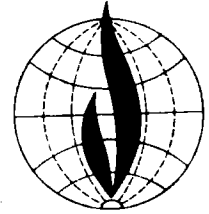


CIJL Yearbook



Vol. I

Constitutional Guarantees for the Independence of the Judiciary

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Centre for the Independence
of Judges and Lawyers

April 1992
Editor: Mona A. Rishmawi

Established in 1978 by the International Commission of Jurists in Geneva, the Centre for the Independence of Judges and Lawyers:

- promotes world-wide the basic need for an independent judiciary and legal profession;
- organises support for judges and lawyers who are being harassed or persecuted.

In pursuing these goals, the CIJL:

- intervenes with governments in particular cases of harassment or persecution and, in some instances, solicits the aid of a network of jurists and lawyers' organisations throughout the world to do likewise;
- works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers endorsed by the UN General Assembly;
- organises conferences and seminars on the independence of the judiciary and the legal profession. Regional seminars have been held in Central America, South America, South Asia, South-East Asia, East Africa, West Africa and the Caribbean. National workshops have been organised in India, Nicaragua, Pakistan, Paraguay and Peru;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- provides technical assistance to strengthen the judiciary and the legal profession;
- publishes a Yearbook in English, French and Spanish. It contains articles and documents relevant to the independence of the judiciary and the legal profession. Over 5,000 individuals and organisations in 127 countries receive the CIJL Yearbook;
- publishes a yearly report entitled "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers".

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Editorial Note

The two UN Basic Principles, one on the Independence of the Judiciary adopted in 1985, and other on the Role of Lawyers adopted in 1990,¹ explicitly define the international norms relevant to the independence of judiciary and the legal profession. While these standards are clearly acknowledged at the international level, their domestic implementation remains a cause of concern. The main challenge facing jurists throughout the world is now translating these norms into adequate guarantees which would reflect themselves in daily realities.

Since its establishment by the International Commission of Jurists (ICJ) in 1987, the Centre for the Independence of Judges and Lawyers (CIJL) has sought to promote and protect judicial and legal independence at both the international and the domestic levels. Stemming out of these convictions, the CIJL was instrumental in the formulation and the adoption of the above UN standards. Additionally, the CIJL has been intervening with governments in particular cases of persecution of jurists, organising conferences and seminars on the independence of judiciary and the legal profession, sending missions to investigate situations of concern, providing technical assistance to strengthen the judiciary and the legal institutions, and publishing periodic reports. Such reports include *Attacks on Justice*, which

¹ Since 1985, the Basic Principles on the Independence of the Judiciary have specified the meaning of this concept and outlined the safeguards needed to ensure its protection. The Basic Principles on the Role of Lawyers, adopted by the UN in 1990, further codify the principles pertaining to the role of lawyers in promoting and preserving democracy, justice and human rights.

annually outlines cases of harassment and persecution of judges and lawyers throughout the world. Through these efforts, the CIJL measures government practices against the internationally accepted norms.

The *CIJL Yearbook*, the first volume of which is issued today, adds to the CIJL periodic publications. Intending to serve as a forum encouraging the debate on the independence of the judiciary and legal profession, each volume of this *Yearbook* will be devoted to a theme relevant to judicial and legal independence. The two CIJL annual reports, *Attacks on Justice* and the *CIJL Yearbook*, replace the *CIJL Bulletin*.

The theme of this volume of the *CIJL Yearbook* is "Constitutional Guarantees for the Independence of the Judiciary," embodied in Article 1 of the United Nations Basic Principles on the of Judiciary. This article states: "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." The *Yearbook* begins by exploring the theory of judicial and legal independence. It moves on to examine how various constitutional systems guarantee these principles. Finally, the CIJL trial observation report in Syria demonstrates how emergency tribunals do away with many of these essential safeguards.

In his article, Adama Dieng, the Secretary-General of the International Commission of Jurists, outlines the main international principles related to the theme under examination. The following articles by Miloud Brahimi (Algeria), Robert Badinter (France), Salvatore Senese (Italy) and

Elzbieta Morawska (Poland) consider the theoretical and practical implementation of this subject in their respective countries. Two reports then follow. The first contains excerpts from a report by The Japan Federation of Bar Associations. The second, a trial observation report by Asma Khader which identifies shortcomings in the Syrian system of exceptional courts. The volume is forwarded by Justice P.N. Bhagwati, the former Chief Justice of India, and Chairman of the CIJL Advisory Board. In his forward, Justice Bhagwati reflects on constitutional guarantees in India.

In general, the articles consider the constitutional provisions guaranteeing the personal independence of individual judges as well as the collective independence of the judiciary as an institution. The contribution from Justice Robert Badinter, President of the *Conseil constitutionnel* of France, examines the basic safeguards contained in the French constitutions to protect the independence of the judiciary. Written by the head of the highest court, this article is of particular significance since the French system serves as a model for many of the constitutional structures explored here.

Many of the contributors point out pitfalls in the formal guarantees. The submissions on Italy and Japan explain the recent developments in these countries' post-World War II constitutional reforms. We also learn how societies undergoing change, such as Algeria and Poland, grapple with different scenarios of protecting judicial independence. These two articles as well highlight the contradiction between entrusting the judiciary with the function of "preserving the aims of the Socialist Revolution," while at the same time subjecting it "only to the laws."

Other forms of politicisation are also considered. The articles discuss questions related to the separation of power, particularly between the executive and the judiciary, the institution of the High Council of Judiciary, as well as the mode of selection, tenure, promotion, and removal of judges.

Several individuals contributed to finalising this volume and thanks are due to them. The efforts of Helen Spraos in translating some of the articles from French into English, and Sara Norman and Dara Chane Leavitt, interns with the CIJL, in providing valuable editorial assistance, are particularly acknowledged.

Finally, obviously, not every point of view expressed in this Yearbook represents CIJL positions. By providing this forum, the CIJL hopes to contribute to advancing the understanding and the promotion of the principles of the independence of the judiciary.

Mona A. Rishmawi
CIJL Director
April 1992

Foreword

The judiciary is one of the institutions on which rests the noble edifice of democracy and the Rule of Law. It is the judiciary that is entrusted with the task of keeping every organ of the state within the limits of the power conferred upon it by the constitution and the laws, thereby making the Rule of Law meaningful and effective. The judiciary in a democratic polity governed by the Rule of Law stands as a bulwark against abuse or misuse or excess of power on the part of the executive, and protects the citizen against governmental lawlessness. It is, therefore, extremely important that the judiciary be totally and wholly independent.

It is in recognition of this vital principle of independence of the judiciary that the Basic Principles on the Independence of the Judiciary have been adopted by the General Assembly of the United Nations. The Basic Principles lay down the standards and norms which the community of nations regards as essential for the purpose of securing and promoting the independence of the judiciary, without which, indeed, there can be no real protection for human rights and fundamental freedoms without any discrimination. Article 1 of the Basic Principles states that the independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the laws of the country, and it shall be the duty of governmental and other institutions to respect and observe the independence of the judiciary. This is the key article, overarching all the others contained in the Basic Principles — it constitutes the very basis and foundation of those provisions. The question then arises of what we mean when we speak of the independence of the judiciary which, as provided in this article, must be guaranteed by the state and enshrined in the constitution or the laws of the country.

It is true that article 1 of the Basic Principles provides that the independence of the judiciary shall be enshrined in the constitution or the laws of the country, implying that it would be sufficient compliance with the requirement of this article if the independence of the judiciary were enshrined in the laws of the country alone. But it is elementary that the laws of the country can always be repealed or amended by the majority in the legislature and, therefore, it would not be wholly safe to leave the independence of the judiciary at the mercy of the ruling party. It is only if the independence of the judiciary is enshrined in the constitution of the country that it would be safe from any assault by a marauding majority in the legislature. This is the reason why the constitutions of most democratic countries in the world explicitly lay down specific rules intended to guarantee the independence of the judiciary. So sanctified and hallowed are the principles of the independence of the judiciary in many of these countries that the constitutional provisions ensuring the independence of the judiciary are made unamendable except by a specified majority. It may be pointed out that in India the principle of independence of the judiciary embodied in the Constitution is regarded as a basic feature of the Constitution unamendable by Parliament.

There has been over the years considerable debate and discussion with regard to the concept of independence of the judiciary. It is now agreed on all hands that conceptually as well as from the point of view of practical reality, independence of the judiciary comprises two basic postulates, namely the independence of the judiciary as an institutionalized organ and the independence of the individual judges. No judiciary can be said to be independent unless these two essentials are present.

The power of appointment of judges is a large power and if it is vested exclusively in the executive, it is likely to undermine the independence of the judiciary in both its aspects. It is necessary that a mechanism be developed which would eliminate — to the maximum extent possible — the influence of the executive in the appointment of judges so that those aspiring for judicial appointments might not be induced to lobby with the executive. Under the Indian Constitution, the government is required to consult the Chief Justice of India in the matter of appointment of judges to the Supreme Court, and the Chief Justice of the High Court and the Chief Justice of India in the matter of appointment of High Court judges. But even this requirement of consultation has unfortunately not helped to eliminate the interference of the executive in the appointment of judges. Of course, it must be conceded that by and large the executive has so far not made a single appointment which has not been approved by the Chief Justice of India, but there have been instances where persons recommended by the Chief Justice of India have not been appointed judges. That is why it has been suggested by several jurists in India that the power of appointment must be vested in a Judicial Service Commission composed of judges, lawyers and law academics, and presided over by the Chief Justice of India, where the executive should also have representation. It is felt that such a procedure would ensure the appointment of persons with ability and integrity and eschew political interference.

Another important factor that has considerable bearing on the independence of the judiciary is security of tenure. The tenure of judges cannot be made dependent on the mere pleasure of the government or the legislative majority. That is why there are provisions in most constitutions guaranteeing

security of tenure to judges. The Constitution of India provides a strict procedure which effectively guarantees security of tenure. A judge can be removed only by an address by both Houses of Parliament to the President, passed by a special majority and on the ground of proved misbehaviour or incapacity. And it is only if a judge is found guilty of misbehaviour or incapacity by a tribunal, constituted not by the executive but by the Speaker of the House — consisting of a sitting judge of the Supreme Court, the Chief Justice of a High Court and a distinguished jurist — that a resolution can be passed by both Houses of Parliament for removal of the judge and that only by a special majority. Thus security of tenure is fully ensured to a judge.

One more factor affects the independence of the judiciary: the dependence of the judiciary on the executive for resources. The judiciary has no power of the purse, and if the judiciary wants to introduce modern technology in the functioning of the courts' system or to expand its facilities or to appoint more judges with a view to expediting disposal of cases, it cannot do so unless the necessary funds are made available by the executive. The judiciary is thus completely dependent on the executive for any reform or innovation it wants to make with a view to effectively improving the administration of justice. The Chief Justice of India has power to alter the heads under which budgetary allocation is made so long as he remains within the budgetary allocation, but the Chief Justice of the High Courts has no such power. If he wants to spend the budgetary allocation made under "Salaries" on furniture, he cannot do so without the approval of the executive. More judges cannot be appointed, even if it might be imperatively necessary to do so. The result is that a backlog of cases piles up, cases take years and years to dispose of and the

credibility of the judicial institution is affected — and this has an adverse impact on the independence of the judiciary as an institution.

One other source of danger to the independence of the judiciary arises from unjust and improper criticism of the judges for the judgments which they deliver. Of course, it must be conceded that there is nothing wrong in critically evaluating the judgment given by a judge. Improper or intemperate criticism of judges stemming from dissatisfaction with their decisions constitutes, however, a serious inroad into the independence of the judiciary as they represent attempts on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision-making process.

It is also necessary to point out that in some countries, particularly India, appointments of Chief Justices of High Courts are made on an acting basis, and they continue as acting Chief Justices for months. This is a pernicious practice, detrimental to the independence of the judiciary, because the acting Chief Justice is always in a state of suspense, not knowing whether he will be confirmed or not and depending on the executive for his confirmation.

In conclusion, I would like to point out that it is not enough to lay down principles for the independence of the judiciary. Even where these principles are enshrined in the constitution, they will remain merely as pious platitudes unless they are effectively implemented. It is essential for the purpose of ensuring such implementation that strong public opinion be created in defence of the independence of the judiciary.

Wherever there is violation of these principles affecting the independence of the judiciary, it must be exposed and the government concerned must be pressured to observe these principles. This is the task which the present Yearbook is calculated to perform, and it is hoped that it will help create public opinion among lawyers, judges, legislators and those in charge of administration that it is vital to observe the principles enshrined in the Basic Principles on the Independence of the Judiciary.

