

## Note

# JUDICIAL SPECIALISATION THROUGH THE PRISM OF THE PRINCIPLE OF A 'NATURAL COURT': A COMPARATIVE ANALYSIS

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**Summary:** 1. Introduction. – 2. The Legal Content of the Principle of a Natural Court. – 3. The Principle of a Natural Court and 'Extraordinary' Judicial Specialisation. – 4. The Anti-corruption Court in Ukraine: 'Specialised' or 'Special'? – 5. Concluding Remarks.

**Keywords:** judicial specialisation, specialised natural court, the right to a fair trial, Supreme Anti-Corruption Court, special court, extraordinary court

## ABSTRACT

**Background:** In the current conditions of the intensive development of public relations and the complication of their legal regulation, more and more states are turning to the specialisation of the judiciary and judicial exercise. Thus, in Ukraine, it is established at the constitutional level that the judicial system in Ukraine is built on the principles of territoriality and specialisation, and higher specialised courts may operate in accordance with the law. In addition, the Constitution of Ukraine states that the establishment of extraordinary and special courts is not allowed. Art. 31 of the Law of Ukraine 'On the Judiciary and the Status of Judges' (2016) states that in the judicial system, there are higher specialised courts, such as courts of first instance for certain categories of cases. This category of court now includes the High Court of Intellectual Property and the High Anti-Corruption Court.

However, there has been a heated debate in Ukrainian political circles about the constitutionality of the anti-corruption court, and accordingly, the subject of the constitutional petition questioned the number of provisions of the Law on the High Anti-Corruption Court and appealed to the Constitutional Court to declare the law unconstitutional. The Constitutional Court of Ukraine has initiated constitutional proceedings on this issue. Acquaintance with the legal position of the subject of the constitutional petition indicates that the key issue of this constitutional proceeding concerns the presence of signs of a 'special court' (within the meaning of Part 6 of Art. 125 of the Constitution of Ukraine) in the mechanism of legislative regulation of the High Anti-Corruption Court.

**Methods:** To find an objective answer to the existing conflict, it was necessary to clarify the legal nature of judicial specialisation and identify key features of the 'special court'. To solve this problem, the authors turned to the theoretical and applied provisions of the principle of a natural court, which became the basis of the subject of this work.

**Results and Conclusions:** In conclusion, this article argues for the idea of the unity and integrity of the judiciary. Common goals and tasks are assigned to the courts, regardless of their place in the judiciary and jurisdictional specialisation. Therefore, courts that are endowed with special goals and objectives, different from those of general courts, were assessed as special courts.

## 1 INTRODUCTION

Courts of general jurisdiction are courts of universal specialisation. However, the intensive development of public relations increasingly complicates their legal regulation, forcing states to resort to certain forms of judicial specialisation to ensure optimal judicial protection. Moreover, the principle of judicial specialisation is established at the level of the constitutions of the states. According to Art. 125 of the Constitution of Ukraine, it is established that the judicial system in Ukraine is based on the principles of territoriality and specialisation. In

addition, it has been established that higher specialised courts may operate in accordance with the law. At the same time, this constitutional norm states that the establishment of extraordinary and special courts is not allowed.

According to the European Commission for the Efficiency of Justice (CEPEJ), the judicial systems in 48 states and entities are divided into systems where most cases are heard in courts of general jurisdiction and systems where a significant proportion of disputes are heard by specialised courts. There are no specialised courts of first instance in 19 states (Andorra, Czech Republic, Georgia, Great Britain – Northern Ireland), and specialised courts of first instance are few in number (Armenia, Bosnia and Herzegovina, Denmark, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Slovenia, Romania, the Russian Federation, the ‘former Yugoslav Republic of Macedonia’, Ukraine, Great Britain – England and Wales, Great Britain – Scotland). Conversely, in Croatia, France, and Portugal, specialised courts make up more than 30% of the courts of first instance, and in Belgium, Malta, and Monaco, about 50%.

Specialised courts of first instance hear various cases. Most of the states have specialised administrative courts, arbitration courts, and labour courts. In several states, there are courts that deal with, for example, military cases, family cases, cases concerning the enforcement of criminal sanctions, and payment of rent. Special courts exist in Finland (the Supreme Court of Impeachment: Charges against the Ministers), Spain (the Court on Violence against Women), and Turkey (Civil and Criminal Courts in Intellectual Property Cases).<sup>4</sup>

In this context, a question arises about the legal nature of judicial specialisation in its relationship with the principle of a ‘natural court’, as well as the permissible limits of specialisation of judicial jurisdictions.

## 2 THE LEGAL CONTENT OF THE PRINCIPLE OF A NATURAL COURT

The principle of a ‘natural court (judge)’ (Spanish – *juez natural*) is a fundamental guarantee of the right to a fair trial. The ideological basis of this principle can already be seen as early as Magna Carta (1215) in the ‘*right to a court of equals in accordance with the laws of the country*’.<sup>5</sup> At the same time, during the French Revolution, the principle of a natural court was reflected in the French Constitution (1791),<sup>6</sup> which stated that citizens could not be deprived of legal jurisdiction by any special decrees or other orders to transfer or withdraw their cases, except as provided by law.

