



International Institute for Justice Excellence

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Policy Statement on Judicial Independence 4th June 2020

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1. The evolution of the concepts of judicial independence and the separation of powers spans many centuries. Aristotle in his treatise, “Politics”, talked of three branches of government; the general assembly, the public officials, and the judiciary. This concept was refined and further expanded by John Locke (1689) and Baron de Montesquieu “The spirit of laws” (1748). He believed that “When the legislative and the executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the monarch or Senate should enact tyrannical laws to execute them in a tyrannical manner”¹. According to him, “Power ought to serve as a check to power”.
2. The concept of judicial independence has a symbiotic relationship with the theory of the separation of powers and is its direct consequence. Attempts formally to guarantee the freedom of the judiciary from government control date back to the English Act of Settlement 1701, section 7 of which ensured that the judges could only be removed on an address to the Crown by both Houses of Parliament.
3. Alexander Hamilton famously wrote that because the judiciary is the “least dangerous” branch, having no influence over “either the sword or the purse”, it was therefore the one that was least capable of defending itself and its responsibility to remain impartial against the other branches of government.² Such thoughts paved the way for providing constitutional protection and safeguards to judicial independence.
4. Judicial independence has partly been impacted by international law through international human right treaties that enshrine principles of fair procedure and the right to be tried before an impartial and independent tribunal.

¹ Sam J. Ervin, Jr

² Hamilton, Alexander. “The Federalist 78.” The Avalon Project : Federalist No 78. Accessed May 1, 2020. https://avalon.law.yale.edu/18th_century/fed78.asp.

5. In Europe, the European Court of Human Rights (ECtHR) has made a great impact on the way in which judicial independence is conceptually analyzed in both Scotland and England. More recently this came into force in the year 2000 in the UK by the implementation of the European Convention of Human Rights as applied in the British Law through the Human Rights Act 1998.
6. The history of judicial independence in the 20th-21st century is robust.³ There exist over forty international and regional documents that uphold the imperative of judicial independence through conventions, comments, principles and declarations. Violations of judicial independence took different forms, and occurred in countries with different systems of government, propelled by various incidents of violation of judicial independence in many parts of the world.
7. In 1966, when the UN passed the International Covenant on Civil and Political Rights, it enshrined the principle of Judicial Independence in Articles 14 and 26. According to General Comment No. 32 (2007), “Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law”.
8. In 1982, the International Bar Association Code of Minimum Standards on Judicial Independence, based on a General Report by Prof. Shimon Shetreet, on 29 National Reports, and 15 topical reports, was adopted.
9. The Montréal Universal Declaration on the Independence of Justice was adopted at the first World Conference on the Independence of Justice held in 1983.
10. Judicial independence has been formally endorsed at the international level as well as by the Bangalore Principles and the Basic Principles of the Independence of the Judiciary adopted by the United Nations in 1985. Also the Istanbul Principles on Transparency, as endorsed by the United Nations, promote the independent ability of the judiciary, rather than of the executive branch, to decide detention issues.
11. In 2004, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, adopted the Burgh House Principles which paid specific attention to the independence of international judiciary.

³ Although the role of Lord Chancellor might be traced to the 7th Century, the English judiciary may have taken birth in 1178, when five members of the personal household of King Henry II were appointed "to hear all the complaints of the realm and to do right". Rule of law, secured by judicial independence, and unobstructed by royal interventions, was enshrined almost 500 years later in the Act of Settlement of 1701. But the pace has changed since.