P.N. Bhagwati
Former Chief Justice of India
Chairman, CIJL Advisory Board

I - ARTICLES

The Rule of Law and the Independence of the Judiciary: An Overview of Principles

*Adama Dieng**

It has been often said that the independence of judiciary is the backbone of the Rule of Law. This article reflects on the general principles governing these two interlinked concepts. It commences by examining the meaning of the Rule of Law and the independence of judiciary. Some specific problems related to these principles are then explored. By carrying out this task, this article does not claim to be comprehensive; rather, it is intended to serve as an introduction to the general theme of this volume: “Constitutional Guarantees for the Independence of the Judiciary.”

The Meaning of the Rule of Law

The notion of the supremacy of the law has borrowed various aspects from all legal systems. *Etat de Droit*, *Rechtsstaat*, *stati di diritto* — all are variations on what we call the “Rule of Law” and are aimed at achieving the same objective: the establishment of individual freedoms and the protection against any manifestation of arbitrary power by the public authorities. The experiences of many generations of jurists from highly diverse nationalities have enabled certain basic conditions and principles

* Secretary-General, International Commission of Jurists (ICJ), Geneva.

to be elaborated, without which the Rule of Law cannot be sustained.¹ These conditions and principles are:

- the separation of powers, a principle which must be defended not only in relations between the legislative, the executive and the judiciary, but also in any area in which a complete concentration of powers may occur;
- judges' independence, not only from the public authorities but also from any influence other than that of the law;
- the requirement that any power emerging from the collective authority — in particular the legislative and the executive — must respect the individual's fundamental rights and freedoms;
- the legality of administrative action;
- control of legislation and administration by independent judges; and
- the need for a Bar which maintains its independence from the authorities and which is devoted to defending the notion of the Rule of Law.

None of these conditions and principles can function without the others, since they are inherently interlinked. They must operate as a whole or they will disappear altogether.

¹ See generally ICJ, THE RULE OF LAW AND HUMAN RIGHTS (1966).

The notion of the Rule of Law is therefore intended in particular to submit the administration to respect of the law. Legislation passed by parliament, which represents the electorate, is the instrument through which the people's sovereignty is imposed on the administration, preventing it from becoming an autocracy. As an abstract principle of general application, law guarantees freedom, equality and security to the individual. By imposing respect for stable norms on state bodies, it reduces the risk of arbitrary initiatives. The measures that will be taken by the public authorities become to a certain extent predictable and acquire a sort of permanent character, the consequences of which can be calculated by the individual in advance.

This does not mean, however, that the Rule of Law is a static notion. On the contrary, in a modern and democratic society the objective of the Rule of Law should not be simply to maintain peace in a frozen or paralysed state; rather, it should have the dynamism of life itself, and it should adapt itself to the constant process of transformation which characterises all living organisms.² Law as a factor of transformation and growth of human society is intended to ensure that this process takes place in an orderly, non-violent and peaceful fashion, while at the same time contributing towards greater justice.³

The Rule of Law, therefore, is only conceivable and workable where human rights are fully recognised and respected. In order to avoid recourse to rebellion, it is imperative that the Rule of

² See Jiménez De Aréchaga, *Some Thoughts on the Rule of Law*, 4 JOURNAL OF THE ICJ 275, 278 (1963).

³ *Id.*

Law be based on the principle of justice where the freedom of the individual is guaranteed. This ultimately depends on the existence of an enlightened, independent and bold judiciary which takes upon itself the task of promoting and protecting human rights.

The Meaning of the Independence of the Judiciary

As far back as 1959, the International Commission of Jurists (ICJ) described the conditions which must govern the existence of an independent and impartial judiciary.⁴ Since then, it has continued to elaborate such norms at both the domestic and the international levels.⁵

⁴ On January 5-10, 1959, the ICJ sponsored the International Congress of Jurists in New Delhi. One hundred and eight-five jurists from 53 countries participated in the Congress' four committees, each of which was devoted to examining a different aspect of the Rule of Law. At the end of the Congress, the committees drafted important papers on the topics of *The Legislature and the Rule of Law*; *The Executive and the Rule of Law*; *The Judiciary and the Legal Profession under the Rule of Law*; and *The Criminal Process and the Rule of Law*. These documents can be found in the ICJ's Working Paper on the Rule of Law.

Several more international congresses followed: in Lagos (1961), Rio de Janeiro (1962) and Bangkok (1965). The ICJ also continues its work on the definition and application of the Rule of Law, and on concepts related to the independence of the judiciary, through its publications (the ICJ JOURNAL and ICJ REVIEW) and, since 1978, through the activities of The Centre for the Independence of Judges and Lawyers (CIJL). See 25-26 CIJL BULLETIN 4-6 (April-Oct. 1990).

⁵ The CIJL was instrumental in the adoption of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers; see *generally infra* note 6.

According to the definition drawn up by the ICJ in 1981, “[i]ndependence of the judiciary means that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements or pressures, direct or indirect, from any quarter or for whatever reason”⁶

As Shimon Shetreet correctly points out, the modern concept of judicial independence cannot be limited to individual judges and their substantive and personal independence, but must also incorporate the collective independence of the judiciary as an institution.⁷ In other words, the independence of the judiciary comprises two basic components: the independence of the judiciary as an institution and the independence of individual judges.⁸

⁶ 8 CIJL BULLETIN 34 (Oct. 1981). This principle was incorporated into the Basic Principles on the Independence of the Judiciary (hereinafter “The Basic Principles”) which were adopted by the UN in 1985. The Basic Principles were adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, held from 26 August to 6 September 1985 in Milan, Italy. By resolution 40/146 of 13 December 1985, the General Assembly of the UN welcomed the Basic Principles with satisfaction and invited governments to respect them and to take them into account within the framework of their national legislation and practice. *See* 25-26 CIJL BULLETIN (April-Oct. 1990).

⁷ S. Shetreet, *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 393 (S. Shetreet and J. Deschênes, eds. 1985).

⁸ Bhagwati, *The Pressures on and Obstacles to the Independence of the Judiciary*, 23 CIJL BULLETIN 14, 18 (April 1989).

In the next section, the standards related to these two notions will be further explored through examining the rules contained in the 1985 UN Basic Principles on the Independence of Judiciary (hereinafter “the Basic Principles”), as well as those contained in the 1989 United Nations Draft Declaration on the Independence of Justice. This Draft Declaration was proposed by Mr. L.M. Singhvi, the UN Special Rapporteur on the independence of the judiciary and the legal profession, and is therefore commonly known as the “Singhvi Declaration.”⁹

a. Collective Independence of the Judiciary

The Basic Principles and the Singhvi Declaration outline several principles which provide for the collective independence of the judiciary. These include the following principles:¹⁰

- the concept of non-interference: An important safeguard for judicial independence guaranteed by the Basic Principles is the requirement of a constitutional guarantee of non-interference with judicial proceedings. The Basic Principles stipulate that “[i]t is the duty of all governmental and other

⁹ The UN Commission on Human Rights, at its forty-fifth session, by resolution 1989/32, invited governments to take into account the principles set forth in Mr. Singhvi’s draft declaration in implementing the 1985 UN Basic Principles on the Independence of the Judiciary. For the text of this declaration *see* 25-26 CIJL BULLETIN 38-58 (April-Oct. 1990).

¹⁰ *See generally* R. Brody, International Norms on the Independence of the Judiciary (ICJ unpublished paper delivered at a conference entitled “The Independence of Justice in a Changing Europe” in Popowo, Poland, 10-13 Oct. 1991).

institutions to respect and observe the independence of the judiciary,”¹¹ and that “[t]here shall not be any inappropriate or unwarranted interference with the judicial process.”¹²

- jurisdictional monopoly: Article 3 of the Basic Principles provides that “[t]he judiciary shall have jurisdiction over all issues of a judicial nature.” In practice, however, many countries create special tribunals to decide certain categories of cases which particularly interest the executive power. The most common of these are special tribunals empowered to deal with cases involving “security.” The establishment of such exceptional courts or tribunals can undermine judicial independence and undercut judicial authority.

- transfer of jurisdiction: This is a related matter which also jeopardises judicial independence. It is normally exercised by transferring the jurisdiction of the regular courts to specifically created *ad hoc* tribunals. Responding to this problem, article 5 of the Basic Principles states that “[e]veryone 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.” The most advanced constitutions provide for the unity and exclusivity of the judiciary’s jurisdiction. More common are provisions specifying that only the judiciary may decide

¹¹ Basic Principles, art. 1.

¹² *Id.* at art. 4.

disputes of a litigious nature, or that only tribunals established by law may decide criminal or civil cases.

- control over judicial administration: Judicial independence requires as well that the judiciary control its own administration. The Singhvi Declaration provides that “[t]he main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.”¹³

b. Personal Independence

As regards personal independence, the Basic Principles provide generally that judges “shall decide matters . . . 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.”¹⁴ In general, the Basic Principles deal with judges’ freedom of expression and association; their qualifications, selection and training; their conditions of service and the length of their mandate; professional secrecy and immunity; suspension and removal; and disciplinary measures. Mechanisms to protect judges’ personal independence should particularly include:¹⁵

- security of tenure: The most important measure to protect the

¹³ Singhvi Declaration, art. 32.

¹⁴ Basic Principles, art. 2.

¹⁵ See Brody, *supra* note 10.

personal independence of judges is the guarantee of tenure in office. Tenure insulates judges from the need to worry about political reaction to their decisions. The Basic Principles provide that judges “shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”¹⁶

- protection from arbitrary removal from office: Article 18 of the Basic Principles provides that “[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.” Removal of a judge for one of these causes is best entrusted to other members of the judiciary, often in the form of an appellate court or a council of magistrates.

- impartial selection process: The selection process is critical to ensure an independent judiciary. If selection is entrusted to the executive (or legislature) without adequate safeguards against abuse, the risk of appointments made on the basis of political or personal loyalty is high. The Basic Principles warn against “improper motives” and mandate a selection process based on the principles of meritocracy and non-discrimination.¹⁷ The same principles also apply to the promotion of judges.¹⁸ This issue is further explored below.

- guarantee of adequate salaries: Proper salaries reduce personal dependency and corruption and help attract those best

¹⁶ Basic Principles, art. 12.

¹⁷ *Id.* at art. 10.

¹⁸ *Id.* at art. 13

professionally qualified to the bench. The Basic Principles provide that a judge's compensation is to be secured by law.¹⁹ The Singhvi Declaration further recommends that judges' salaries should not be diminished during their term of office,²⁰ and that they should be "periodically reviewed to overcome or minimize the affect of inflation."²¹ In addition, judges should receive pensions after their retirement.²²

- prohibition of punitive transfer of judges: In many countries, judges have been transferred from one location to a less desirable one in order to punish them. Because an involuntary transfer can be punitive and is often tantamount to an invitation to resign, the lack of constraints on transfer can seriously compromise personal judicial independence. The Singhvi Declaration states in this regard that "[n]o promotions shall be made from an improper motive," and that "[e]xcept pursuant to a system of regular rotation of promotion, judges shall not be transferred . . . without their consent."²³

While a gap still exists between the vision informing these standards and the actual situation, it is important to emphasize that the acceptance of these standards as international norms is a great step forward. Today, more than ever, this acceptance must be put into practice through the active commitment of those

¹⁹ *Id.* at art. 11.

²⁰ Singhvi Declaration, art. 16 (a).

²¹ *Id.* at art. 18 (b).

²² *Id.* at art. 18 (a).

²³ *Id.* at arts. 14 and 15.

most directly concerned — the judges — as well as through the solidarity of lawyers and the public's awareness of the importance of an independent judiciary.

Specific Problems Affecting Judicial Independence

This section focuses on two main issues which effect the paradoxical relationship between the independence of the judiciary and the concept of the separation of powers. These are the question of the proper administration of the judicial selection process and the question of judicial financial resources.

a. The Selection Process of the Judiciary

The first question to be posed with regard to the independence of the judiciary is: can there be independence when the power to nominate judges or to grant them promotions is left entirely in the hands of the executive power? *A priori*, the reply is negative. With regard to democratic countries, this, however, must be somewhat qualified, since the executive power is at least accountable to the people for its acts *via* parliament. Nevertheless, even in such countries there is no doubt that political considerations can intervene in the decision to nominate or promote a judge. It is sufficient to refer to the dilemma embodied in the French Constitution of 1958 which, in article 64, states that the President of the Republic is the guarantor of judicial independence, while at the same time stipulating, in article 66, that the judicial authority is the guardian of individual freedoms. Ironically, this amounts to saying that the head of the executive is the guarantor of individual freedoms.