The idea of a ‘natural court’ has become decisive for the constitutional order of many countries. Thus, according to the Venice Commission’s report on the independence of the judiciary,<sup>7</sup> many European constitutions contain the subjective right of a person to be heard by a ‘lawful judge’ (often defined in law as a ‘judge of natural law pre-established by law’). The conclusion of this report states that the basic principles concerning the independence of the judiciary should be enshrined in the Constitution or in texts of equivalent legal force. Among them are the following: the judiciary is independent of other public authorities, judges are

4 Judicial systems of Europe. The efficiency and quality of the justice system. Study CEPEJ no 23/2016 r. (data 2014) p. 39.

5 O Shevchenko, *History of the state and law of foreign countries* (Ventura 1995) 65.

6 Constitution of France 1791 <<http://www.hist.msu.ru/ER/Text/cnst1791.htm>> accessed 7 December 2021.

7 European Commission Report ‘For Democracy through Law’ (Venice Commission) on the independence of the judiciary (Venice, 12-13 March 2010 ) <[https://newjustice.org.ua/wp-content/uploads/2018/05/EU\\_Standarts\\_book\\_web-1.pdf](https://newjustice.org.ua/wp-content/uploads/2018/05/EU_Standarts_book_web-1.pdf)> accessed 10 December 2021.

subject only to the law, and differ only in the functions they perform, including the principle that a natural law judge or judge by law is pre-established by law and is immutable.

Most often, such guarantees are formulated through a negative sentence, for example, in the Belgian Constitution:

No person may be deprived of the opportunity to be heard by a judge appointed by law (Art. 13).

or the Italian Constitution:

No person may be deprived of the possibility of considering his/her case by a judge of natural law established by law.

Other constitutions define the 'right on a judge appointed by a law' in an affirmative way, such as the Slovenian Constitution:

Only a judge appointed in accordance with the rules established in advance by law and the relevant court regulations may judge this person.

Art. 24 of the Estonian Constitution:

No person may, without his or her own will, be transferred from the jurisdiction of one court to the jurisdiction of another court.

Art. 8 of the Constitution of Greece:

No person shall, without his or her own will, be deprived of the right to have his or her case heard by a judge established by law.

Art. 33 of the Liechtenstein Constitution:

No person shall be deprived of the right to have his or her case heard by a judge; the establishment of special tribunals is prohibited.

Art. 13 of the Luxembourg Constitution:

No person may be deprived of the right to have his or her case heard by a judge established by law.

Art. 17 of the Constitution of the Netherlands:

No person shall be deprived of his or her access to a court to which he or she has the right to apply in accordance with the law.

Art. 83 of the Austrian Constitution:

No person may be deprived of the right to have his or her case heard by a judge established by law.

Art. 32 p. 9 of the Portuguese Constitution:

No person shall be deprived of access to a court which already has jurisdiction under the law in force.

Art. 48 of the Slovak Constitution:

No person may be excluded from the jurisdiction of a judge designated by law. The jurisdiction of the court is established by law.

Art. 101 of the Basic Law of Germany:

No person may be excluded from the jurisdiction of his lawful judge.<sup>8</sup>

To date, the idea of a natural court is reflected in Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), which establishes that all persons are equal before the courts and tribunals and that everyone has the right to a fair and public hearing in the determination of any criminal charge against him or her or in case of defining of

8 All the above-mentioned quotes may be found here: *European and international standards in the field of justice* (Kyiv 2015) 103.

the responsibilities in any civil proceedings for a fair and public hearing by a competent, independent, and impartial tribunal established by law. Likewise, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to a fair trial and provides that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, that will decide on his or her rights and obligations of a civil nature or establish the validity of any criminal charges against him or her.

The principle of a natural court is detailed in Clause 5 of the Basic Principles on the Independence of the Judiciary (1985),<sup>9</sup> which states that everyone has the right to a fair trial by ordinary courts or tribunals applying the established legal procedures. Tribunals that do not apply properly established legal procedures to replace the jurisdiction of ordinary courts or tribunals should not be established.

In the modern sense, the principle of natural judgment means that no person can be convicted except by an ordinary, previously established, competent court or judge. As a consequence of this principle, the creation of emergency, *ad hoc* extraordinary courts, and courts established *ex post facto* are not allowed. Although the principle of a 'natural court (judges)' is based on the related principle of equality before the law and the court, which means that laws should not be discriminatory or applied by judges in a discriminatory manner. However, as noted by the UN Human Rights Committee, equality before the law and equal protection of the law without any discrimination does not mean that any difference in treatment is discriminatory. As the Committee has repeatedly pointed out, a difference in behaviour is permissible only if it is based on reasonable and objective criteria.

The UN Commission on Human Rights has reaffirmed the principle of the 'natural judge' in a number of resolutions it has adopted. For example, in Resolution 1989/32, the Commission recommended that states take into account the principles contained in the draft Universal Declaration on the Independence of Justice, also known as the Singhvi's Declaration.<sup>10</sup>

Art. 5 of this Declaration states:

(b) No judicial body shall be established *ad hoc* in order to replace the jurisdiction duly vested in the courts; (c) Everyone has the right to a fair trial within a reasonable time and without undue delay by ordinary courts or tribunals, in the manner prescribed by law, with the possibility of judicial review; (e) During emergencies, the State shall make every effort to ensure that the cases of civilians accused of any criminal offense are dealt with by ordinary civil courts. It is also worth noting the two resolutions on the "honesty and integrity of the judiciary", in which the Commission reiterated that everyone has the right to a fair trial in ordinary courts or tribunals that have established legal procedures, and that tribunals which do not apply properly established legal procedures, in order to replace the jurisdiction of ordinary courts or judicial authorities, should not be created.