12. Standards that underpin judicial independence need to remain relevant by continuously evolving and being updated. This is important if judicial standards are to be regarded as cornerstones for the substantive protection of human rights and democracy.⁴
13. The Universal Charter of the Judge was adopted in 1999 and was last updated in 2017.
14. The Mt. Scopus Standards were developed in 2008 for both national and international judges and continued to be consolidated until 2015.
15. One mission component of the International Institute for Justice Excellence is to study practice as it relates to administering justice more uniformly and effectively. In this regard, there are universal principles that enable the practice of administering justice more uniformly, one of the most important principles being the independence of the judiciary as an equal branch of government. The IIJE is also an institution dedicated to the public good and supporting the education of the public about issues of importance to civil society because public opinion is a key factor in the support and functioning of an independent judiciary.
16. Learned Hand, a renowned student of human liberty, aptly stated the following:
“I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. ”
17. We, the Board of Directors of the International Institute for Justice Excellence, wish to reinforce the values of the separation of powers and the independence of the judiciary in these insecure times. These values must not die in the hearts of the people.
18. The independence of the judiciary is a core foundation for the achievement of the following core values and functions of any constitutional State: an impartial and equal application of the rule of law, the resolution of disputes between different organs/institutions of the State and between persons and between persons and public authorities and the enforcement of fundamental and human rights of people in a State. In order to secure the independence of the judiciary, issues relating to the concept of an independent judiciary, its relationship with the executive and legislature, the process of

⁴ Shetreet, Shimon (2009) "The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges," Chicago Journal of International Law: Vol. 10: No. 1, Article 13. Available at: <https://chicagounbound.uchicago.edu/cjil/vol10/iss1/13>

19. judicial appointments and removal and discipline, standards of judicial conduct especially including impartiality and internal independence, the use of tools of artificial
20. intelligence in the era of digitization and the judiciary's relationship with the media all have to be considered in order to lay down the safeguards underlining the independence of the judiciary. This is essential particularly in situations of perceived or real national emergency, to ensure that such circumstances are not used as a pretext to undermine fundamental human rights, judicial independence and the rule of law.
21. The principles and safeguards of an independent judiciary are as follows:
 - i. The judiciary as a whole should be independent and its independence should be ensured through the Constitution of each State.
 - ii. Each judge should enjoy both personal and substantive independence. Personal independence means that the terms and conditions of judicial services are adequately secured and substantive independence means that the judge decides cases according to law and commands of his or her conscience without interference.
 - iii. A judge should be independent in deciding cases vis-à-vis his colleagues and superiors.
 - iv. The judiciary should have collective independence⁵ which “requires a greater measure of judicial participation in the central administration of the courts, including the preparation of budgets for the courts.” The executive should not have control over the judicial process and judicial functions or the administration of the judiciary and its staff.
 - v. Judicial administration should vest with judicial leadership. Judicial leadership should ensure that the court system is transparent and accountable through the use of performance measures and evaluated at all levels of the organ.
 - vi. To buttress the financial independence of the judiciary, the state should provide adequate financial resources to the judiciary with a view to enabling judges fully to perform their duties properly, efficiently, fairly and expeditiously.
 - vii. One of the elements which strengthens judicial independence is an adequately resourced judicial administration. With a view to ensuring efficiency, fairness and exposure to modern technology in the judicial process, it is essential that the judges should receive appropriate training and education both pre-service and periodically in-service in judicial academies run by the judiciary. This would entail high quality professional training and appropriate material resources including premises, furniture and equipment. The training of the staff attached to the judges is also essential to facilitate the judicial process by making it more efficient, expeditious and transparent.

⁵ New Delhi Standard 9 calls for exclusive judicial responsibility for judicial administration at the central level, or at least joint responsibility with the Executive. The Montreal Declaration provides that the main responsibility for court administration shall vest in the judiciary.

