

THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY

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by Daniel C. Préfontaine QC and Joanne Lee¹

The International Centre for Criminal Law Reform and Criminal Justice Policy

Introduction

In this Anniversary year of the *Universal Declaration of Human Rights*, it is particularly appropriate to survey the legacy of those who drafted the basic principles enunciated in that document. These principles have guided many countries making the transition to democratic systems of government during the last fifty years. This anniversary gives us an opportunity both to celebrate the progress that has been made, and to recognize how much more needs to be done.

This paper will focus on the rule of law principles underlying the right to a fair trial, especially the role of an independent judiciary. Following a consideration of the major international instruments in this area will be a brief examination of some of the ways that these international standards have been implemented in a selection of jurisdictions, including those of international criminal tribunals. Some of the current threats to judicial independence will be highlighted, including attacks on the judiciary by the media and the legislature even in well-established democracies.

There is increasing acknowledgement that an independent judiciary is the key to upholding the rule of law in a free society. This independence may take a variety of forms across different jurisdictions and systems of law. But the same principle always applies, namely the protection of human rights is dependent on the guarantee that judges will be free and will reasonably be perceived to be free to make impartial decisions based on the facts and the law in each case, and

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to exercise their role as protectors of the constitution, without any pressure or interference from other sources, especially government. This basic premise is crucial to the maintenance of the rule of law.

At the same time, laws must be public knowledge, clear in meaning, and must apply to everyone equally,² including the government. Unless the government subordinates itself to the law, and to the sovereignty of the people through the constitution, that government may rule *by* law, but its authority will not be grounded in the rule *of* law.³ Rule *by* law still allows governments to use their power arbitrarily to deny fundamental rights to citizens, or to cover up their own corrupt practices. Once citizens lose confidence in the fairness of the legal and political system, they may turn to other means to assert their basic rights, and inevitably this results in violence and loss of human life⁴.

Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law. In fact, rule of law reform in "developing" countries is considered so important that it is becoming a major category of international aid.⁵

But it takes time and patience to turn around deeply entrenched political interests and values. We should be cautious when trying to promote externally-imposed rule of law reform as some kind of "elixir" or "panacea" for all the ills of countries in transition.⁶ First, the principles underlying the rule of law must be properly understood and respected by all those who will be affected by the new laws. Then, even in well-established democracies, experience tells us that we need to be vigilant to ensure that respect is maintained for the law and for those who administer the law.

The Universal Declaration of Human Rights (1948)

²p.96, T. Carothers, "The Rule of Law Revival" (1998) v.77 n.2 Foreign Affairs 95

³ There has been some criticism to this effect of some Asian countries' attitudes toward law reform : see p.101, *ibid.*

⁴ As in Indonesia, where many students have lost their lives in mass demonstrations against the present and former governments.

⁵p.103, Carothers, *supra.*

⁶p.105, *ibid.*

Although the UDHR was originally an aspirational, non-binding document, its provisions are now regarded as having become the accepted norms of customary international law⁷, including those provisions on the right to a fair trial.

The Declaration establishes in Article 10 that all persons are "entitled in full equality to a fair and public hearing by an independent and impartial tribunal" whenever criminal charges are laid against them. As stipulated in Article 11, they must be presumed innocent until it is proven otherwise, and may not be charged with an offence, or dealt a penalty, that was not part of the law when they are alleged to have committed the offence.

Further, Articles 6 to 8 prohibit arbitrary arrest, detention or exile, and provide rights to equal recognition before the law, and an effective remedy for everyone under the law.

These are the absolute minimum standards required under international law.

International Covenant on Civil and Political Rights (1966)

Similar provisions in the ICCPR have received widespread support from the international community⁸. The ICCPR generally provides more detail and expands the scope of the rights set out in the UDHR. For example, it gives rights to accused persons to prepare adequately for their defence, to be informed as to the charge against them, to have an interpreter if required, and even to communicate with legal counsel of their choice⁹. But these provisions are binding only on States parties to the Covenant and subject to various interpretations and degrees of implementation by them.

⁷ See eg. p.124, H.J. Steiner & P. Alston, *International Human Rights in Context : Law, Politics, Morals* (New York : Oxford University Press, 1996)

⁸ The ICCPR has approximately 60 signatories and 140 parties.

⁹ Article 14

In this context and reality the Human Rights Committee is currently considering a *Draft Third Optional Protocol to the ICCPR, "Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy"*.¹⁰ This would provide that no derogation is possible from certain rights under Articles 9 and 14 ICCPR, even when a state of emergency has been declared. So the right to a fair trial would be guaranteed under all conditions, in those States that sign the Optional Protocol.

Other international instruments and standards

The right to a fair trial is affirmed by two other significant international conventions : the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984)*¹¹ and the *Convention on the Rights of the Child (1989)*¹², with respect to trials involving children. In addition, the major regional human rights conventions also promote the principles asserted by the UDHR¹³, as does modern international humanitarian law to a considerable extent¹⁴.

In 1985, the United Nations General Assembly adopted the *Basic Principles on the Independence of the Judiciary*¹⁵, which outline the fundamental elements of an independent judiciary. These include a requirement that the independence of the judiciary be guaranteed by the state and enshrined in the Constitution or some other legislative instrument. The *Principles* also

¹⁰ The Optional Protocol is one of the annexes to a Report entitled "The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening", E/CN.4/ Sub.2/ 1994/24 of 3 June 1994.

¹¹ See Articles 12-15.

¹² Especially Articles 37 and 40.

¹³ See Arts. 6 & 7, *European Convention on Human Rights (1950)*, Arts. 8-10, *American Convention on Human Rights (1969)*, and Article 7, *African Charter on Human and Peoples' Rights (1981)*.

¹⁴ See Article 3 common to the four *Geneva Conventions (1949)*; various fair trial guarantees for prisoners of war in the *Third and Fourth Geneva Conventions*; Article 75, *Protocol I*, and Article 6, *Additional Protocol II (1977)*.

