



## THE JUDICIARY

Throughout the world, experience has shown that without the rule of law, efforts to combat corruption are largely futile. If judges are not impartial, professional in their work and independent, the criminal law cannot be relied upon as a major weapon in the struggle to contain corruption. If they are actually corrupt, the situation is even worse. Judicial independence is asserted internationally in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.<sup>1</sup>

The United Nations Basic Principles on the Independence of the Judiciary was adopted at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985. The chapter on the independence of the judiciary reads<sup>2</sup>:

- 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
- 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.*
- 3. 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.*
- 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*

*5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*

*6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.*

*7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.*

Most recently, in a landmark development, chief justices around the world have drafted and adopted the Bangalore Principles on Judicial Integrity.<sup>3</sup> These principles are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. Endorsed by the United Nations in 2003, they are also intended to assist members of the executive, the legislature, lawyers and the public in general to better understand and support the judiciary. The principles assert that judges should be accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

In the European context, there are a number of major instruments; among them, The Judges' Charter in Europe<sup>4</sup>, a Recommendation on the Independence, Efficiency and Role of Judges<sup>5</sup> made by the Council of Europe, and the European Charter on the Statute for Judges, adopted by participants at a multilateral meeting in 1998.<sup>6</sup> Judicial integrity is best built and sustained by the judiciary itself as the "third arm" of the state (together with the executive and the legislature). This can be achieved through clear, well-publicized and enforced codes of conduct and through judges providing examples of high personal standards. Leadership has to be asserted from the top, and instances of judicial malpractice disci-

plined. Courts should be inspected and judgments examined for their consistency. Court staff should be properly supervised, and effective complaint mechanisms established for the public. Adequate personal security, facilities, salaries and status are also important. Subjecting the lower judiciary, in particular, to examinations has proved a success in weeding out incompetent judges in some countries in the former Soviet Union and is now being used elsewhere in the world.

### INDEPENDENCE AND JUDICIAL COUNCILS

Like any public organization, the judiciary must be well-managed if it is to deliver its services swiftly and efficiently. But the product of the judiciary is the just resolution of disputes, which demands that it be independent and operate without pressure from other branches of government.

The mechanism for the appointment of judges is often a matter of controversy. Together with guarantees of judicial independence, it is frequently provided for in a country's constitution.

Many believe that politicians are only interested in appointing judges who will do their bidding. Politicians can feel able to challenge the legitimacy of judges sitting in judgment on elected officials when the judges themselves have not been elected. Ideally, there should be a process that involves consultation with other senior judges and with practicing judges.

To prevent judicial appointments and management from becoming a means for compromising judicial independence, many countries have created judicial councils. These are bodies separate from other government branches and are entrusted with selecting and promoting judges, and otherwise managing the court system. The senior judiciary is frequently appointed by a judicial council, which can also be responsible for discipline. Such councils are usually provided for in a country's constitution, but can generally also be created by legislation.

Although these councils differ from country to country, their success depends on how well policymakers address questions related to their composition,

the selection of their members, their responsibilities, and their accountability. Spain's experience with its Consejo General del Poder Judicial shows how one nation has dealt with these issues and reveals the factors that must be taken into account when addressing them.<sup>7</sup>

### SHOULD JUDGES BE ELECTED?

The election of judges by the people is superficially attractive.<sup>8</sup> It was introduced in the United States during the 19th century as a way of trying to combat corruption in the judiciary by removing the power of appointment from corrupt politicians and placing it in the hands of the electors.

As one scholar has observed: "Concerns about the penetration of partisanship into the appointive judicial selection process reinforced worries about administrative efficiency and the status of the bench and bar. By the mid-1840s the second American party system thrived as part of a robust political culture in which the spoils of public office belonged to the victors. Judgeships were important items of patronage, but delegates from across the ideological spectrum criticized the party-directed distribution of these offices whether by the executive or the legislative branch. Radicals adopted a strong antiparty position. They believed popular election would prevent party leaders from dictating the composition of the bench."<sup>9</sup>

For a long period, this system seemed to work satisfactorily. However, in recent times, judicial elections have become a battlefield for special interest groups, each determined to get judges elected who will favor their particular position. This risks jeopardizing qualified candidates who will administer the law fearlessly, fairly and without favor. These special interest groups often act without the consent of the candidate they are supporting. This development has given rise to projects designed to promote reforms, which would reduce the excesses of the present.