The existence of specialised courts or jurisdictions is quite common and is due to the specifics of the issues that such courts consider. Thus, specialised jurisdictions exist in many legal systems to deal with issues related to labour, administrative, family, commercial law, and so on. In addition, for criminal proceedings, in exceptional cases, the existence of special jurisdictions for certain groups, such as indigenous peoples and minors, is recognised in international law and is determined by the specificities of the persons prosecuted.

9 Basic Principles of Judicial Independence (1985) <[https://zakon.rada.gov.ua/laws/show/995\\_201#Text](https://zakon.rada.gov.ua/laws/show/995_201#Text)> accessed 10 December 2021.

10 The Singhvi Declaration became the basis for the United Nations Basic Principles on the Independence of the Judiciary.

In its work, the Human Rights Committee has not developed significant practice on the principle of 'natural judge', but it has addressed the issue of 'extraordinary' or special courts. Traditionally, it did not consider special courts, which are inherently incompatible with para. 1 of Art. 14 ICCPR.<sup>11</sup>

In general comment no. 13, adopted in 1984, the Human Rights Committee expressed the following view:

The provisions of Art. 14 apply to all, both ordinary and special courts and tribunals, and are covered by this article. The Committee notes the existence in many countries of military and special courts dealing with civilian cases. This could lead to serious problems with fair, impartial and independent administration of justice. Often the reason for the creation of such courts is to allow the use of exceptional procedures that do not comply with the usual rules of justice. Although the Covenant does not prohibit such categories of courts, the consideration of civil cases by such courts may be carried out on an exceptional basis and under conditions in which all the guarantees provided for in Article 14 are fully complied with ... If member-states in case of emergency as provided in Art. 4, depart from the usual procedure required by Art. 14, they must ensure that these deviations do not go beyond what is necessary due to the severity of the actual situation, and meet the other conditions of paragraph 1 of Art. 14.<sup>12</sup>

The Committee has repeatedly expressed its concern about the use of special courts and has recommended in several cases that such courts shall be abolished. The Committee also considers the abolition of special courts as a factor contributing positively to the implementation of the ICCPR at the national level. For example, the Committee recommended that Nigeria repeal 'all decrees establishing special tribunals or abolishing ordinary constitutional guarantees of fundamental rights or the jurisdiction of ordinary courts'. In its case against Nicaragua, the Committee found that 'the proceedings before the *Tribunales Especiales de Justicia* [ad hoc special tribunals] did not provide the guarantees of fair trial provided for in Art. 14 of the Covenant'.

The Committee found a violation of the right to a fair trial in a case in which the accused was tried and convicted in both the first and appellate instances, consisting of 'faceless judges', without proper public hearings and adversarial proceedings; he was not allowed to be present<sup>13</sup> and defend himself during the trial, either in person or through his representative, and was not given the opportunity to ask questions of the prosecution witness.

In a similar case concerning Peru, the Committee concluded that the very nature of the

"faceless judges" trial system in a remote prison was based on the exclusion of the public from the trial. In this situation, the accused do not know who the judges hearing them are, and unacceptable obstacles are created to prepare the accused for defense and communication with their lawyers. Moreover, this system is not able to guarantee the main aspect of a fair trial: the court must be, and this must be obvious, independent and impartial. The review system conducted by "faceless judges" does not guarantee the independence or impartiality of judges, as the court, being established ad hoc, may include active members of the armed forces.

The Human Rights Committee noted that special tribunals must comply with the provisions of Art. 14 ICCPR. However, he said that 'quite often the reasons for the establishment of

11 *International principles concerning the independence and accountability of judges, lawyers and prosecutors*. Practical Guide 1 (International Commission of Jurists 2007) 8-9.

12 *Ibid.*, 10.

13 *Ibid.*, 11.

such courts are to allow the use of exceptional procedures that do not comply with the usual rules of justice’.

The Inter-American Commission on Human Rights also called for the principle of the ‘natural judge’ – ‘The Commission’s position was clearly summarized in the general guidelines it formulated for Member States in 1997: and their natural judges’.

If we turn to the case-law of the ECtHR on the application of Art. 6 of the ECHR, we can see that the Court dissonates the right to a natural (fair) to the courts of ‘special’ specialisation, including courts of state security and emergency or military court. Thus, in the case of *Arap Yalgin and Others v. Turkey* (2001),<sup>14</sup>

The Court considers in this connection that where, as in the present case, a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons’ independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, the *Sramek v. Austria* judgment of 22 October 1984, Series A no. 84, p. 20, § 42). In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see the *İncal* judgment cited above, p. 1573, § 72) (46).

In conclusion, the applicants’ fears as to the Martial Law Court’s lack of independence and impartiality can be regarded as objectively justified (48).<sup>15</sup>

In *Ergin v. Turkey* (2006),<sup>16</sup> the Court concluded that

The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto* (47).”

... [the] Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant’s doubts about the independence and impartiality of that court can therefore be regarded as objectively justified (54).<sup>17</sup>

In the cases mentioned above, a question arises as to the correlation of the principle of a natural court with judicial specialisation, which is becoming more and more established in many countries, as well as the limits of such specialisation.

