

DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY ("SIRACUSA PRINCIPLES")

A Committee of Experts organised by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, and hosted by the International Institute of Higher Studies in Criminal Sciences met at the Institute in Siracusa, Sicily, on 25-29 May 1981 to formulate draft principles on the Independence of the Judiciary. The participants comprised distinguished judges and other jurists representing different regions and legal systems. They came from Africa, Asia, America and Eastern and Western Europe.

*The main purpose of the meeting was to seek to exchange information and formulate principles which might be of assistance to Dr. L.M. Singhvi, Special Rapporteur on the Study on the Independence of the Judiciary of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination. Dr. Singhvi was present at the meeting, and submitted the Draft Principles to the Sub-Commission at its August 1981 meeting as an annex to his progress report (UN Doc. E/CN.4/Sub.2/481/Add/)**

I. Preamble

Art 1. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable for the implementation of this right.

II. Definition

Art. 2. Independence of the judiciary means

(1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and

(2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

III. Qualification. Selection and Training of Judges

Art. 3. Applicants for judicial office should be individuals of integrity and ability, well-trained in the law and its application.

Art. 4. Applicants qualified as set out in Art. 3 above should have equality of access to judicial office.

Art. 5. Selection for the appointment of judges should be made without distinction of any kind such as race, colour, sex, language or religion, political or

other opinion, national or social origin, property, birth or status.

[Note: This article is without prejudice to the requirement that a judge be a citizen of the country in question.]

Art. 6. These principles apply whatever the method of selection and appointment of judges.

[Note: In some countries candidates for the judiciary are post-graduates who have been admitted by competitive examination to a special school for future judges, and when they have successfully completed the school's curriculum, they are appointed to existing vacancies. In some countries judges are recruited by competitive examination and receive apprenticeship training by attending courts and learning from the judges. In another country appointment is open to candidates who have successfully completed a postgraduate practical service assisting judges, prosecutors, lawyers and administrators. In some countries judges are elected by their fellow citizens. In other countries they are chosen from practicing members of the bar. No international norms give preference to any of these methods. Experience indicates that each is capable of sustaining a competent, independent and impartial judiciary.]

Art. 7. In-service training should be made available to keep judges informed of important developments, including developing social trends, new technologies and their legal consequences, studies into the causes of crime and sentencing policies and their effects.

IV. Posting. Transfer and Promotion Posting

Art. 8. The assignment of a judge to a post within the court to which he is appointed is an internal administrative function to be carried out by the court itself.

[Note: Unless assignments are made by the court, there is a danger of the erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the Magistrature or similar body.]

Transfer

Art. 9. Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their freely given consent.

[Note: Unless this principle is accepted transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.]

Promotion

Art. 10. Promotion should be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law.

Art. 11. An independent commission composed entirely or in its majority of judges should be established with responsibility for deciding upon promotions or for recommending candidates for promotion to the appropriate authority.

[Note: All court systems are hierarchical in structure. Only in some countries, however, has a system developed where judges are encouraged to expect promotions to higher courts or promotions in rank. This may create among the judges a pressure to conform which is dangerous for judicial independence.]

Creation of judicial commissions such as those described above constitute an important safeguard against the use of promotions to restrict judicial independence, as well as being the most reliable procedure for identifying those best qualified for higher judicial posts. Many countries have Judicial Service Commissions or Superior Councils of the Magistrature which fulfil these functions. In doing so, they should give consideration to any representations made by representatives of the bar, by other associations or by members of the public.

In addition to the establishment of commissions such as those described in the principle, additional safeguards may be desirable to safeguard against the possibility of promotions having an influence on judicial independence. In some countries, for example, the list of vacant posts and the list of candidates for those posts are published to permit public scrutiny of promotions. In one country, changes from one court to a higher court are considered changes in function rather than changes in rank, and salaries are based on years of experience rather than on the particular judicial office held.

In order to ensure that respect for the fundamental human rights of all persons becomes a reality, it is of the greatest importance that the judiciary be composed of men and women having the requisite qualities. Thus in every system for the promotion of judges, the fundamental goal must be to appoint the individuals who have best demonstrated the qualities mentioned in this principle.]

V. Retirement. Discipline. Removal and Immunity Retirement

Art. 12. All judges, whether selected by appointment or elected, should have guaranteed tenure until a mandatory retirement age, subject only to removal for incapacity or serious illness.

[Note: Pursuant to this principle elected judges should not be required to stand for re-election.]

This article is not intended to apply to international courts.]

Discipline

Art. 13. Any disciplinary proceedings concerning judges should be before a court or a board composed of and selected by members of the judiciary.

Art. 14. All disciplinary action should be based upon standards of judicial conduct promulgated by law or in established rules of court.

Art. 15 The decision of a disciplinary board should be subject to appeal to a court.

