



# INTERNATIONAL STANDARDS FOR THE INDEPENDENCE OF THE JUDICIARY<sup>1</sup>

## EXECUTIVE SUMMARY

The independence of the judiciary gives concrete expression to two essential elements of democracy, namely the rule of law and the separation of powers. In a constitutional democracy, the political process and any state function must take place within the confines of the law. Judges are tasked to uphold the rule of law. To ensure that they do so without improper influence, they must be independent from the executive and legislative branch of power. Their role for democracy is particularly important in safeguarding human rights.

Under international law the following working definition of judicial independence can be discerned: an independent judiciary must (a) be *impartial*; (b) approach cases in an *unbiased* manner; (c) display *no prejudice*; (d) be *politically independent*; and (e) operate *without fear*. On the basis of international law these principles can be translated into the following operational guidelines:

- a) The power to make judicial appointments should not lie in the hands of a single political actor, especially the executive, with the ability to exercise wide discretion in the selection and appointment of judges. It is preferable for judicial appointments to be made through a process that provides for the participation of other sectors of government and society, for example judges, the legal profession, opposition political parties, civil society, the legislature, or members of government responsible for judicial administration.
- b) Security of tenure requires that judicial appointments be for life, until mandatory retirement, or for a set term of office.
- c) Terms of service and remuneration cannot be reduced unfavourably, and must be secured by law.
- d) Judges must remain accountable for their conduct: judges may only be dismissed or disciplined for

serious misconduct, incompetence or incapacity, on the basis of objective standards and criteria that are set out beforehand, and through fair procedures with a right of judicial review.

- e) Transfer and re-assignment of judges within the judiciary must be determined by the judiciary internally and lie beyond the sole control of the legislature or executive.
- f) All courts must be established by law: the court structure must not be subject to summary modification by the executive, and *ad hoc* courts must be prohibited.
- g) The judiciary, or an independent judiciary council, must be responsible for the administrative management of the judiciary.
- h) Tribunals other than traditional courts are subject to the same principles of judicial independence as the ordinary courts.
- i) Courts must be provided adequate financial resources to fulfil their functions. The judiciary itself or a judiciary council must be solely responsible for managing the judiciary's budget.
- j) The allocation of cases to judges is a matter of internal judicial administration. Ideally, case allocation should be randomized or routinized.
- k) Military tribunals must have no jurisdiction to try civilians.
- l) Prosecuting authorities must be impartial, and operate fairly.
- m) A judiciary council, if established, should be composed primarily of judges, and its powers and functions set out clearly in law.

This Briefing Paper sets out international standards for judicial independence and complements DRI's Report, *International Consensus: Essential Elements of Democracy* (2011),<sup>2</sup> and the DRI/Carter Center Report, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012).<sup>3</sup>

<sup>1</sup> This Briefing Paper was written by Richard Stacey and Sujit Choudhry from the Center for Constitutional Transitions at NYU Law. It was edited by Michael Meyer-Resende, Evelyn Maib-Chatré, Geoffrey Weichselbaum and Mehdi Foudhaili of Democracy Reporting International.

<sup>2</sup> Available online at [http://www.democracy-reporting.org/files/essential\\_elements\\_of\\_democracy\\_2.pdf](http://www.democracy-reporting.org/files/essential_elements_of_democracy_2.pdf).

<sup>3</sup> Available online at [http://www.democracy-reporting.org/files/dri\\_report\\_strengthening\\_democratic\\_governance\\_.pdf](http://www.democracy-reporting.org/files/dri_report_strengthening_democratic_governance_.pdf)

# 1. INTRODUCTION: JUDICIAL INDEPENDENCE IN CONSTITUTIONAL DEMOCRACY

The independence of the judiciary is as much an essential element of constitutional democracy as human rights and the rule of law that the courts are mandated to protect. The United Nations General Assembly recognized this link in the 2004 declaration on the “essential elements of democracy”.<sup>4</sup> The discussion of international law on judicial independence in this Briefing Paper is anchored in an understanding of the essential functions of courts in constitutional democracy. Courts in constitutional democracies serve two functions. First, the judiciary is the ultimate guarantor of human rights in a democratic system. Human rights and in particular political rights enjoyed by all on equal terms are crucial to democratic government, because they ensure that the people can freely express their political will and preferences. The link between the people’s free expression of popular will and democratic government is expressed in Art. 21(3) of the Universal Declaration of Human Rights (UDHR).<sup>5</sup> Second, the judiciary in a democracy must secure the rule of law by ensuring that the conduct of the executive and administrative branches of government is consistent with previously enacted laws, with rights, and with the constitution. In order to discharge both functions, courts must enjoy judicial independence.

## 1.1. WORKING DEFINITION OF JUDICIAL INDEPENDENCE

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is the “hard” law basis of the international law definition of judicial independence.<sup>6</sup> The article states that all persons are equal before courts and tribunals, and that all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal (see further section 2). The United Nations Human Rights Committee provides an authoritative interpretation of the article in General Comment No. 32,<sup>7</sup> which yields the following working definition of judicial independence:

- (1) Courts must treat all parties *impartially* without discrimination.
- (2) Courts must display *no bias* or *favour* towards particular parties.
- (3) Courts must not pre-judge cases (i.e., there is no *prejudice*).
- (4) Courts must be *politically independent*; they must not be beholden to, or subject to manipulation or influence

from the executive, administrative or legislative branches of government, which will often be parties before the courts.

- (5) Courts must be able to fulfil their functions *without fear*: courts cannot act independently if they face retribution for judgments unfavourable to private parties or government.

The principles of this working definition ensure that two functions of judicial independence in a constitutional democracy – to guarantee human rights and the rule of law – can be fulfilled.

The UN Basic Principles on the Independence of the Judiciary bring these elements of judicial independence together in a succinct definition:<sup>8</sup>

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 interferences, direct or indirect, from any quarter or for any reason.

In addition, constitutional democracies around the world have encoded versions of this working definition in domestic constitutions. One example is the South African Constitution, which provides (Art. 165(2)):

The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

The Kenyan Constitution emphasises fidelity to the Constitution and the law and prohibits interference in the work of the courts (Art. 160):

In the exercise of judicial authority, the Judiciary ... 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.

The 2012 Egyptian Constitution (Art. 74)<sup>9</sup> recognized these requirements in principle. The provision is identical to Art. 65 of the 1971 Egyptian Constitution:

The independence and immunity of the judiciary are two basic guarantees to safeguard rights and freedoms.

<sup>4</sup> Adopted 20 December 2004, the resolution was officially published in 2005. See: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/59/201&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/59/201&Lang=E). See also DRI, *International Consensus: Essential Elements of Democracy*.