14 *Arap Yalgin and Others v Turkey* <<https://hudoc.echr.coe.int/eng?i=001-59674>> accessed 10 Dec 2021.

15 *Ibid.*

16 *Ergin v Turkey* (2006) <<https://hudoc.echr.coe.int/eng?i=001-75327>> accessed 10 December 2021.

17 *Ibid.* See also Jeremy McBride, *European Convention on Human Rights and criminal process* (2nd ed KIC 2019) 230-231.

### 3 THE NATURAL COURT AND 'EXTRAORDINARY' JUDICIAL SPECIALISATION

Today, judicial specialisation has taken many forms, including the establishment of specialised chambers in existing courts or the creation of separate specialised courts. This trend in the organisation of the judiciary has spread not only in Europe but also in other countries. It has become common practice for specialised courts (judges) to work with a limited area of law (e.g., criminal law, family law, economic and financial law, intellectual property law, competition law) or to deal with specific situations that arise in special areas (for example, related to social, economic, or family law). At the same time, it is extremely important to clearly establish the permissible limits of judicial specialisation, which should protect society and the state from illegal judicial entities of special specialisation.

If we turn to the position of the Consultative Council of European Judges (CCJE) on this issue, then this international institution clearly distinguishes between natural judicial specialisation and special (extraordinary) courts. This approach is due to the potential danger that the latter will not be able to ensure compliance with all the guarantees enshrined in Art. 6 of the ECHR. The CCJE has also repeatedly objected to the establishment of special courts, noting that, in the case of such courts, they must fully ensure compliance with all the guarantees imposed on ordinary courts.<sup>18</sup>

Examining the protection of human rights in the context of terrorist threats, the CCJE pointed out that the universal response of European states to the need to constitute a balance between counter-terrorism security and human rights was to refuse to establish a *tribunaux d'exception* as a response to threats carried by terrorism. States must trust their existing judicial institutions, which shall find a balance in accordance with the rules of law generally applicable in democracies, including international conventions and, in particular, the ECHR. The role of a judge in terrorist offences should not differ from that of a judge in relation to other offences, except where the nature of the subject matter does not justify a waiver of the usual rules governing the jurisdiction of the courts. However, the importance of terrorism implies that crimes in this category should be dealt with by courts with jurisdiction to hear and decide on the most serious crimes when such jurisdiction is shared between national courts. Local circumstances or needs related to the security of judges may sometimes justify recourse to specialised courts with jurisdiction over terrorism cases, but in any case, it is important that these specialised courts consist of independent judges and use ordinary procedures with full respect for the rights of the party to the defence and publicity of the trial and that the fairness of the trial is guaranteed in all cases. Thus, the CCJE recommends that states refrain from creating a *tribunaux d'exception* or legislation incompatible with universally recognised rights, both in the context of administrative action to prevent acts of terrorism and in the context of criminal proceedings.<sup>19</sup>

The research and acquired experience of CCJE in the field of judicial specialisation provided the opportunity to develop certain standards in this field. In particular, the laws and regulations governing the appointment, holding, promotion, tenure, and discipline of judges should be the same for both specialised and general judges. The principle of equal status for general and specialised judges should also apply to judges' remuneration. Specialisation in itself does not justify the definition of the work of a specialised judge as more important. It is seen that the dominant role in decision-making should be played by 'general' judges. Specialised judges and courts should exist only when necessary due to the complexity or peculiarity of the law or

18 Opinion No 15 (2012) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the specialisation of judges.

19 Opinion No 8 (2006) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on 'the role of judges in the protection of the rule of law and human rights in the context of terrorism.'

facts and for the proper administration of justice. Specialised judges and courts should always remain part of a single judicial body. Specialised judges, as 'general judges', must meet the requirements of independence and impartiality in accordance with Art. 6 of the ECHR, and in principle, both general and specialised judges should have equal status.<sup>20</sup>

One of the features of modern judicial specialisation, in our opinion, is the extraordinary judicial specialisation, the introduction of which is due primarily to the crisis processes that are experiencing the judicial system itself. 'Extraordinary' specialisation is specialisation that is subject to already specialised courts, in particular, in the field of criminal justice. The tendency of a number of states to introduce such courts is primarily due to the corruption and inefficiency of general courts. In fact, such specialisation is a resuscitation, an anti-crisis mechanism of the existing judicial system.

Disbelief in the ability of the traditional justice mechanism to combat corruption properly has prompted many countries to set up specialised anti-corruption courts. The most common argument in favour of the establishment of specialised anti-corruption courts is the need for greater efficiency in dealing with corruption cases and the associated need to signal to the national and international community that the country is serious about fighting corruption.<sup>21</sup>

In Slovakia, for example, a specialised court was set up out of fear that criminal organisations would blackmail or bribe general court judges. The law establishing such a court was passed in 2003, and in 2005 the court began its work. The main reason for the creation of the anti-corruption court was the desire to break the local ties between judges, lawyers, prosecutors, and organised crime. The Anti-Corruption Court was formed of new judges who were offered high judicial remuneration, personal protection, and protection. During the first years of the anti-corruption court, certain results were achieved: special knowledge was accumulated, some local criminal ties were severed, and several cases were successfully completed.

