

# The Independence of the Judiciary: Concepts and Challenges

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It is shocking to look at the documentation of the Centre for the Independence of Judges and Lawyers (CIJL) regarding the judges and lawyers who suffer reprisals while carrying out their professional duties. The CIJL seventh annual report demonstrates that during 1995, at least 337 such cases existed in 51 countries. Of these, 23 were killed, 4 "disappeared", 36 tortured, 142 detained, 30 attacked, 58 received threats of violence, and 44 professionally sanctioned or obstructed.

These figures shed a worrying light on the state of human rights protection around the world. One should remember that human rights can only be protected where the judiciary and the legal profession are free from interference. Independent judges and courageous lawyers can effectively force governments to respect individual rights and freedoms. A tortured detainee awaits his lawyer's visit and her/his action to relieve his pain and suffering. Inside a courtroom, it is the lawyers and judges who can stand against abuse and injustice. Victims look to judges for justice and remedies. Professional judges and lawyers turn human rights protection into a reality. Hence, protecting judges and lawyers from harassment and intimidation is essential for the effective protection of human rights.

In 1978, the CIJL was established by the International Commission of Jurists (ICJ) to respond to the growing attacks on judges and lawyers. Since its inception, the CIJL has sought to develop practical mechanisms to promote and protect judicial and legal independence. Every year since 1989, it issues an annual report entitled *Attacks on Justice* to highlight the plight of judges and lawyers.

Measures that threaten judges and lawyers vary from violent actions such as killings, torture and enforced disappearances, to subtle ones such as removing judicial discretion and limiting judicial resources. The CIJL assesses the actions against international standards. In 1985, the United Nations adopted the *Basic Principles on the Independence of the Judiciary*. These standards explain what is meant by judicial independence and identify some basic safeguards to protect it. In 1990, standards were also adopted defining the role of lawyers.

Numerous human rights instruments have been formulated since the *Universal Declaration of Human Rights* in 1948. The main problem remains in their implementation. Since the first International Conference on Human Rights held in Teheran in 1968, implementing international obligations has been identified as the chief obstacle facing human rights protection. This is an area where the actions of individual judges and lawyers and their organisations, as well as those of human rights groups, become critical.

But before we go any further into concrete problems facing judges and lawyers and how they can be dealt with, let us first turn our attention to what we mean by judicial independence. I will concentrate for the time being on the judges and their independence, leaving the discussion over the role of lawyers to the time when we explore the current examples of harassment of judges and lawyers.

## I. THE MEANING OF JUDICIAL INDEPENDENCE

There are basic guarantees to ensure the proper administration of justice in every society. If the justice system is to function adequately, the public must have confidence in it. Justice must be efficient and accessible. Its quality, fairness and ability to develop sound rules of law must be ensured. The ultimate goal of the system must be the protection of human rights. To achieve this objective, the judiciary must be independent and impartial.

These issues indicate the tense conceptual relationship between two essential values: judicial independence and judicial accountability. They demonstrate that while it is essential that judges be independent, it is also important that the judiciary, like other branches of government, be accountable to the public. A discussion on how far this accountability should go, and what institutions should be put in place to safeguard against abuse, is beyond the scope of this intervention. It might be sufficient to state at this stage that proper structures and mechanisms should be established to balance questions of accountability with the requirements of judicial independence.

Let us now turn our attention to examining the meaning of judicial independence.

Different legal traditions around the world give varying content to this term. To arrive at an international definition, one must rely on the 1985 *UN Basic Principles on the Independence of the Judiciary*. The *UN Basic Principles*, which were adopted by the United Nations General Assembly in 1985 by consensus, draw up definitions and guarantees that are common to all the legal systems of the world.

Principle 2 states that:

*the judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements or pressures, direct or indirect, from any quarter or for any reasons.*

According to this principle, independence encompasses impartiality, but goes beyond it. Impartiality reflects on the ability of the judge, in the words of the UN Human Rights Committee not to:

*harbour any preconceptions about the matter put before him, and [...] not to act in ways that promote the interests of one of the parties.*<sup>1</sup>

Independence, on the other hand, describes functional and structural safeguards against interference.

It should be stated at the outset, however, that judicial independence is not the only concept that immunises judges from pressures. There are other related doctrines and values that contribute to this immunity. These include the doctrine of the *sub-judiciae*, which requires the exclusion of comments on pending trials; the parliamentary practice in many

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1. Communication No. 387/1989 *Karttunen v. Finland*.

countries of refraining from debating a matter pending before courts; and the rules and traditions restricting judges' involvement in political or public controversy.

