Independence of the Judiciary

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A. Introduction

1 The concept of judicial independence is not defined in an exact way and often varies from jurisdiction to jurisdiction. This does not detract from its status as a cornerstone of the → rule of law. It also does not mean that there are no core features of judicial independence upon which there is universal agreement. Vital to the concept of judicial independence is the idea that courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. Judicial independence is therefore conceived and understood in relation to other institutional actors.

2 Qualified and independent judges are essential for the → legitimacy of the judicial system and the → administration of justice. Courts can only contribute to the rule of law if the courts are legitimately composed and judges are independent.

B. Historical Background

3 According to Joseph Diescho: ‘The genesis of the doctrine of judicial independence is to be found in the evolution of a constitutional democratic state in Europe’. The doctrine takes its roots in Montesquieu’s book, Spirit of the Laws/De L'esprit des Loix (1748). Montesquieu theorized, for the first time, the need that the executive, legislative, and judicial functions of government should be assigned to different bodies.

4 The independence of the judiciary is also related to the concept of separation of powers and the existence of → checks and balances. Alexis de Tocqueville theorized this concept after he observed the functioning of America’s society in the mid-nineteenth century (On Democracy in America/De La Démocratie en Amérique (1899)). He noticed that, contrary to Europe, the United States ('US') President was the mere executor of the law and that he was checked by other institutional entities in the exercise of his executive authority.

5 Until the 18th century, judicial independence was a concept unknown to the British legal system. The emergence of judicial independence as a modern concept in the United Kingdom ('UK') can be traced to 1701 when the Act of Settlement was enacted. This is what Shetreet refers to as the first phase of British judicial independence when the concept was domestically received (Shetreet (1976)). The Act of Settlement among other things curtailed the Crown’s judicial powers and served as a safeguard against future monarchs’ abuse of power after the 1688 Great Revolution. This was followed by the second phase when the British concept of judicial independence came to be used internationally (Shetreet (2009) 275). The adoption of the theoretical model of separation of powers doctrine by other states and the text of Article III US Constitution (Constitution of the United States of America: 17 September 1787 (as Amended to 1992) (US)) are examples of the exportation of judicial independence during the second phase.

6 As seen above, after the US gained its independence in 1776, its constitutional history was marked by the checks and balances system among the three organs of government. This system has been a great inspiration for western countries.

C. Definition

7 Judicial independence can be defined as the ability of individual judges and the judiciary as a whole to perform their duties free of influence or control by other actors. Judicial independence is as old as constitutionalism itself. Formal guarantees of judicial independence from government control date to at least 1701, when England’s Act of
Settlement granted judges explicit protection from unilateral removal by the crown in the context of a larger shift of power from the King toward Parliament and the courts.

D. Distinctions

8 Ríos-Figueroa and Staton distinguish between *de iure* and *de facto* independence. *De iure* independence ‘deals with formal rules designed to insulate judges from undue pressure, either from outside the judiciary or from within’, whereas *de facto* independence ‘is behavioural’ (Ríos-Figueroa and Staton 106–7). This last aspect of independence refers to the autonomy of the judge when they take a decision, which means that the outcome reflects the judge’s judicial preferences, but also to the fact that their decision can be enforced in practice. When it sometimes seems that the judiciary of a state is *de iure* independent, the *de facto* independence is often difficult to measure since judicial independence is ‘not directly observable’ (Ríos-Figueroa and Staton 108).

9 One can also distinguish between external judicial independence and internal independence. The external independence depends widely on how judges are appointed, and the internal independence refers more to the assignment of a case to a judge (Neppi Modona). However, Ríos-Figueroa writes about external independence as ‘the relation between the elected branches and Supreme Court Judges’ and about internal independence as ‘the relation between Supreme and Lower Court Judges’, whereas autonomy is defined as ‘the relation between the elected branches and the institution of the judiciary’ (Ríos-Figueroa 5). Therefore, in one and the same country, the Supreme Court can be autonomous and externally independent while the lower court judges can be internally dependent.

10 In describing the conceptual foundations of judicial independence, courts as well as scholars have made a distinction between formal independence and substantive independence. Formal independence entails that judges are required to be independent of the body constituting the court in which they serve. Substantive independence demands independence in individual cases. According to Shetreet, substantive independence can be characterized as the neutrality of mind of a judge (Shetreet (1976) 630). Substantive independence, on the other hand, requires that a judge acts independently and impartially in a concrete case before them.