However, the activities of the anti-corruption court have caused dissatisfaction among some politicians and judges of ordinary courts, which led to the repeal of a law on a specialised anti-corruption court in 2009 as a result of a constitutional complaint. In particular, the main grounds for the constitutional submission were: security screening for judges – requirements that did not meet the principle of judicial independence; the high salaries of judges of the specialised court, which was discrimination against other judges; the personal jurisdiction of the court over high-ranking officials.

Following the elimination of identified legal inconsistencies in 2009, a new law was passed, and a new specialised court was established. Today, the Specialized Court of Slovakia consists of 14 judges, and the Specialized Prosecutor's Office consists of 19 prosecutors. The court hears several categories of cases: premeditated murder, economic offences involving more than 6.6 million euros, serious crimes committed by a criminal or terrorist group, and extremist crimes.<sup>22</sup>

However, such special anti-corruption specialisation does not always become a panacea against corruption. In Indonesia, where anti-corruption courts have been set up as a counterweight to corrupted courts of general jurisdiction, several judges of such courts have been accused of corruption. In the Philippines, the Supreme Court has removed a judge from a specialised anti-corruption court on charges of involvement in corruption.<sup>23</sup>

20 Opinion No 15 (2012) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the specialisation of judges.

21 Matthew K Stevenson, Sophie A Schutte, 'Specialized anti-corruption courts – Comparative cartography' (2017) 5 U4 Issue Chr. Michelsen Institute 26.

22 Expert discussion of the best international practices of establishing specialised anti-corruption courts took place – <<http://www.vru.gov.ua/news/2067>> accessed 10 December 2021.

23 Andrew Sliusar, 'Anti-corruption court in Ukraine: preconditions for formation and guarantees of efficiency' <<https://ti-ukraine.org/news/2175/>> accessed 10 December 2021.

According to Matthew K. Stevenson and Sophie A. Schutte, the most important issue in the relationship between anti-corruption courts and the ordinary judicial system is the question of the place of the special court in the hierarchy of courts. In particular, should the anti-corruption court be a separate body, and should such judges specialise only in anti-corruption cases? Should a specialised anti-corruption court have primary jurisdiction (i.e., a court of first instance), an appellate court, or a combination of both? Also, which court should have appellate jurisdiction over anti-corruption court decisions? Countries with specialised anti-corruption tribunals have made different choices in addressing these issues.

Firstly, some countries do not have separate anti-corruption courts or units but only appoint certain judges to deal with corruption cases (the 'single judge' model). Under such an organisation, which predominates in Bangladesh and Kenya, appeals against decisions of judges of anti-corruption courts of first instance go through one or more regular intermediate rounds of appeals before the Supreme Court.

Secondly, for those countries that have established an independent specialised anti-corruption court, the most typical approach is to operate this special body as a court of first instance and to establish a procedure for receiving appeals from the anti-corruption court immediately to the Supreme Court. Judges of special courts are often given a status equivalent to that of intermediate judges of the Court of Appeal. Examples of this category include Burundi, Cameroon, Croatia, Nepal, Pakistan, Senegal, and Slovakia.

Thirdly, some countries have introduced a mixed system where the anti-corruption court can function both as a court of first instance in certain cases (usually more important cases) and as a court of appeals in other cases. The two most striking examples in this category are the Philippines and Uganda. In the Philippines, the court (Sandiganbayan) has exclusive primary jurisdiction over corruption-related offences committed by high-ranking officials; when such offences are committed by lower-level officials, local regional courts have primary jurisdiction, and the Sandiganbayan Court has appellate jurisdiction. Uganda's system is similar in that the anti-corruption unit (ACU) of the Supreme Court usually acts only as a court of first instance in high-profile cases; in other cases, the ACP considers appeals against decisions of magistrates.

In Botswana, all corruption cases are heard by ordinary magistrates' courts, but appeals are heard by the Corruption Court (Botswana High Court) and not by ordinary courts of appeal. Decisions of the Court of Justice on corruption cases can be challenged in the same way as any other decision of the High Court in Botswana - in the Court of Appeal, the highest court in the hierarchy of judicial authorities in Botswana. As the Botswana Court of Corruption has only an appeals function and never functions as a court of first instance, it can also be considered as a separate category: a special appellate unit.

Finally, at least four countries – Afghanistan, Bulgaria, Malaysia, and Indonesia – have established specialised anti-corruption courts, which include both courts of first instance and courts of appeal. That is, in these complete parallel systems, there are anti-corruption local courts and anti-corruption appellate courts to hear appeals against decisions of anti-corruption local courts.<sup>24</sup>

International and foreign experience separates the permissible limits of judicial specialisation in order to ensure equal and fair judicial protection. However, there are countries whose judiciary has failed to gain the necessary level of independence from corruption, bribery, intimidation, and undue political influence. To overcome this crisis of the judiciary, states are forced to resort to extraordinary judicial specialisation. In fact, the existence of separate anti-corruption courts (judges) indicates that other judges are potentially dependent, and

24 Stevenson and Schutte (n 20) 18-19.

therefore cannot be trusted to hear certain categories of criminal proceedings. However, the existence of such judicial specialisation should be a temporary measure, as all judges should be equal in their independence and have an appropriate level of legitimacy.