Secondly, the reference in principle 2 to the *judiciary* rather than the *judge* indicates that the concept of judicial independence is not only limited to individual judges and their substantive and personal independence. It also incorporates the collective independence of the judiciary as an institution.

The personal independence of judges relates to such questions as judicial appointment, promotion, transfer and removal from office. It also addresses matters concerning the administration of courts such as case assignment and scheduling. It is widely accepted by the various legal systems and traditions that executive control over such matters is inconsistent with judicial independence, and this is reflected in the *UN Basic Principles*.

The collective independence of judicial institutions deals mainly with judicial administration. It requires judicial involvement in the control of the central administration of the courts, including in the preparation of court budgets. This type of independence is not yet recognised as absolute, however. In practice, judicial involvement in these matters range from non-involvement, to mere consultation, to sharing responsibility with the executive or the legislative powers, to exclusive judicial control. The *UN Basic Principles* do not adequately address this component of judicial independence.

Thirdly, it is also clear from principle 2 that judicial independence should not be perceived only in terms of shielding the judge from external pressure. The principle indicates that judges must be immune from pressure "from any quarter or for any reason". This formulation captures the need to protect the internal independence of the judges vis-à-vis their colleagues or superiors. This last thought is particularly important in some jurisdictions which allow superiors to supervise and instruct inferior judges on their actual rulings before they are rendered.<sup>2</sup> Internal independence also relates to questions of self-esteem and safeguards against one's ideological or political bias, or career interest.

Let us now explore, in some details, some of these functional and structural safeguards.

### **A. Non-interference with the Judicial Process**

The independence of the judiciary is grounded on the principle of separation of power. The most common measure to ensure the integrity of the judicial process is a

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2. Cambodian judges raised this problem during a CIJL seminar entitled "Judicial Independence and Function in Cambodia" which was held in July 1993. This was also a major issue mentioned by tunisian judges during another CIJL seminar which took place in November 1994 in Tunisia.

constitutional prohibition against any interference by other branches of government such as the executive and the legislator, in the judicial process.

A complex question in this regard relates to judicial discretion. Some governments, as part of their fights against crime, propose laws by which they remove judicial discretion in sentencing and impose mandatory sentences on certain crimes. Judges have been arguing, and we agree with them, that these measures violate judicial independence. There is currently a heated debate on this matter in both the United Kingdom and the United States.

Interfering in the judicial process is not only limited to State organs, however. Non-state actors, such as opposition groups, guerrillas and para-military groups also interfere in the judicial process. Powerful individuals, such as land owners, as well as private corporations threaten judicial independence in many countries. It is the duty of governments to safeguard against such intrusions.

Another difficult question is the relationship between the media and the judiciary. An independent judiciary and an independent media are prerequisite to a society living under the rule of law. Media coverage of judicial proceedings could result in their improvement and in increased public confidence in the administration of justice. Certain media reports may, however, threaten a party's right to a fair trial. Freedom of information and speech must be balanced with the needs of the proper administration of justice.<sup>3</sup>

## **B. Jurisdictional Monopoly**

Principle 3 provides that "the judiciary shall have jurisdiction over all issues of a judicial nature". This principle relates to the possibility of creating special tribunals to decide certain classes of cases particularly those involving labour disputes, military justice and administrative law. It is widely believed that such a practice can undermine judicial independence if these tribunals are not granted the same safeguards of independence that are offered to the regular judiciary. Administrative tribunals are often believed to be too closely linked to the executive. Military tribunals are particularly vulnerable in this regard.

To address this problem, many constitutions provide for the unity and exclusivity of the judiciary's jurisdiction. More common are provisions specifying that only the judiciary may decide disputes of a litigious nature.

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3. The CIJL explored, at length, the relationship between the media and the judiciary in a seminar held in Madrid in January 1994. The papers presented in this meeting were published in Volume IV of the CIJL Yearbook, "The Media and the Judiciary", December 1995.

### **C. Self-administration**

The full separation of powers requires that the different branches of government have control over their own affairs. This means that the judiciary should have sufficient organisational separation from the legislature and the executive.

Two main problems are common in many countries. The first relates to who has the power to select, promote, transfer and remove judges. In some countries, this power is granted to the Ministry of Justice. Other countries establish a Judicial Council. The problem is that the executive often controls this Council. The Council is often composed of executive appointees, or ex-officio members. In several countries, judges ask that the Council be composed of elected representatives of judges as well as other representatives of the civil society.