The insidious substitution of the principle of “hierarchisation” of powers for that of their “separation,” the principle found in the previous French Constitution, modifies the constitutional role of the judiciary. The judiciary now finds itself reduced to being merely a “judicial authority.” Louis Joinet correctly remarks that “[t]his constitutional change was the starting point of progressive reinforcement of executive tutelage over the judiciary.”²⁴ Among the manifestations of judicial subordination which he mentions is the poor guarantee of tenure. Mr. Joinet states that judges are encouraged “to leave their posts at the earliest opportunity, for this is the only way to obtain promotions with the increases in rank and remuneration which that implies. Paradoxically, irremovability from office can become a sanction rather than a guarantee. The ‘secure’ magistrate is most often the one to whom all advancement has been refused.”²⁵

In countries where the legal system is based on the French model, the judiciary is hybrid. Two types of magistrates — the *magistrats du siège* (judges) and those of the *parquet* (prosecutors and assistant prosecutors) — are united in one single body.²⁶ This poses certain problems. Judicial independence is jeopardised by provisions whereby a magistrate can act in both capacities during the course of his or her career. Furthermore, there are certain risks that the independence of the judiciary will be weakened by the simple fact that the President of the Republic also acts as Chairman of the High Council of the

²⁴ Joinet, *The Difficult Relationship of the Judiciary with the Executive and Legislative Branches in France* in 7 CIJL BULLETIN 37 (April 1981).

²⁵ *Id.* at 40.

²⁶ See also Joinet, *supra*, at 37.

Judiciary (HCJ), with the Minister of Justice sitting as its Deputy Chairman. The HCJ's composition and powers have aroused, and continue to arouse, a great deal of criticism from judges both in France and Senegal, to mention but two countries.

It is instructive to recall President Mitterand's statement on 30 November 1990, when French judges demonstrated at the Place Dauphine. In a speech made to the *Cour de Cassation*, he disparaged the idea of reform of the HCJ in the following terms:

Must we resort to the major undertaking implicit in a modification of the Constitution [in order to ensure the independence of the judiciary]? Those who seek to break any link with the head of state would wish to do so... But then, I ask you, who would be the guarantor of your independence in our republic? The professional bodies and the union? The corporation? On the pretext of protecting judges against any potential abuse by the authorities, which are continually subjected to the control of parliament and public opinion, unaccountable powers would be given sway over the judiciary.²⁷

Clearly, the question of the separation of executive and judicial powers is of the utmost importance. The HCJ remains a paradox: although it operates as one of the main tools with which to maintain the independence of the judiciary, it also poses a major threat to this independence.

²⁷ Le Monde, December 1, 1990.

b. The Judicial Budget

Another source of concern and a factor which violates the independence of the judiciary is its dependence on the executive for financial resources. The judiciary has to limit itself to the funds allocated to it in the annual budget. Although the budget is discussed and voted upon by the legislature, in most countries the legislature is under the control of the executive. Consequently, by ensuring the allocation of insufficient funds, the executive can limit the recruitment of judges and hinder the expeditious functioning of the legal apparatus. The resulting delays in judicial proceedings — a source of complaint throughout the world — damage the judiciary's credibility and stature, which in turn impacts negatively on judges' independence.

Financial autonomy is thus essential to the independence of the judiciary. Every constitution should therefore assign the direct administration of judicial funding to the judiciary itself, with provisions for the assistance of competent technical bodies. This funding should be used by the judiciary to ensure judges' pay as well as the material needs generated by the administration of justice (court buildings, office furniture, publications, etc.). The sum thus allocated, in accordance with the financial resources and standard of living in each country, should enable judges to have a decent level of income, commensurate with the dignity of their office and sufficient to free them from serious financial difficulties, so that their immediate needs do not run counter to their independence.

Conclusion

In conclusion, it is appropriate to recall the words of Roger Lallemand, a Belgian jurist, who correctly stated that “all thinking about the independence of the judiciary is hazardous.”²⁸ Independence is a value, an ideological principle, the basis of which must be understood. This should not make us forget that the independence of the judiciary remains the best guarantee of the exercise of the rights and freedoms required by human dignity. Far from being a luxury for a poor state, a legal structure which is quantitatively and qualitatively sufficient to carry out the services expected of it must be considered one of the necessary components of a society and a precondition for its progress.

⁵⁶ Lallemand, *Indépendance et discipline*, in LES POUVOIRS DU JUDICIAIRE 27, 27 (C. Panier & F. Ringelheim eds. 1987).

Constitutional Guarantees for the Independence of the Judiciary in Algeria: 1962 - 1991*

Miloud Brahim^{**}

Algeria became independent on 5 July 1962, less than thirty years ago. Its experience in legal matters has therefore been relatively short and has been characterised by fluctuations and one abrupt change. This change occurred with the adoption of a new constitution on 23 February 1989, prior to which the judiciary had been considered a simple function of the state. It was intended — in the same way as the executive or the legislative function, but with fewer prerogatives — to work towards the construction of socialism under single-party rule. The new constitution, however, provided unequivocal legislative guarantees for an independent judiciary.

The 1963 Constitution

The first constitution, which was adopted by referendum on 8 September 1963, was suspended on 19 June 1965 when the National Assembly was dissolved. Between that date and 1977, when the National People's Assembly was elected following the adoption, on 19 November 1976, of the second constitution, the executive power legislated by means of ordinances. Clearly, therefore, legal proceedings in Algeria were determined for

* Translation from the French original.

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many years by the political leadership, unaffected by any expression of popular will. This, in fact, continued to be the case until the Constitution of 1989, since the 1976 Constitution allowed the President of the Republic to legislate by ordinance during the intersessions of the National People's Assembly.¹ Several of these ordinances affected the independence of the judiciary. The suppression of the independent judiciary therefore began at an early stage and continued for a long period.

When independence was proclaimed, the massive departure of judges of French origin, who had formed the backbone of the system, left the country without any legal apparatus. For this reason, the provisional government responsible for leading the country until new institutions were established decided to go ahead "on a provisional and revocable basis" with recruitment of judges according to qualification to the "ranks, scales and grades of the legal hierarchy currently in use."²

It will be noted that the qualifications referred to above are not spelled out. In fact, this ordinance was taken to enable the promotion of assessors, who did not have the necessary qualifications, to the posts of judges and magistrates left vacant by the departure of the holders of these offices.

However, the "provisional and revocable" nature of these appointments, necessitated by force of circumstance, was never

¹ Constitution of 19 November 1976, art. 153.

² Ordinance No. 62/049, art. 1, of 21 September 1962. This ordinance concerns appointments to the legal hierarchy.

implemented, since none of the promotions made possible under the 1962 ordinance³ were subsequently revoked. It is therefore legitimate to infer that this clause had a dissuasive function, ensuring judges' docility during a particularly turbulent period of independent Algeria's short history.

Furthermore, the country's political leadership at this time was largely preoccupied with consolidating its authority. On 8 September 1963, a constitution was adopted which lacked any reference to the separation of powers, and by extension, to the judiciary. Out of seventy-eight articles, only three were devoted to "justice."⁴ The most important clause was in article 62, which stated that "in the exercise of their functions, judges must be guided only by the law and the interests of the Socialist Revolution."⁵ At the same time, it stipulated that judges' independence was to be guaranteed by the law and the existence of a High Council of the Judiciary.⁶ The ambiguity of such a drafting, inviting judges to obey the law while at the same time subjecting them to the interests of the Socialist Revolution, was certainly intentional and reflected legislation which was itself ambiguous.

To avoid any legal vacuum after independence, Law No. 62/157 of 31 December 1962 renewed "the legislation in

³ Ordinance of 21 September, 1962.

⁴ Constitution of 8 September 1963, arts. 61- 63.

⁵ Constitution of 8 September 1963, art. 62, para. 1. Cf. art. 48 of the 1952 Polish Constitution in E. Morawska, *Judicial Independence in Poland: From the 1952 Constitution to the 1989 Reforms* in this volume. - Ed.

⁶ Constitution of 8 September 1963, art. 62, para. 2.

force on 31 December 1962 . . . until further notice, except for those provisions which undermine the internal or external sovereignty of the Algerian state or are discriminatory or are of colonialist inspiration . . . are to be considered null and void.”⁷ In other words, the body of law imposed by the French during the colonial era remained in force until specifically repealed by new legislation, or were found during a judicial examination to undermine the sovereignty of the state, to be discriminatory or to contain colonialist inspirations.

Thus, independent Algeria’s first constitution considerably politicised the task of the judge, who was given the responsibility of applying texts, many of which were of foreign origin, in the light of the interests of the Socialist Revolution. Loyalty to the law alone, which could have ensured a certain independence of the judiciary, was therefore not considered sufficient. Judges had to remain in conformity with the interests of the Socialist Revolution since, as the preamble to the December 1962 law explained, “circumstances have not permitted the country to be endowed with legislation corresponding to its needs and aspirations.” Under such conditions, the independence guaranteed to judges “by the law and the existence of a High Council of the Judiciary” was necessarily subject to serious qualification.

Given its composition, it is reasonable to consider that the High Council of the Judiciary acted as an institution for the control of judges rather than for their protection. Article 65 of the Constitution reserved only two seats on this body, out of a total of 11, for judges elected by their peers. Even after the 1963

⁷ Law No. 62/157 of 31 December 1962, art. 2.

Constitution was suspended by the coup d'état of 19 June 1965, it continued to provide the inspiration for Algerian institutions, as the 1969 ordinance laying out the judges' statute illustrates.⁸

Ordinance No. 69/27 of 13 May 1969

The preamble to this text, the first of its kind to be genuinely Algerian and fully elaborated, is unusually clear. The Algerian legislator considered it inherent that the law must "strive for the protection and the defence of the Revolution and, to this end, must take into account the superior interests of the nation in the application of the law." From this it followed that "the defence of the Revolution necessarily implies the commitment of the judiciary to revolutionary goals. Consequently, the law constitutes a specialised function of the single revolutionary power."

Once the law had been expressly qualified as a "function" in the service of authority, it was logical that (still according to the preamble) "judges, in the free exercise of their mission in the service of the people and the Revolution, benefit from the protection of the authorities against any interference in their task."

The system was thus consistent. The judiciary was not a power in its own right but constituted a mere function, while judges simply had the right to the protection of an authority which proclaimed itself to be both revolutionary and unique.

Under such conditions, there can be no question of the independence of the judiciary. The freedom granted during the

⁸ Ordinance No. 69/27 of 13 May 1969.

exercise of the judge's mission was obviously a purely formal concession, since the role of the judiciary was directed towards the service of the people and the Revolution.

Any reference to the citizen was totally absent from the preamble to the ordinance, which effectively meant that the judiciary was placed under tutelage. Moreover, judges on the bench and from the public prosecutor's office — the latter coming under the hierarchical authority of the Justice Minister — belonged to the same service.⁹ All had to take the same oath to “safeguard the higher interests of the nation at all times,” as a result of which they were entitled to the “protection afforded by the authority” in the terms already referred to in the preamble.¹⁰

The High Council of the Judiciary, on which three party representatives sat,¹¹ gave its opinion on the appointment and allocation of legal offices.¹² It played no part, however, in the protection of judges, but acted as a disciplinary council with the capacity to give its non-binding opinion to the Justice Minister.

In fact, the executive power maintained undivided authority over judges. Thus, “transfers take place by decree of the Minister of Justice, the Keeper of the Seals” where there is

⁹ *Id.* at art. 1.

¹⁰ *Id.* at art. 5.

¹¹ *Id.* at art. 16.

¹² *Id.* at art. 21, para. 1.

no transgression,¹³ while "removal from office constitutes a penalty."¹⁴

When added to the fact that promotions were left in the hands of the administration, the power to effect unrestricted transfers of judges by simple order constituted an extremely effective means of exerting pressure to thwart any inclination for independence.

Special Courts

To complete the picture of the legal set-up in Algeria prior to the 1989 Constitution, reference must be made to the establishment of special courts, initially intended to curb economic offences and, subsequently, political ones. These were the courts for the Suppression of Economic Offences, established in 1966,¹⁵ and the State Security Court, established in 1975.¹⁶

These courts functioned according to a special procedure and applied provisions departing from criminal law. They were composed of judges appointed by the political power in a fashion running completely contrary to any spirit of the independence of the judiciary.