#### 4 THE ANTI-CORRUPTION COURT IN UKRAINE: 'SPECIALISED' OR 'SPECIAL'?

In 2018, Ukraine also introduced a separate anti-corruption judicial specialisation. Ukraine has chosen a model that provides for the establishment of a single state-wide Supreme Anti-Corruption Court (SACC) as a court of first and appellate instance with exclusive jurisdiction. The motives for choosing such a model were largely due to external influences. US Federal Judge Mark Wolf, an international expert who has been active in anti-corruption reforms in Ukraine, points out that

the EU and the US have encouraged Ukraine to establish new institutions, hire new prosecutors, judges and other officials. And the world is watching to see if it can work, because if it fails in Ukraine, if the problem cannot be solved within the country, an international law enforcement mechanism will be needed, and this will create an even stronger argument for the International Anti-Corruption Court.

In this regard, Ukraine is seen as a 'laboratory of anti-corruption reforms.'<sup>25</sup>

Also, according to I. Y. Kuz and M. K. Stevenson, anti-corruption activists have been actively campaigning for a strong anti-corruption court, enlisting the support of international players such as the International Monetary Fund (IMF), the European Union (EU), the World Bank, and other donors. These actors, although reluctant to participate in the creation of the SACC at first, later became its indispensable driving force. In principle, local activists persuaded the IMF to make the creation of the SACC a condition for providing Ukraine with \$ 1.9 billion in funding. In addition, the EU, in a Memorandum of Understanding with Ukraine, adopted in September 2018, similarly stipulated financial assistance.<sup>26</sup>

After the constitutional reform of 2016, there is a provision in Art. 125 of the Basic Law of Ukraine: 'According to the law, higher specialized courts may operate'. Developing this constitutional provision, it was established in Art. 31 of the Law 'On the Judiciary and the Status of Judges' (2016) that in the system of the judiciary, there are higher specialised courts as courts of first instance for consideration of certain categories of cases. The SACC and the High Intellectual Property Court (or IP Court) were included in this category of courts.<sup>27</sup> In 2018, the legislator passed the Law on the Supreme Anti-Corruption Court, and the Law on the Establishment of the Supreme Anti-Corruption Court initiated the establishment of this court.

However, in political circles, there was a discussion about the constitutionality of this court and, accordingly, the subject of the right to a constitutional petition (49 deputies) in the constitutional petition (no. 04-02 / 6-339 of 22 July 2020)<sup>28</sup> questioned a number of provisions of the Law 'About the Supreme Anti-Corruption Court' and appealed to the Constitutional

25 'International Anti-Corruption Court: Utopian Concept or Real Perspective?' <<https://www.radiosvoboda.org/a/28583748.html>> accessed 10 December 2021.

26 Ivanna Yana Kuz, Matthew K Stevenson, 'Supreme Anti-Corruption Court of Ukraine. Innovations for Impartial Justice' (2020) 4 (5) BRIEF 2.

27 The Supreme Court of Intellectual Property (or IP Court) was formally established in 2017 but has not yet started its activities (14 December 2021).

28 Constitutional submission (no 04-02 / 6-339 of 22 July 2020) on the compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine 'On the Supreme Anti-Corruption Court' of 7 June 2018 no 2447-VIII <[https://ccu.gov.ua/sites/default/files/3\\_349\\_2020.pdf](https://ccu.gov.ua/sites/default/files/3_349_2020.pdf)> 6 September 2021.

Court of Ukraine to declare this law completely unconstitutional. In turn, the Constitutional Court of Ukraine has initiated constitutional proceedings on this issue.<sup>29</sup>

Detailed acquaintance with the legal position of the subject of the constitutional petition indicates that the key issue of this constitutional proceeding concerns the presence of signs of a 'special court' (within the meaning of Part 6 of Art. 125 of the Constitution of Ukraine) in the mechanism of legislative regulation of the SACC's legal status.

To find an objective answer to this collision, it is necessary to identify the main features of a 'special' court abstractly. And for the solution of this applied problem, in our opinion, it is appropriate to turn first to the ideological foundations of the principle of a 'natural court'.

Having survived the epoch of totalitarian terror, mass repressions, and punitive justice of the Soviet era, a clear awareness of what type of court is inadmissible in a democratic society with the rule of law has formed in modern Ukraine. On the domestic constitutional and legal basis, the concept of a 'natural court' was primarily reflected in the constitutional provisions (Part 6 of Art. 125) as an imperative norm-prohibition. The inadmissibility of the formation of extraordinary or special courts is a kind of safeguard against 'unnatural' courts.