<sup>5</sup> Universal Declaration of Human Rights, 10 December 1948, General Assembly resolution 217 A(III), (UDHR).

<sup>6</sup> See in this regard, DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 13.

<sup>7</sup> UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007.

<sup>8</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985, para 2.

<sup>9</sup> The 2012 Egyptian Constitution was suspended on 8 July 2013, and at the time of writing is in the process of being amended. A 10-member technical committee, composed of six judges, one professor and three retired academics, was appointed by the interim government to propose changes to the 2012 Constitution. These proposals were published on 20 August 2013. On 1 September 2013 a presidential decree called for the establishment of a 50-member committee to prepare a complete draft Constitution.

In Tunisia, the June 2013 draft Constitution provides (Arts. 100, 101 and 106):

The judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the Constitution, the sovereignty of law, and the protection of rights and freedoms.

Judges are independent. No power shall be exercised over their rulings other than the power of the Constitution and law.

A judge must be competent. He must commit to impartiality and integrity. He shall be held accountable for any shortcomings in the performance of his duties.

Any interference in the judiciary is prohibited.

The principles of judicial independence in Tunisia's June 2013 draft Constitution recognize an important distinction between judges' personal independence and the institutional independence of the judiciary. Alongside this distinction, this Briefing Paper recognizes two more: the distinction between the judiciary itself and the institutions that support the work of the judiciary, and the distinction between judicial independence in common law countries and civil law countries.

## 1.2. THE DISTINCTION BETWEEN JUDGES' PERSONAL INDEPENDENCE AND THE INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY

Ensuring that judges decide cases fairly and independently is only one element of judicial independence. Just as individual judges themselves must be independent, the judiciary as an institution must remain impervious to manipulation and outside influence. Judicial independence implies both that judges must be individuals of integrity and must decide cases before them in accordance with the principles of judicial independence and be free from outside interference, and also that the judiciary as an institution functions autonomously, without interference from the other branches of government, in regulating its own administrative and internal arrangements. The distinction between judges' personal independence and the institutional independence of the judiciary is reflected in section 3.1 and section 3.2 below, which deal respectively with constituting the judiciary and the functioning of the judiciary.

## 1.3. THE DISTINCTION BETWEEN THE COURTS AND THE INSTITUTIONS THAT SUPPORT THE WORK OF THE JUDICIARY

Judges do not operate the judicial system by themselves; they are supported by other institutions. Judges must make decisions on the basis of information and facts that are presented to them by lawyers (on the distinction between common law and civil law judicial systems in this respect, see section 1.4 below). The legal representatives who appear in

court, as well as institutions and individuals responsible for prosecutions, investigations and the collection of evidence, must act impartially if judicial decisions are to uphold the rule of law and respect and protect human rights.<sup>10</sup> In section 3.3 below, the Briefing Paper deals with the international law on how the institutions that support the judiciary affect judicial independence. International law reflects the distinction between the independence of courts themselves and the independence of the institutions that support the work of the courts.

## 1.4. THE DISTINCTION IN THE JUDICIAL SYSTEMS OF COMMON LAW AND CIVIL LAW COUNTRIES<sup>11</sup>

Differences between the common law and civil law traditions affect the role of the courts and influence how judicial independence should be understood in each context. First, judges in common law countries are usually appointed on the basis of their achievements during a long career as a legal professional (the recognition model), while judges in civil law countries are appointed as civil servants soon after a basic legal qualification (the career model). Although politicians may play a more important role in the appointment of judges in the recognition model, and judges themselves play a more important role in appointments in the career model, opportunities for improper interference in the appointments process exist under both models. Careful attention to the rules for appointment in both civil law and common law countries must ensure the independence of judges. Tunisia follows the civil law tradition, as set out in the June 2013 draft Constitution: the judiciary, the administrative courts and the financial courts are structured on the career model, with judges appointed as civil servants (Arts. 112-114). However, the Constitutional Court is an exception, and is structured on the common law, recognition model: judges are to be appointed to the Constitutional Court after at least 15 years of "high expertise" (Art. 115).

Second, judges in civil law systems generally play a more active role in criminal prosecutions (the inquisitorial system), as opposed to judges in the common law system who act as passive adjudicators of opposing legal teams (the adversarial system). While the distinction is not absolute (common law judges play a role in pre-trial proceedings in identifying relevant evidence, and trial lawyers in civil law countries are active in suggesting evidence to inquisitorial judges), the distinction emphasizes that the personal independence of judges in civil law systems must receive special attention,

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<sup>10</sup> UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>11</sup> In countries with a common law tradition, the courts play a central role in the development of the law. Judicial decisions create binding legal 'precedent', which guides other courts in subsequent cases dealing with similar matters. The 'common law' is the law that develops in this way through the decisions of the courts. In countries with a civil law tradition, comprehensive legal 'codes' purport to set out the law in its entirety. Judges apply the law as it is stated in these codes, but their decisions do not create precedent that other courts are bound to follow. In contrast to common law countries, in civil law countries the law does not develop through the decisions of the courts.

while the fairness of the judicial process and the impartiality of prosecution authorities must receive special consideration in common law systems.

## 2. JUDICIAL INDEPENDENCE AND INTERNATIONAL LAW

Under international law, there is a distinction between “hard” law and “soft” law. “Hard” law refers to agreements and rules of international law that impose precise and legally binding obligations on states. “Soft” law refers to international agreements that are not formally binding or impose no clear or precise obligations on state parties, or to interpretive statements on treaties, such as the General Comments issued by the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights, which carry no binding legal force. Relevant sources of international law on judicial independence fall into both categories. This Briefing Paper refers to both hard and soft law sources on judicial independence.

### 2.1. RELEVANT SOURCES OF INTERNATIONAL LAW: “HARD LAW”

#### 2.1.1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR is a multilateral treaty adopted by the UN General Assembly on 16 December 1966. The states party to the Covenant are legally bound by its provisions.<sup>12</sup> The Covenant includes a clear statement of the requirement of judicial independence in the right to fair trial. Article 14 provides in part:

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

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<sup>12</sup> Details of the member states and states party to the ICCPR can be found online at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtmsg\\_no=IV-4&chapter=4&lang=en#Participants](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtmsg_no=IV-4&chapter=4&lang=en#Participants).

### 2.1.2. REGIONAL TREATIES

As with the ICCPR, regional multilateral treaties impose legally binding obligations on states party to the treaty. A number of these treaties include a requirement of judicial independence in the form of a right that mirrors Art. 14 of the ICCPR. Examples include:

- African Charter on Human and Peoples’ Rights: Art. 3 guarantees equality before the law and equal protection of the law; Art. 26 imposes a direct obligation on state parties to guarantee the independence of the courts. The European Convention on Human Rights: Art. 6 guarantees the right to a fair trial before an independent and impartial tribunal and the right to be presumed innocent.
- The American Convention on Human Rights: Art. 8 guarantees the right to a fair trial before a competent, independent and impartial tribunal and the right to be presumed innocent.

