the exercise of its functions and that it is protected from any external influence. Regarding the latter, the case-law of the Court of Justice of the European Union shows that the rules that govern the appointment procedure of said bodies have to comply



with the same requirements that apply to the appointment process of judges (CJEU, 2021d). More specifically, the Court of Justice of the European Union has affirmed that the creation of a specialized body within the Public Prosecutor's Office for the investigation and prosecution of crimes committed by judges and prosecutors seems in principle incompatible with judicial independence, since it could be perceived as an instrument of pressure and intimidation against judges. For this reason, its creation must be justified with imperative reasons related to the good administration of justice and, in any case, the need to guarantee the immunity of the judge against abusive complaints must be safeguarded.

In this regard, as indicated in the first part of the document, the personal responsibility of a judge for a judicial error through a repetition action must be limited to exceptional cases and delimited by objective and verifiable criteria. More specifically, regarding the conditions related to the requirement of judges' personal responsibility through a repetition action, national regulations must clearly and precisely provide the necessary guarantees so that neither the investigation aimed at verifying that the requirements and circumstances that may cause such liability to be incurred nor the repetition action may become instruments of pressure on the jurisdictional activity (CJEU, 2021d). In order to prevent these conditions from having dissuasive effects among judges in the exercise of their function of judging with full independence, particularly in sensitive areas such as the fight against corruption, it is essential that the competent authorities, when initiating and carrying out the investigation aimed at verifying that the circumstances that may give rise to the personal responsibility of the judge and to exercise the action of repetition concur, act, in the exercise of their functions, in an objective and impartial manner, and that the material conditions and procedural rules that govern the exercise of these powers are compatible with the guarantees of due process. In particular, this means that the definitive clarification of the existence of a judicial error cannot happen in a procedure initiated against the State without the judge having had the opportunity to exercise the right of defense.

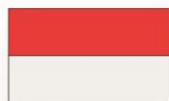
For its part, the Inter-American Court has defined the objective of each disciplinary procedure to assess the conduct, suitability, and performance of the judge as a public official (IACHR, 2009). In the Apitz Barbera case, it stated that when a disciplinary body is called to evaluate a judge's conduct consisting of an inexcusable judicial error, previously declared by the court that heard the challenges to the sentence containing the



error, the motivation of the applied sanction cannot be the same as that of the court of ordinary jurisdiction. In this case, the disciplinary body will have to use a new and different motivation that assesses the type of disciplinary offense, the suitability of the official for the exercise of the position, the seriousness of the conduct, and the proportionality of the sanction (IACHR, 2008). In this sense, therefore, the inter-American case-law seems perfectly in tune with the case-law of the Luxembourg Court.

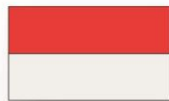
Regarding the authorities in charge of establishing and resolving procedures on the suspension, removal, or dismissal of a judge, citing the "Basic Principles of the United Nations on the Independence of the Judiciary", the Court of San José has emphasized that the body in charge of these processes must be impartial with respect to the subject of the procedure and allow him to exercise his right of defense. Likewise, if the members of the disciplinary body can be freely removed, there are no due guarantees to ensure the independence of the body itself nor, therefore, the independence of the judiciary as a whole (IACHR, 2001).



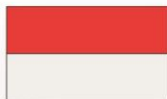


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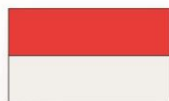
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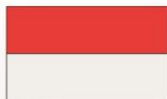
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