There is a paradox in the idea of the public electing judges. Voters will need information that will allow them to assess how each candidate is likely to perform in office. Candidates for election to the

executive branch of government and legislature typically make promises as to what they will do in office, but in the case of judges, voters want courts that are fair and impartial. Judges cannot be unbiased if they have previously made commitments about how they would act in specific types of case if elected to the bench. The United States has rules to try to resolve the paradox; meaningful information is needed, but candidates should not impair their impartiality as judges (e.g. by expressing political views which might suggest that they had prejudged issues before they heard legal arguments). As judicial candidates and third parties now increasingly turn to “vicious and often misleading rhetoric”<sup>10</sup> to make their points, there needs to be a thoughtful re-examination of the present rules, particularly as the issue of judicial candidates’ speech is now before the US Supreme Court.

Discussions among non-American, senior common law judges have come down firmly against the practice of electing judges.

### DISCIPLINING JUDGES

Constitutional guarantees exist against arbitrary removals of judges. These guarantees require that only a special process usually involving the legislature can result in the removal of a member of the higher judiciary. And even then, only after due process has been provided. Similarly, salaries and benefits for judges cannot be reduced to prevent a government from pressurizing judges through threats to cut their incomes, etc. The judiciary is further protected by its very actions – it sits in public, it gives reasons for its decisions and, for the most part, its decisions are subject to appeal to higher courts. Some countries are also establishing “court user committees” where representatives of user groups meet with local judges to find appropriate remedies for any problems experienced. This establishes de facto accountability at the grass roots level.

The most important element is probably security of tenure. If a judge, once appointed, can only be removed for grave and serious misconduct, then the judge is freed from the need to court popularity – whether among the public or politicians – in order to be re-appointed. Experience in the United States

has shown that even judges carefully chosen by conservative administrations can become progressive reformers once on the bench.

Judicial independence is for the benefit of the institution, not the individual judge. But judges’ independence does not place them beyond the reach of accountability.

However, judicial independence is best served by other judges assuming responsibility for the accountability of an individual judge; at least up to the point where impeachment by the legislature may come into play. Individual judges must be both appointed and held directly accountable in ways that do not compromise the institution’s independence. Disciplinary tribunals should have a majority from the judiciary and can be rendered more legitimate by the inclusion of non-lawyers, but never politicians.

The chief justices who drafted the Bangalore Principles (above) believed that the senior judiciary should accept the task of building and sustaining judicial integrity for itself. The most potent tool would seem to be an appropriate code of conduct. This should be developed by the judges themselves, who should provide both for its enforcement and for advice to be given to individual judges when they are in doubt as to whether a particular provision in the code applies to a particular situation.

Judicial codes of conduct have been used to reverse such unacceptable practices as when the sons and daughters of judges appear as lawyers to argue cases before their parents.<sup>11</sup> In a country where there is considerable trust in the judiciary, such an appearance might not cause any concern, but in a country where there is widespread suspicion that there is corruption in the judiciary, such a practice takes on an altogether different appearance.

### WHAT JUDGES CAN DO TO BUILD INTEGRITY AND PUBLIC TRUST

A meeting of the Nigeria’s Federal Chief Justice and State Chief Justices recently addressed the challenges they face. As leaders of judicial administrations, they have to ensure that standards of

performance are raised to a level where the public has total confidence in the judiciary as an institution and in individual judges in particular.<sup>12</sup>

In the course of their deliberations they identified four broad headings under which to address their tasks:

- *Improving access to justice*
- *Improving the quality of justice*
- *Raising the level of public confidence in the judicial process*
- *Improving efficiency and effectiveness in responding to public complaints about the judicial process*

Having established these headings, they then identified the ways in which they, themselves, would wish to be judged – or “measured” as a technician would say.