The second problem relates to administrative autonomy. This includes the ability to control such matters as case-assignment, court scheduling, as well as the budget and finances, including judicial salaries. The judiciary is often granted scarce resources and is thus unable to deal with its workload. Backlogs and delay become problematic. The issue of resources also affects the standing of the judiciary in society and the self-esteem of judges and their ability to confront powerful actors who want to pressure them.

A technique for assuring financial independence of the judiciary is a constitutional requirement that a fixed minimum percentage of the country's total budget be allocated to the judiciary.

### **D. Tenure**

The most important guarantee of personal independence is fixed tenure in office. Principle 12 provides that judges "shall have guaranteed tenure until a mandatory retirement age or the expiry of their term". This secures judges from worrying over the political reaction to their decisions.

Many judges fear removal from office or involuntary transfer. Principle 18 provides that "[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties". Removal of a judge for cause is best entrusted to other members of the judiciary, often in the form of an appellate court or a Judicial Council.

Involuntary transfer can be punitive. It is often regarded as tantamount to an invitation to resign. Law should protect judges against this measure. Some countries grant this power to the Judicial Council. Others give the highest court the power to transfer judges. The lack of constraints on the authority to transfer can seriously compromise personal judicial independence.

## E. Judicial Immunity

The doctrine of judicial immunity requires that judges enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of judicial functions. This doctrine, which is reflected in principle 16, does not prejudice disciplinary procedures, or the right to appeal for compensation from the State for judicial errors or even misconduct.

As principle 17 states, however, appropriate procedures must be established to deal with complaints made against judges in their judicial capacity. These procedures should ensure fairness to the judges and the opportunity of a full hearing. Above all, disciplinary actions must be based upon established standards of judicial conduct.

## II. THREATS TO THE INDEPENDENCE OF JUDGES AND LAWYERS DURING 1995 AND THEIR IMPACT ON HUMAN RIGHTS

The independence of the judiciary depends on the willingness of the government to safeguard the above-mentioned guarantees. The following is a summary of the main features that the CIJL found to threaten judicial and legal independence during 1995 as was reported in the seventh edition of the CIJL annual publication, *Attacks on Justice*. As will be clearly illustrated, these threats have direct impact on the human rights situation.

### A. Violence and Special Justice

Of the 337 reported cases in *Attacks on Justice*, there were 23 cases of killed jurists. Most of them were in Colombia.

We covered the cases of 113 lawyers in Turkey alone. Of them 74 were detained and 32 tortured. Many lawyers in Turkey are now reluctant to speak about human rights abuses. This is because Article 8 of the 1991 *Anti Terror Law* outlaws making written or oral statements and meetings aimed at "damaging the indivisible unity of the State [...]" Most of the Turkish lawyers catalogued in our report were tried before State Security Courts under this provision. Although this article was amended last October to make it necessary to prove intent, its mere existence causes concern.

In several countries, vague laws are introduced to criminalise dissent. While Algeria cancelled the decree that loosely defines terrorism and established special courts in February 1995, it transferred most of the decree's provisions to the *Penal Code* and the *Law of Criminal Procedures*. Although article 45 of the Algerian Constitution limits *garde à vue incommunicado* detention to a maximum of 48 hours, the law allows this detention to be extended to 12 days.

Colombia and Peru continue to resort to courts with *Faceless Judges*. Although there were attempts in Colombia in 1995 to reduce the secrecy surrounding the identity of



judges, prosecutors and witnesses in these courts, decrees established under the *State of Commotion* eliminated this progress. The use of *Faceless Judges* was extended in Peru until October 1996.

Bahrain also resorts to exceptional justice. The *Security Act* of 1974 permits the detention of persons accused of security offences for a maximum of three years without trial. In addition, the Supreme Court of Appeal sits as a State Security Court. In this capacity, the Court holds trials *in camera*. Witnesses for the defence do not testify before the Court; instead they submit written statements. The Court record may not be photocopied or duplicated.

In Nigeria, there is a dual judicial system with both ordinary courts and special tribunals. Although the ordinary judiciary is reluctant to offend presidential authority, the Government often refuses to comply with court orders. Moreover, the importance of military tribunals grew in 1995. Military personnel with little legal training form these tribunals. Such tribunals have the authority to oust the supervisory jurisdiction and judicial review of the high courts. Their decisions are not subject to appeal.

## **B. Problems Related to Separation of Power**

In addition to violence and intimidation, the judiciary is often weakened by structural problems as we stated before. Tension between the executive and the judiciary is growing and many parts of the world. In Albania, when the Chief Judge opposed the draft Constitution proposed by the President, four of the judges of the Court of Cassation were dismissed, three threatened with dismissal, and the Court's budget was blocked. This sparked a crisis between the judiciary and the government. On September 6, 1995, police surrounded the court and prevented the judges from entering the premises. Judges who attempted to enter were physically assaulted.