¹³ *Id.* at art. 21, para. 2.

¹⁴ *Id.* at arts. 24-25.

¹⁵ Ordinance No. 66/180 of 21 June 1966. These courts were replaced by the economic sections of the criminal court under Ordinance No. 75/46 of 17 June 1975.

¹⁶ Ordinance No. 75/45 of 17 June 1975.

Thus the President of the Revolutionary Council (i.e. the head of state after the coup d'état of 19 June 1965) chose the president and the assessors of each Special Court for the Suppression of Economic Offences.¹⁷ As for the State Security Court, this was constituted by five judges, including two officers from the People's National Army.¹⁸

The National Charter and the 1976 Constitution

The year 1976 was to be that of the conceptualization of the Algerian experience in all fields, with the referendum on the National Charter held on 27 June 1976. This profoundly political text was put forward for popular approval after several months of public debate. It was intended to be the "supreme source for the nation's policies and the laws of the state."¹⁹ In other words, the National Charter was located above the Constitution, which was adopted a few months later, and the "political" prevailed over the "legislative and the legal." That was why great attention was paid to ensuring a "judiciary and a legal function which are to be vigilant, upright and firm, all the more so because, for the Algerian citizen, the colonial era was synonymous with the reign of injustice, while the Revolution is synonymous with equity."

It will be noted that while this document refers to vigilance, integrity and firmness, no reference was made to any judicial autonomy. The aim was above all to ensure the "strengthening

¹⁷ Ordinance No. 66/181 of 21 June 1966.

¹⁸ Ordinance No. 75/46 of 17 June 1975.

¹⁹ Ordinance No. 76/57 of 5 July 1976, art. 1.

of the law with a view to defending the gains of the Revolution and to guarantee every citizen the legitimate defence of his rights.” The legitimacy of the rights of the citizen were therefore to be measured by the degree of their conformity with the ideals of the Revolution. Consequently:

Particular attention will be paid to improving the quality of the personnel by continual retraining. Appropriate procedures should guarantee the normal course of a judge’s career and offer protection against interference of any kind. Similarly, a rigorous control will be instituted to detect any weaknesses. The defence of judges’ prerogatives and of the defendants’ rights against any possible deviations by the judge are the foremost conditions for justice.

This last quotation is highly indicative of the synthesized character of the National Charter. It intended to protect judges from any form of interference, while at the same time submitting them to rigorous control to avoid any deficiencies or deviations from the mission of defending the Revolution, *conferred on them by the political power. But the contradiction is only apparent, since the Charter specified “the necessity of providing ideological training for legal officials,”* who were deliberately classified as “state agents.”

It was left to the constitution adopted by referendum on 19 November 1976 and promulgated by ordinance on 22 November 1976 to put the vision of the judiciary described in the National Charter into a legal framework. As if to confirm the hierarchy of norms, the Constitution described the Charter as the

“fundamental source of the nation’s policies and the laws of the state”²⁰ as well as the “fundamental point of reference for any interpretation of the constitution’s provisions.”²¹

Articles 164-182 of the Constitution were devoted to the “judicial function,” a notion which is reflected in the subtitle “Power and its organisation.” They feature after the “political function” (arts. 94-103), the “executive function” (arts. 104-125) and the “legislative function” (arts. 126-163), but before the “control function” (arts. 183-190) and the “constituent function” (arts. 191-196).

As if to neutralise the notion of legality, the concept of legitimacy is highlighted from the start. Article 164 stipulated that “the law guarantees each and every person the legitimate safeguard of their fundamental rights and freedoms.” Accordingly, the judge was to obey only the law,²² but at the same time was to “work towards the defence and protection of the Socialist Revolution.”²³ “He is [therefore] to be protected against any form of pressure, intervention or intrigue likely to impede fulfilment of his mission or respect for his free will.”²⁴

It is no surprise to come across the same false dichotomy which characterised the previous texts, whereby purely formal

²⁰ Constitution of 19 November 1976, art. 6, para. 1.

²¹ Constitution of 19 November 1976, art. 6, para. 2.

²² Constitution of 19 November 1976, art. 172.

²³ Constitution of 19 November 1976, art. 173, para. 1.

²⁴ Constitution of 19 November 1976, art. 173, para. 2.

rights were granted to the judge, together with the imposition of genuine constraints. These restrictions were reinforced by article 174, according to which “the judge is responsible to the High Council of the Judiciary . . . for the way in which he carries out his mission,” it being specified that “the law protects the defendant against any abuse or possible deviation by the judge.”²⁵

The 1989 Constitution

A restrained judicial system was therefore continuously in operation in Algeria from independence until the Constitution of 23 February 1989, despite the successive adaptations aimed at achieving greater consistency. This new constitution was a product of the bloody events of October 1988, which rang the death knell of the consensus surrounding the single-party state institutions.

In its preamble, the new constitution places itself “above all else” as a “fundamental law guaranteeing individual and collective rights and freedoms,” thereby ridding the institutional field of the National Charter. By referring to “the primacy of law” and the “exercise of powers” (in the plural), it paves the way for democracy and pluralism, which it intends to favour through the protection afforded by the “principle of the people’s choice.”

It is no longer a question of “functions” at the service of a single power, but of the “organisation of powers” (the subtitle)

²⁵ Constitution of 19 November 1976, art. 175.

into three clearly distinguished branches: the executive, the legislative and the judicial.²⁶

The chapter devoted to the judiciary opens with article 129, which formally provides that “the judiciary is independent,” while article 130 allocates judges the mission of protecting “society and freedoms” and of guaranteeing “respect for fundamental rights of each and everyone.”

The notion of an independent judiciary therefore entered Algerian law in unequivocal terms through the Constitution of 23 February 1989. Subsequent clauses illustrate and reinforce this principle. While article 138 repeats the formula already encountered in the previous text, according to which “judges must be guided only by the law,” the paragraphs found in previous constitutions which identify the function of the judiciary around protecting the interests of the Revolution were omitted.

Henceforth, the judge is expected to obey the law alone and “is protected against any form of pressure, intervention or intrigue likely to impede fulfilment of his mission or respect for his free will.”²⁷

To strengthen this notion, the High Council of the Judiciary is assigned an entirely new role, fundamental for the independence of the judiciary. It is to decide “on nominations, transfers and the course of judges’ careers, under the conditions

²⁶ Constitution of 23 February 1989, arts. 129-148.

²⁷ Constitution of 23 February 1989, art. 139.

determined by law” and to “ensure respect for the provisions of the judges’ statute of judges and control over their discipline.”²⁸ This statute was fixed by law in 1989,²⁹ which in turn marked a radical departure from the previous one, established by ordinance on 13 May 1969.

The key role of the High Council of the Judiciary is specified in article 3, which stipulates that judges are to be appointed by presidential decree after consultation with the Council and in accordance with the Constitution. In practice, it follows that decisions concerning appointments are left to the Council, except for the formality of issuing the decree.

The oath sworn by a judge “to fulfil my mission well, to keep deliberations secret and to conduct myself as an upright judge, faithful to the principles of the law”³⁰ no longer bears any resemblance to the previous one. In other words, the judge is no longer expected, as was the case under the old statute, to “safeguard the superior interests of the Revolution at all times.”³¹

On the other hand, while judges must always respect confidentiality, this is in order to guarantee independence and

²⁸ Constitution of 23 February 1989, art. 146, paras. 1 and 2.

²⁹ Law No. 89/21 of 12 December 1989.

³⁰ Constitution of 23 February 1989, art. 4.

³¹ Constitution of 19 November 1976, art. 3.

impartiality.³² For the same reason, they are “forbidden from belonging to any political organisation.”³³

The law’s most innovative aspect, rightly linked to the independence of the judiciary, is the introduction of the principle of the guarantee of tenure for judges with ten years service on the bench, who are “irremovable and cannot be transferred or given another assignment without the judge’s consent.”³⁴ The depth of this reform can best be grasped when it is recalled that the Minister of Justice used to have the monopoly over transfers, which he could use and abuse at will simply by issuing an order.³⁵

Moreover, the High Council of the Judiciary, as it is conceived by the new law, ensures genuine protection for judges against any interference by the executive power, in accordance with the mission assigned to it by the Constitution.³⁶ The Council is presided over by the Head of State and is composed of 21 members. Thirteen of these are elected judges, together with the presiding judge, the public prosecutor and the vice-president of the Supreme Court, three members designated by the President of the Republic and a separate institution from the government, represented by the Justice Minister.³⁷

³² Constitution of 23 February 1989, art. 7.

³³ Constitution of 23 February 1989, art. 9.

³⁴ Constitution of 23 February 1989, art. 16.

³⁵ Constitution of 19 November 1976, art. 21.

³⁶ This formation largely resembles the French model. On the critique of this model, see A. Dieng, *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* in this volume. - Ed.

³⁷ Constitution of 23 February 1989, art. 63.

The number of elected judges has been increased to thirteen (from seven under the old system), while representatives of the former single party and of organisations unrelated to the legal apparatus have been removed. Thus, since its decisions are taken by a majority vote, with its current composition,³⁸ the High Council of the Judiciary is in a position to assume its role in complete independence from the executive power.

It should be remembered that among the Council's functions are the appointment, transfer and promotion of judges,³⁹ but also the control of their discipline.⁴⁰ It is interesting to note that for the most serious punishments (temporary suspension, retirement from office, dismissal or withdrawal of the position of honorary magistrate), a qualified majority of two thirds of the members present is required,⁴¹ it being specified that dismissal can only be pronounced by decree.⁴² Other sanctions are taken by order of the Minister of Justice.⁴³

Another major innovation is the Law of 12 December 1989, which grants all judges who are not prevented from doing so the right to form their own professional association. A National Judges' Association emerged in the month following the

³⁸ Constitution of 23 February 1989, art. 75.

³⁹ Constitution of 23 February 1989, arts. 78-82.

⁴⁰ Constitution of 23 February 1989, arts. 83-104.

⁴¹ Constitution of 23 February 1989, art. 100.

⁴² Constitution of 23 February 1989, art. 104, para. 1.

⁴³ Constitution of 23 February 1989, art. 104, para. 2.

promulgation of this law, and has already brought attention to itself by taking a public stance which has sometimes been clearly hostile to the Chancellery or the Government.

In an interview given to the daily newspaper *El Watan*, the president of the National Judges' Association declared plainly that "since independence, pressure has always been exerted on judges with the aim of keeping us under the governmental executive's thumb. Autonomy clearly disturbs some people. We are the government's No. 1 target."⁴⁴

The interest in such statements lies less in the obviously excessive accusations made, but rather in the fact that they have been uttered in total freedom, safe from any threat of punishment. Obviously, such a statement would have been completely unthinkable prior to the upheavals introduced by the Constitution of 23 February 1989.

Conclusion

It is too early to appreciate the impact that the on-going reforms will have, but it is beyond doubt that the Algerian judiciary has undergone a profound change since the adoption of the 1989 Constitution. The judiciary has now obtained the legislation necessary to ensure its independence, and judges have sufficient guarantees to accomplish their mission free from the pressures to which they had previously been subjected.

⁴⁴ *El Watan*, No. 299, 25 September 1991.

Judicial Independence in France*

Robert Badinter**

Historical Introduction

Not all of the fourteen constitutions which have been in force in France over the last two centuries have dealt with the judiciary and its independence. The constitutional laws of 1875, which governed France until the collapse of the Third Republic, did not refer to the judiciary at all. This failure on the part of the drafters contributed to a major doctrinal controversy, in which the specialists in public law who believed in a judiciary with a separate existence from the two other powers (Carré de Malberg and Esmein) opposed the followers of Duguit, who did not.

With this one exception, the other constitutions have sought to establish a constitutional basis for the judiciary, but in only three cases is the concept of a judicial power employed. The most significant case in point is that of Title III, Chapter V of the 1791 Constitution which is devoted to the "Judicial Power," while article 16 of the Declaration of the Rights of Man and Citizen proclaims the principle of the separation of powers. Thanks to Benjamin Constant, the judiciary as a separate power was accorded a prominent place in the *Acte Additionnel* to the constitutions of the Empire, as well as in the 1848 Republic's Constitution.

* Translation from the French original.

** President of the *Conseil constitutionnel* of France.

Whether by an irony of fate or as the price to be paid for periods of unrest, those constitutions which affirmed the existence of a judicial power have historically had an extremely brief existence.