¹⁵ UNGA Resolutions 40/32 and 40/146. The Principles were originally adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, August, 1985 : see A/CONF.121/22/Rev.1 (1986) at page 53.

emphasize the importance of selecting and training judges appropriately, and making provision for their discipline, suspension or removal with suitable complaints handling mechanisms.

The General Assembly in 1990 adopted *Guidelines on the Role of Prosecutors*¹⁶ and *Basic Principles on the Role of Lawyers*¹⁷. This was in recognition of the fact that the judiciary can only fulfil its role effectively when it is assisted by independent, fair-minded prosecutors¹⁸, and an independent bar. In the common law adversarial system, in particular, legal counsel on both sides must be able to remain faithful to their duty to respect the law, over and above the interests of their clients and of those responsible for investigating crimes. So, for example, the Prosecutors' Guidelines stress the need to ensure that all the evidence for the Prosecution has been obtained lawfully, and that any evidence more favourable to the accused's case should be presented as well. In this way, an impartial judge can weigh the evidence more accurately, and reach a fairer decision according to the law and the facts.

The Lawyers' Guidelines require governments to ensure certain guarantees for lawyers, in order to protect the rights of clients. One of these guarantees is that lawyers are not to be identified with their clients or their clients' causes, so they can advocate freely and effectively, without fear of repercussions for themselves, no matter how unpopular their client's cause. Without such protection for lawyers, there would be no prospect of a fair trial for an accused person.

These three sets of principles on Judicial Independence, Prosecutors and Lawyers are just a starting point, however. Several major non-governmental organisations have created more comprehensive standards.¹⁹ While these have yet to be endorsed at a governmental level, some

¹⁶UNGA Resolution 45/166 of 18 December 1990, originally adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, August/September, 1985. Report prepared by the Secretariat, A/CONF.144/28 (1990) at page 188.

¹⁷ Ibid at page 117.

¹⁸ See Preamble to the *Guidelines on the Role of Prosecutors*, op cit.

¹⁹ Including: *Draft Principles on the Independence of the Judiciary* (Siracusa Principles) 1981; *Draft Principles on the Independence of the Legal Profession* (Noto Principles) 1982; *The Rule of Law and Human Rights (Declaration of Delhi, Law of Lagos, Resolution of Rio Declaration of Bangkok)*; Union International des Avocats : *The International Charter of Legal Defence Rights*; International Bar Association : *Minimum Standards of Judicial Independence* 1982; *International Convention for the Preservation of Defence Rights* 1987; and *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*, adopted by the Sixth Conference of Chief Justices of Asia and the Pacific on 19/8/95.

of them were annexed to the *Draft Declaration on the Independence of Justice* presented to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1985. However, this Draft Declaration has yet to be adopted by the General Assembly. So the three basic sets of principles that were adopted “are today the acknowledged yardstick by which the international community measures that independence.”²⁰

Monitoring International Standards

Following the adoption of the aforementioned principles, the UN Sub-Commission on Minorities then turned its attention to establishing a mechanism for monitoring implementation. In 1994, the first Special Rapporteur on the Independence of Judges and Lawyers was appointed. The mandate is thematic, and incorporates investigatory, advisory, legislative and promotional activities.²¹

The current Special Rapporteur, Dato’ Param Cumaraswamy, has reported that he receives complaints of attacks on judges and lawyers from all over the globe, and endeavours to investigate as many of them as he can. Some complaints may be dealt with through an exchange of correspondence with the relevant personnel. But sometimes an in-situ investigation of a series of allegations causing particularly widespread concern is warranted. In these situations, the Special Rapporteur is reliant upon governmental co-operation, which may not always be easy to secure. Most of the complaints are initiated by NGO’s, some with perceived political agendas, and thus the Special Rapporteur’s presence in a country may require him to exercise considerable diplomacy and caution.²²

Nevertheless, the Special Rapporteur has provided four mission reports in the last four years, as well as four general reports detailing complaints received and measures taken to investigate these

²⁰ p.5, D. Param Cumaraswamy, U.N. Special Rapporteur on the Independence of Judges and Lawyers, “The UN Basic Principles and the work of the UN Special Rapporteur on the Independence of Judges and Lawyers”, paper delivered to ICJ Conference on The Rule of Law in a Changing World, Cape Town, South Africa, 20-22 July, 1998.

²¹ p.8, *ibid.*

in approximately thirty five “country situations” a year. His reports also highlight positive developments in rule of law reform and identify “theoretical issues of special importance”, such as: the independence of judges of the lower courts and statutory tribunals; temporary judges; the use of “faceless” tribunals²³ ; and the need for satisfactory mechanisms for resolving conflicts between the legal profession and the judiciary.

The Special Rapporteur advises many countries on ways to improve structural weaknesses in their judicial systems. With the number of nations progressing from autocratic styles of governance to democracy in recent years, the Special Rapporteur has a “challenging” workload. Added to this is the “need for constant vigilance” even in the most developed nations. As the Special Rapporteur noted earlier this year, judicial independence “is not safe even in countries where one would imagine it to be.”²⁴ He refers specifically to recent attacks on judicial independence in the United States, the United Kingdom, Australia and Belgium.

As well as the Special Rapporteur’s reports, the Centre for the Independence of Judges and Lawyers (CIJL) publishes an annual report, *Attacks on Justice*, and until recently the Lawyers’ Committee for Human Rights published *Attacks on Lawyers and Judges*, also annually. The CIJL report of 1997 showed an increase of 25% in such attacks, since the 1996 report.

Implementation of International Standards

The following is a necessarily brief and selective survey of some of the ways that judicial independence has been and is being implemented around the globe. The intention is to provide illustrative examples of the types of progress being made in many other countries towards rule of law reform, and to highlight some of the threats to judicial independence in those countries that may feel tempted to take the rule of law for granted within their own borders.