11 A further distinction can be made between the independence of the judiciary and the independence of individual judges and courts. Judicial independence can be defined as a characteristic of individual judges or as a characteristic of the judiciary as a whole. If judicial independence is guaranteed at the institutional level but not at the individual level, individual judges can be forced to obey the wishes of the leadership of the judiciary. However the guarantee of judicial independence on the individual level, and a judge’s freedom to pursue individual preferences, if unchecked, could also only invite abuse. It further raises the likelihood that judges may decide cases in inconsistent ways, which could potentially undermine the predictability and stability of the law. The way in which the Japanese judiciary is organized, for example, renders lower court judges highly obedient to an administrative bureaucracy controlled by the chief justice of the Supreme Court of Japan (Pimentel).

E. Judicial Independence and Supervision of Judges

12 The relationship between judicial independence and → judicial accountability is a contentious issue. According to Shetreet: ‘Judicial accountability has many faces. It includes a variety of methods and mechanisms for checking judges. Some of them are statutory, such
as disciplinary supervision and appellate review. Some of them are non-statutory, such as the public control over judges’ (Shetreet (1984) 998).

13 Scholars have different views about the nature of this relationship. Some scholars are of the view that judicial independence must be absolute, with no interference from any external source. They base this view on the importance of judicial independence and the (apparently) existing contradiction between judicial independence and any review of a judge’s actions and that no external reviewing mechanism should be maintained to handle this matter. According to this understanding, even matters of judicial administration must be handled by and within the judicial system itself (Shetreet (1984) 991). This view prefers the appellate review system as is the case in England where the appellate courts have an important role in the discipline of judges. According to Shetreet:

The appellate court is the only institution which officially and openly passes upon judicial misconduct and, when warranted, has the power to take disciplinary action, ranging from mere censure to criticism of the judge’s misconduct to a reversal of his [or her] judgment or setting aside a conviction coupled with severe condemnation (Shetreet (1976) 284–85).

F. Judicial Independence in Constitutional Law


15 Judicial independence is traditionally well-respected in Islamic culture. The principle of judicial independence is a well-established principle in Islamic Sharia to the extent that all Arab states protect the principle in their laws (Sherif and Brown 5).

16 Judicial independence is at the core of judicial politics in many African states. This is the case particularly in Kenya (Ojwang 10). The 2010 Constitution of Kenya (Constitution of the Republic of Kenya: May 6, 2010) has enhanced protection for judicial independence. Article 160 states: ‘(1) In the exercise of judicial authority, the Judiciary, as constituted by Art. 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.’

17 Even in the case of strong constitutional protection judicial independence is dependent on the extent to which the executive respects the independence of the judiciary. The United Nations Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in 1985 (‘UN Basic Principles’) identify the content as including the following: the impartiality of judgment and the absence of improper influences of any kind; the exclusive authority of the judiciary over its competence; and the absence of any inappropriate or unwarranted interference in the judicial process. The Bangalore Principles of Judicial Conduct (2002), endorsed by the UN Commission on Human Rights at its 59th Session in Geneva (2003), identify the following principles as components of judicial independence: impartiality, integrity, propriety, equality, and competence and diligence, and gives guidance on how judges should apply the principles in practice. A considerable number of African states have adopted the requirements formulated by the UN on judicial independence in their Constitutions. Section 165(2) of the Zimbabwean Constitution (Constitution of the Republic of Zimbabwe: May 22, 2013) for example enforces the preamble of the Bangalore Principles which lay emphasis on the importance that judges, individually and collectively, honour and respect the judicial office as a public trust and strive to enhance and maintain
confidence in the judicial system. The Uganda Code of Judicial Conduct (2005) reinforces the Bangalore Principles for they are more or less a replica of the Bangalore Principles. Principle 1 of the Uganda Code of Judicial Conduct requires that a judicial officer has to be independent in the execution of their judicial function, be impartial (Principle 2), exercise the highest level of integrity (Principle 3), avoid acts of impropriety (Principle 4), offer equal protection of the law (Principle 5), and above all be competent and diligent (Principle 6) (Uganda Code of Judicial Conduct). The South African Code of Judicial Conduct of 2012 refers to the Bangalore Principles in its Preamble with regard to the point that the judiciary should conform to internationally accepted ethical standards (Code of Judicial Conduct 2012).


19 The provisions on judicial independence in these African Constitutions have some common features. Almost all these provisions state that in the performance of their work judges should be free from interference. A number of Constitutions state that the judiciary shall only be subject to the Constitution and the law and shall not be subject to the control of any person or authority. Some Constitutions, such as the Constitution of Ghana, provide detail on matters such as judicial remuneration. A distinction is to be made between African countries belonging to the Commonwealth and former French and Portuguese colonies.