### 2.2. RELEVANT SOURCES OF INTERNATIONAL LAW: “SOFT” LAW

#### 2.2.1. UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The UDHR is a non-binding declaration of the United Nations General Assembly, although some of its provisions are considered customary international law. The UDHR affirms the right to a fair trial before an independent and impartial tribunal (Art. 11), the right of accused persons to be presumed innocent (Art. 11), and the guarantee that all are equal before the law and enjoy all rights and freedoms equally. The UDHR imposes no legal obligations on countries, but is an important interpretive guide to the ICCPR and other international treaties that do impose obligations of rights protection and judicial independence.

#### 2.2.2. UN BASIC PRINCIPLES AND GUIDELINES

The UN has adopted several sets of basic principles and guidelines as framework models for how a country’s domestic laws and institutional structures can protect the independence of the judiciary. These documents are not legally binding, but are intended instead as a resource for countries committed to judicial independence.

These documents include:

- Basic Principles on the Independence of the Judiciary,<sup>13</sup>
- Basic Principles on the Role of Lawyers,<sup>14</sup>
- Guidelines on the Role of Prosecutors,<sup>15</sup>

<sup>13</sup> UN Basic Principles in the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985.

<sup>14</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

- Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary;<sup>16</sup> and
- Draft Universal Declaration on the Independence of Justice (the “Singhvi Declaration”).<sup>17</sup>

### 2.2.3. UNITED NATIONS HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 32

The United Nations Human Rights Committee periodically issues General Comments which offer authoritative interpretations of the rights included in the ICCPR (the Committee on Economic, Social and Cultural Rights does the same for the International Covenant on Economic, Social and Cultural Rights). While the General Comments themselves are not legally binding, the rights in the ICCPR, which they interpret, do impose legally binding obligations on states party to the Covenant. Accordingly, the General Comments are an important source of information about what obligations and duties states party bear under the ICCPR.

General Comment No. 32 deals specifically with the fair trial rights in Art. 14 of the ICCPR. It is valuable in understanding what Art. 14 means for individual states as they seek to fulfil the right to fair trial and ensure judicial independence in their domestic legal systems. It is an influential document.

### 2.2.4. RAPPORTEUR'S ANNUAL REPORTS AND RAPPORTEUR'S MISSIONS

The United Nations Special Rapporteurs are individuals who bear either a thematic or a country-specific mandate from the United Nations Human Rights Council to investigate human rights issues on behalf of the United Nations. Since 1994, the United Nations has appointed a Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur has filed Annual Reports.

Alongside the Annual Reports, the Special Rapporteur undertakes periodic missions to selected countries. The reports compiled on the basis of these missions are in-depth case studies of judicial and legal institutions in individual countries, and an assessment of how those structures and institutions succeed or fail in upholding the principles of judicial independence. Both kinds of documents offer useful analyses of how principles of judicial independence can be translated into practice in domestic contexts. At the same time, the documents offer warnings of how domestic judicial and legal systems can fail to uphold principles of judicial independence.

The reports of other thematic Special Rapporteurs are also valuable as soft law sources for judicial independence. For instance, the Special Rapporteur of the Sub-Commission on

the Promotion and Protection of Human Rights developed the Draft Principles Governing the Administration of Justice through Military Tribunals.<sup>18</sup>

### 2.2.5. REGIONAL STATEMENTS

A handful of regional organizations have made declarations or statements of judicial independence. These statements are not binding, and thus occupy a similar status to the United Nations Basic Principles and Guidelines (section 2.2.2). While they reflect the opinions of regional international organizations rather than the opinions of the global international community, they are nevertheless instructive in indicating the universal nature of many principles of judicial independence, as well as assisting in understanding judicial independence in specific regional contexts. Relevant regional statements include:

- The Association of South East Asian Nations Human Rights Declaration: Art. 20(1) guarantees the presumption of innocence and the right to a fair trial before a competent, independent and impartial tribunal.<sup>19</sup>
- The Consultative Council of European Judges (Council of Europe) Magna Carta of Judges;<sup>20</sup>
- Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges;<sup>21</sup>
- African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa;<sup>22</sup>
- The Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region (the Law Association for Asia and the Pacific);<sup>23</sup>
- Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence;<sup>24</sup> and
- Inter-American Democratic Charter.<sup>25</sup>

<sup>18</sup> Draft Principles Governing the Administration of Justice through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/2006/58, 13 January 2006.

<sup>19</sup> Adopted by the Heads of State of the Association of South East Asian States, Phnom Penh, 18 November 2012.

<sup>20</sup> Adopted by the Council of Europe Consultative Council of European Judges, Strasbourg, 17 November 2010.

<sup>21</sup> Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

<sup>22</sup> Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of the African Union, Maputo, 4-12 July 2003.

<sup>23</sup> Adopted by the Conference of Chief Justices of Asia and the Pacific Resources, Beijing, 19 August 1995.

<sup>24</sup> Adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association.

<sup>25</sup> Adopted by the OAS General Assembly at its special session held in Lima, Peru, 11 September, 2001.

<sup>15</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>16</sup> Economic and Social Council resolution 1989/60, endorsed by General Assembly resolution 44/162, 15 December 1989.

<sup>17</sup> Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, endorsed by Commission on Human Rights resolution 1989/32 (the “Singhvi Declaration”).

## 2.2.6. INTERNATIONAL NGO STATEMENTS

A handful of international associations and non-governmental organizations have issued statements and handbooks on judicial independence in domestic judiciaries. Two are:

- International Association of Judges, Universal Charter of the Judge;<sup>26</sup> and
- Judicial Group on Strengthening Judicial Integrity and Round Table Meeting of Chief Justices, Bangalore Principles of Judicial Conduct.<sup>27</sup>

## 3. JUDICIAL INDEPENDENCE IN PRACTICE: KEY AREAS WHERE INTERNATIONAL LAW OFFERS GUIDANCE

The three subsections in this section consider judicial independence in three areas: the constitution of the judiciary (section 3.1); the functioning of the judiciary (section 3.2); and the institutions that support the functions of the judiciary (section 3.3). International law seeks to uphold the components of judicial independence, as set out in the working definition in section 1.1 above, in all three of these contexts.