²² pp.8-9, *ibid.*

²³ See page 18 for more information

²⁴ p.2, *ibid.*

The first illustrative example is Canada, which has a comprehensive, well-established structure for guaranteeing the independence of the judiciary and the rule of law.

1. The Canadian Experience

In Canada, the independence of the federally appointed judiciary is guaranteed by the Canadian constitution, more specifically, sections 96 to 100 of the *Constitution Act, 1867*, (which provide for the appointment of superior court judges, their security of tenure and financial security) and its preamble which provides for a constitution "similar in principle to that of the United Kingdom," and incorporates fundamental rights of judicial independence which date back to the *Act of Settlement* of 1701. Judicial independence is also guaranteed in the Canadian *Charter of Rights and Freedoms*, Schedule B to the *Constitution Act, 1982*, which provides in s.11(d) that every person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. The fundamental rights incorporated in the preamble and the Charter provision apply as well to judges of the Provincial Court who are appointed by the Provinces.

The Chief Justice of Canada in a recent judgement explained the importance of judicial independence :

"Judicial independence is valued, because it serves important societal goals - it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal, served by judicial independence is the maintenance of the rule of law, one aspect of which is the

constitutional principle that the exercise of all public power must find its ultimate source in a legal rule."²⁵

An excellent summary of the decisions of the Supreme Court of Canada in this area is to be found in the judgement of McLachlin J. in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at 825-28. To summarize, judicial independence as a constitutional principle fundamental to the Canadian system of government possesses both individual and institutional elements. Actions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our Constitution. As protectors of our Constitution, the Courts will not consider such intrusions lightly. In an earlier decision Chief Justice Dickson noted the importance and influence of international instruments in reaffirming the basic principles governing the independence of the judiciary.²⁶

In *Valente v. The Queen*²⁷, the Court defined the notion of judicial independence as follows:

“...judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.” He concluded that “...judicial independence is a status or relationship resting on objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions...”

In the same case, Justice LeDain enunciated the three core characteristics of judicial independence as:

- (1) security of tenure,
- (2) financial security, and

²⁵ *Re Provincial Court Judges*, [1997] 3 S.C.R. 3

²⁶ See *Beauregard v. Canada* (1986) 2 S.C.R. 56, 74 which refers to the *Draft Principles on the Independence of the Judiciary* (Siracusa Principles) 1981; the International Bar Association: *Minimum Standards of Judicial Independence* 1982 and 1983 Montreal Declaration

²⁷ [1985] 2 S.C.R. 673 at 687 & 689

(3) administrative independence.

Security of Tenure

Security of Tenure of federally appointed judges is assured in s. 99 of the *Constitution Act*, 1867, which provides :

(1) Subject to subsection 2 of this section, the Judges of Superior Courts, shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and the House of Commons.

The *Judges Act*, R.S.C. 1985 c. J1, establishes the Canadian Judicial Council, which consists of all chief justices and associate chief justices of superior Courts. The Canadian Judicial Council receives complaints, and if investigation warrants, the Council may direct a committee to conduct an inquiry to determine whether the judge has become “incapacitated or disabled from the due execution of the office of judge” by reason of age, infirmity, misconduct or failure in the due execution of the office.²⁸ This Committee usually consists of three Chief Justices appointed by the Council, and two lawyers appointed by the Minister of Justice. The Minister or the Attorney General of a province may also request that an inquiry be held.²⁹

Following such an inquiry, at which the judge may be represented by counsel and has an opportunity to be heard, Council as a whole considers the report and recommendations of the Inquiry Committee. If in the opinion of the Judicial Council the judge has become incapacitated, Council may recommend that the judge be removed from office. In cases where the Inquiry Committee has decided that the conduct complained of does not merit removal from office, the Committee may express its disapproval of the conduct.

In 1996, a Canadian federal court judge in Quebec was found unfit for office by an Inquiry Committee. The judge had “berated a jury and made insensitive remarks about women and

²⁸ Section 65(3)

²⁹ Section 63(1)

Jews”³⁰ while sentencing a woman found guilty of murdering her husband, which remarks had created a storm of controversy. The Inquiry Committee believed “that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system.”³¹ The full Judicial Council recommended to the Minister that the judge be removed from office. However, the judge resigned before his matter came before the Parliament.

Most of the provinces have established Judicial Councils, to investigate and inquire into complaints against Provincial Court judges, who are appointed by the Province.

Financial Security

Section 110 *The Constitution Act*, 1867, imposes on Parliament the duty of fixing the salaries, allowances and pensions of the federally appointed judges. In 1975, the Parliament of Canada amended the *Judges Act* to provide for the establishment, every three years, of an independent commission appointed by government to inquire into the adequacy of salaries and benefits of the Federally appointed judges.³²

Until 1997, salaries of provincial court judges were fixed by the executive in most provinces. In 1997, the Supreme Court of Canada decided that the procedures by which salaries of provincial court judges were fixed were unconstitutional, as providing insufficient guarantees of financial security to assure independence of the judiciary, or its perception. The Court concluded that the system which required that judges negotiate their salaries and benefits with the executive could lead to the perception of a lack of independence. The Court recognized that the provincial legislature had the authority to reduce salaries when warranted by economic conditions. The Court concluded that the existence of an independent body to make recommendations regarding salaries and benefits was essential to avoid the possibility of political interference through

³⁰ p. 15, Dato’ Param Cumaraswamy, *supra*.

³¹ *ibid*.

³² Recent amendments provide for the appointment of a Commission every four years, and require the Minister to table a response in Parliament within a limited time.

economic manipulation. The recommendations would not bind Parliament but require a response which would withstand the rationality test.