[Note: Opinion was divided as to whether the disciplinary board should also include a minority of non-judges.

Disciplinary sanctions may include a variety of options ranging from censure or reprimand to the most drastic action of removal.

A common law judge who was unable to attend the meeting has suggested that articles 13 and 15 should be amended to read as follows: "13. Disciplinary proceedings against a judge shall be taken formally where it is desired that the judge be, for serious reason, removed from his office. Such disciplinary proceedings shall be taken in the first instance before a board composed of members of the judiciary selected by their peers and there shall be a right of appeal from the decision of such a board to a court.

15. Where the conduct of a judge does not warrant removal from his office, disciplinary or other procedures in relation to that conduct should be taken privately in accordance with the powers vested in the Chief Judge of his court."]

Removal

Art. 16. A judge should not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

Immunity

Art. 17. Judges should have immunity from civil suit for acts done in their official capacity.

[Note: The principle that a judge, in exercising his legal authority, should be free to act upon his convictions without fear of personal consequence to himself is of the highest importance for the proper administration of justice. Liability to answer to everyone who feels aggrieved by the action of a judge would be inconsistent with the possession of this freedom and would destroy the independence of the judiciary.

This principle is without prejudice to the right which an individual should have to compensation from the state for injury incurred by reason of negligence or fraudulent or malicious abuse of authority by a court, and this right should be assured by an effective legal remedy.

In regard to the degree of immunity there was a difference of opinion. Some were in favour of absolute immunity, believing that the principle of public accountability would

be adequately met, where necessary, by disciplinary action. Others considered that in principle, and in accordance with the practice of some countries, a disciplinary board or a court should be able to remove a judge's immunity in a case of fraudulent or malicious abuse of authority. Another view was that an injured party should be able to apply to a court to have the immunity of a judge removed.]

VI. Working Conditions. Administrative and Financial Arrangements

Organisation of the Judiciary

Art. 18. Any hierarchical organisation of the judiciary and any difference in grade or rank should in no way interfere with the right of the individual judge to pronounce freely in accordance with his appreciation of the facts and his interpretation of the law.

[Note: In some countries the judiciary is organised in strictly hierarchical order, prevailing even between members of the same court. In these circumstances the higher ranking judges, especially if they are likely to be asked to recommend a colleague for promotion, may even unwittingly exercise a restrictive influence on the independence of subordinate colleagues, or induce in them an unduly deferential attitude towards their superiors. Consequently it appears useful to enunciate this principle.]

Assignment of cases

Art. 19. The court itself should be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

[Note: There may be, and in some jurisdictions there is, a right of appeal to the court as a whole where such decisions are made by the President or a senior judge of a court.]

Specialisation of Judges and Tribunals

Art. 20. Considering the increase in the volume and diversity of judicial matters, the creation of specialised courts contributes to efficiency and the effective administration of justice, which in turn enhances the independence of the judiciary. Nevertheless, specialisation should not preclude the periodic rotation of judges, assisted by appropriate in-service training.

Professional privilege

Art. 21. Judges are bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings. They must not be required to testify on matters of which they have knowledge as judges.

[Note: It is clear that if judges can be required to testify or otherwise disclose information about their deliberations their independence may be threatened.]

Freedom of Association and Expression

Art. 22. In accordance with the Universal Declaration of Human Rights, members of the judiciary like any other citizens are entitled to freedom of expression, association and assembly. However, judges should refrain from expressing public criticism or approval of the government, or from commenting on controversial political issues, in order to avoid any impression of partisanship.

[Note: Judges should be free to form and join associations of judges, to represent their collective interests and to express opinions and take positions orally or in writing on matters pertaining to their functions and to the administration of justice. Such associations may organise assemblies, conferences, or general or specialised meetings for the entire judiciary or sections of it, and issue reports and communicate their views in an appropriate manner.

Opportunities for dialogue and consultation between judges of the same rank or grade can help to reinforce judicial independence.

The freedom of expression of judges is, of course, subject to the limitations of professional secrecy, in accordance with Article 21.

There was considerable discussion whether it was proper for judges to be members of political parties. Some took the view firmly that they should not in any circumstances, in order both to keep themselves free from possible political pressures and not to prejudice their reputation for impartiality. Others thought that they could without harm be members of a political party, but that they should not hold office or take part in policy formulation or in party activities.

Yet others saw no objection to judges having full freedom of association in political parties and playing an active and even leading role in them.

Some of those opposed to these latter views considered that there might be less objection to a judge being a member of a political party in a one party state.

In some countries a 'duty of reserve'¹ is imposed upon judges. This requires them as a matter of discipline to exercise restraint in the exercise of their freedoms, in order to reconcile them with the particular nature of their responsibilities.