### 3.1. CONSTITUTING THE JUDICIARY: BALANCING ACCOUNTABILITY AND INDEPENDENCE

The personal independence of judges is protected, in large part, by the mechanisms and procedures for the appointment of judges and the extent to which politicians or private parties are able to influence judicial behaviour after judges are appointed. However, judges who fail to perform their tasks competently, independently or impartially must be accountable for their actions. Judicial independence cannot permit judges to act without any degree of accountability. The rules for the appointment, terms of service, dismissal, discipline and sanction of judges must strike a delicate balance between the need for protecting judges from undue external influence, and the need for judicial accountability. General Comment No. 32 of the United Nations Human Rights Committee sets out this need for balance:

States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. ...

Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. ...

[J]udges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.<sup>28</sup>

### 3.1.1. APPOINTMENT

The United Nations Basic Principles on the Independence of the Judiciary note that the mechanisms for judicial appointment must make appointment dependent on integrity and ability and include safeguards against appointment for improper motives.<sup>29</sup> The Basic Principles on the Independence of the Judiciary do not set out what these appointment mechanisms should be, instead leaving the details to the determination of domestic law.<sup>30</sup> Appointment procedures must prohibit discrimination.<sup>31</sup>

In civil law countries, although judicial appointments are usually made under the career model, appointment to constitutional courts or supreme courts often occurs according to a different mechanism. Because important questions of policy or constitutional interpretation come before constitutional courts and supreme courts, it is widely accepted that political actors should play a role in selecting judges on those courts. The same consideration applies to the selection of judges in supreme courts and lower courts in common law countries, where judicial decisions influence the development of the law. Appointment to constitutional and supreme courts is thus an issue of importance in both civil law and common law countries.

The procedures for constitutional court appointments merit careful attention.<sup>32</sup> Three common models for constitutional court appointments include the legislative supermajority model (e.g. Germany, where each of the two chambers of the legislature appoint half of the total judges on the Federal Constitutional Court by a two-thirds majority vote), the multi-constituency model (e.g. Turkey, where after constitutional amendments in 2010, the legislature appoints three constitutional court judges and the President appoints the

<sup>26</sup> Approved by the International Association of Judges on 17 November 1999.

<sup>27</sup> The Bangalore Draft Code of Judicial Conduct 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

<sup>28</sup> Paras 19-21.

<sup>29</sup> Para 10.

<sup>30</sup> See also the International Association of Judges, Universal Charter of the Judge, para 9; Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, para 1(2); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles A(4)(i) and (k).

<sup>31</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 13; Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, principle II(1).

<sup>32</sup> For a detailed treatment of these models, see the forthcoming report on constitutional court appointments by the Center for Constitutional Transitions and International Institute for Democracy and Electoral Assistance, available at <http://constitutionaltransitions.org/>.

remaining 14; here the executive constituency is over-emphasised), and the judicial council model<sup>33</sup> (e.g. South Africa's Judicial Services Commission). The UN Special Rapporteur on the Independence of Judges and Lawyers's Annual Report 2009 notes that appointments procedures dominated by either the legislature or the executive carry risks to judicial independence. Opportunities for legislative and executive domination arise more easily in the legislative supermajority model and the multi-constituency model. The Special Rapporteur therefore recommends the judicial council model be followed, since an independent, corporatist and deliberative body offers the greatest prospect of an independent appointment process.<sup>34</sup> The Council of Europe and the African Union concur in this assessment.<sup>35</sup>

A related issue is the appointment of the Chief Justice. In many countries, the Chief Justice holds specific powers over the judiciary and plays an important administrative role. In some cases, the Chief Justice is appointed through unique procedures that do not apply to the appointment of other judges.<sup>36</sup> The Special Rapporteur's Annual Report 2009 recommends that judges on a specific court elect their own head of court.<sup>37</sup>

The 2012 Egyptian Constitution provided that the judges of the Supreme Constitutional Court would be appointed on decree by the President, but that ordinary legislation would determine "the judicial or other bodies and associations that nominate them, the manner in which they are to be appointed, and the requirements to be satisfied by them" (Art. 176). This mechanism put some constraint on the President's discretion to appoint judges, because judicial or other bodies would nominate candidates for appointment. However, leaving important details to ordinary legislation, such as which bodies are to nominate candidates, the manner of appointment and the requirements and qualifications for appointment, creates the risk that the legislature will fail to impose meaningful limits to the President's discretion to appoint judges. It is preferable for the details of the appointment process to be entrenched in the Constitution itself.

Tunisia's June 2013 draft Constitution proposes a multi-constituency model for appointments to its "recognition-model" Constitutional Court (see section 1.4 above). The Tunisian appointment model involves members of the legislature, the executive, and an independent judicial council established under Arts. 109-111. Art. 115 prescribes a two-step appointments process. First, the President, the Speaker of the Chamber of Deputies, the Prime Minister, and the Supreme Judicial Council each nominate six candidates.

Second, the legislature's lower house selects the Court's judges from the four lists of candidates, selecting three judges from each list of six candidates. Judges must be elected by a three-fifths supermajority of the Chamber of Deputies. This requirement of a legislative supermajority ensures that usually no one political party can control appointments to the Constitutional Court. These measures minimize the risk that a single actor can dominate appointments to the Constitutional Court, and provides safeguards to ensure that candidates who are not independent and impartial, or who are perceived as such, will not be appointed. By contrast, with respect to appointments to its other, "career-model" courts, the June 2013 draft Constitution provides only that "Judges shall be nominated by virtue of an order made by the President of the Republic based on the assent of the Supreme Judicial Council" (Art. 103), and that "A law shall regulate" the mandate, procedures, organization and terms of reference of these courts (Arts. 112, 113 and 114).

### 3.1.2. SECURITY OF TENURE

Security of tenure ensures that judges cannot be dismissed, except in specific circumstances, until the expiry of their term of office. The international law is clear on this point.<sup>38</sup> This protects judges from summary dismissal by executives, legislatures, or even a judicial council dissatisfied with particular judges' decisions.<sup>39</sup> In particular, the Special Rapporteur's Annual Report 2009 raises concerns about short terms of office and regular judicial performance reviews. The Special Rapporteur concludes that short terms of office weaken judicial independence, and that in post-authoritarian transitions term length should gradually be extended so as to progressively introduce life tenure.<sup>40</sup>

Whether judges are appointed until a mandatory retirement age, or for set terms of office, however, is a matter for the determination of each legal system. The Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence recognize this point, even while they indicate a preference for permanent appointments.<sup>41</sup> The African Union Guidelines are clear that security of tenure must be guaranteed for the duration of the term of office, whether this is until a mandatory retirement age or until the expiry of a set term, although appointment under fixed-term contracts is prohibited.<sup>42</sup>

The 1971 Egyptian Constitution provided only that judges would not be removed from office (Art. 168). The 2012 Egyptian Constitution expanded on these provisions to some extent (Art. 170):

<sup>33</sup> See section 3.3.2 for details on judicial councils.