Administrative Independence

In *Valente (supra)*, the Supreme Court of Canada defined administrative independence in relatively narrow terms as control by the courts “over administrative decisions that bear directly and immediately on the exercise of the judicial function” and include such matters as the assignment of judges, the determination of sittings of the court and court lists, and related matters of allocation of court rooms, and the direction of the administrative staff carrying out these functions.

Generally, in Canada, few problems have arisen in this respect, and courts are achieving greater control over budgets allocated to the court, court staff and other administrative functions.

Immunity

Another feature necessary for the continuation of judicial independence and impartiality is the immunity afforded to judges respecting their function as judges. In Canada, judges enjoy absolute immunity from criminal and civil actions in respect of judicial decisions. A judge cannot be compelled to answer questions relating to judicial or administrative decisions made by the judge in the exercise of his/her judicial functions.³³

Accountability

³³ See *MacKeigan v. Hickman*, *supra*.

Aspects of security of tenure and of immunity may be viewed by some as unnecessarily limiting accountability on the part of judges. Nevertheless, such autonomy is necessary to ensure an independent judiciary.

However, this does not mean that judges are not accountable. First, judges are bound by the rule of law. They must decide cases in accordance with the evidence before them and the law. With the exception of the highest appellate level, the judgements of all trial courts and appeal courts as well as the manner in which the proceedings have been conducted by them are subject of appeal and, if warranted, correction or modification by the court of appeal.

All judicial proceedings are conducted in open court, under the scrutiny of the bar, the public and the press. The reasoning in judicial decisions and the conduct of proceedings are subject to criticism by courts of appeal, by other judges, the legal profession, academics, and by the press and the public.

In addition to the complaints process outlined above, chief justices, chief judges and judicial colleagues continue to exert considerable moral suasion.

Recently, a Working Committee of the Canadian Judicial Council, with the cooperation of the Canadian Judges Conference and in consultation with the judiciary and the Bar published “Ethical Principles for Judges.” These *Ethical Principles* are advisory in nature, and will provide assistance to judges in making decisions on the difficult ethical issues which confront them.

All judges in Canada also have access to non-compulsory continuing education or training programs, which include substantive law, language training, as well as social context issues such as gender and cultural sensitivity. Control and approval of programs falls within the jurisdiction of the Canadian Judicial Council, and the courts of each province.

The protection and maintenance of judicial independence is left to the courts, as is every other constitutionally guaranteed right.

International assistance

Canadian judges are involved in a range of programs for international judicial training and development. The Commonwealth Judicial Education Institute provides assistance to the judiciary of developing countries, drawing on the expertise offered by judges from all over the Commonwealth. The Commissioner for Federal Judicial Affairs in Canada also liaises with External Affairs and the Canadian International Development Agency to help provide international judicial education and training by Canadian judges. The Chief Justice of the Supreme Court of Canada believes there is a “moral” duty to be involved in such programs³⁴. In addition, both Justice Canada’s International Law and Activities section, and the Canadian Bar Association’s International Development Committee are actively involved in international assistance.

The right to a fair trial

In keeping with international standards, the Canadian Charter provides extensive protection for accused and detained persons. Section 15 provides for equality before the law³⁵. Sections 7-11 follow closely the relevant provisions of the ICCPR pertaining to the life, liberty and security of the person³⁶; unreasonable search and seizure³⁷; arbitrary detention and imprisonment³⁸;

³⁴ p.6, The Hon. Judge Nancy K. Orr, P.E.I. Provincial Court, “Opportunities for international judicial and legal training”, (1998) Fall/Automne, Vox Judicia.

³⁵ Section 15(1). However, this provision is qualified by the words "without discrimination", which have been held by the Supreme Court of Canada to require proof of discrimination, not just inequality : see *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

³⁶ Section 7

safeguards pertaining to arrests³⁹ and criminal and penal proceedings⁴⁰. The interpretation of section 7 has involved a consideration of a wide range of issues, such as a prisoner's right to counsel at disciplinary hearings⁴¹, and an accused person's right to pretrial disclosure, the limits of which right have yet to be determined conclusively. In *Stinchcombe's* case⁴², the Supreme Court of Canada initially imposed a broad duty of disclosure on Crown prosecutors, to enable the accused to prepare properly for trial. The Court relied on the principles set down by Mr. Justice Rand in *Boucher v. The Queen*⁴³, regarding the public duty role of the prosecutor, which doesn't involve "winning" or "losing" cases. As one commentator has expressed it: "It followed that the fruits of the investigation which are in the possession of counsel for the Crown are not its property for use in securing a conviction but the property of the public to be used to ensure that justice is done."⁴⁴

However this obligation to disclose is not absolute. The Crown retains a discretion to withhold some information, such as material it considers to be irrelevant, but these discretionary aspects remain controversial.⁴⁵

As a further check on the discretionary powers of prosecutors, the Supreme Court of Canada has held that Crown attorneys and attorneys general are generally immune from civil action, but not in the case of malicious prosecutions.⁴⁶ This ruling was based on public policy considerations that balanced the need for prosecutors to be shielded from disgruntled accused persons - in order to maintain impartiality when deciding which cases to pursue - against the rights of citizens to seek redress when the process has been abused.

³⁷ Section 8

³⁸ Section 9

³⁹ Section 10

⁴⁰ Section 11

⁴¹ *Howard v. Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985) 45 C.R. (3d) 242

⁴² *R. v. Stinchcombe* [1991] 3 S.C.R. 326

⁴³ [1955] S.C.R. 16

⁴⁴ pp.348-349, D. Stuart, "Prosecutorial Accountability in Canada", in P.C. Stenning (ed), *Accountability for Criminal Justice : Selected Essays* (Toronto : University of Toronto Press, 1995)

⁴⁵ See p.350, Stuart, *ibid.*

2. *The United States*

Some jurisdictions in the United States have taken the notion of judicial independence and accountability much further than in other democracies. The U.S. federal courts have had complete administrative autonomy since 1939⁴⁷. The Chief Justice of the U.S. Supreme Court appoints a Director of the Administrative Office, after consultation with the Judicial Conference of the U.S. The Administrative Office is responsible for the administration of all federal courts except the U.S. Supreme Court, which is managed by the judges themselves. Most state courts also manage their own budgets, including budget requests.