- viii.** Legislation introducing changes to the terms and conditions of judicial services should not be applied to judges holding office at the time of such legislation unless the changes improve the terms of service and are generally applied.
- ix.** Judicial tenure, salaries, pension and benefits (including their value relative to that paid to other holders of public office) should be secured constitutionally and by law. Salaries and pensions may move upwards and downwards depending on the social and economic conditions in a country. However, the question of any reduction in the salaries, pensions or other financial benefits paid to the judiciary should be left to the judiciary to decide taking into account those social and economic conditions
- x.** Enforcement of a court decision or the orders of the judiciary should be regarded as an integral part of the judicial process. Such enforcement, under supervision of the administration of justice, should be guaranteed by the Constitution.
- xi.** The recent trend of establishing judicial selection boards or commissions which include representatives of the judiciary and the legal profession should be viewed favourably.
- xii.** Judicial appointments and transfers should be based on a transparent process including consideration of professional qualifications, integrity, efficiency and suitability. There should be guarantees in place to ensure that the procedure and the process in this regard are transparent and appointments so made are based on objective criteria.
- xiii.** Temporary or part-time judges should be appointed only with proper safeguards secured by law.
- xiv.** The judiciary should shun prejudices and corruption. The process and the grounds for discipline, suspension and removal of judges should be entrenched constitutionally or fixed by law and should be based upon established standards of judicial accountability and conduct.
- xv.** The proceedings for discipline, suspension and removal of judges should be processed expeditiously, transparently and independently.
- xvi.** A judge should enjoy immunity from legal action in the exercise of his official functions.
- xvii.** Every judicial system should have a citizens' complaint procedure to allow citizens to submit complaints against impropriety or misconduct on the part of judges.
- xviii.** Judges should not serve on executive or legislative bodies or hold positions in political parties.

- xix.** Judges should not practice law and should refrain from engaging in business or any other professional activity.
- xx.** A judge should disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which there is a reasonable suspicion of bias or potential bias.
- xxi.** The State and the judiciary should ensure that judges are independent and are able to act without any restriction, inducement, pressures, threats or direct or indirect interference.
- xxii.** In the process of judicial decision making, if tools of artificial intelligence are used it is essential that the right of access to the judiciary or the right to a fair trial should not be undermined. These tools must be used with due respect to the principles of the rule of law and judges' independence in their decision-making process.
- xxiii.** A judge should always behave in such a manner as to preserve the dignity, impartiality and independence of the judiciary.
- xxiv.** Judges should discourage ex-parte communications from parties except as expressly provided by rules of the court.
- xxv.** A case should not be withdrawn from a particular judge without valid reasons.
- xxvi.** The power to transfer a judge from one court to another should vest in a judicial authority in accordance with law and should ordinarily be exercised with the consent of the transferred judge.
- xxvii.** Whoever is master of the roster in a court is perceived to be capable of influencing the judge or bench seized of a case. To ensure greater transparency, a committee of two or three judges of the court should be in charge of the roster and assign cases to different benches.
- xxviii.** The allocation of work between judges should ordinarily be carried out under a predetermined and transparent plan subject to the Chief Justice having the power to change the predetermined plan for sound reasons.
- xxix.** The media should show responsibility when reporting on judicial proceedings so as not to compromise the public perception of the court's impartiality and independence. Nor should any judge make any comment in public that might be reflective of his tilt to either party pitted before him in a case of which he is seized.
- xxx.** The dissemination of judgments to the public through the media is essential in a democracy to sustain public confidence in the judiciary, as also to educate the public about constitutional values and the law. The public awareness of such a judicial role through the media inspires trust and confidence in the

xxxi. judiciary. When judicial independence is threatened by the political branch/ executive, it is because of such a trust that the civil society and public in a democracy reacts to safeguard it.⁶

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⁶ Two events are illustrative on the rationale of this principle; in 1988, the Prime Minister of Malaysia, Mahathir Muhammad dismissed the Chief Justice and two senior most judges of the Malaysian Supreme Court because of their adverse orders against the Government. He got away with it as there was no public reaction to what he did to judicial independence. Whereas in 2007, when General Musharraf, the then President of Pakistan dismissed the Chief Justice, the Supreme Court restored him, he was again dismissed and there were countrywide demonstrations in favour of Judiciary. The President had to resign and the Chief Justice was restored.