<sup>34</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, A/HRC/11/41, 24 March 2009, paras 25-28.

<sup>35</sup> Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, para 1(2)(c); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(h).

<sup>36</sup> See the South African Constitution, Art. 174.

<sup>37</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 48-50

<sup>38</sup> See generally, DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 17.

<sup>39</sup> UN Basic Principles on the Independence of the Judiciary, para 12.

<sup>40</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 54-55.

<sup>41</sup> See para II(1).

<sup>42</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles A(4)(l), (m), and (n)(3).

Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment and disciplinary actions against them are defined and regulated by the law. When delegated, their delegation is absolute, to the destinations and in the positions defined by the law, all in a manner that preserves the independence of the judiciary and the accomplishment of its duties.

As in many other cases in the 2012 Egyptian Constitution, the danger here lies in the relegation of important details to ordinary law. This creates a danger that the legislature will be able to insulate itself from the scrutiny of an independent and impartial court by passing laws for the appointment, discipline, and conditions of service of judges that are favourable to the legislature. These important details should be set in the Constitution itself to reduce the possibility that the legislature can influence the composition of the judiciary by amending relevant legislation with a simple majority.

### 3.1.3. TERMS OF SERVICE

Guaranteeing judges' remuneration, and otherwise guaranteeing that the conditions and terms of their service will not be reduced unfavourably, is an important element of judicial independence. Threats of reductions in pay or less favourable terms of service can be used to influence judges' decisions.

The Basic Principles on the Independence of the Judiciary provide that "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."<sup>43</sup> The Consultative Council of European Judges' Magna Carta of Judges provides:<sup>44</sup>

In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.

The Special Rapporteur's Annual Report 2009 notes the principle that judges' salaries must be guaranteed by law,<sup>45</sup> and refers to the recommendation in the Basic Principles on the Independence of the Judiciary that judges' salaries should be "adequate".<sup>46</sup>

While a constitution may provide that the remuneration and benefits of judges shall not be varied in ways that are disadvantageous to judges (e.g. Constitution of Kenya, Art. 160; Constitution of South Africa, Art. 176), the constitution need not stipulate what the remuneration and benefits of judges shall be. These details can be left for determination by ordinary legislation or government regulation, applicable to all

judges or classes of judges. Embedding these details in a constitution limits the ability of the system to adapt to changes, since these details can only be changed by means of a demanding constitutional amendment procedure.

### 3.1.4. DISMISSAL, DISCIPLINE AND SANCTION

The Basic Principles on the Independence of the Judiciary provide that judges should not be removed or suspended from office except for reasons of incapacity, inability to discharge their duties, or a lack of fitness for the position. Further, all disciplinary proceedings must adhere to standards of procedural fairness, with judges subject to discipline, removal or sanction only for violation or non-fulfilment of established standards of judicial conduct. All such proceedings must be subject to independent review.<sup>47</sup> Human Rights Committee General Comment No. 32 states that judges should only be removed in cases of serious misconduct or incompetence.<sup>48</sup>

With respect to disciplinary procedures, the Special Rapporteur's Annual Report 2009 states that an independent body should be tasked with the discipline of the judiciary, including questions of dismissal, rather than the legislative or executive branches. In addition, the requirements of "natural justice" or procedural fairness<sup>49</sup> must be observed in any proceeding that may lead to the dismissal or suspension of a judge, and any decision of such a body must be susceptible to judicial review.<sup>50</sup>

Tunisia's June 2013 draft Constitution accordingly provides (Art. 104):

No judge may be transferred without his consent, no judge may be dismissed, and no judge may be suspended, deposed, or subjected to a disciplinary punishment except in such cases and in accordance with the guarantees provided for by the law and by virtue of a justified/reasoned decision issued by the Supreme Judicial Council.

These measures are consistent with the international law on judicial security, but it is important to realize that countries in transition from authoritarian regimes may require special dismissal and appointment mechanisms. The Special Rapporteur's Annual Report 2009 recognises that in transitional periods, the processes for the removal of judges associated with previously authoritarian regimes are exceptional.<sup>51</sup>

<sup>43</sup> Para 11.

<sup>44</sup> Para 7.

<sup>45</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 73ff.

<sup>46</sup> Para 11.

<sup>47</sup> UN Basic Principles on the Independence of the Judiciary, paras 17-20.

<sup>48</sup> UN Human Rights Committee, General Comment No. 32, para 20. See also DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 17.

<sup>49</sup> Natural justice or procedural fairness, as the concept has developed in common law countries in particular, is a requirement of proceedings in court or in other tribunals and forums. It consists of two components: First, natural justice prohibits bias on the part of the adjudicator or person presiding over proceedings, including the perception of bias. Second, every party to the proceedings must have a fair opportunity to present his or her case to the forum, ensuring that the forum hears all sides of the dispute.

<sup>50</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 61.

<sup>51</sup> *Ibid.*, para 64.



### 3.1.5. TRANSFER AND PROMOTION

Transfer of judges to less favourable postings can be used as a threat to influence judicial behaviour. Rules for transfer must be carefully constituted to eliminate this threat, but allow for reasonable and necessary administrative re-assignment and transfer of judges.<sup>52</sup> While transfer and re-assignment can act as a threat to influence judicial decisions if not properly controlled, promotion can be used as an incentive to reward judicial behaviour that is favourable to political elites. Any system of promotion must eliminate judicial advancement as a reward for political bias. The Basic Principles on the Independence of the Judiciary require that promotions occur through a system based on “objective factors, in particular ability, integrity and experience”,<sup>53</sup> and Human Rights Committee General Comment No. 32 recommends that there be clear procedures and objective criteria for the promotion of judges.<sup>54</sup>

The Special Rapporteur’s Annual Report 2009 supports this with the recommendation that judges’ promotion should be decided on by an independent body composed of at least a majority of judges.<sup>55</sup>

### 3.1.6. COURT STRUCTURE

The status of courts and the organization of the judicial system are sometimes embedded in constitutions, albeit to different degrees. The United States Constitution, for example, establishes only the United States Supreme Court and leaves the establishment and functioning of all the other courts to ordinary legislation (Art. III, cl. 1). The South African Constitution, on the other hand, establishes all courts, sets out the judicial hierarchy, and outlines the jurisdiction of each court in that hierarchy (Art. 166). Where the constitution does not establish courts, it may be open to the legislature and the executive to establish special or *ad hoc* courts, at their discretion, such as special courts to try those accused of acts of terrorism. The power to create special courts could be abused to allow special courts to circumvent ordinary (and perhaps often onerous) fair trial procedures, in so doing undermining judicial independence or at least the perception of judicial independence. In this regard, the Basic Principles on the Independence of the Judiciary provide:<sup>56</sup>

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.