While U.S. judges at the federal level are all appointed and enjoy security of tenure, most State judges and district attorneys are elected by a popular vote and face re-election on a regular basis. This approach has caused considerable disquiet amongst some defendant lawyers, particularly in States where the district attorney has been elected mainly because of his or her propensity to seek the death penalty for convicted persons, rather than a propensity for impartiality or outstanding ability. However, those in favour of popularly elected judges and public attorneys would argue that this is far more democratic and leads to greater accountability.

3. *Australia*

The issue of judicial independence has often been in the media spotlight in Australia, particularly in recent years. In June of this year, the New South Wales Judicial Commission referred the matter of a certain State Supreme Court judge to the State Parliament, because they considered him to be a "procrastinator" and not fit for office. He had acquired a reputation for taking an extraordinarily long time to deliver his reserved judgements, the worst example of which was said to be a sentence that he handed down ten months after the hearing.

⁴⁶ *Nelles v. R. in right of Ontario et al* [1989] 2 S.C.R. 170

⁴⁷ See p.108, M.L. Friedland, *A Place Apart : Judicial Independence and Accountability in Canada*, A Report prepared for the Canadian Judicial Council, May, 1995.

The Judge was asked to make a statement in person to the Parliament, at the Bar of the Upper House, in which he explained that he had been suffering depression, which had caused him to have severe doubts about his judgements, such that he delayed writing them. Now that he was over the depression, he argued, he shouldn't lose his job simply because of a past illness that was now cured. The Upper House debated the issue at length, and the motion for his removal was finally defeated 26:16 on a conscience vote.

The judge's speech was broadcast on television, which added yet another dimension of scrutiny to the whole process, namely public scrutiny, and helped to fulfil the judge's aim of bringing attention to the little understood plight of those who suffer depression, particularly judges. The broadcast also increased public understanding of the relationship between the judiciary and the legislature.

4. China

With the signing of the ICCPR, China continues its march in legal and judicial reform.

The 1982 Constitution of the People's Republic of China provides that the people's courts independently exercise their judicial power and are not subject to interference by any administrative organ, social organization or individual.⁴⁸ In 1983, the Organic Law of the People's Courts was amended to incorporate this constitutional principle.

In 1995, the Judges Law came into force to ensure, as stipulated in the first Article, that the people's courts will independently exercise judicial power according to the law and that judges will fulfil their duty according to the law.⁴⁹ The Law also provides some general principles and rules regarding the responsibilities, qualifications, rights, obligations, selection, appointment, removal, rank, performance evaluation, training, reward, punishment and discipline, salary and

⁴⁸ The Constitution of the People's Republic of China (1982), Article 126.

⁴⁹ The Judges Law (1995), Article 1.

benefits of judges. The adoption of this law was an important step forward in implementing the principle of judicial independence in the Chinese justice system.

In 1996, China adopted some major amendments to the Law of Criminal Procedure, incorporating the presumption of innocence as well as the right to defense counsel in the pre-trial process. Under the old law access to counsel was restricted to trial and seven days prior to trial. To implement the constitutional principle of judicial independence, some important changes were introduced under the amendments.

For many years, decisions were often made by the judicial committees in Chinese courts rather than the trial judges. Cases were often pre-judged behind closed doors by the members of these committees that usually included the chief and deputy chief judges of the courts or other high-ranking court officials. Consequently, the trial became a show to announce the judgement that was not made by the trial judge but by the committee.

With the passage of the amendments, this system has started to change gradually. Under the amended Law of Criminal Procedure, the trial judges must make their own judgement at the trial unless they decide to pass the case on to the judicial committee, in the event that it is a complicated case or a major case and the trial judges have difficulties making their own judgments.⁵⁰ The key points in the judicial and scholastic interpretations of this provision are: first, the trial judges shall have the power to make independent judgements in ordinary cases; second, the trial judges shall exercise this power only in the trial rather than before the trial; third, the trial judges shall decide whether or not to pass a complicated and/or major case on to the judicial committee for a decision; fourth, unless the trial judges decide to do so, the committee shall not step in and take over; fifth, in a case whereby the committee is requested to make a decision, the Chief Judge of the court can decide to return the case and order the trial judges to make their decision.⁵¹

⁵⁰ Law of Criminal Procedure (1996), Article 149.

Another major change introduced by the amendments to the Law of Criminal Procedure is the abolition of the system of “exemption from prosecution.” Under the old Law, Chinese prosecutors could convict an accused person by exempting him from prosecution if the case was considered minor. This kind of decision was made by the prosecutor internally without involving the judiciary and defense counsel. Although this was intended as a form of leniency, it in fact gave the prosecutors the power to convict people without trial. Therefore it was challenged as a violation of the principles of judicial independence and open trial.

Now, the Chinese judges are required to act impartially and equally before all citizens and legal persons. They must base their decisions on the facts and in accordance with the law. They must conduct open trials except where state secrets, individual privacy or juveniles are involved. In late 1998, Chinese courts have started to open their doors to the public by allowing anyone to enter the court rooms to observe the trials without having to obtain approvals. In the meantime, the Supreme People’s Court appointed some prestigious judges as superintendents to observe and supervise the work of local courts and investigate cases of judicial corruption. In addition, the Chinese courts are reviewing their organizational structures and administrative procedures as a continuing effort to implement the principle of judicial independence and improve the justice system.