The Judiciary under the 1958 Constitution

The Constitution of 4 October 1958 retained the concept of the judicial authority rather than power, which some believed at the time to be an indication that the drafters of the constitution were distrustful of the judiciary. The reality is doubtless somewhat less clear-cut. At any rate, with the passing of time, two observations can be made. First, while it is true that the text of the 1958 Constitution devotes only limited attention to the judiciary, it nevertheless lays out the basic principles. Second, the content of the original constitutional corpus has been brought to life and enriched by the jurisprudence of the *Conseil constitutionnel*. These observations will be considered in turn below.

The first reaction one feels when looking at the actual text of the Constitution of the Fifth Republic is that the authors devoted very few provisions to the judiciary, some would even say startlingly few. After this initial sentiment, however, it subsequently becomes clear that the constitutional texts have established fundamental principles with regard to the judiciary.

The belief that the judiciary has a reduced status in the text of the 1958 Constitution stems from two sets of observations.

First: Quantitatively, out of a total of 92 articles which comprise the Constitution, only three specifically relate to the

judiciary. The articles in question, articles 64, 65 and 66, appear in Title VIII of the Constitution. Three out of 92 certainly represents an extremely small proportion.

It is true that two of the Constitution's other titles could be attributed to the jurisdictional function. Title VII, which is devoted to the *Conseil constitutionnel* immediately springs to mind. This Council originally appeared to act primarily as the guardian of the rules of the rationalised parliamentary system of government envisaged by the drafters of the Constitution. Although the *Conseil constitutionnel* has subsequently won recognition as a court of law comparable to a constitutional court, it is nevertheless far from being a supreme court at the pinnacle of the judicial hierarchy in the way that the Supreme Court of the United States is.

Similarly, while it must be pointed out that Title IX of the 1958 Constitution is devoted to the *Haute Cour de Justice* (High Court of Justice), the jurisdiction of this court lies within a specific context connected to the possibility of attributing criminal responsibility to members of the government or the President of the Republic.

Second: The argument which suggests that the judiciary is given an undervalued role has sometimes found an echo in the fact that the 1958 Constituent Assembly refers to the judicial authority, rather than power, in the actual heading of Title VIII.

In fact, the terminology used by the Constitution of 4 October 1958 was pre-determined by the constitutional law of 3 June 1958 which, while empowering the government led by General de Gaulle to prepare a draft constitution, directed the executive,

among other things, to implement the principle according to which “the **judicial authority** must maintain its independence in order to be in a position to ensure respect for fundamental freedoms.”

By placing the text of the Constitution in the context outlined by the constitutional law of 3 June 1958, one realises that the authors did in fact establish fundamental principles regarding the judiciary. These are expressed not only in Title VIII but also in other constitutional provisions.

Clearly, it is the three articles composing Title VIII which first attract attention. It is worth recalling that article 64 of the Constitution makes the President of the Republic the guarantor of the independence of the judiciary as well as specifying that judges on the Bench are irremovable. It stipulates that the Head of State, in the exercise of his mission, is assisted by the *Conseil Supérieur de la Magistrature* (High Council of the Judiciary), the composition and general attributions of which are defined in article 65. Article 66, on the other hand, prohibits any arbitrary detentions and makes the judiciary the custodian of personal freedom.

Leaving Title VIII to one side, other constitutional provisions do have a bearing on the judiciary. Article 34 of the Constitution, which specifies the areas governed by law lists as matters falling within the competence of the legislature rules concerning the definition of felonies and misdemeanours and the associated penalties, criminal procedure, amnesties, the creation of new courts of law and the status of judges. Moreover, the question of judges' status must not be promulgated in ordinary law but, in accordance with both articles 34 and 64 of the Constitution, in an organic law.

The preamble to the 1958 Constitution, because of the references it incorporates to previous texts (Declaration of the Rights of Man and Citizen, the preamble to the Constitution of 27 October 1946 and its consecration of the fundamental principles recognised by the laws of the Republic), has also had a bearing on the exercise of the jurisdictional function, in particular with regard to criminal law and procedure.

Although the main principles relating to the judiciary can be extracted from the constitutional texts, it has been noticeable that, over a long period, it has been up to the jurisprudence of the *Conseil constitutionnel* to give them their full weight.

The Role of the Constitutional Council

The jurisprudence of the *Conseil constitutionnel* has, as it were, brought life to the constitutional provisions relating to the judiciary and its independence. This is noticeable as much on the organic level as on the functional level.

With regard to the organisation of justice, the role of the constitutional judge has consisted in defining the competence of the legislator more precisely and even extending it further, while the same time controlling the exercise of constitutional principles.

In a democratic country, parliament's intervention in matters pertaining to the organisation of the judiciary provides a certain guarantee. What is more, when judges' status is at issue, a basic law must be passed, and the 1958 Constitution makes the promulgation of basic laws dependent on prior

verification of their conformity with the Constitution by the *Conseil constitutionnel*.

Whether through the compulsory control of basic laws or the discretionary control of ordinary statutes, the constitutional judge is entrusted with protecting the legislator's prerogatives. The provisions of article 34 of the Constitution reserving the creation of new courts to the passing of a statute have been interpreted as requiring Parliament's involvement in establishing the constituent rules of any new court, whether as part of the judicial hierarchy, juvenile courts or the *juge de l'expropriation*. In matters pertaining to a statute or a basic law, the Council has obliged the legislature to exercise its competence in full without delegating it to the executive. The basic lawmaker cannot leave the task of determining the status of the *Conseillers référendaires* (judges of the *Cour de Cassation*) to the regulations given that the principle of irremovability of the judges on the bench is at issue. The *Conseil constitutionnel* has ruled that a matter concerning a basic law cannot be delegated to the government operating *via* ordinances on the basis of article 38 of the Constitution.

Therefore, while the principle of the competence of the legislator is protected, it remains subject to the control of the *Conseil constitutionnel*. One of the key ideas behind the court's jurisprudence is that the independence not simply of judges but also of the courts must be protected.

On the first point, several decisions taken by the *Conseil constitutionnel* have censured provisions of basic laws which contravened either the principle of independence proclaimed in the first paragraph of article 64 of the Constitution, or the rule

of the irremovability of the judges on the bench, set forth in the fourth paragraph of the same article. In the mind of the constitutional judge, the principle of independence and the rule of irremovability are complementary. Irremovability is not a form of privilege, but rather is aimed at securing a wider observance of the independence of the courts.

With regard to the second point, the Council has, since a decision of principle of 22 July 1980, considered that the requirement of independence applies equally to the *juge judiciaire* under article 64 as to the *juge administratif* in view of the "fundamental principles recognised by the laws of the Republic." For the Council, independence requires that neither the legislature nor the government can censure decisions made by the judges, impose any injunctions on them or substitute them when judging lawsuits falling within their competence.

The degree to which law courts assert their independence is in proportion to the missions which are constitutionally assigned to them.

With regard to the administrative courts, we will restrict ourselves to stressing the fact that the *Conseil constitutionnel* has found a constitutional basis for its intervention in controlling the legality of administrative acts in the "fundamental principles recognised by the laws of the Republic."

However, the most significant jurisprudence concerns the competence of the judicial courts. As we saw above, article 66 of the Constitution, in addition to forbidding arbitrary detention, makes the judiciary the guardian of personal freedom. The *Conseil constitutionnel* has given a broad interpretation to this mission.

The Council has not restricted the scope of the article to protection from arbitrary detention. Article 66 is applied when the legislature empowers the criminal investigation department to carry out inspections of vehicles or identity checks on the public highway, whenever the inviolability of the home is at stake, and obviously when personal freedom is forfeited or any major restriction is placed on the freedom to come and go at will. Such was the case for the prolonged detention of foreigners in airport transit areas (decision of 25 February 1992).

When personal freedom in the sense of article 66 is at stake, the legislature must allow for the judiciary's intervention so it can retain the "full responsibility and power of control which are its concern" (decision of 29 December 1983).

Conclusion

In short, consideration of the independence of the judiciary in France illustrates a general rule to the effect that the value of legal texts, even the Constitution, is only as great as the application they are given in practice.

Through its jurisprudence, the *Conseil constitutionnel* has managed to give full scope to the principles established by the authors of the 1958 Constitution, thereby side-stepping the doctrinal debate as to whether the judiciary should be considered as a separate power or as an authority. The main consideration is to ensure the prerequisite for good administration of justice, which is the independence of both judges and the courts.

The “Autogoverno” of the Italian Judiciary*

Salvatore Senese**

The principle of recruitment by competitive examination has been incorporated into the Italian legal system since unification in the nineteenth century. The same concept was written into the 1947 Constitution of the Republic although, on the basis of particular merit, law professors or defence lawyers at the Court of Cassation may have all the functions of the single judge conferred on them by election or be appointed as advisers to the Court.

These provisions have, however, remained a dead letter, with the consequence that today, as in the past, Italian judges form a professional body whose members have a particular relationship of service to the state, involving both rights and duties. Judges in Italy therefore represent, albeit in a very distinctive way, a bureaucracy necessitating a series of activities to ensure their administration and coordination, such as their appointment and their assignment to various posts.

The numerical composition, the structure and other aspects of the legal services are first determined by general legislative acts. These acts form the basis of an apparatus which presents administrative problems, ranging from the appointment of judges

* Updated and translated version of *L'“autogoverno” de la magistrature italienne*, in *LES POUVOIRS DU JUDICIAIRE* 65-76 (C. Panier & F. Ringelheim eds. 1987).

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to various services to their transfer from one post to another, and from the organisation of each service to the distribution of business within each sector, and so on.

The Judiciary and the Government

This set of organisational activities — which could be defined as “the administration of jurisdiction,” since it is largely a question of administration even though these services support and provide the necessary preconditions for the power to judge — was for a long time assigned to the Italian executive power. The executive dealt with these matters either directly or through the heads of jurisdictions, who were in this respect explicitly attached to the Minister of Justice by a hierarchical link.

The Italian monarchy’s entire institutional history was marked by endless debates about the infringements on the independence of the judiciary engendered by the system, even though this independence was accepted by the official ideology as being one of the distinctive characteristics of the post-unitary political regime. Allocation of the administration of justice to the executive power was, in particular, found to be one of the major means whereby judges’ independence was violated.

Fascism, which openly repudiated liberal values, had only to make the bureaucratic structure more rigid and increase dependence on the Minister and the executive power in order to bring the judiciary back under the government’s wing.

This explains why the Republic’s Constitution, which was the outcome of the joining of those political forces and currents of thought which had fought against fascism, removed responsibility

for the administration of the judiciary from the executive power. The Justice Minister was only left with responsibility for organisational matters and implementation, inclusive of that relating to legal officials. The only prerogative regarding judges left to the Minister of Justice by the Constitution is the power to start disciplinary proceedings against them.

More precisely, the Constitution elevated the independence of the judiciary to the position of one of the fundamental values of the new state, closely linked to the protection of basic freedoms. The issue therefore arose of the governing of a professional body, in other words, of a judiciary characterised by a certain number of fixed bureaucratic traits. The solution adopted by the drafters was to reduce the bureaucratic elements within the judiciary to a minimum by praising the professionalism of its members as acting as an equalising factor between its various functions (article 107/3 of the Constitution proclaims that “judges are only distinguishable from one another by the diversity of their functions”), and by stating that no barrier or mediation can stand between the judge and what is to be judged.

The Judge and the Law

In practice, this relationship can be translated into the principle of the judge’s submission to the law alone, the guarantee of the *juge naturel* and the attribution to all judges of the power and duty to control the constitutionality of laws prior to their application. Thus, the reconstruction and the proving of facts, as well as the identifying of the relevant principle of law, resemble an act of sovereignty, the exercise of which marks an *original* bestowal on each judge, who is called on to become

“a critic of the law” to be applied. The judge therefore forms an essential link in the control of constitutionality, which is entrusted to the Constitutional Court by all the legislative acts of Parliament.

Since the drafters wanted the judiciary to be entirely removed from the executive power, they established a body issuing from the judges themselves as well as from Parliament: the High Council of the Judiciary (HCJ). While the Council is certainly bureaucratic in origin, it is composed of subjects of equal dignity which have the original attribution of sovereign powers. In order to exercise these powers, the conceptual and cultural position of each is valued and protected.

Article 104 of the Constitution states as follows:

The judiciary is autonomous and independent of any other power.

The High Council of the Judiciary is presided over by the President of the Republic.

The first presiding judge and the public prosecutor of the Court of Cassation are *ex-officio* members.

Two thirds of the other members are chosen by all the ordinary judges among the various different categories. The remaining third is chosen by Parliament at a common sitting from university law professors and lawyers with more than 15 years experience.