As noted by V Komarov and N Sibilov, Art. 125 of the Constitution

contains an imperative norm prohibiting the establishment of emergency and special courts. Moreover, neither the Constitution of Ukraine nor the Law of Ukraine "On the Judiciary and the Status of Judges" discloses the meaning of these concepts. The use of retrospective tools leads to the conclusion that both in law and in science, special courts are understood as separate judicial institutions with their own system of instances for consideration of certain categories of cases (usually only criminal). Extraordinary courts are considered courts that are formed once, to consider a specific (usually criminal) case on the basis of a special act of the relevant public authority. This significance of the above concepts shows that even enshrining in law the possibility of the existence of such courts and defining a certain order of their formation does not deprive them of special or extraordinary status, as they by their nature contradict the requirements of the Constitution.<sup>30</sup>

The difficult experience of one's own historical past has necessitated the establishment at the constitutional level (Art. 125 of the Basic Law) of a norm prohibiting the establishment of extraordinary and special courts. This constitutional provision is reproduced in the commented article of the Law. Extraordinary courts are judicial bodies with a special legal status (compared to general courts), which are created only in exceptional cases – in the event of a coup, revolution, state of emergency, war, etc. In some cases, extraordinary courts are created in the absence of a special state under normal conditions as an instrument of socio-political terror (for example, in the 1930s, the NKVD *troika*). Extraordinary courts always pursue a punitive goal. They are not conditioned by the tasks established by law, nor by the usual form of judicial procedure or general principles of justice, such as the right to defence or the presumption of innocence. Usually, the consideration of cases in the emergency court is a closed nature of terror, and their decisions are not subject to any appeal.

Special courts are judicial bodies that were formed to expedite the resolution of certain categories of cases specific to a certain period. In the history of Ukraine, there have been examples of special courts that operated under a simplified procedure, and cases were considered in the absence of protection. A distinction must be made between 'extraordinary'

29 You can view the open part of the plenary session on the official website of the Constitutional Court of Ukraine at <<http://ccu.gov.ua/kategoriya/2020>> accessed 10 December 2021.

30 VYa Tatsiy (ed), *Constitution of Ukraine. Scientific and practical commentary* (2nd edn, reworked and add., Pravo 2011) 873.

or 'special' courts and 'specialised' courts. At the same time, in the presence of a separate specialisation in the field of administrative, economic, and criminal law, the introduction of a 'special' specialisation in intellectual property and anti-corruption has become a legislative novelty. The formation of 'higher' judicial units obviously presupposes the existence of lower-level instances subordinate to them. However, as follows from the provisions of the Law, higher specialised courts are formed as courts of first instance. In view of the above, it seems that there is a certain dichotomous inaccuracy in the name of the newly created judicial institutions, as well as in determining their place in the court system of Ukraine. Accordingly, either the status of these courts should be determined at the level of local specialised courts, or their name should be adjusted by removing the term 'higher'. Perhaps the most acceptable for their characterisation is the concept of 'special specialised courts'. However, as is well known, in the domestic legal system, intellectual property issues belong to the sphere of civil law relations (book four of the Civil Code of Ukraine 'Intellectual Property Law'), and corruption offences and crimes to the sphere of criminal law relations and crime prevention (Chapter 17 Criminal Code of Ukraine 'Crimes in the sphere of official activity'). Therefore, the separation of these courts into a separate group is unjustified, as there are all grounds to include them in the general judicial system of Ukraine.<sup>31</sup>

At the same time, the question arises whether there is any special specificity of court proceedings in a particular category of cases under the jurisdiction of the SACC, in contrast to criminal offences that are no less dangerous to society and the state, such as those concerning the national security of Ukraine, against the life and health of a person, drug trafficking, or against peace, the security of mankind and international law, etc. As we know, it does not exist. All this is the conduct of courts of general jurisdiction in the field of criminal law.

In contrast to the system of general jurisdiction, an 'extraordinary' jurisdiction was created – an exclusive jurisdiction that contains signs of contradiction to the constitutional concept of a 'natural court'.

The principle of specialisation in the organisation and activity of judicial bodies is primarily aimed at optimising the work of the general judicial system, improving its efficiency. As it is known, according to Part 2 of Art. 22 of the current law 'On the Judiciary and the Status of Judges' (2016), local general courts consider civil, criminal, administrative cases, as well as cases of administrative offences in cases and in the manner prescribed by procedural law. This fully corresponds to the notion of general jurisdiction, the formation of which is provided for in para. 12 of the 'Transitional Provisions' of the Constitution of Ukraine. The system of courts of general jurisdiction is a constitutional imperative.

Thus, certain forms of judicial specialisation in relation to general jurisdiction are permissible as subsidiary or ancillary forms, and in no case should they replace general judicial specialisation. The constitutional imperative of a separate judicial specialisation, within the general jurisdiction, is only administrative courts (Part 5 of Art. 125 of the Constitution of Ukraine).

The subsidiary nature of a particular judicial specialisation, in relation to the general judicial jurisdiction, is directly indicated by the constitutional provisions (Part 4 of Art. 125). In particular, the Basic Law clearly states the dispositive rather than the imperative nature of higher specialised courts: 'According to the law, higher specialized courts may operate'. The Constitution of Ukraine assumes the possibility of the existence of 'higher specialised courts' but does not stipulate the necessity of their existence, such as the Supreme Court or administrative courts.

31 Law of Ukraine 'On the Judiciary and the Status of Judges', *Scientific and practical commentary* (Kyiv: Alerta 2019) 21-22.