With the signing of the ICCPR, the reform of China’s judicial system is placed under international scrutiny. There are still some major difficulties that this reform has to overcome in the next few years, such as judicial corruption, local protectionism, lack of professionalism among some judges and the lack of financial support to raise the salaries of the Chinese judges. However, the Chinese judiciary and law reformers are making progress in addressing these problems.⁵²

⁵¹ See Zhou Daoluan et al. (eds.), 1996, The Amendments and Application of the Law of Criminal Procedure. People’s Court Publishing House. Also see Cheng Guangzhong et al. (eds), 1997, The Jurisprudence of Criminal Procedure (New Edition). China University of Political Science and Law Publishing House.

⁵² For a comprehensive review of the relevant issues, see Cheng Guangzhong, Daniel Préfontaine, Bian Jianlin and Vincent Yang (eds.), The United Nations Standards and China’s Legal System of Criminal Justice. Publishing House of Law.

5. *Peru*

Peru provides a striking example of a country struggling to come to terms with a violent, politically unstable past, and anxious to re-establish the rule of law as swiftly as possible. Much of Peru was under a state of emergency between 1979 and 1992, in response to extreme political violence initiated by both the Shining Path group (Sendero Luminoso) and the Tupac Amaru Revolutionary Movement (MRTA).

In 1992, democratically elected President Alberto Fujimori established a Government of Emergency and National Reconstruction pursuant to Decree Law 25.418. This involved implementation of a number of extreme measures including : a purge of the judiciary, which had developed a reputation for either corruption or giving in to intimidation by terrorists; introduction of a new constitution and dissolution of the Constitutional Court, to be replaced by a new Constitutional Tribunal; dismissal of the Attorney-General and the Comptroller General of Peru, as well as numerous prosecutors; and "exceptional procedures" to prosecute civilians charged with terrorist-related crimes and treason.

Of these "exceptional procedures", the use of "faceless" civil and military tribunals for trying crimes of terrorism and treason caused the most concern amongst defence lawyers and human rights activists. These tribunals were introduced to protect the identity of those who were to prosecute and adjudicate at such hearings, so they could safely convict those accused of terrorism and treason, without fear of threats to their own personal safety being made later by the convicted person's colleagues. The proceedings were always conducted in private, with the judges and prosecutor hidden behind a one-way mirror. In addition, voice-distorting microphones were used by the judge and prosecutor, and the identity of police and military witnesses was generally kept secret as well. Clearly such a hearing violates most of the international standards for a fair trial.

The Special Rapporteur, Mr. Cumaraswamy, visited Peru in September 1996, at the invitation of the Peruvian government. The primary focus of his mission was to observe these "faceless"

tribunals in operation, and to evaluate them for himself.⁵³ He concluded that "the concealing of the judge's identity erodes public accountability of judges handling terrorist-related crimes or treason."⁵⁴ He did not consider that the judges were at risk, as judges had not at that time been the targets of terrorist-related violence since 1992. He also expressed concern over the fact that at the military tribunals, which tried cases of treason, only one in five of the judges was legally qualified. The others were all military personnel, who arguably could be influenced by their duty to follow the orders of their superiors, rather than being entirely impartial arbiters.

At the conclusion of his mission, the Special Rapporteur called for the abolition of both civil and military "faceless" tribunals. He noted that the recently created Ad Hoc Commission on Pardons had already identified several innocent people who had been convicted by these tribunals, and that "it was also clear that these tribunals no longer protected the security of judges, prosecutors and witnesses."⁵⁵ Unfortunately, he also added, "In any event, in the light of the considerable improvement in the security situation, there is no longer any justification to continue with these tribunals."⁵⁶ It was unfortunate because, only two months later, on 8 November 1996, an attempt was made against the life of the President of the Constitutional Tribunal, Mr. Nugent. Then in December 1996, members of the Revolutionary Movement of Tupac Amaru stormed the residence of the Ambassador of Japan in Lima and held more than seventy people hostage for days, attracting international media attention. Not surprisingly, institutional reforms of the administration of justice in Peru were put on hold while the Peruvian government re-assessed its earlier decision to water down its anti-terrorism measures. How do you find the right balance between the need for due process for those accused of terrorist activities, and the right to life, liberty and security of those who have to uphold the law? There simply are no easy answers in such circumstances. We can only hope that gradual progress will continue to be made towards

⁵³ He also investigated the need for judicial reform in Peru, and considered some of the amendments to anti-terrorist legislation in light of international standards. See D. Param Cumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers, *Report on the mission to Peru*, E/CN.4/1998/39/Add.1, 19 February 1998.

⁵⁴ p.17, *ibid.*

⁵⁵ p.11, D. Param Cumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers, "Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment", Report delivered to the Fifty-third session of the Commission on Human Rights, E/CN.4/1997/32, 18 February 1997.

⁵⁶ *ibid.*

full implementation of human rights in those countries still struggling to establish and maintain basic law and order.

Threats to Judicial Independence

The greatest threat to judicial independence is complete disregard by a government for the provisions of the constitution. Unfortunately, many military governments today refuse to subject their authority to a constitutional system, ignoring court orders made against them, and providing few mechanisms for the protection of human rights. Even some democratically elected governments still dominate and control the courts in their country, so there is no check on the potential excesses of unfettered and arbitrary political power.

All four reports to date of the Special Rapporteur on the Independence of Judges and Lawyers detail numerous examples of other kinds of attacks on judicial independence and the rule of law from all over the world, including: abductions of human rights lawyers in many jurisdictions, often allegedly by government forces; threats by the President of Belarus to suspend the Constitutional Court after it ruled that certain Presidential Decrees were unconstitutional⁵⁷ ; attacks on the independence of the Malaysian Bar in 1997⁵⁸ ; and the reported assassination of a Colombian ombudsman, also in 1997⁵⁹ .