The Council elects a vice-president from among those members designated by Parliament.

The elected members of the Council stay in office for four years and are not immediately re-eligible.

While members are in office they cannot appear on professional lists, nor act as members of Parliament or of regional councils.

Article 105 specifies that “[t]he High Council of the Judiciary is to decide, according to the laws on the organisation of the judiciary, on appointments, postings and transfers, promotions and disciplinary measures concerning judges.”

It should be made clear that when the Italian Constitution refers to judges, it is referring to both judges on the Bench and those from the *Parquet* (Public Prosecutor’s Office). Both therefore act as electors and are eligible for the HCJ, whose prerogatives concern both groups equally.

The removal of all competence in the administration of the judiciary from the attributions of the executive power undoubtedly represents an innovation in the liberal-democratic form of government. By this move, the Constitution removed from the executive a slice of the state’s political and administrative activities, which cannot be ignored, and which had traditionally been attributed to the executive. It entrusted a relatively new body in the institutional typology to administer the judiciary.

A precedent for the institutional innovation represented by the HCJ, as defined by the Italian Constitution, can perhaps be found in an analogous body created by the Constitution of the Fourth French Republic. However, in that case, the removal of

powers from the executive was less radical than under the Italian system and, for many reasons which could best be explored by French jurists, the body was short-lived and bore little fruit.

A Growing Awareness

The Italian HCJ was therefore established without a solid tradition behind it, and without a sufficient institutional culture or an equivalent level of experimentation to that which underlies the most important institutions of the liberal-democratic state. This explains why the constitutional design was implemented slowly, in bursts, as the HCJ gradually began to acquire a sense of its own nature and as civil and political society gradually and in various ways became aware of its role. This recognition was partially followed, in an uncertain and erratic manner, by a progressive adjustment of its means; an increase in the requirements for the fulfilment of its role; a development of the specific culture of those directly called on to contribute to its composition (judges and Parliament); and of their action to obtain the necessary means to fulfil their task.

The current shape of the HCJ has been formed in stages, through the translation of constitutional precepts into norms of ordinary law and through practical experience and the development of statutory norms, as well as by the gradual specification of the body's functions and its means of operation.

As for the legislative updating of the Constitution, it is sufficient to recall that the law establishing the HCJ dates from 1958, that is to say 10 years after the entry into force of the Constitution. It was the outcome of a struggle led by the National Association of Italian Judges (ANMI) and the democratic forces

in the country. This delay should perhaps be seen as a favourable quirk of history. It allowed the HCJ to start its operations with a professional body of judges whose association had had time to consolidate after being reconstituted following the fall of fascism. Consequently, it was genuinely representative of the entire judiciary and was able to act as a united whole. This point is worth stressing, since the Italian HCJ is, as we have already seen, made up in its majority of judges elected by their peers. For the system to be able to operate without being reduced to the level of petty scheming, the entire judiciary must be present in a single electoral body. A corps of judges shaped by a strong community life provides the basis of an electoral body where debate on the great themes of justice allows conceptual options to be outlined around which consensus can be built. In this way, the intention behind the body's formation is realised through a numerically preponderant representation elected by all judges.

Eliminating Bottlenecks

The 1958 law demonstrated a certain timidity, the vestige of notions left over from the former system of government. For instance, the Council could only confer on the initiative of the Minister of Justice; two fifths of judges' seats were reserved for those from the Court of Cassation (who represented less than one tenth of the total number); each judge could only vote for eligible candidates from his or her own category;¹ only judges with at least nine years service were eligible, etc. These restrictions were gradually lifted through the intervention of the Constitutional Court and the legislator. The current system,

¹ In Italy, judges on the Bench and those from the *Parquet* are divided into three broad categories: lower court judges, appeal court judges and judges from the Court of Cassation.

whose strong points were defined in 1975 and subsequently revised in 1981, 1985 and 1990, assigns the election of HCJ members to the entire body of judges, by means of the allocation of seats to competing lists according to a system of proportional representation. It also establishes that out of the total number of judges to be elected (20), two are to be judges currently practising at the Court of Cassation (whether on the Bench or the *Parquet*).

In 1963, the Constitutional Court put an end to the dependency stemming from the Minister's power of initiative, which used to weigh down the HCJ's activities. Since then, the Council has been able to deliberate in total freedom from this initiative.

The Underlying Significance of the Developments

Rather than pay too much attention to this slow evolution, it is preferable to observe how, as the many legislative bottlenecks were gradually overcome, the judges' community life developed through a progressive enrichment of their debates. These touched on the great themes of justice; their relation to democracy and the rule of law; the conditions for full independence of the judiciary; the role of public opinion; the relationship between the judge and the law, between the judge and the constitution and between the judge and society; and even the role of the judge and the judiciary in a democracy battling against the huge problems of terrorism, the crime of the Mafia and the Camorra and the criminality of power.

It is in this context that the various conceptual options emerged from the Judges' Association (which incorporates

90% of judges under its banner and is therefore highly representative), giving rise to what are called currents, i.e. groups separated by their theoretical positions. Dialectic and confrontation thereby entered into the world of the judiciary, unleashing clashes and the search for common values, but also comparisons, dynamics with a democratic tendency, the custom of a certain tolerance towards others' positions, acceptance of criticism, as well as the beginning of an opening towards civilian society and the currents of thought running through it.

In its turn, this process fed and was reflected in the development of the independence of the judiciary as a whole and of every judge in the exercise of his or her functions, as well as of judicial pluralism. This has led to the discovery of the conceptual roots of certain fundamental constitutional provisions, such as those relating to the *juge naturel* and the submission of the judge exclusively to the law.

It has become clearer that the independence and the equality of each judge are intended to ensure judicial pluralism, in the same way that the principle of the *juge naturel* is intended to guarantee in practice the development of the protection of various conceptual and cultural positions present in society.

The Guarantee of Pluralism

Through the introduction of the proportional system using competing lists for the election of judges to the HCJ, this dual process (the value attached to the independence of the judiciary as a whole and to each judge within the judiciary) found its natural outcome. Given the necessary conditions (i.e. the conceptual and jurisprudential pluralism within the judiciary),

this mechanism has proved to be the most appropriate for both practically updating and giving full meaning to the elected position of the judges on the Council. It avoids the risk that the Council would be reduced to a choice of eminent persons who give their rubber stamp to decisions, anchoring it instead in choices made on the basis of conceptual positions, programmes and the coherence shown by each group when these are applied. Given the constitutional ban on the reselection of elected members² — a ban which has the effect of ensuring that power is dispersed among judges — election from competing lists encourages those selected to show a commitment towards the list which put forward their candidacy. This system thereby protects one of the characteristics of the electoral system, i.e. the possibility that the electoral body may sanction those elected. Moreover, the pluralism thus established among judges on the Council, when added to that stemming from the presence of ‘lay’ representatives, tends to provide a guarantee of the independence of judges from the Council itself. One particular aspect of independence — characterised as “internal independence” — which is not sufficiently guaranteed in those systems where judges are governed by the heads of jurisdictions, is thereby safeguarded. Moreover, the moral strength which the Council’s deliberations acquire when based on a convergence of opinions following a conflict between differing positions, should not be underestimated.

More generally, the “political” character, in the broad sense, of a system of this type is equivalent to replacing the bureaucracy in the government of the judiciary with a democratic dimension.

² Costituzione art. 104, § 6.

This acts to the benefit of independence, a value which flourishes in democracy but which is inevitably threatened by bureaucracy. It was not purely by accident that the first Council elected under the system of proportional representation was that which inaugurated the period of vigorous interventions on the subjects of the distribution of business and of respect for the *juge naturel*. Nor was it by chance that, from the moment when all judges' conceptual positions were represented on the Council, the dialectic within the Judges' Association became more constructive and productive and more marked by a spirit of tolerance and the search for valid solutions on the institutional level.

New Facets of the Judge's Role

The HCJ, in its current form, has had to manage the bureaucratic and organisational problems of a judiciary which has seen a huge expansion of its role, its hold over collective life and its defence mechanisms when faced with attacks of historic proportions on lawfulness and democracy.

Of course, this is the particularity of the Italian case, but it also reflects a more general process which, in well-developed societies, leads to a previously unimagined expansion of the role of the judge. This process is well known to experts in comparative law who translate the phenomenon into that of the judge "responsible for the development of the law," a synthetic expression which alludes to many factors, including the following:

- the increasingly wide margins left by the legislator to the discretion and the creativity of jurisprudence due to the current means of formulating the basic laws;

- the unprecedented development of the attributions and activities of the state and the political power, and the ensuing need for control;
- the emancipating character of much of the legislation and judges' participation in the implementation of this legislation; and
- the increasing use of lawsuits in conflicts of collective interest. Instead of isolated subjects, increasing numbers of organisations, branches of power and collective bodies are appearing before the court, causing the judiciary to have an increasing impact on collective equilibria.

But governing the administration of justice with this new role assumed by judges requires the objective politicisation of the HCJ's attributions and, at the same time, vastly complicates its practical functioning. New obligations hidden in the small print of these attributions come to the fore: protecting judges' outside independence when faced with reactions from important interest groups affected by their most noteworthy actions in defence of lawfulness; ending the underground relations between the centres of power; promoting professionalism so as to be on a par with the questions on which judges are required to act; and enhancing a legal culture capable of harmonising judges' objectively political role with the guarantees and rules of the judiciary.

It has become increasingly clear that the guarantee for the independence of the judiciary, which the Constitution intended the HCJ to provide, is not limited to the protection of each judge from interference by the executive. Such a guarantee is

necessary but is not in itself sufficient to ensure an independent judiciary, since a series of preconditions is also required. These include judges' professionalism; their aptitude for their specific functions; the absence of links of any kind between judges and the centres of power; the clear organisation of jurisdictions and appropriate means for distributing business; the effectiveness of legal work; and the diffusion of the culture of the judiciary. According to the Italian Constitution, all these requirements can only be confided to the HCJ, as the summit of an apparatus whose activities of management, promotion and control represent "the administration of justice" as it stands today.

The "Self-government" of the Judiciary

For the very reason that this set of administrative activities is exercised in such a way as to avoid any interference of *raison d'Etat*, any conditioning which might arise from an assessment of the interests of the government's general policy and of the party framework within which this operates highlights the great novelty of the system. This novelty stems from the contribution that an institution such as the Italian HCJ makes to the shape of government. "Self-government" of the judiciary, as the Council's activities are sometimes termed, is a valid description as long as it is not construed in a narrowly corporative sense, whereby judges are said (falsely) to administer themselves. In fact, as we have seen, the HCJ is presided over by the President of the Republic and a third of its members are elected by Parliament from outside the ranks of the judiciary. "Self-government" instead means that the guidelines governing the Council's activities all lie within the framework of the political values underlying the role assigned to judges by the Constitution, and that they constitute an essential part of

the design of the state. These values are those of judicial independence and autonomy, the rejection of special judges and of any “political” jurisdiction (with the exceptions mentioned in articles 90/2, 96 and 103), the principle of the lawfulness of legal action, the vigorous affirmation of the “justiciability” of any subjective situation guaranteed by constitutional arrangement, the protection of judicial pluralism, judges’ attribution of the role of guarantor of republican freedoms and the activation of the control of the constitutionality of laws. In short, they constitute institutional pluralism and polycentricity.

“Self-government” therefore means that it is from this set of values, which are at the heart of the judiciary in the Republic and which have their place above the party system and away from the game of potential parliamentary majorities, that the HCJ must draw the main themes which inspire its policies. The Council’s “political” role is therefore a function of the defence of these values and not of the incongruous mix of political and partisan interests inside the body. Moreover, by examining the Council’s concrete experience over the past years, it becomes clear that the politicisation of the institution has in fact been sparked off by subordination to the logic of party political interests, when this had expressed itself.

This experience has highlighted the fact that the HCJ forms part of the political system, even if it is located outside the framework of the party structure. Politics, when all is said and done, is not simply a question of parties and the *continuum* of parliament-government. Instead, there are various tendencies operating inside the general political system, not all of which are directly based on universal suffrage: those based on autonomy and sub-systems. It is these which form the basis of modern pluralism.

A Period of Criticism

This report would not be complete if I did not stress the fact that the concept of self-government, such as I have defined it, is neither recognised nor accepted by all Italians. On the contrary, it is the subject of highly divergent assessments in political and cultural circles. In particular, as the novel character of the HCJ's contribution to the shape of government becomes clear, concern begins to be voiced and alarm bells to be rung in the wider political debate. Certain political parties accuse the HCJ of being too politicised.