20 Formally, many domestic Constitutions and international instruments claim that the courts are or should be independent. The foundational documents of domestic courts typically state that the judges of the court should be ‘persons of proven integrity, impartiality and independence’ who fulfil the conditions required in their own countries for holding high judicial office or who are jurists of recognized competence in their own countries. Judges are also commonly required to take an → oath or solemn declaration of independence before taking up office.

G. Key Features of Judicial Independence in a Comparative Perspective

21 Almost all democracies have legislation and rules of practice aimed at safeguarding and promoting the independence of the judiciary. There is a large measure of agreement about the core features that are indispensable to judicial independence.

1. Judicial Selection and Appointment

22 According to the UN Basic Principles, there shall, in the → selection of judges, be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, or status. A requirement that a candidate for judicial office must be a national of the country concerned is, however, not discriminatory. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law (Principle 10). By taking the judicial
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oath of office, judges undertake to act impartially and independently and to be people of integrity and superior moral fibre.

23 Concerns often arise about the influence of the executive or general ‘political motivations’ in the appointment process of judges. The influence exerted by interest groups in judicial selection is particularly prevalent in the US. This was the case for the Supreme Court nomination of Judge Robert Heron Bork in 1987, where the interest groups influenced the outcome of the Senate’s vote (Myers III). However, the executive should not ‘pack’ a court with its own political sympathizers. In apartheid South Africa, for example, courts were packed with judges and state prosecutors who understood their brief to serve the interests of the state. The appointment and promotion of judges was done by the State-President-in-Council (the cabinet) and the process was not public (Gordon and Bruce 16). As a result judges were overwhelmingly ‘all-male, all-white, all middle-class and largely Afrikaans-speaking’ (Rickard). In the 25 years since South Africa’s democratic transition, however, significant transformation of the judiciary has taken place. Although there has been a significant increase in the number of female and black judges appointed to the South African courts, there is still much scope for improvement in terms of gender and race representation in the judiciary (Toxopeus).

24 The use of temporary judges is, for example, allowed in Scotland (section 35(3) Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, since repealed by the Courts Reform (Scotland) Act 2014, 1 January 2015). However, this practice is open to debate as judges are not sufficiently protected by the judicial guarantees securing judicial independence such as security of tenure that protect permanent judges. Acting judges are also more vulnerable and susceptible to the threat of removal (Tjombe 233, 234).

25 The establishment of judicial selection and appointment bodies can be described as an emerging trend. In countries such as South Africa, Zambia, Zimbabwe, and Kenya such bodies are called Judicial Service Commissions (‘JSC’). In South Africa and Zimbabwe the JCS is a body specially constituted by the respective Constitutions. The rationale for the creation of the JSC was to moderate the influence of the President and to lessen the role of partisan interests in the appointment of judges. It is argued that a judicial selection commission has a better chance of appointing meritorious candidates by providing for stronger scrutiny of judicial candidates (Corder 260). The functions of a JSC is to appoint judges but can also include the role of disciplining judges and advising the executive on the administration of justice. There are different approaches to the composition of such bodies. The Beijing Statement of Principles of the Independence of the Judiciary states: ‘Where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained’ (Beijing Statement, Art. 15). There are widely diverging views on what constitutes the correct composition of a judicial service commission. In the UK for example the Judicial Appointments Commission is made up of the President and Deputy President of the Court, and a member each from the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission (Constitutional Reform Act 2005, schedule 8 para. 1(1)). Whereas it is undesirable for the executive to dominate on judicial selection commissions, it can be argued that a selection commission consisting exclusively of judges is similarly undesirable and that a mixed composition results in a more objective bench. Restricting the composition of a selection commission to members of the judiciary could have the adverse effect of not being inclusive enough and of reinforcing the prejudices held in the judiciary. It could also mean that judges will be overly deferential to their judicial colleagues for fear of not being promoted, for example. A diverse selection committee is also more likely to appoint a more representative and diverse judiciary. In the UK, judicial
appointments are however subject to the approval of the Lord Chancellor. Appointments are, in principle, also subject to judicial review.

26 Many jurisdictions establish advisory bodies that are charged with recommending candidates for judicial positions, mostly by creating binding or non-binding lists of eligible persons. The position of Chief Justice of the Supreme or Constitutional Court is normally taken out of this advisory procedure. The body is supposed to be independent from the executive. The degree of independence of commissions such as JSCs varies greatly however. The extent to which they further independence in the appointment process depends largely on the composition of such a body, as is underlined by Joseph Colquitt. Such bodies should also be respected and not ignored or considered as merely recommendatory. To attain that goal ‘[t]he commission must have the confidence and support of the public which it serves’ (Colquitt 81). It can be gained in three ways: the commission should be representative of the population and commissioners be respected individuals; the commission should be independent; and finally the commission should be subjected to review, regulation and, when appropriate, sanctions (Colquitt).