This involved intensive brainstorming about what the indicators should be that they would like to see applied to measure the impact of their work. They bore in mind that these had to be matters over which the judges themselves had a measure of control, and that they had to be actions which could impact the judicial process favorably. on.

The following is the program that the Nigerian chief judges designed for themselves:

### **Access to justice**

7. *Code of conduct reviewed and, where necessary revised, in ways that will impact on the indicators agreed at the Workshop. This includes comparing it with other more recent Codes, including the Bangalore Code. It would also include an amendment to give guidance to Judges about the propriety of certain forms of conduct in their relations with the executive (e.g. attending airports to farewell or welcome Governors). Ensure that anonymous complaints are received and investigated appropriately.*
8. *Consider how the Judicial Code of Conduct can be made more widely available to the public.*

9. *Consider how best Chief Judges can become involved in enhancing the public's understandings of basic rights and freedoms, particularly through the media.*
10. *Court fees to be reviewed to ensure that they are both appropriate and affordable.*
11. *Review the adequacy of waiting rooms etc. for witnesses etc. and where these are lacking establish whether there are any unused rooms etc. that might be used for this purpose.*
12. *Review the number of itinerant Judges with the capacity to adjudge cases away from the court centre.*
13. *Review arrangements in their courts to ensure that they offer basic information to the public on bail-related matters.*
14. *Press for empowerment of the court to impose suspended sentences and updated fine levels.*

### **Quality of Justice**

15. *Ensure high levels of cooperation between the various agencies responsible for court matters (police; prosecutors; prisons).*
16. *Criminal Justice and other court user committees to be reviewed for effectiveness and established where not present, including participation by relevant non-governmental organisations.*
17. *Old outstanding cases to be given priority and regular decongestion exercises undertaken.*
18. *Adjournment requests to be dealt with as more serious matters and granted less frequently.*
19. *Review of procedural rules to be undertaken to eliminate provisions with potential for abuse.*
20. *Courts at all levels to commence sittings on time. Increased consultations between judiciary and the bar to eliminate delay and increase efficiency.*
21. *Review and if necessary increase the number of Judges practising case management.*

22. *Ensure regular prison visits undertaken together with human rights NGOs and other stakeholders.*
23. *Clarify jurisdiction of lower courts to grant bail (e.g. in capital cases).*
24. *Review and ensure the adequacy of the number of court inspections.*
25. *Review and ensure the adequacy of the number of files called up under powers of review.*
26. *Examine ways in which the availability of accurate criminal records can be made available at the time of sentencing.*
27. *Develop Sentencing Guidelines (based on the United States' model).*
28. *Monitor cases where ex parte injunctions are granted, where judgments are delivered in chambers, and where proceedings are conducted improperly in the absence of the parties to check against abuse.*
29. *Ensure that vacation Judges only hear urgent cases by reviewing the lists and files.*

### Public Confidence in the Courts

30. *Introduce random inspections of courts by the Prevention of Corruption Commission.*
31. *Conduct periodic independent surveys to assess level of confidence among lawyers, judges, litigants, court administrators, police, general public, prisoners and court users.*
32. *Strengthen the policies and initiatives to improve the contact between the judiciary and the executive.*
33. *Increase the involvement of civil society in Court User Committees.*

### Improving our efficiency and effectiveness in responding to public complaints about the judicial process

34. *Systematic registration of complaints at the federal, state and court level.*
35. *Increase public awareness regarding public complaints mechanisms.*
36. *Strengthening the efficiency and effectiveness of the public complaints.<sup>13</sup>*

The Nigerian judges have demonstrated that there are areas in which they are free to impact positively on the integrity of the judicial process without having to wait for laws to be changed.