According to the 'natural court' principle, the jurisdiction of the system of courts of general jurisdiction should include all criminal and civil proceedings (general jurisdiction). It is obvious that the list of articles of the Criminal Code of Ukraine, which is transferred to the jurisdiction of the SACC, should naturally belong to the jurisdiction of general criminal proceedings. However, according to Art. 33-1 of the Criminal Procedure Code of Ukraine, the exclusive jurisdiction of the SACC was introduced, which includes criminal proceedings in respect of corruption offences provided for in the note to Art. 45 of the Criminal Code of Ukraine (corruption offences in accordance with the Criminal Code of Ukraine are criminal offences under Arts. 191, 262, 308, 312, 313, 320, 357, and 410, in case of their exercise by abuse of office, as well as criminal offences under Art. 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, and 369-3 of the Criminal Code of Ukraine, as well as Arts. 206-2, 209, 211, and 366-1 of the Criminal Code Ukraine, if there is at least one of the conditions provided for in paras. 1-3 of Part 5 of Art. 216 of the Criminal Procedure Code of Ukraine (CPC). The SACC investigative judges exercise judicial control over the observance of the rights, freedoms, and interests of persons in criminal proceedings concerning criminal offences within the jurisdiction of the SACC.

Other courts defined by the CPC may not consider criminal proceedings in respect of criminal offences that fall within the jurisdiction of the SACC (except as provided for in paragraph 7 of Part 1 of Art. 34 of the CPC). That is, if the accused or victim is or was a judge or an employee of the SACC staff and the criminal proceedings fall within the jurisdiction of this court, such criminal proceedings in the first instance are carried out by the Court of Appeal, which has jurisdiction over the city of Kyiv, and in this case, decisions are appealed to the Court of Appeal, which is determined by the panel of judges of the Criminal Court of Cassation of the Supreme Court. Thus, by giving the SACC exclusive jurisdiction over the system of general courts, the legislator has significantly deviated from the permissible limits of constitutional legality.

According to the Constitution of Ukraine, the judiciary and directly the courts are entrusted with one of the key constitutional tasks - judicial protection of individual rights and freedoms.<sup>32</sup> In particular, it follows from Art. 8 'appeal to the court to protect the constitutional rights and freedoms of man and citizen directly on the basis of the Constitution of Ukraine is guaranteed'; Art. 55 'human and civil rights and freedoms are protected by the court'; Art. 32 'everyone is guaranteed by judicial protection of the right to refute inaccurate information...'; Art. 125 'in order to protect the rights, freedoms and interests of the person in the field of public relations, there are administrative courts'; Art. 145 'The rights of local self-government are protected in court'.

At the same time, the task of all courts, according to Art. 2 of the Law 'On the Judiciary and the Status of Judges' (2016), is to ensure everyone's right to a fair trial and respect for other rights and freedoms guaranteed by the Constitution and laws of Ukraine and international treaties, binding nature of which is granted by the Verkhovna Rada of Ukraine.

However, according to Art. 3 of the Law on the Supreme Anti-Corruption Court, the SACC has separate, special tasks that differ significantly from the tasks of general courts. Thus, the Law states:

The task of the High Anti-Corruption Court is to administer justice in accordance with the principles and procedures of justice provided by law in order to protect individuals, society and the state from corruption and related criminal offenses and judicial control over pre-trial investigation of these criminal offenses, observance of the rights, freedoms and interests of persons in criminal proceedings, as well as resolving the issue of recognizing unfounded assets and their recovery into state revenue in cases provided by law, in civil proceedings.

32 Ibid, 18.

The SACC is tasked with combating corruption, which has an accusatory bias. The ‘newest’ task of resolving the issue of declaring assets unfounded and collecting them into state revenue in cases provided by law in civil proceedings, which is, in fact, ‘civil’ confiscation, is also of concern. Thus, the SACC has special, ‘extraordinary’ tasks, which currently contradicts both the letter and the spirit of the Basic Law of Ukraine.

## 5 CONCLUDING REMARKS

The judiciary in the state must be unified and integral. Such unity and integrity are ensured by a single common goal and tasks assigned to the courts, regardless of their place in the judiciary and jurisdictional specialisation. Therefore, courts that are endowed with special, different from the general courts, goals, and objectives are special courts.

International and foreign experience indicates the permissible limits of judicial specialisation in order to ensure equal and fair judicial protection. However, there are countries whose judiciary has failed to achieve the required level of independence. To overcome this crisis of the judiciary, states are forced to resort to extraordinary judicial specialisation. In fact, the existence of separate anti-corruption courts (judges) indicates that other judges are potentially dependent, and therefore cannot be trusted to hear certain categories of criminal proceedings. However, the existence of such judicial specialisation should be a temporary measure, as all judges should be equal in their independence and have an appropriate level of legitimacy.

Given the current situation in Ukraine, it is crucial to strike a reasonable balance between national sovereignty and constitutional legitimacy on the one hand and the external influences of international and foreign actors trying to administer the legal system on the other.

This theoretical analysis also provides grounds to single out the features of a ‘special court’ in the context of Art. 125 of the Constitution of Ukraine, in particular:

- 1) A separate judicial institution with a separate system of instances for consideration of certain categories of cases selected from the general array (special jurisdiction) or in respect of a separate category of persons.
- 2) A court that is entrusted with a special purpose and objectives, different from other general courts.
- 3) A court that is formed to expedite the resolution of certain categories of cases or cases that are special for a certain period.
- 4) A court in which judges have a special legal status (special tasks in the case of judicial proceedings; special professional qualifications (requirements, selection criteria); special (extraordinary) procedure for forming the judiciary, etc.).

At the same time, the establishment of the principle of natural justice is a fundamental constitutional and legal heritage of civilised humanity, which is designed to protect people and their rights and freedoms from arbitrariness and the use of justice as an instrument of terror and wrongful persecution.

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