27 In recent years, the mechanism of a JSC has developed in mostly African countries to deter the excessive influence of the executive on judicial independence. The role of the JSC in South Africa, for instance, is to ‘advise the national government on any matters relating to the Judiciary or administration of justice’ and for that purpose it interviews candidates for judicial posts and makes recommendations for appointment to the bench (section 178(5) Constitution of the Republic of South Africa). Judicial service commissions are currently in place in numerous African countries (Botswana; Eritrea; Eswatini; Gambia; Kenya; Lesotho; Malawi; Namibia; Nigeria; Somalia; South Africa; South Sudan; Sudan; Tanzania; Uganda; Zambia; Zimbabwe), but also exist in Fiji, Guyana, Jamaica, Maldives, Samoa, and Sri Lanka. Provisions on the JSCs’ compositions vary among African jurisdictions, but they all tend to be very detailed, leaving little room for discretion. Several seats tend to go to high-court judges by default; occasionally, other jurists and even non-jurists will be added to represent the public. The legislative plays little or no role in the choice of members of the JSCs. Article 103 Constitution of Botswana: 20 September 1966 (as Amended to 2005) (Bots), for example, states that:

1 There shall be a Judicial Service Commission for Botswana which shall consist of—

   a. the Chief Justice who shall be Chairman;

   b. the President of the Court of Appeal (not being the Chief Justice or the most Senior Justice of the Court of Appeal);

   c. the Attorney-General;

   d. the Chairman of the Public Service Commission;

   e. a member of the Law Society nominated by the Law Society; and

   f. a person of integrity and experience not being a legal practitioner appointed by the President.

...
4 The Judicial Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution.

28 Various Eastern European jurisdictions in their post-Cold War Constitutions established judicial councils that are jointly selected by the judiciary and the legislative. According to the Constitution of the Republic of Albania: 21 October 1998 (as Amended to 2016) (Alb), Article 147, the High Judicial Council shall

ensure the independence, accountability and appropriate functionality of the judicial power in the Republic of Albania. [It] shall be composed of eleven members, six of which are elected by the judges of all levels of the judicial power and five members are elected by the Assembly among jurists who are non-judges.

29 The Constitution of the People’s Republic of Bulgaria: 12 July 1991 (as Amended to 2015) (Bulg), Article 130, stipulates:

The Supreme Judicial Council shall consist of 25 members. Sitting on it ex officio shall be the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Prosecutor General ... Eligible for election to the Supreme Judicial Council besides its ex officio members shall be practising lawyers of high professional and moral integrity with at least 15 years of professional experience ... Eleven of the members of the Supreme Judicial Council shall be elected by the National Assembly by a majority of two-thirds of the National Representatives, and eleven shall be elected by the judicial authorities.

30 Similar provisions can be found in the Constitution of the Republic of Armenia, 5 July 1995 (as Amended to 2015) (Arm), Article 174; the Constitution of the Republic of Kosovo: 9 April 2008 (as Amended to 2016) (Kos), Article 108(6); the Constitution of Montenegro: 12 October 1992 (as Amended to 2013) (Montenegro), Article 127; the Constitution of the Republic of Serbia: 30 September 2006 (Serb), Article 153; the Constitution of the Republic of Slovenia: 23 December 1991 (as Amended to 2016) (Slovn), Article 131.

31 France’s Constitution of 1958 (with Amendments through 2008), Article 65, enshrines the establishment of a High Council of the Judiciary. The High Council, which makes recommendations for the appointment of judges, counts among its members ‘six qualified, prominent citizens who are not Members of Parliament, of the Judiciary or of the administration’, to be appointed by the President of the Republic, the President of the National Assembly, and the President of the Senate.

2. Confidentiality of Judicial Deliberations

32 It is widely accepted that secrecy of the judicial decision-making process protects judicial independence. This confidentiality encourages the uninhibited exchange of ideas among judges and those who assist judges. Although the privilege on judicial communications is not absolute and can for example yield to interests such as the need to obtain evidence in investigations of judicial misconduct, unnecessary infringements upon judges’ confidentiality is often seen as threatening judicial independence.
Concerning trial by jury, the law on this subject varies in different common law jurisdictions: ‘To a substantial extent that difference is explained by the First Amendment to the United States Constitution, which inhibits the enactment of some legislation of the kind which exists in England and most Australian jurisdictions’ (Gleeson 3). In New South Wales, Australia, the subject is dealt with by the Jury Act of 1977 (Sampford 12). Section 68B(1)(a) Jury Act stipulates that: ‘A juror must not, except with the consent of or at the request of the judge or coroner, wilfully disclose to any person during the trial or coronial inquest information about … the deliberations of the jury.’ However, the publication by the media of accounts of jury deliberations does not always constitute contempt of court. In some circumstances, as in England where the legislation is significantly more restrictive than the New South Wales legislation, disclosure can, nevertheless, be sanctioned when it is likely to affect the attitude of future jurors and the quality of their deliberations (Attorney-General v New Statesman and Nation Publishing Co Ltd (1981) (UK)).