Although the 1973 Constitution of Pakistan contemplates separation of the judiciary from the executive in accordance with a specified schedule, the government twice delayed the implementation of the separation of powers by constitutional amendments. The Supreme Court has now ruled that this separation must take place not later than March 31, 1996.

Attention should be given to Hong Kong in the countdown to 1997 when sovereignty will be transferred to China. There are already some worrying indications. In 1990, the United Kingdom and China agreed that the legal system will essentially remain the same, with minor changes. Amongst the changes was the establishment of a Court of Final Appeals to replace the Judicial committee of the Privy Council which is the highest court in the United Kingdom. It was agreed that foreign judges will serve on the Court. A subsequent agreement made in 1991 and confirmed in 1995 restricted, however, the number of foreign judges to one. The Agreement does not clarify how and when the first judges will be appointed and it may exclude executive acts from the court's jurisdiction.

### **C. Judicial Resources**

In 1995, the regular judiciary in Peru received only one third of the budget it requested. The problem began when the 1993 Constitution eliminated the constitutional requirement that no less than 2% of the State budget be allocated to the judiciary. The judiciary in Argentina faces similar problems.

In Equatorial Guinea, the Government does not publish the State Official Gazette because, it claims, it lacks resources. It promulgates acts, decree-laws and decrees on radio and television.

If courts in Rwanda, Ethiopia and Cambodia, for instance, lack, as our report shows, pencils, paper, legal texts, never mind adequately trained and qualified judges, how can they contribute to peace and stability in these countries? If judicial institutions are so weak that they cannot adequately address individual grievances, what choice do individuals then have, other than taking the law into their own hands? In Haiti and Brazil, private citizens have resorted to vigilante justice.

### **D. Influence of Commercial Companies**

Corporations also try to influence the judiciary as was said before. Last year, for instance, the government of Papua New Guinea entered into an agreement with a company by which it agreed to enact legislation making it a criminal offence to commence or continue proceedings against this company.

## **III. THE EFFORTS OF THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)**

This overview of the state of judges and lawyers throughout the world illustrates the importance of working for the promotion and protection of judicial and legal independence. In 1978, the International Commission of Jurists established the Centre for the Independence of Judges and Lawyers (CIJL) to respond to the growing attacks on judges and lawyers. Since its foundation, the CIJL has sought to develop practical mechanisms to promote and protect judicial and legal independence. The CIJL has several organizations of judges and lawyers affiliated to it.

The CIJL employs several methods in conducting its work. In addition to being instrumental in the formulation and adoption of the 1985 *UN Basic Principles on the Independence of the Judiciary* and the 1990 *UN Basic Principles on the Role of Lawyers*, the CIJL has been intervening with governments in particular cases of persecution of jurists; organising conferences and seminars; and publishing periodic reports. Such reports include the *CIJL Yearbook* which serves as a forum for discussion on the subject of independence of the judiciary and the legal profession, and the

above-mentioned report, *Attacks on Justice*, on the harassment and persecution of judges and lawyers throughout the world.

When a case of a harassed or persecuted jurist comes to the attention of the CIJL, the CIJL verifies the facts and assesses the legality of the governmental measure on the basis of the two *UN Basic Principles on the Independence of the Judiciary and the Role of Lawyers*.

If it is found that the measure violates these standards, the CIJL writes to the government requesting it to immediately remedy the violation. When appropriate, the CIJL makes its concern public by issuing a *CIJL Alert*. This *Alert* is distributed to a widespread network of judges' and lawyers' associations and interested human rights groups.

From time to time, the CIJL sends missions to investigate situations of concern or the status of the bar and the judiciary in specific countries. Such missions make governments aware of the international vigilance in the observance of the principles of judicial and legal independence.

The CIJL also sends observers to the trials of jurists. This method exposes particular legal systems to international scrutiny. It is a well an effective way of demonstrating solidarity among jurists.

## CONCLUSION

Some question the value of practical work to promote and protect the independence of judges and lawyers on the basis that the concept of judicial independence is too complex. Some also argue that the reality in most societies is that judges and lawyers are already more protected than average citizens.

With this presentation, I tried to demonstrate that the concept of judicial independence is not as vague or complex as many think. There are international standards that identify minimum measures and safeguards to protect judicial independence. In addition, I wanted to show that these measures are not a luxury or mere privileges for judges. They are much needed, if not even vital, to preserving the rule of law of any society.