On several occasions, draft laws aimed at abolishing the system of electing judges from competing lists under proportional representation have been presented to Parliament, and there have even been calls from a number of quarters for the modification of the constitutional provisions relating to the HCJ. Certain political parties belonging to the governmental majority were at the source of a movement intended to gather the necessary signatures for a referendum to repeal the provisions currently governing the election of judges to the HCJ. The Constitutional Court declared this referendum inadmissible, but the disquiet has not been dissipated.

Because judges belong to various groupings, the current system is accused of being subjected to *lotizzazione*, a practice whereby political patronage governs appointments to office and, more generally, all decisions concerning judges.

This failing doubtless does exist, but to a lesser extent than elsewhere in Italian public life (for example, in the world of banking, large state holding companies, the media, etc.).

Particularly noteworthy is the fact that this shortcoming does not seem to have appeared with the proportional representation system. Instead, this system brought it out into the open and allowed it to be exposed to scrutiny. In fact, it was within the HCJ that the phenomenon was denounced and documented for the first time. Each group's position on this problem and on particular cases has been the subject of debate among judges. It has even ended up by becoming one of the issues at stake in the electoral battle on which judges on the various lists have expressed their opinions. Recently, the phenomenon seems to have been considerably reduced.

The Dynamics of Democracy

It is precisely the HCJ's attachment to the dynamics of democracy which can serve as an antidote to the temptations of patronage, through the example of a Council composed of "eminent persons" free from such tendencies. Patronage is an evil and a degeneracy which threatens democracy, but that is not a reason to abandon democracy. Instead it should instil vigour into its functioning. As Council member Mario Cicala, the representative of a conservative group of judges (Independent Magistracy) has correctly observed, "when political debate is emphasised, there is little room for patronage, but when confrontation slackens, it takes root."

In order to combat political patronage and to underline its anti-democratic character, in 1982 the HCJ decided — through a regulation which the then-President of the Republic, Sandro Pertini, had himself called for — to make all its meetings public. An exception was made when, following special deliberations, it was accepted that there were serious reasons for

protecting judges' "privacy." However, "privacy" has seldom been accepted as paramount and has been ruled out *a priori* when judges' aptitudes and professional capacities are under discussion. Since then there have been no appointments, from that of the first presiding judge of the Court of Cassation down to that of the most inexperienced judge, which is not brought into the open *via* a public examination of the reasons which lead one candidate to be preferred over another. The same could be said, with a few exceptions, for all other measures, including transfers aimed at improving service, which depart from the principle of fixture of tenure and, for this reason, can only be decided upon on very serious grounds. In 1985, the guarantee of public sessions was extended to the meetings of the HCJ's disciplinary proceedings, on the basis of the consideration that the provision of the 1946 law imposing private meetings had been abrogated by article 6 of the European Convention on Human Rights. This argument was supported — as far as the applicability of this latter provision on disciplinary procedures goes — by the jurisprudence of the European Court of Human Rights, particularly its decision of 8 June 1976, in the *Engels* case, regarding the disciplining of Dutch soldiers, and the decision of 23 June 1981, in the *Le Compte* case, concerning the disciplining of Belgian doctors.

The HCJ's public hearings have led to an outcry, with some people perceiving an outbreak of politics in a sphere of activity which should remain discreet and reserved (public sessions are, it is said, the distinctive characteristic of parliamentary debates). What has been called "political," however, is nothing more than one of the characteristics of democracy: transparency and the possibility of being informed and open to discussion. There is perhaps some element of truth

in the accusation if the word “political” is taken in its broadest sense, since there can be no authentic democracy without politics. The problem is, however, that the word is used in a pejorative sense as a synonym of “partisan.”

A Period of Suspicion

The other occasions when the HCJ has been accused of politicisation seem to reflect a similar misunderstanding.

Thus, a regrettable sign of politicisation has been seen in the decision taken under the chairmanship of President Pertini and with his vote, to form a special committee within the HCJ to support judges engaged in proceedings against the Mafia. Likewise, the position adopted by the HCJ was also misconstrued when the Council (again under President Pertini’s chairmanship and with his vote) recalled the judiciary’s prerogatives and duties at a time when the President was criticised by various political parties in Parliament and in the country as a whole, after judges discovered the schemes of the P2 lodge and the intrigues of the banker, Calvi. Politicisation was also alleged when the HCJ lent its support, again thanks to President Pertini, to the judges in Padua who, in good faith, had arrested policemen accused of torture, in spite of the fact that they had been decorated shortly before for freeing the American General Dozier, who had been kidnapped by the Red Brigade. This support was made necessary by the campaign of moral lynching which certain political parties and newspapers had unleashed in the country, portraying the judges, who had simply done their duty, as enemies of the police.

The HCJ was even accused of politicisation following the severe disciplinary sanctions, extending to dismissal, adopted

against the judges who had belonged to the P2 lodge or who had been compromised by the Mafia. No politician and no high ranking Italian civil servant who appeared on the lists of the P2 lodge, however, has been subjected to similar proceedings, which explains why a discordant intervention by the HCJ in relation to the logic of the *continuum* parliament-government, could appear “political.” But this, in my opinion, should demonstrate the value of the presence of various tendencies inside the general political system and bring appreciation for the institutional polycentricity, rather than lead to the demise of the HCJ simply because it is alleged to be “politicised.” This is particularly true since the decisions in question were taken unanimously or with a very large majority, thereby refuting the image presented by the critics themselves of a Council deeply divided into small opposing factions by proportional representation and politicisation.

The HCJ and the Crisis of the Republic

Attacks on the HCJ or, to be more precise, on the institutional logic expressed by the current Italian HCJ, have intensified since the second half of the 1980s.

This escalation has gone hand in hand with converging offensives against the judiciary from various political sectors. Since the mid-1970s, the judiciary has demonstrated increasing independence of action, exercising real control of legality over the public authorities and the private sector. During the late 1970s to the early 1980s, it also played a decisive role in the defence of the republic against official corruption or deviations by the state apparatus, particularly the secret services, as well as against terrorism and organised crime, thereby acquiring an

unquestionable legitimacy in the eyes of the public. But the victories over terrorism and organised crime bore a price in terms of the deterioration of legal procedures and practices and, more generally, in the weakening of the guarantees of basic freedoms. Terrorism blocked the process of reform of the legal codes and prompted emergency legislation which ultimately made the judicial system more intractable, causing the culture of the judiciary to suffer as a result.

The judiciary has nonetheless continued to occupy a significant place in national life, while at the same time bringing its characteristic flaws into the framework of legislation marred by authoritarian traits and sometimes lame or irrational structures. Powerful or openly criminal interests have been affected, but sometimes (or often) guarantees of basic freedoms have simultaneously suffered. Uneasiness is growing in society with regard to judges and the judiciary, whose previously acquired legitimacy is now becoming tarnished.

This reduced legitimacy has been exploited by those political sectors which find a fully independent judiciary hard to tolerate. Referendums have been organised questioning the law, including one intended to abrogate the provisions governing the election of judges to the HCJ on a proportional basis which was, as we have seen above, declared inadmissible by the Constitutional Court. Another such referendum sought to abrogate the provisions restricting the judge from being taken to task in cases of denial of justice, deceit, fraud and misappropriation of public funds. This latter referendum, held to be admissible by the Constitutional Court, took place in early November 1987. It was backed up by the deceptive catch phrase "no power without responsibility," which obviously had

a strong sway over public opinion. An opportunistic reflex won the day in Italian politics. Even those political parties with an extremely critical view of referendums indicated to their supporters that they should vote in favour of abrogation for fear of being isolated. Only one small party, representing at that time less than 3% of the electorate (the Italian Republican Party), took a stance against the proposed change, together with a handful of intellectuals and jurists from across the political spectrum. In these circumstances, the alliance in support of abrogation, which represented 97% of the national Parliament, was victorious, even though the vote in favour was lower than this figure (less than 80% of valid votes). Judges' legitimacy nevertheless received an extremely serious blow.

From this point onwards, the judiciary benefited less from the support of public opinion. Judges were held to be responsible for all the faults of the legal system (its slowness, its complexity, its ineffectiveness and so on). They were even blamed for the deficiencies attributable to the government and the authorities, who skimmed on the financing of the legal budget (always below 1% of the total state budget), and who have, among other things, drawn up chaotic and excessive legislation and have refused to redraw the map of the more than 50-year-old legal districts.

The independence of the judiciary has been used in the collective mind to make judges solely responsible for the defects of the entire legal policy, which is the responsibility of the *continuum* government-parliament. Such manipulation finds its most fertile ground in the campaign against the HCJ. Since this body filters all complaints about the evils of the judicial process, it is easily portrayed as the "judges' mini-parliament," bearing full responsibility for the poor functioning of the legal system.

To this set of crisis factors of a general nature was added, from July 1985 onwards, an extrinsic but nonetheless important factor: the election of Mr. Francesco Cossiga as President of the Republic, thereby acceding automatically to the presidency of the HCJ.

In as much as President Pertini had shared the institutional conception of the HCJ described above and had defended the Council against attacks, President Cossiga has expressed a highly reductionist notion of the HCJ and has taken every opportunity to feed and support its critics. In this way, tensions began to be felt inside the HCJ itself, beginning to emerge as early as December 1985, when President Cossiga prevented the Council from discussing an attack by the government on the independence of the judiciary. On that occasion, he assumed absolute power over the HCJ's agenda, a power which the best theorists deny to the President of the Republic and which the HCJ contests.

Since then, the conflicts have multiplied to an extent which cannot be encompassed within the scope of this article. It should suffice to mention the hostile stance adopted by President Cossiga following a decision taken by the HCJ that a judge's membership of the Free Masons was sufficient grounds for the post of President of Chamber of the Court of Cassation to be given to a younger judge. This was at a time when there was a climate of growing suspicion of judges' impartiality, which led to the passage of a legislative decree preventing judges from belonging to political parties. Equally illustrative of the President's attitude was the veto he exercised over the Council's

discussion of the attacks on Judge Felice Casson.³ It should be noted in passing that the President has lost no opportunity to add his voice to the attacks on Judge Casson whether in Italy or abroad.

These clashes have led to serious crises and have virtually paralysed the HCJ. On more than one occasion, direct confrontations have taken place between the President of the Republic and the current Vice-President of the Council, Mr. Galloni (a law professor, a veteran politician, a former Deputy Secretary of the Christian Democrats and an ex-minister, several times member of Parliament). As of December 1991, the most serious clash has just ended in a unanimous judges' strike in opposition to President Cossiga, which took place on 3 December 1991, and in a general outcry by the press and the judiciary. Once again, the subject at issue was the President's attempt to prevent the HCJ from discussing the way certain heads of jurisdiction had organised the distribution of the work of judges under their control or had applied the criteria previously established on this matter.

But rather than listing the cases, it is preferable to note that the approach which President Cossiga has adopted in relation to the HCJ is only one aspect of a wider strategy which he has decided to follow. President Cossiga has abandoned the role of guarantor assigned to the President under the Italian Constitution in favour of taking an active and partisan part in the political dialectic and debate. This attitude has aroused

³ See INTERNATIONAL COMMISSION OF JURISTS, ATTACKS ON JUSTICE, JUNE 1990-MAY 1991.

severe criticism from several contemporary Italian intellectuals. We need only refer to Professor Norberto Bobbio who, in spite of being a friend of President Cossiga, has on several occasions severely reprimanded him in public.⁴ The judiciary has also, on several occasions, demonstrated its disapproval of the way in which President Cossiga interprets his role. In particular, this is evident in the statement of position signed by 52 constitutional law professors, published in *La Repubblica* and elsewhere on 12 June 1991, and a later statement signed by 51 law professors published in the same newspaper on 3 December 1991.

Given this scenario, the stakes are no longer the HCJ, but the Italian Republic's constitutional regime. It could be that the system of government may change, taking the HCJ with it. In that case, those who are interested in constitutional solutions to the independence of the judiciary would be wrong to consider the experience of the Italian HCJ as a beautiful Utopia which went bankrupt. They should be sufficiently discerning not to lay the failings of Italian democracy at the HCJ's door. Instead they should place the debates about the HCJ in relation to the wider discussions about democracy, and leave aside the extraneous events in Italy today.

New Frontiers

In conclusion, a hypothesis can be put forward that the open discussions of the Italian HCJ are nothing more than the reflection — debased in some cases, but worthy of attention in others — of a wider debate which runs through political thought.