3. Security of Tenure

Security of tenure means that judges should be appointed for life or until a specific retirement age or amount of years on the bench (→ terms of office of judges). Security of tenure provides job security, and allows appointed judges to act in accordance to what they believe is right under the law, because they do not have to fear that they will be dismissed if they make an unpopular decision or decisions contrary to the will of the executive or prevailing political powers. Judges should not have to win favour with the executive to seek re-election. This is another reason why the appointment of part-time or acting judges should be done with circumspection.

The US Constitution protects judicial independence in Article III which states that federal judges may hold their positions ‘during good Behaviour.’ US judges effectively have lifetime appointments as long as they satisfy the ethical and legal standards of their judicial office. Article III US Constitution has been the subject of controversy. According to James Lindgren: ‘Except for the state of Rhode Island, no other western jurisdiction has life tenure for high court justices’ (debate between James Lindgren and Thomas W Merrill ‘Pros and Cons of Potential Term Limits for Supreme Court Justices’ (25 March 2014)). Because such practice does not allow a high turnover rate it does not create more opportunities for gender and racial diversity. That is one of the reasons why more people argue in the sense of a shorter mandate (LaFrance), as it is the case in most European countries, even if lifetime mandates are still seen as a guarantee for the independence of the judiciary in the US. ‘Good behaviour’ clauses in combination with a limited term or maximum age are to be found in the Constitutions of Argentina, Canada, Chile, Colombia, Liberia, Maldives, Marshall Islands, Mauritius, Micronesia, Palau, Philippines, Sierra Leone, Sri Lanka, Swaziland, Tonga, and the collective documents making up the Constitution of the UK. Numerous Constitutions also regulate the case of removal of a judge in the case of physical or mental incapacity. A more restrictive provision is to be found in Articles 97 and 98 German Basic Law:

Art. 97

1 Judges shall be independent and subject only to the law.

2 Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts,
judges may be transferred to another court or removed from office, provided they retain their full salary.

Art. 98

1 The legal status of federal judges shall be regulated by a special federal law.

2 If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his [or her] official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him [or her] dismissed.

36 There is also a debate concerning the difference between renewable terms versus non-renewable ones. In South Africa, for example, section 176(1) of the Constitution provides that a constitutional court judge holds office for a nonrenewable term of twelve years or until they reach the age of 70 years. In France, constitutional court members serve for nine-year non-renewable terms (Art. 56 Constitution of the French Republic: 4 October 1958 (as Amended to 23 July 2008) (Fr)). Lengthy non-renewable terms are, indeed, the standard model for European countries’ constitutional courts (Ferejohn and Pasquino). Non-renewable terms can promote judicial independence in two ways. First, judges do not face the electorate to retain their jobs and, secondly, they are less pressured by political attacks (Epstein 567–68). However, renewable terms can be seen as maximizing accountability (Epstein, Knight, and Shvetsova 12).

37 Finally, whereas most international and regional courts such as the European Court of Justice (→ European Union, Court of Justice and General Court) forbid its judges from holding any other occupation, whether gainful or not, for practical reasons some judges of the ad hoc courts (such as the East African Court of Justice) are employed part-time and can therefore also hold judicial office in their home states. Judges may, however, not hold any political or administrative office in the service of a state. The International Law Commission has stated that: ‘Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence’ (Art. 10(2) Draft Statute for an International Criminal Court (1994)).