## 3.2. THE JUDICIAL FUNCTION: INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY

### 3.2.1. CONSTITUTIONAL VERSUS STATUTORY RULES FOR THE INTERNAL FUNCTIONING OF THE JUDICIARY

The Basic Principles on the Independence of the Judiciary state that judicial independence must be set out in the constitution or the laws of a country: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.”<sup>57</sup> Entrenching rules in the constitution provides protection against political manipulation, but must be balanced against the need to leave a degree of flexibility to adapt to changing circumstances, which can be best achieved through ordinary legislation. Also, courts must be flexible enough to react and adapt to the conditions and circumstances presented by each case, which means a constitution should not be too detailed in prescribing how courts should function in their day-to-day operations. The Beijing Statement of Principles of the Independence of the Judiciary states that the judiciary should be largely responsible for developing its own rules of administration.<sup>58</sup> Accordingly, some constitutions allow that the “internal” functioning of the courts shall be determined by the courts themselves, usually within a framework of legislation or the constitution.<sup>59</sup>

### 3.2.2. JUDICIAL VS. ADMINISTRATIVE REMEDIES

The right of access to justice and the right to an effective remedy are recognized by the UDHR (Art. 8). The right to a fair trial and to an effective remedy for the violation of rights in the ICCPR (Arts. 2(3) and 14), as well as in the other “hard” sources of international law, imply that the determination of any individual’s rights shall be through a fair hearing before a competent, independent and impartial tribunal. Human Rights Committee General Comment No. 32 recognizes with respect to Art. 14 of the ICCPR, access to justice is an inherent element of the right.<sup>60</sup>

Does this right require that individuals have access to courts and judges to determine their rights, or will administrative review processes suffice? The Special Rapporteur’s Annual Report 2008 notes the trend to broaden the definition of “access to justice” to mean “the effective availability of institutional channels for the protection of rights and the resolution of various types of conflict in a timely manner and in accordance with the legal order”.<sup>61</sup> Art. 2(3) of the ICCPR, for example, confers a right to an effective remedy in respect of

<sup>52</sup> Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, endorsed by Commission on Human Rights resolution 1989/32 (the “Singhvi Declaration”), para 15.

<sup>53</sup> UN Basic Principles on the Independence of the Judiciary, para 13. The African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa reproduces this statement in principle A(4)(o).

<sup>54</sup> UN Human Rights Committee, General Comment No. 32, para 19.

<sup>55</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 68-72.

<sup>56</sup> Para 5.

<sup>57</sup> Para 1.

<sup>58</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 36.

<sup>59</sup> See DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 17.

<sup>60</sup> UN Human Rights Committee, General Comment No. 32, para 9.

<sup>61</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2008, A/HRC/8/4, 13 May 2008, para 16.

the rights enumerated in the Covenant, while Art. 25 of the American Convention on Human Rights provides for the “right to simple and prompt recourse” for the violation of rights “recognized by the constitution or the laws of the state concerned or by this Convention.” Neither provision requires that the remedy be provided by a court. In principle, alternative forums for the resolution of legal disputes provide benefits of cost and speed,<sup>62</sup> but such alternative forums should (a) not close off routes of access to courts, especially to protect rights, and (b) operate with similar safeguards for independence and impartiality as ordinary courts.

### 3.2.3. BUDGET

The Basic Principles on the Independence of the Judiciary provide that courts must have adequate resources to properly serve the judicial function.<sup>63</sup> The Beijing Statement reiterates the requirement that judges have the “resources necessary” to perform their functions, and emphasizes the principle that executive power “which may affect judges in their office ... or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.”<sup>64</sup> The Commonwealth Latimer House Principles are detailed on this issue, protecting funds, once allocated, from reduction.<sup>65</sup>

The Special Rapporteur’s Annual Report 2009 recommends that a fixed percentage of national budget be allocated to the judiciary, and the Special Rapporteur has recommended that a baseline of two to six per cent of GDP be devoted to the judiciary.<sup>66</sup> Sometimes a fixed percentage of GDP or annual budget is entrenched in the national constitution. For example, Art. 177 of the Constitution of Costa Rica provides:

The budget shall allocate to the Judicial Branch an amount of no less than six percent of the ordinary income estimated for the fiscal year. However, when this amount is greater than the sum required to cover the basic needs budgeted by said Branch, said Department shall designate the difference as excess revenue, together with a plan for additional expenditure, in order that the Legislative Assembly may take the appropriate measures.

Art. 172 of the Constitution of El Salvador provides:

The Judicial Organ shall have at its disposal an annual allocation of no less than six percent of the current income of the State’s budget.

The Beijing Statement addresses the issue of limited resources, indicating that the judiciary’s budget should always occupy a high priority in the allocation of resources.<sup>67</sup>

A second issue that concerns the finances of the judiciary goes to how its budget is spent. The management and allocation of the budget is as important a consideration in the judiciary’s independence as the resources it is allocated in the first place. The Special Rapporteur has recommended that judicial independence is best served when the judiciary or an independent body, rather than the executive or legislative branches, is responsible for the judiciary’s budget.<sup>68</sup>

### 3.2.4. CASE ASSIGNMENT

The right to a lawful judge is an element of the right to fair trial and the requirements of judicial independence. It requires that the political branches not be empowered or authorized to assign or allocate particular judges to hear particular cases. The Basic Principles on the Independence of the Judiciary accordingly state that case allocation is a matter to be determined within the walls of the judiciary without any room for interference or intervention from the other branches of government.<sup>69</sup>

The Special Rapporteur’s Annual Report 2009 extends this principle to include an objective mechanism for allocating cases that safeguards judges from interference from within the judiciary, e.g. the drawing of lots or the use of the alphabetic list of judges. It is possible to imagine that case allocation may be in the hands of a single person within the judiciary, such as the Chief Justice;<sup>70</sup> but this may raise concerns when the Chief Justice is appointed through a different process than other judges and may therefore have a closer relationship to the executive.<sup>71</sup>

Further, the Special Rapporteur has noted that the practices of several countries that allow select senior judges exclusive control over case allocation has led to abuse.<sup>72</sup> The Special Rapporteur’s Annual Report 2009 therefore recommends either some form of randomized allocation procedure, or allocation according to a highly detailed management plan based on objective criteria.<sup>73</sup>

### 3.2.5. SPECIAL COURTS AND MILITARY TRIBUNALS

Special courts and military courts, as distinct from the ordinary civilian courts, raise special considerations for judicial independence and for democracy. Human Rights Committee General Comment No. 32 accepts the existence of special courts, and notes that the ICCPR neither prohibits the existence of special courts nor the trial of civilians in special

<sup>62</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2008, para 35.