### LEGISLATING FOR INTEGRITY IN LITHUANIA

Lithuania's Law on Courts provides that a person may only be designated as a judge if he or she has an impeccable reputation. It provides that a person cannot be considered as having an "impeccable reputation" if:

- *he or she has been convicted of an intentional crime, notwithstanding the expiration of the conviction*
- *he or she was convicted of a negligent crime and the conviction has not expired*
- *he or she was dismissed from office on the basis of the decision of the Court of Honour of Judges*
- *his or her conduct or activities are not in line with rules of judges' professional ethics.*

In order to guarantee the independence of the judges, the Law (a) prohibits any interference by government authorities and institutions, members of the Seimas and other officers, political parties and public organizations or individuals with the work of judges; and (b) provides for judges which are non-political. No judge may hold any other elected or appointed post, or be employed in a business, or any other private organization or enterprise. He or she may not receive any salary other than that of a judge, and compensation for any educational or research activities he or she may undertake.<sup>14</sup>

## COURT STAFF

Surveys around the world suggest that malpractices among court staff are prevalent when court records management systems are inadequate. Lawyers and their clients bribe for files to be lost, for cases to be slowed down (or accelerated), for judgments not to be enforced, and for judges to be changed to those of their choosing. Little of this can happen without the active participation of court staff. Surveys of court users' experiences have been carried out in a number of countries in order to ascertain the extent of the problem in order to craft necessary reforms.

In the Indian state of Karnataka, it was found that court staff were refusing litigants access to their files to discover routine information such as dates for hearings. To overcome this problem, a website was established and all routine information posted on it. The very existence of the website – as a competitive source of information – was reported as having forced court staff to drop these demands. The website does not provide access to their files as such, but to information on when and where cases will be tried.

## COURT USER COMMITTEES

A growing number of countries (including Nigeria) are constituting “court user committees” which bring together various court user groups to discuss, with judges, how a judicial system is functioning, to promote cooperation and to identify both problems and solutions. This added accountability at the local level can be a powerful inducement for all those involved in the justice system to conduct themselves with integrity.

## THE LEGAL PROFESSION

In many countries, lawyers are a prime source of corruption. They stand accused of bribing court officials, bribing judges and defrauding clients with false claims of having paid bribes. In such countries, the way in which the legal profession is disciplined becomes central to the integrity of the judicial process. However, this is another area into which the government intrudes at the risk of making matters even worse. The temptation to “discipline” a lawyer

whose successes in court have upset a government can be overwhelming. Yet, if the public is to be served, and the rule of law is to prevail, citizens must have an independent legal profession available to them.

The United Nations Basic Principles on the Role of Lawyers asserts that professional associations of lawyers have a vital role to play in upholding professional standards and ethics.<sup>15</sup> This should be achieved by protecting their members from persecution and improper restrictions and infringements, by providing legal services to all in need of them, and by cooperating with governmental and other institutions to further the ends of justice and defend the public interest.

The principles require that governments:

*shall ensure that lawyers:*

*(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference*

*(b) are able to travel and to consult with their clients freely both within their own country and abroad*

*(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics*

Although recognizing the central role played by the legal profession in upholding the rule of law and the fairness of legal proceedings, the corruption law reformer will want to ensure that the legal profession is properly regulated and disciplined. This will help prevent lawyers themselves from becoming actively involved in corrupt practices, whether on their own behalf or that of their clients.

While it is desirable that a legal profession should police itself, through the profession's own disciplinary body, it is also increasingly recognized that the participation of a minority of outsiders in the deliberations can make the decisions more transparent and more acceptable to the public.