4. Remuneration and Financial Independence

38 Financial independence forms an important component of judicial independence (→ financing of courts). One of the reasons judges are generally fairly generously compensated is that they should not be tempted to take bribes. If a judge has a financial interest in a case before them, they should reveal such interest and promptly recuse themselves from hearing such a case (Swart 2012) In Germany, the Basic Law guarantees adequate remuneration for judges that is fixed by law (BVerfGE 12, 81, at 88). It is important that the state allocates sufficient financial and other resources to the judiciary to prevent temptations that arise as a result of financial insecurity. Furthermore, a judge may not be pressurized by a reduction in their salary. Numerous Constitutions thus guarantee that compensation shall not be diminished during a judge’s continuance in office, compare the Constitution of the Argentine Nation: 23 August 1994, Article 110 (Arg); Constitution of Mexico: 5 February 1917 (as Amended to 2015) (Mex), Article 116; Constitution of the Republic of South Africa: 11 October 1996 (as Amended to 2012) (S Afr), Article 176(3);
The issue of budgetary autonomy is of great importance. The judiciary in Latin American countries had been seen as corrupted for a long time before judicial reforms happened (Nagle 347). The Constitution of Brazil provides guaranteed amounts of the budget for the judiciary, in addition to providing fixed salaries for judges (Constitution of the Federative Republic of Brazil: 5 October 1988 (as Amended to 2014) (Braz)). This practice allows the judiciary not to be restricted ‘by the annual vicissitudes of the current approach to governmental spending’ (Tacha 649). On the contrary, the US Congress has a large control on the judiciary’s budget that keeps judges worrying about funds (Ferejohn 382). The power of Congress to inflict de facto pay cuts on judges may arguably threaten the independence of the judiciary.

In the context of international courts it is important that courts be sufficiently budgeted for the payment of decent judicial salaries to make judges less vulnerable to interference by financial sponsors. Such sponsors might threaten to withdraw funding if certain outcomes are not achieved (Shany 101).

5. Avoidance of (the Appearance of) Bias

In the context of judicial independence, the perception of bias is almost as problematic as bias itself. Judges should be free from even the faintest suspicion of bias because such perceptions could erode public confidence in the judiciary, which is considered essential in a democracy based on the rule of law. An independent judge would be impartial and unbiased (impartiality of the judiciary). The rule against bias, a rule of natural justice, is captured in the phrase nemo iudex in re sua and means that a person cannot be a judge in their own case. The purpose of the rule is to prevent either the appearance or possibility of judicial bias. The rule applies not only to cases in which a judge is a party to the proceedings, but also to those in which a judge has a personal or pecuniary interest in the outcome (Swart (2003) 185). In the Pinochet case, Lord Hope stated that ‘judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as a defendant or a prosecutor’ (R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 2) (1999) (UK) 289I). The nemo iudex principle also finds application in a case where a judge, although they may not have an interest in a case, acts in a way that raises suspicion that they might not be impartial (Webb v The Queen (1994) (Austl)). One way to avoid (appearance of) bias is judicial self-recusal. This refers to the act of voluntary abstaining from participation in an official action such as a legal proceeding due to a conflict of interest of the judge. Examples of circumstances where a judge should recuse themselves include any case in which a judge might not be impartial or experience conflict of interest such as where a party in the case might be a company in whom the judge has invested or where a party may be a friend or family member. Whereas the exercise of judicial discretion resulting in self-recusal is preferable (section 455 of Title 28 US Code), judges might also be asked to recuse themselves by one of the advocates in the case (section 144 of Title 28 US Code).

6. Discipline and Removal of Judges

In jurisdictions such as South Africa where judges are elected by a judicial service commission, such a commission is often tasked with the disciplining of judges. In the US this role is fulfilled by the Judicial Discipline Commission.
It is a constitutional principle in France that judges may not be removed without their consent (Art. 64 Constitution of the French Republic).

With some exceptions, German judges may only be dismissed on the basis of a court decision. There is a specific chamber at the Federal Court of Justice for matters of supervision over federal judges (‘Dienstgericht’) (section 61, DRiG (The German Judiciary Act) (Ger)).

The UN Basic Principles state that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct (Principles 17–19). The judge shall for example have the right to a fair hearing and appropriate procedures.

7. Freedom from External Pressure

In a country where judicial independence prevails, judges are to be free in their decision-making and bound solely by the law. Only relevant facts and law should form the basis of a judge’s decision. Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice. It is a key tenet of judicial independence that judges should be free from external and improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest, or other judges, in particular more senior judges. In some jurisdictions the prohibition against outside influence is extensive. German law prohibits even indirect means of influence, such as recommendations, solicitations, and suggestions as well as psychological influence (Seibert-Fohr; BGHZ 57, 344, at 348). Judges in Germany are further protected from interference from the judiciary itself: a chief justice may not change the judgement of a judge sitting singly (Seibert-Fohr).

8. Personal Immunity

Judges will commonly enjoy personal immunity from civil suits for monetary damages, or improper acts or omissions in the exercise of their judicial functions. This rule was developed in the common law tradition according to which ‘the king can do no wrong.’ Therefore, as a general rule a judge enjoys immunity from civil damages if they have jurisdiction over the subject matter in issue. This means that a judge has immunity for acts relating to cases before the court (Barr v Matteo (1959)) but not for acts relating to cases beyond the court’s reach. A criminal court judge, for example, would not have immunity if they tried to influence proceedings in a juvenile court.