Public criticism of the judiciary and their conduct

One key topic that the Special Rapporteur has been pursuing is the relationship between the media and the judiciary⁶⁰ . This relationship has become particularly strained in recent times in democratic societies, where greater access to technology and constitutional protection of the right to freedom of expression have allowed the media to have an increasingly visible role especially

⁵⁷ See 1997 and 1998 Reports : E/CN.4/1997/32 and E/CN.4/1998/39.

⁵⁸ 1997 Report, *ibid.*

⁵⁹ *ibid.*

⁶⁰ See para.47, 1997 Report, *ibid.*

in criminal trials. While media coverage of trials is to be encouraged, such coverage is not always fair, accurate and unbiased⁶¹, nor does it necessarily encourage greater respect for the judicial process. Decisions by judges to exclude evidence, the use of the reasonable doubt rule to acquit someone charged with a serious offence, perceived leniency in sentencing, the protection of minority rights, often all bring on a barrage of criticism against the judiciary, as being contrary to the will of the majority, who have erroneously been convinced that Courts are "soft on crime", and that crime is ever more prevalent.

Attacks on the judiciary by both the media and politicians are causing grave concern in many common-law jurisdictions at present, particularly the United States and Australia. This has prompted one Australian High Court judge to state that criticism of the judiciary in his country has "gone too far. Unless there is a measure of mutual restraint, the judicial institution will be damaged ...".⁶² Justice Kirby was responding to a bombardment of verbal abuse from politicians, the media, even academics and lawyers⁶³, in response to the High Court's 1996 *Wik* decision upholding native title rights on some pastoral properties⁶⁴. The Federal Attorney General, Mr. Williams, recently announced in December 1998 that he would draw up guidelines to limit politicians' criticism of judges, after he himself had been criticized by judges for failing to defend the judiciary against such attacks, a role traditionally taken on by the Attorney General. The guidelines will set the limits of "appropriate commentary" for politicians about the courts as well as for judges about the government.⁶⁵

Similar criticisms of judges were expressed in Canada after the adoption of the Canadian *Charter of Rights and Freedoms*, and s.52 of the *Constitution Act*, 1982, which granted to the Courts the power to declare legislation inoperable to the extent that it conflicts with the basic human rights and freedoms protected by the Charter. With that amendment, an independent judiciary took on

⁶¹ See generally, V.M. Bonventre & J.A. DeMarco, "Court Bashing and Reality : A Comparative Examination of Criminal Dispositions at the New York Court of Appeals and Neighboring High Courts", (1997) Winter, *The Judge's Journal*, 9

⁶² pp.25-26, The Hon. Justice Michael Kirby, "Attacks on Judges - A Universal Phenomenon", paper delivered to American Bar Association, Section of Litigation, Winter Leadership Meeting, Maui, Hawaii, 5 January 1998.

⁶³ See pp.2-3, Kirby, *ibid.*

⁶⁴ *Wik Peoples v State of Queensland* (1996) 141 ALR 129

an increased importance in Canada's constitutional framework. Yet, the use of this power by the courts has resulted in increasingly severe criticism of the judiciary, by some politicians, the media and other commentators who decry the so called "activist judges" who have struck down legislation as inconsistent with the Charter, or have otherwise protected Charter rights. This has led to calls for limitations in the discretion, power and independence of the judiciary, and has included calls for greater accountability, term limits and judicial elections.

Much debate in this area has focused on whether to allow more television cameras in courtrooms. As Justice Kelly of the Supreme Court of Nova Scotia points out in a recent paper on the subject⁶⁶, there are significant advantages to allowing more widespread coverage of entire trials, as well as disadvantages. For instance, the televising of complete court proceedings will avoid the filtering of those proceedings through a journalist's eye, which may be looking for something sensational to focus on, or guided by an editorial perspective that may be biased against a particular accused person. In Canada, as in a number of jurisdictions, many hearings are broadcast live in their entirety, such as important constitutional cases before the Supreme Court of Canada. On the other hand, jurors might be improperly influenced by commentary on televised proceedings, while witnesses, lawyers and others may be unduly affected by the presence of the cameras.

Clearly more thought needs to be given to the respective roles of the media and the legislature in maintaining respect for the judiciary and the rule of law, even in countries where the rule of law is frequently taken for granted.

International developments

⁶⁵ B. Lagan, "A-G will act to curb attacks against judges", Wednesday, December 9, 1998, The Sydney Morning Herald, National News, <http://www.smh.com>

⁶⁶ Justice F.B. William Kelly, "Free Press v. Fair Trial : Judicial-Media Interaction", paper presented to the Society for the Reform of Criminal Law Ninth Annual Conference, December, 1995, Santa Monica, California.

Ad Hoc Tribunals

International criminal tribunals particularly require high standards of judicial independence and other provisions for a fair trial, lest the tribunal be misused by powerful States for purely political ends, which may adversely affect whole nations.

In the case of the civil wars in the former Yugoslavia and Rwanda, the UN Security Council felt it was necessary to set up ad hoc international criminal tribunals⁶⁶ that were completely separate from the domestic legal systems, in order to obtain the most impartial forum for the trials of those charged with war crimes and crimes against humanity. At the time, there was concern that even those territorial governments that retained the means for prosecuting their citizens for war crimes, may lack the will to do so.⁶⁷ The Yugoslavian and Rwandan International War Crimes Tribunals were also intended to raise the "symbolic profile"⁶⁸ of their proceedings and thus have a widespread deterrent effect.

The right to a fair trial was enshrined in the Statute of each tribunal⁶⁹, implementing most of the standards required under the ICCPR, not just the minimum standards set by the UDHR. Article 21 sets out the rights of the accused, including the right to a "fair and public hearing",⁷⁰ subject to the need to protect the victim's identity⁷¹. There is a right of appeal⁷², and of review where a new and potentially decisive fact comes to light after the initial proceedings⁷³, as well as protection against double jeopardy if an "impartial and independent" tribunal has already

⁶⁶ See Security Council resolutions 808 of 22 Feb. 1993, 827 of 3 May 1993 & Add.1 of 17 May 1993, 935 of 1 July 1994, and 955 of 8 November 1994.