## ENDNOTES

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- 2 Agreed at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985 (<http://www1.umn.edu/humanrts/instreet/i5bpj.htm>)
- 3 Bangalore Principles on Judicial Independence: [www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf); the document was adopted by the General Assembly of the UN Human Rights Commission on the recommendation of the Special Rapporteur on the Independence of the Judiciary in May 2003.
- 4 On March 20 1993, European Association of Judges Recommendation no. R (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1993, 518th Meeting of the Ministers Deputies, Council of Europe <http://cm.coe.int/ta/rec/1994/94r12.htm>
- 5 Recommendation No. R (94) 12 was adopted by the Committee of Ministers of the Council of Europe on October 13, 1994 ([http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Legal\\_professionals/Judges/Instruments\\_and\\_documents/Rec\\_94\\_12E%20+%20explanatory%20memorandum.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Legal_professionals/Judges/Instruments_and_documents/Rec_94_12E%20+%20explanatory%20memorandum.pdf))
- 6 Meeting on the statute for judges in Europe, organized by the Council of Europe, 8-10 July 1998, ([http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_cooperation/Legal\\_professionals/Judges/Instruments\\_and\\_documents/charte%20eng.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Legal_professionals/Judges/Instruments_and_documents/charte%20eng.pdf))
- 7 See Guerra, Luis Lopez: Governing the justice system: Spain's judicial council, World Bank PREM Note 54(: <http://www1.worldbank.org/prem/premnotes.cfm?offset=21>)
- 8 See Mark Kozlowski and Praveen Krishnan, Freeing Candidate Speech in Judicial Elections: Or, How Safe are Loose Cannons? Brennan Center for Justice Judicial Independence Series (<http://www.brennancenter.org/resources/jiseries/jiseries2.pdf>); Mark Kozlowski, Regulating Interest Group Activity in Judicial Elections, Brennan Center for Justice Judicial Independence Series (<http://www.brennancenter.org/resources/jiseries/jiseries1.pdf>); Deborah Goldberg, Craig Holman Samantha Sanchez, The New Politics of Judicial Elections: Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns ("Justice At Stake Campaign", Brennan Center for Justice, NYU School of Law) p. 28)
- 9 Kermit Hall in *The Judiciary on Trial: Constitutional Reform and the Rise of an Elected Judiciary 1846 – 1860*, *The Historian* 46 (1983): 337-354 (<http://www.pbs.org/wgbh/pages/frontline/shows/justice/howdid/kermit.html>)
- 10 Mark Kozlowski and Praveen Krishna, Freeing Candidate Speech in Judicial Elections: Or, How Safe Are Loose Cannons? (Brennan Center for Justice at New York University Law School), [www.brennancenter.org/resources/ji/ji2.pdf](http://www.brennancenter.org/resources/ji/ji2.pdf)
- 11 Michael Kirby, Tackling Corruption Globally ([http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_stjames.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames.htm)); Canadian Judicial Council, Ethical Principles for Judges (1998); The publication of Ethical Principles for Judges is the latest in a series of steps to assist judges in carrying out these onerous responsibilities. It represents a concise yet comprehensive set of principles addressing the many difficult ethical issues that confront judges as they work and live in their communities. It also provides a sound basis to promote a more complete understanding of the role of the judge in society and of the ethical dilemmas they so often encounter. ([www.cjc-ccm.gc.ca/english/publications/ethic\\_e.pdf](http://www.cjc-ccm.gc.ca/english/publications/ethic_e.pdf)); Judicial Ethics in South Africa – Issued by the Chief Justice, the President of the Constitutional Court and the Judges President of the different High Courts and the Labour Appeal Court, and the President of the Land Claims Court, March 2000: The preamble to the South African Code of Ethics for Judges includes the following: "To fulfil that constitutional role the judiciary needs public acceptance of its moral authority and integrity, the real source of its power. Accordingly, the Constitution commands all organs of state to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of the judiciary. But it is even more important that judges at all times seek to maintain, protect and enhance the status of the judiciary. To that end they should be sensitive to the ethical rules which govern their activities and behaviour both on and off the bench..." (<http://www.sundaytimes.co.za/2000/04/16/politics/pol16.htm>)
- 12 Strengthening Judicial Integrity and Capacity in Nigeria: Extract Report of the First Federal Integrity Meeting for Nigerian Chief Judges, Abuja. 26-27 October 2001
- 13 See "Strengthening Judicial Integrity and capacity in Nigeria: Report of the First Federal Integrity Meeting for Nigerian Chief Judges, Abuja, Nigeria, 26, 27 October 2001".
- 14 Anti-Corruption Network for Transition Economies: [http://www.anticorruptionnet.org/acncgi/user\\_side/projects.cgi?lang=en&site\\_type=graphics&come\\_from=projects&search=1&country\\_id=14](http://www.anticorruptionnet.org/acncgi/user_side/projects.cgi?lang=en&site_type=graphics&come_from=projects&search=1&country_id=14)
- 15 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990 adopted by the UN Congress in Havana (<http://www1.umn.edu/humanrts/instreet/i3bprl.htm>)