<sup>63</sup> Para 7.

<sup>64</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, paras 38 and 41.

<sup>65</sup> Para II(2).

<sup>66</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 37.

<sup>67</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 42.

<sup>68</sup> Special Rapporteur’s Mission to Kazakhstan, 2005, E/CN.4/2005/60/Add.2 11 January 2005, para 26.

<sup>69</sup> Para 14.

<sup>70</sup> See, for example, Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 35.

<sup>71</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 47.

<sup>72</sup> Special Rapporteur’s Mission to Kazakhstan, 2005, para 59; Special Rapporteur’s Mission to Russia, 2009, A/HRC/11/41/Add.2, 23 March 2009, para 61; Special Rapporteur’s Mission to Kyrgyzstan, 2005, E/CN.4/2006/52/Add.3, 30 December 2005, para 67.

<sup>73</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 47.

courts. Indeed, military courts remain necessary in democracies because military codes of justice and laws that govern the armed forces often have no equivalent in the civilian legal system. Military and security institutions operate their own courts to uphold the codes of law that are necessary to maintain an efficient and well-functioning military.<sup>74</sup> The standards of fairness, independence and impartiality that govern ordinary civilian courts, however, must apply to these special courts.<sup>75</sup>

The African Commission of Human and Peoples' Rights has held that while "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process", military tribunals must be subject "to the same requirements of fairness, openness, and justice, independence, and due process" as any other court.<sup>76</sup> By contrast, the view of the Special Rapporteur on the Independence of Judges and Lawyers is that the use of military courts to try civilians should be prohibited or at least drastically restricted.<sup>77</sup> This line is also taken by the Inter-American Commission on Human Rights, which has stated that civilians should never be subject to military tribunals,<sup>78</sup> and the Inter-American Court of Human Rights, which has held that the "basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law."<sup>79</sup>

In order to address the concerns that military and special courts pose, the Special Rapporteur has recommended the adoption of Draft Principles on Military Tribunals prepared by the Special Rapporteur to the Sub-commission on the Promotion and Protection of Human Rights.<sup>80</sup> These draft principles explicitly avoid the question of the legitimacy of military courts, focusing instead on ensuring that those courts comply with the international law of judicial independence.<sup>81</sup> The draft principles provide, however, that military courts must not try civilians, that military courts may try only military personnel for military offences, and that the jurisdiction of the ordinary courts should be preferred over military courts in specific circumstances.<sup>82</sup>

While the 1971 Egyptian Constitution did not include a prohibition on the trial of civilians in military courts, the 2012 Egyptian Constitution provided that civilians could not be tried in military courts except where their actions harmed the military (Art. 198). That provision was not only vague, but it also left open the possibility of trying civilians in military courts. The Tunisian June 2013 draft Constitution provides (Art. 107):

Courts shall be classified by virtue of a law. No exceptional courts or procedures that may prejudice the principles of fair trial may be established or adopted.

Military courts are responsible for military crimes. A law shall regulate the mandate, structure, and organization of the military courts, their applicable procedures and the statute of military judges.

In Tunisia, existing law allows the trial of civilians in military courts. These provisions of the June 2013 draft Constitution do not change this position, and, as in Egypt, maintain the status quo under which civilians can be tried "for military crimes" in military courts.

### 3.3. THE NETWORK OF INSTITUTIONS SUPPORTING JUDICIAL INDEPENDENCE

#### 3.3.1. PROSECUTING AUTHORITIES

International law is clear about the need for domestic arrangements to ensure the impartiality of the prosecuting authority. The United Nations Guidelines on the Role of Prosecutors are intended to assist states in ensuring the effectiveness, impartiality and fairness of prosecutors, and should be taken into account and reflected in national legislation and practice.<sup>83</sup>

It is important to note that international law does not require that prosecuting authorities be independent, since in many cases the institutions responsible for prosecution are under the control of or form part of the executive or judiciary. Many civil law systems today have a mixed prosecutorial system, or a "soft" inquisitorial system, with a two-stage criminal process. In the first stage, a "prosecuting judge" directs prosecutors in the investigation of possible crimes and the collection of evidence. At the end of the investigation and on the basis of the evidence, the prosecuting judge will decide whether to formally institute criminal charges. The second stage involves the criminal trial. If the prosecuting judge decides to institute charges, a new judge is appointed to preside over the criminal trial, which then proceeds in a largely adversarial setting with prosecutors and defence lawyers appearing before the impartial judge.

In civil law systems, the impartiality of prosecuting judges is important because they play a role in directing criminal prosecutions. As long as the impartiality of judges is assured,

<sup>74</sup> Brett J. Kyle and Andrew G. Reiter, *Militarized Justice in New Democracies*, Law and Society Review (2013), 375.

<sup>75</sup> UN Human Rights Committee, General Comment No. 32, para 22.

<sup>76</sup> African Commission in Human and Peoples' Rights, decision of May 2001, Communication 218/98 (Nigeria), para 44.

<sup>77</sup> Special Rapporteur's Mission to Peru, 1998, E/CN.4/1998/39/Add.1, 19 February 1998, para. 78

<sup>78</sup> Annual Report of the Inter-American Commission on Human Rights, 1997, Chapter VII, Recommendation 1, para. 4

<sup>79</sup> *Castillo Petruzzi et al v Peru*, Inter-American Court of Human Rights, judgment of 30 May 1999, Series C No. 52, para 129.

<sup>80</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2007, A/HRC/4/25, 18 January 2007, para 29; Draft Principles Governing the Administration of Justice through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/2006/58, 13 January 2006.

<sup>81</sup> Draft Principles Governing the Administration of Justice through Military Tribunals, 2006, para 14.

<sup>82</sup> Draft Principles Governing the Administration of Justice through Military Tribunals, 2006, Principles 5, 8 and 9, paras 20-21 and 29-35.

<sup>83</sup> United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

there is no reason that prosecutorial services will not be impartial, even though they are not “independent” of the judiciary as in common law systems. It is important that judges in civil law systems remain independent vis-à-vis the executive, and shielded from improper manipulation or influence by members of the executive. Similarly, the public prosecutors who try the cases before the judge presiding at trial must be impartial. The Guidelines on the Role of Prosecutors therefore emphasize that prosecutors be impartial and fair, and make clear the connection between an impartial prosecuting authority and the right to a fair trial before an independent tribunal.

This partly inquisitorial character of civil law systems is in contrast to the “adversarial” nature of criminal proceedings in common law countries, where judges are referees between lawyers representing the prosecution and the defence, and at no stage formally direct criminal investigation or participate in decisions to prosecute. It is common in common law systems for the prosecuting authority to be an institution entirely independent of the executive, and thus less susceptible to manipulation or influence from the executive. Prosecuting services can be housed within the executive, but must in these cases be shielded from influence from members of the executive and must continue to operate impartially vis-à-vis the executive.