Disqualification from hearing particular cases

Art. 23. Judges can and should decline to sit in cases where their independence may properly be called into question, whether or not so requested by one of the parties. In doubtful situations the court or the Chief Justice or President of the Supreme Court should decide upon request by the judge concerned.

[Note: In some jurisdictions there is an immediate right of appeal against a refusal by a judge to disqualify himself.]

Financial provisions

Art. 24. To ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfillment of its judicial functions.

Art. 25. The budget of the judiciary should be established by the competent authority in collaboration with the judiciary. The amount allotted should be sufficient to enable each court to function without an excessive workload. The judiciary should be able to submit their estimate of their budgetary requirements to the appropriate authority.

[Note: It is essential for the independence of the judiciary that salary levels should be such that judges are not exposed to the temptation to seek other sources of income.

An exception to the principle of non-reduction of salaries may be made at a time of economic difficulty if there is a general reduction of public service salaries and members of the judiciary are treated equally.]

Physical protection

Art. 27. It is the responsibility of the executive authorities to ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them.

[Note: Whether it is a question of direct and personal threats or of the general situation of public order, judges should be able to carry out their functions in the calmness and safety which are necessary for their independence. They should be able to count on the protection of the competent authorities.]

VII. The Role of the Judiciary in a Changing Society

Art. 28. In societies in which radical changes are being made serious tensions sometimes arise between the judiciary and the executive or legislature. In these circumstances judges often have a difficult role to fulfil, calling for the highest judicial qualities. On the one hand they should understand and give due weight to the goals and policies of the changing society when construing legislation or reviewing administrative decisions. On the other hand they must uphold the human rights of individuals and groups which are laid down in the constitution, laws and, where applicable, international instruments, or which reflect the lasting values of the society. As in the other situations, justice requires judges to adjudicate impartially between the conflicting rights and interests and apply the law according to their understanding of its meaning.

[Note: Tensions and conflicts of the kind referred to have at times arisen when a constitutional or other court has invalidated reform legislation or executive action as being unconstitutional, or when there has been a series of decisions restricting the effect of reform legislation, such as trade union or land reform laws or programmes of nationalisation. It may be noted that these tensions or conflicts usually arise in countries where the independence of the judiciary is in general respected and the judiciary is not subservient to the executive.

Judges should accordingly inform themselves fully about the goals and policies of a

changing society. They must also be alert to restrict limitations on personal freedom and resist all forms of discrimination. It follows that at times the judicial function may legitimately operate as a restraining factor on reform legislation, not as a result of an instinctive resistance to change, but following a considered weighing up of the conflicting interests and values at stake. Where possible judges should, in order to avert accusations of partiality or obstruction, make clear in their judgements their understanding of the different social and political interests at stake. In some legal systems, however, this is impossible as the law forbids the judge to give judgment in this way.]

VIII. Judicial Independence and the Protection of Human Rights

Art. 29. The independence of prosecutors and advocates and the fearless and conscientious fulfillment of their respective professional duties is a necessary complement to the independence of judges, and is an essential safeguard for the attainment of justice, liberty and respect for the rule of law, and for the protection of human rights of all persons in any society.

[Note: In criminal proceedings the independence and impartiality of judges can be substantially assisted by the independence of prosecutors and lawyers. In particular the independence of defence lawyers must be fully preserved to enable them to counterbalance the role of prosecutors and assist the judges by marshalling countervailing evidence and argument.

In some countries prosecutors although part of the Judiciary, are hierarchically organised and subject to the orders of the Executive. The latter thus has the means to exercise an indirect pressure on judges of the bench through influential prosecutors. It is preferable therefore that prosecutors should, except in relation to specific matters specified by law, be independent of the executive power.]

Art. 30. The principle of the independence of the judiciary entitles and requires a judge in a criminal case to ensure the fair conduct of the prosecution and to enquire fully into any allegation made of a violation of the rights of the accused which is relevant to the issues in the case.

Art. 31. Judges should keep themselves informed about international conventions and other instruments establishing international human rights norms, and should seek to implement them as far as feasible within the limits set by their national constitution and laws.

[Note: In some countries the constitution recognises the primacy of duly ratified treaties over national law, including even laws passed subsequent to the ratification of or accession to the treaty concerned. In other countries laws enacted after the date of ratification or accession prevail and their provisions must be applied by the judiciary. The wording of this article is intended to cover both situations.]

Art. 32. Derogations from the principle that the judiciary should have jurisdiction, directly or by way of review, over all issues of a judicial nature, may be admissible in times of war or grave national emergency, under conditions prescribed by law.

[Note: Experience shows that in times of war or national emergency there is an increased risk of abuses of power and of severe derogations from constitutionally or legally guaranteed freedoms and rights.

The constitution and laws should, therefore, define precisely the circumstances and conditions of admissibility of such derogations by the executive and institute controls to be exercised by the legislature or other appropriate organs.]