9. Diversity and Representation

In many domestic and international systems measures are slowly being introduced to correct the gender imbalance as well as the representation of minority groups.

In the South African context, the transformation in the judiciary and judicial independence are closely linked. It is accepted that the composition of the bench impacts on various aspects of judicial activity and influences public opinion about the independence and legitimacy of the courts (Gordon and Bruce 20).

On the international plane, the Rome Statute of the International Criminal Court, for example, introduced a novel system of mandatory geographical and gender representation.
10. Judges’ Authority to Determine their Competence

51 The UN Basic Principles note that the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law (Principle 3 UN Basic Principles). This may serve as a safeguard against ‘intentionally stripping courts of their jurisdiction and diverting cases to other tribunals with a view to having those cases disposed of by tribunals that do not enjoy the same conditions of independence as the original courts’ (Shetreet (2009) 289).

52 It is vital to judicial independence that cases be assigned to judges in a neutral manner. This refers to what is called ‘internal judicial independence’. Cases should ideally be assigned by senior judges or senior officials of the court and assignment should solely be done on clear and convincing evidence of the ability to perform the task. In some jurisdictions the assignment is done according to an electronic system which is designed to prevent political or other interference. It is generally considered to be in the interest of judicial independence that cases should be assigned in a ‘random’ way. That is what we can call the right to a lawful or natural judge, who is identified thanks to objective criteria such as the chronological order or categories of cases (Neppi Modona). According to Neppi Modona, the principle of the natural judge is ‘present in numerous Constitutions, such as Austria, Germany, Greece, Portugal, Luxembourg, Estonia, Spain, Slovakia, Italy, mostly in a negative form such as “Nobody can be removed from the natural judge established by law”’ (Neppi Modona 5). The right to natural judge further means that the judges who decides a specific case must be identified on the basis of objective criteria predetermined by law and not on the basis of the discretionary choices of any individual (Anti-Corruption Network 15).

53 In New Zealand, at the Wellington High Court, allocation of cases is made by the Court’s registry after a timetable as to the availability of each judge is drawn up by the executive judge of the Court in consultation with the other judges. Thus, the allocation is based purely on availability (Butler 95–6).

H. Leading Jurisprudence

54 Incal v Turkey (Judgment of 9 June 1998) is a seminal case on judicial independence. In Incal, the European Court of Human Rights (ECHR) formulated certain criteria to be followed in assessing the independence and impartiality of judges within the meaning of section 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)—the right to be heard before an independent and impartial tribunal. The criteria identified in Incal include: the manner of appointment of judges; their term of office; the existence of safeguards against outside pressure; and whether they present an appearance of independence. The criteria formulated in Incal has been cited by many international courts. The case has also been cited by the Inter-American Court of Human Rights (IACtHR).

55 In the Canadian case Valente v The Queen (1985) (Can), the Supreme Court of Canada (Cour suprême du Canada) observed that the requirement that judges must be reasonably perceived as being independent is important because it is a goal of judicial independence to ensure public confidence in the justice system. The court stated that ‘Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation’ (Valente v The Queen paras 20, 22).
The question of judicial independence was highlighted in the ground-breaking *Pinochet* case. This issue revolved around the claim that one of the Law Lords, Lord Hoffman, had a conflict of interest and should have recused himself from the case. One of the appeal judges in the case, Lord Hope, stated that in light of Lord Hoffman’s links with Amnesty International—he was chairperson and director of Amnesty International Charity Limited—he could not be seen to be impartial. Amnesty’s interest in the case was not a financial one but lay in refuting Pinochet’s claim of immunity and securing his eventual trial for crimes against humanity. Since the principle against bias is not limited to financial interest this interest was sufficient to require recusal. The House of Lords decided that the case fell under the category of cases where a judge is to be automatically disqualified if they have an interest in the case (Jones 395).

The – African Commission on Human and Peoples’ Rights (ACommHPR) in the case of *Media Rights v Nigeria* (2000) paragraph 60 referred to Principle 10 of the UN Basic Principles. The case involved the banning of a number of publications in Nigeria after a new law was introduced requiring the registration of newspapers and magazines with retroactive penalties for non-registration. The new law further ousted the jurisdiction of the courts which was said to threaten the independence of the judiciary.