⁶⁷ See Report of Secretary-General to the Security Council of 5 December 1996, in which he stated that: "According to information received from the Office of the Prosecutor, Croatia's cooperation with the International Tribunal leaves much to be desired", at p.278, L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague: Kluwer Law International, 1997)

⁶⁸ p.278, Sunga, *ibid.*

⁶⁹ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, May 25, 1993 & *Statute of the International Tribunal for Rwanda*, November 8, 1994.

⁷⁰ Article 21(2)

⁷¹ Article 22

⁷² Article 25

⁷³ Article 26

“diligently prosecuted” the accused for the same serious violation of international humanitarian law⁷⁴.

The International Criminal Court

The two ad hoc tribunals paved the way for the creation of a permanent International Criminal Court. On 17 July 1998, the Statute for this Court was adopted in Rome at the UN Diplomatic Conference of Plenipotentiaries ("the Rome Statute").

Prior to this conference, Human Rights Watch had identified seven benchmarks for the new International Criminal Court that needed to be met in order to ensure that the Court would be "an independent, fair and effective judicial institution."⁷⁵ These benchmarks were : "1) a jurisdictional regime free of any state consent requirement; 2) independence from the Security Council; 3) an *ex officio* prosecutor; 4) qualified deference to state claims of jurisdiction (complementary); 5) authority over war crimes whether committed in international or non-international conflicts; 6) clear legal obligation for state parties to comply with court requests for judicial cooperation; and 7) the highest standards of international justice respecting the rights of the accused and appropriate protection for witnesses."⁷⁶ After the Rome Statute was finalized, Human Rights Watch stated : "Assessing the Conference results with these criteria in mind, we have a very good statute."⁷⁷

Of particular relevance to this paper are the provisions that cover investigations and prosecutions, those on the rights of suspects and accused persons, and those on the composition and administration of the Court. Despite considerable controversy, it was finally agreed that the ICC Prosecutor should be free to initiate investigations without first having to seek approval from

⁷⁴ Article 10

⁷⁵ p.1, Human Rights Watch, *The ICC Statute : Summary of the Key Provisions* (New York : Human Rights Watch, September 1998)

⁷⁶ *ibid.*

⁷⁷ *ibid.*

state parties or the Security Council. These bodies can trigger investigations by referring "situations" to the Prosecutor. But the Court will decide which individuals involved in those "situations" are to be investigated and prosecuted.

The Prosecutor's decision to proceed with an investigation is then subjected to a pre-trial judicial hearing to determine whether there is a reasonable basis on which to proceed. If the Prosecutor decides not to proceed with an investigation, s/he must also advise the Pre-Trial Chamber, as well as the informant or referring body. The Pre-Trial Chamber may overturn the Prosecutor's decision not to proceed, but only if the sole basis for the decision was "in the interests of justice".

One of the concerns of Human Rights Watch is that the powers of the Prosecutor may be insufficient to conduct a thorough investigation.⁷⁸ The Prosecutor will be heavily reliant on the co-operation of national authorities when trying to interview witnesses and conduct on-site investigations.⁷⁹ However, this was a compromise, effected to allay fears that the Prosecutor would have too much power over sovereign states.

The rights of suspects⁸⁰ and accused persons⁸¹ are well protected under the Rome Statute, with all of the guarantees that are set out in detail in the ICCPR, plus others that implement some of the *Guidelines on the Role of Prosecutors*. For example, the Prosecution must disclose any evidence that mitigates the guilt of the accused or affects the credibility of evidence for the Prosecution.

The judges of the International Criminal Court will be nominated by states parties and then elected by the Assembly of states parties. Judges may have either criminal or international law expertise, or both, and a "fair representation of female and male judges" must be taken into account during the selection process, as well as equitable geographical distribution. Consistent with judicial independence, judges may only be removed or disciplined if they are found guilty of

⁷⁸ *ibid*, p.4.

⁷⁹ See Articles 57 & 99, Rome Statute.

⁸⁰ Article 55, *ibid*.

⁸¹ Article 67, *ibid*.

misconduct. The same applies to the court's prosecutors. The judges will also be empowered to make Regulations which will govern the day-to-day administration of the Court.

The high level of consensus achieved with the acceptance of the Rome Statute demonstrates widespread acceptance throughout the international community of the principles first enunciated in the UDHR pertaining to fair trials and the independence of the judiciary. No doubt the apparent congruity between so many states will be tested each time the jurisdiction of the ICC is invoked. But, as UN Secretary-General Kofi Annan stated after the Rome Statute was adopted : "The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."⁸² It is hoped that the ICC will provide an exemplary model for states seeking to provide for, or strengthen, the independence of their judiciary, and respect for the rule of law across all jurisdictions.

Conclusion

After 50 years, although the Universal Declaration may still not be universal in its application, the signs are nevertheless encouraging. There is considerable support around the globe for rule of law reform and the international community can take considerable comfort from the progress made in Canada and similar jurisdictions. But there is still a long way to go. Civil unrest and conflict on almost every continent mean that many disputes are still not being settled by peaceful means, so that the rule of force will decide the outcome, not the rule of law. The fragility of the rule of law is even evident in more developed nations, where public attacks on the judiciary threaten the integrity of our constitutional system. So, the best safeguard will have to be the unrelenting proactive efforts of the legal profession, the judiciary, non-governmental organisations and institutions to promote the rule of law and judicial independence. Of necessity this will need to be reinforced by all governments with the resources to do so, in order to achieve in the next century universal "freedom, justice and peace in the world."⁸³

⁸² "Statement by the United Nations Secretary-General Kofi Annan at the Ceremony held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court", 18 July 1998, @ www.un.org/icc/

⁸³ Preamble, *Universal Declaration of Human Rights* (1948)