In Tunisia, Art. 112 of the June 2013 draft Constitution provides that the “public prosecution is part of the judicial system”, and that the “judges belonging to the public prosecution shall practice their tasks within the framework of the penal policy of the State according to the procedures established by the law”. The existing procedures established by law in Tunisia, however, allow the executive to exercise a degree of control over public prosecutors. The question that remains is whether Art. 112 provides prosecutorial functions with enough independence from executive interference, by placing them within the judiciary, to ensure that they can function independently vis-à-vis the executive.

With respect to the appointment of prosecutors, the Guidelines require that selection criteria must prohibit appointments based on partiality or prejudice, and exclude any discrimination based on a range of grounds including race, colour, sex, religion and political opinion.<sup>84</sup> The Guidelines require that the operations and functions of prosecutors be insulated from political interference:

States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.<sup>85</sup>

As with judges, prosecutors must enjoy security of tenure, adequate remuneration, and promotion and transfer based on

objective factors and decided on in accordance with fair and impartial procedures.<sup>86</sup>

### 3.3.2. JUDICIARY COUNCIL

A judiciary council is an independent, corporatist body comprised of members of the judiciary, the executive and legislative branches of government, the legal profession and civil society, mandated with the performance of specific tasks related to constituting the judiciary and the functions of the judiciary. These tasks vary, but they usually are taken to include the nomination or appointment of judges, decisions on discipline, dismissal and promotion of judges, and administrative matters related to the internal functions of the courts. The establishment of such a body has been supported by a number of regional soft law instruments, including those issued by the Council of Europe<sup>87</sup> and the African Union,<sup>88</sup> and the Beijing Statement.<sup>89</sup> All of these statements emphasize the need for independence in such a body, and the need for representation, even majority representation, by members of the judiciary on such a body. Roughly 60 per cent of countries have established a judiciary council.<sup>90</sup>

The Special Rapporteur’s Annual Report 2009 offers a useful summary of the principles to be borne in mind in constituting a judiciary council.<sup>91</sup> These can be summarized as follows:

- The composition of a judiciary council should include legislators, lawyers, academics and civil society, but judges should constitute the majority of its membership;
- The representation of political representatives should be minimized;
- The judiciary should have a substantial say in selecting the members of a judiciary council; and
- The powers of a judiciary council – which could include conducting competitive examinations and interviews for judicial postings, or direct powers to nominate or appoint judges at its discretion – must be carefully set out in law.

The 1971 Egyptian Constitution provided for a council to administer the common affairs of the judiciary (Art. 173). It was to be composed of the heads of the various courts, but the President was to be its chair. The 2012 Egyptian Constitution did not provide for the establishment of an independent corporatist body or judiciary council, providing instead that “[t]he law determines the judicial or other bodies and associations that nominate [judges], the manner in which

<sup>86</sup> *Ibid.*, paras 6-7.

<sup>87</sup> Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, para 1(2)(c)(i).

<sup>88</sup> African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(h).

<sup>89</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 15.

<sup>90</sup> Tom Ginsburg, *Judicial Appointments and Judicial Independence*, United States Institute for Peace, January 2009 (available online at [http://www.constitutionmaking.org/files/judicial\\_appointments.pdf](http://www.constitutionmaking.org/files/judicial_appointments.pdf)), at 4.

<sup>91</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 28-30.

<sup>84</sup> Guidelines on the Role of Prosecutors, para 2(a).

<sup>85</sup> *Ibid.*, para 4.

they are to be appointed, and the requirements to be satisfied by them' (Art. 176). These provisions do not meet the basic requirements set out in the Special Rapporteur's Annual Report 2009. With the President as the chair of the body, and with ordinary law setting out the details and requirements of judicial appointment, the risk existed that the President would be able to dominate judicial appointments as well as the operation of the judiciary, thus compromising the independence of the judiciary and the impartiality of judges.

The June 2013 draft Constitution of Tunisia establishes a Supreme Judicial Council divided into four separate councils representing the administrative court, financial courts, ordinary courts, and a fourth organizing council ("the judicial councils board") (Art. 109). The membership of each of the four councils is to be composed half of judges and half of non-judges. Each council is responsible for the discipline of the judges of the courts it represents, while the Supreme Judicial Council as a whole "shall ensure the judiciary's sound performance and respect for its independence" (Art. 111). The head of the Supreme Judicial Council is to be elected by its members, from among its most senior member judges (Art. 109). This model would appear to be consistent with the recommendations included in the Special Rapporteur's Annual Report 2009.

## 4. CONCLUSION

The importance of judicial independence to constitutional democracy cannot be overstated. Courts serve to protect human rights and to secure the rule of law, and in so doing help to ensure that the principles of constitutional democracy are upheld. In order to do so, it is critical that courts operate consistently with the tenets of judicial independence. International law provides a working definition of judicial independence, comprising five components, which every legal system must meet: courts must (a) be *impartial*; (b) approach cases in an *unbiased* manner; (c) display *no prejudice*; (d) be *politically independent*; and (e) operate *without fear*.

The international law offers both "hard law", binding rules for judicial independence, and "soft law" guidelines for judicial independence. International law permits these rules and guidelines to be met in a variety of ways in different domestic legal and constitutional contexts, and does not demand that specific models of the judiciary be established or that specific mechanisms and procedures for regulating judicial conduct be put in place. Assessing whether a country's rules and mechanisms for the operation of the judiciary are consistent with the international law requires detailed and thorough analysis of relevant rules and mechanisms in light of the international law.

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Or contact:

[info@democracy-reporting.org](mailto:info@democracy-reporting.org)

## ABOUT THE CENTER FOR CONSTITUTIONAL TRANSITIONS AT NYU LAW

The Center for Constitutional Transitions at NYU Law (Constitutional Transitions) generates and mobilizes knowledge in support of constitution building. Constitutional Transitions generates knowledge by identifying issues of critical importance to the success of constitutional transitions, where a lack of adequate, up-to-date research impedes the effectiveness of technical assistance for constitution building, and assembles and leads international networks of experts to complete thematic research projects that offer evidence-based policy options to practitioners. Constitutional Transitions mobilizes knowledge through an innovative clinical program that provides “back office” research support to constitutional advisors in the field, and deploys faculty experts and field researchers for support on the ground. We meet existing field missions’ needs for comprehensive research, dramatically enhancing their effectiveness and efficiency in their role as policy advisors and actors.

<http://www.constitutionaltransitions.org>

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