The Supreme Court of India recently passed down a decision that is seen as safeguarding the independence of the judiciary. After winning a single-party majority in May 2014 for the first time since 1984, the Bharatiya Janata Party government led by Prime Minister Narendra Modi sought to replace the existing mode of appointment, promotion, and transfer of judges in courts of constitutional jurisdiction by the collegiums of judges. The party sought to introduce a National Judicial Appointments Commission (‘NJAC’) comprising the Chief Justice of India and two of the senior-most judges of the Supreme Court, as well as the Union Minister of Law and Justice and two ‘eminent persons’ appointed by the Union executive. However, in a public interest litigation—*Fourth Judges’ Case, Supreme Court Advocates-on-Record Association v India*, Writ Petition (Civil) No 13 of 2015, 2016 (5) SCC 1, 2015 (11) SCALE 1, 16th October 2015, India; Supreme Court (2015) (India)—the Supreme Court on 16 October 2015 declared the acts establishing the NJAC unconstitutional since they were violating the principle of judicial autonomy, a part of ‘the basic structure of the Constitution’, which is unamendable under case law (*Minerva Mills Case (India)*) (1980); *Kesavananda Bharati Sripadagalvaru v State of Kerala* (1973) (India)).

I. Oversight

This approach is, however, not currently the prevailing view on the relationship between judicial independence and accountability. Many believe that judges, like all public officials, should be subject to supervision (Burbank 912). If one takes the view that the judiciary and the courts fulfil the role of a public authority it is argued that it is not appropriate for any public authority to review itself, without supervision by some external body. Proponents of the principle of accountability of governmental bodies and employees argue that the judiciary, as holders of the public trust, should be subject to the supervision of their work to ensure they are functioning in accordance with the law. For example, in Israel, an ad hoc tribunal for discipline (the Court of Discipline) is in charge to supervise the work of judges. The disciplinary proceedings against a judge can be initiated only by the Minister of Justice. The Court of Discipline is composed of judges of the Supreme Court but also of non-judges such as law professors or lawyers. The Court of Discipline may recommend to the President of the state the removal of a judge if their behaviour justifies it (Shetreet (1984) 998).
Oversight mechanisms should be carefully designed and managed to counter the possibility or impression of executive interference. Whereas there is no unique model for assuring independence of the judiciary, international law encourages countries to create an authority for the supervision of the judiciary that is not dominated by the government. International instruments recommend a mixed composition of judges and non-judges for the body. The European Commission for Democracy through Law (→ Venice Commission) recommends that a substantial element or a majority of the members of the judicial council should be elected by the judiciary itself. The UN Human Rights Committee emphasized that the exercise of power by a justice ministry over judicial matters, including its powers of inspection of the courts, can constitute a threat to the independence of the judiciary.

In the US, federal judiciary oversight mechanisms deter and prevent fraud, waste, and abuse. Oversight mechanisms also promote compliance with ethical, statutory, and regulatory standards (Strategic Plan for the Federal Judiciary, September 2015). In the context of Eastern Europe and the former Soviet republics, accountability has at times been seen as a threat to independence. In the interest of professionalism however judges should be held accountable, for instance, for abusive conduct during disciplinary proceedings. Oversight mechanisms also take the form of performance evaluations. In some of the former Soviet republics, the number of reversed judgments plays a role for evaluating judges’ professional performance, and consequently for their career and sometimes even their tenure. This practice could have a negative effect on judicial independence since it opens the door to executive interference. A balance has to be struck between accountability and substantive independence (OSCE Meeting Report). One reason why some states object to the idea of an oversight mechanism over the judiciary is that bodies deciding on cases of judicial discipline must not be controlled by the executive branch. Any kind of control by the executive branch over judicial councils or bodies entrusted with discipline is undesirable (OSCE Meeting Report). In Kenya judicial oversight and vetting was resisted by certain judges who argued that judicial accountability mechanisms violate the principle of security of tenure (International Commission of Jurists 121) It should also be asked whether there is any oversight over those who exercise oversight over the judiciary. In systems with constitutional supremacy, such as South Africa, the final oversight may rest with a Constitutional Court.

Conclusion

The strength of rule of law worldwide is largely measured by the extent of judicial independence. Judicial independence is a core element of the rule of law. Instruments such as the UN Basic Principles and the Bangalore Principles of Judicial Conduct have been instructive in defining the core content and components of judicial independence.

Judges need to be independent from the executive. The relationship between the judiciary and the executive is particularly complex and is context dependent. There is, however, broad agreement that the relationship most conducive to judicial independence would be a relationship in which the executive has a minimal role in the procedural regulation of the judicial profession and in the substantive decision-making of judges. The use of the mechanism of a JSC is one way to curb executive influence in the appointment of judges. Whereas a measure of oversight over the judiciary is desirable, oversight mechanisms should be carefully designed and managed to counter the possibility or impression of executive interference.
It is further of vital importance that judges should not merely be independent but should be perceived by the public to be independent. Any perception of bias weakens public confidence in the judiciary.

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