⁴ See *La Stampa*, 8 May 1991 and 27 November 1991.

This debate concerns the shape of democracy and the new frontiers which must be won, over and beyond the irreplaceable but, many believe, insufficient mechanisms of universal suffrage. The discussion extends to the role that the judiciary and its various tendencies should play in the political system. This question has even entered the work of the United Nations, as the report by Mr. L.M. Singhvi on the independence and impartiality of the judiciary proves. This states that “[n]o matter what judges do or fail to do, controversies on the question of ‘politicisation’ of the judiciary will always remain because the judiciary does not function in a vacuum. It is possible to increase professionalisation of the judiciary But the modern judiciary would still have to decide questions which are political in nature, have political consequences and which inevitably bring the judges within the range of political fire.”⁵

⁵ L.M. Singhvi, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, para. 93, U.N. Doc. E/CN.4/Sub.2/1985/18/Add.1 (1985).Ed.

Judicial Independence in Poland: From the 1952 Constitution to the 1989 Reforms*

Elzbieta Morawska**

The Constitution now in force in the Republic of Poland dates back to 1952.¹ While this instrument was amended several times, most notably in February 1976, it has retained its basic character throughout the decades of Communist rule. At the time of its adoption in 1952, it was described as "the expression of new political relations of people's authority which built the state of people's democracy, strengthening its authority, its power, structure and democratic rights, liberties and citizen's duties."² After the 1989 change however, it was labelled as a formal guarantee for "Stalinizing" the Polish judiciary.³

* This is an edited version of the original article. The editor wishes to express gratitude to Professor Dzislaw Kedzia of the United Nations Permanent Mission of Poland in Geneva and a Member of the "Round Table" for his valuable discussion on the development of Polish judicial system.

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1 The Constitution was adopted by the Constituent Assembly of the Polish People's Republic on 22 July 1952.

2 Excerpt of the presidential speech of Boleslaw Bierut at the sitting of the Constituent Assembly on 18 July 1952.

3 The range of statutes made after World War II and passed in 1949-1950 were similarly labelled. See Andrzej Rzeplinski, *Sadownictwo w PRL-u*, Warsaw, (10) 1989r.

This article provides an overview of the recent reforms concerning the Polish judiciary. It first looks at the 1952 Constitution, moves on to consider the 1989 amendments, and finally discusses the latest propositions for a new constitution.

The Judiciary Under the 1952 Constitution

According to article 48 of the 1952 Constitution, the courts were given the task of protecting the social and political system of the Polish People's Republic, the achievements of the Polish working people, the people's rule of law, social property, and the rights of citizens and punished offenders. The Supreme Court, the *voivodship* courts,⁴ the regional courts and special courts were entrusted with carrying out these functions. Judicial review was to be exercised with the participation of lay judges.⁵

While judges were guaranteed functional independence in running their offices,⁶ the Constitution did not — and this continues to this day — guarantee the judiciary a position separate from the legislative and executive authorities. Moreover, the Constitution did not preserve judicial immunity, irremovability of judges or judicial autonomy.

As for judicial appointments, in principle both lay judges and professional judges were to be elected. The mode of election and the terms of office were to be defined by law. The constitutional norm of appointing judges by way of election,

4 The *voivodship* courts are district courts of second instance. *Ed.*

5 Constitution of 1952, art. 49.

6 Constitution of 1952, art. 52.

however, was never carried out due to the lack of a proper legislative act as was required by article 49.

In conformity with article 5 of the Structure of the Common Courts Law of 27 April 1949, the common courts ruled with the participation of lay judges. These judges were independent in the fulfilment of their official duties and subject only “to the laws.”⁷ Such lay judges enjoyed the same rights and duties as professional judges when considering court cases. They were appointed by the head of the court from the list of the appropriate presidium of the People’s Councils.

In February 1976, under the monopoly of power by the Polish United Worker’s Party, the Constitution was amended and the rule concerning judicial appointments was abandoned. The right to appoint and to recall judges was placed under the sole authority of the Council of State.

Amendments to the 1952 Constitution

Several different sets of constitutional amendments concerning the structure of the courts were adopted in 1989. The genesis of these amendments can be found in the proposals of

⁷ “Law” was defined to mean parliamentary statutes only. This provision became particularly problematic when these statutes embodied notions contrary to international human rights law and prejudicial to the independence of the judiciary. - *Ed.*

Solidarnosc made in 1980-1981. The *Solidarnosc* proposals were also discussed during the "Round Table."⁸ These proposals were centred around three notions: judicial autonomy and the independence of judges, the cancellation of the rule by which Supreme Court judges were appointed for five-year terms, and the formation of a National Council of the Judiciary.

Following the agreement of the "Round Table," a constitutional amendment was adopted on 7 April 1989, changing both the status of judges and the mode of their appointment. This amendment, which became article 60 of the Constitution, states that:

- "1. Judges shall be appointed by the President of the Republic of Poland on a motion of the National Council of the Judiciary.
- "2. Judges are irremovable, except as provided by law.
- "3. The composition of the National Council of the Judiciary and its powers shall be established by law."

These amendments concerned as well the constitutional regulation of the Supreme Court. The norm of appointing and recalling judges of this court after five years was removed from article 61.3; article 61.4 now stated that "[t]he First President of the Supreme Court (Chief Justice) shall be appointed and recalled by the Diet on the motion of the President."

⁸ Between February and April 1989, the opposition leaders of Poland held negotiations, known as the "Round Table," with the communist government focusing on necessary political and social reforms. One "sub-table" focused on the administration of justice and reform of law.- *Ed.*

On 20 December 1989, a set of amendments to the statutes relative to the power and structure of the Supreme Court and the common courts was adopted. These established a firm basis for guarantees of judicial independence. With reference to the Supreme Court, the amendments state, *inter alia*, that:

1. The Supreme Court no longer has the right to define guiding principles for the judiciary.
2. The Supreme Court is denied competence to prepare principles of law which bind lower courts.⁹
3. The First President of the Supreme Court (the Chief Justice) no longer has the right to review the courts' verdicts.¹⁰

The independence of Supreme Court judges was further strengthened by two new rules: first, Supreme Court judges are to be appointed for an indefinite term of office (i.e., the fulfilment of their official duties for life). Second, the reference to the quality of judge's fulfilment of official duties was

⁹ These were later published in the "Collection on the Principles of Law." This form of court law-making was seriously abused during the communist regime. - *Ed.*

¹⁰ The Polish system of justice allows three levels of judicial review. These include two reviews on facts and law by the first instance and appeal levels, and one on law only conducted by the Supreme Court. In addition to these formal reviews, the Supreme Court is authorised to re-open a case which is already *res judicata* and conduct an extraordinary review. Such exceptional procedure is possible upon the request of the Minister of Justice, the President of the Supreme Court, or the Polish Ombudsman if he or she demonstrates that there has been an exceptionally clear breach of law. - *Ed.*

cancelled, considerably reducing cases in which a judge may be removed from office.

The amendments to Supreme Court law proclaimed new relations between the Supreme Court and other authorities. The most important of these are the prohibition of a judge's membership in any political party and the ban on participation in political activities. These prohibitions, however, do not concern a judge's membership in Parliament.¹¹

The amendments to laws governing the Supreme Court applied as well to those concerning the common courts. Thus, the independence of common court judges was also strengthened in several ways. First, on 22 December 1989, the norm referring to the quality of the fulfilment of the duties relevant to common courts judges was deleted. Following the constitutional amendments, the irremovability of judges was clearly repeated, and the Minister of Justice was deprived of the right to remove judges from the Bench. Additionally, the articles concerning the socialistic duties of the courts and judges were crossed out of the common court law. And finally, like Supreme Court judges, common court judges were specifically prohibited from belonging to political parties and taking part in any political activities, except membership in Parliament.¹²

The restriction of the supervisory function of the Minister of Justice was crucial for the independence of the judiciary.

¹¹ The Polish system, therefore, does not strictly separate between the legislative and the judicial powers. - *Ed.*

¹² *See supra* note 11.

A further amendment resulted, for example, in the fact that the Minister could no longer examine court verdicts.

Further amendments to the 1952 Constitution were adopted on 29 December 1989. They had, however, only a formal value and did not relate directly to the judiciary. In December 1989 as well, a new statute concerning the judiciary was adopted: the National Council of the Judiciary law. The National Council of Judiciary is the main organ of the judicial autonomy which has the right to make decisions concerning the personal issues and the structure of the courts as well.

Preparation of a Draft Polish Constitution

The Polish Parliament is composed of two houses known as the Senate and the Diet. In December 1989, the two houses both appointed constitutional commissions. These two commissions drafted separate proposed constitutions, with separate provisions for the judiciary.

a. The Senate Constitutional Commission

The basis for the work of the Senate Constitutional Commission was a paper presented by Professor Stanislaw Wlodyka from Cracow University, entitled "The Constitutional Issues of Administration of Justice." His proposals were fully accepted by the senators and their advisers.

According to this paper, the constitutional principles governing the structure of the judiciary and its relations with other state organs should include two fundamental concepts:

- organisational and structural separation of the judiciary and

the courts from other state organs (the relation with the executive power); and

- separation of the courts' competence from other state organs (the relation with the legislative power).

Two results follow from these principles:

- court verdicts may not be changed or waived by any other organs; and
- the ordinary courts do not have the right to examine the validity of laws which were correctly promulgated.

The first result obviously emerged from past experience.¹³ As for the second, the power to examine the constitutionality of laws was granted to a Constitutional Tribunal. Since executive authorities had in the past abused the licence granted to them to issue regulations, it seemed reasonable to maintain the courts' authority to examine the validity of legal acts lower than statutes if, during the hearings, doubts were raised about their legality.

Two more issues are connected with the rule of separation of the courts in this draft constitution. They concern the question of supervision over the courts' work. Taking into account the bad practice of the past period, it was deemed necessary to ensure that the supervision by the Ministry of Justice over the work of the courts did not violate judicial independence, and that there would be no possibility for the Supreme Court to establish

¹³ See, e.g., *supra* note 10.

guiding principles for the judiciary similar to those which existed until December 1989.¹⁴

Another group of constitutional norms should define the specific status of individual judges, i.e., their independence and guarantees for it.

In summary, according to the draft adopted by the Senate Constitutional Commission, the Polish Constitution should include the following:

1. A general principle that separates judges posts and their rights and duties, defined by statute. This norm is necessary mainly to avoid the regulation of these issues by legal acts lower than statutes.
2. A norm concerning the independence of the judiciary and some of its guarantees. This should include the following:
 - a) the mode of judicial appointments;
 - b) irremovability of judges. The general principle included in article 60.2 of the Constitution is not sufficient, since it states that "the law may specify exceptions to this rule."
Apart from the general concept of irremovability, it is necessary to introduce specific new principles concerning the removal of a judge from office, the suspension of the fulfilment of a judge's official duties, forced retirement or the transfer of a judge to another post.
 - c) judicial immunity.

¹⁴ See *supra* note 9.

In the plenary meeting of the Constitutional Commission of the Senate on 23 January 1991, the Chairman of the Sub-Commission, responsible for the chapter on the judicial power, spoke about the constitutional norms of judicial power. As a basis for the future constitutional norm of the judiciary, the Chairman proposed that the administration of justice be carried out only by the courts. He added that this rule may be qualified by appointing, for example, boards to judge small offences. However, the judicial review of decisions inflicting punishments in a case of petty offence shall be guaranteed.

The Chairman further stressed that another basic rule of judicial power shall be the independence of judges. He defined the independence of judges to mean that:

1. The judgments of courts shall not be changed or repealed by other authorities.
2. The courts shall not be empowered to examine the validity of laws which were correctly promulgated, but the courts have the right to examine the validity of legal acts lower than statutes.
3. The supervision of the work of the courts shall be done while respecting the independence of the judiciary.
4. The structure of the courts, their power and the judicial procedure shall be defined by the law.
5. The special courts shall be included in the structure of the common courts.

6. The Constitution shall define the special position of the judge, i.e. his independence, irremovability, immunity, the rules concerning the deposition of a judge from office, transfer to another place or forced retirement.

The Chairman's proposals were discussed at the next meeting of the Commission. At this session, senators proposed to include in the future constitution the guarantee for the independence of the judges in the fulfilment of their duties.¹⁵ This includes the two most important guarantees for the independence of the judiciary. The first deals with the irremovability of a judge and the deposition of a judge from office, suspension in the fulfilment of his official duties, transfer to another place and forced retirement, all of which may be done only under a court verdict and exclusively in cases prescribed for by law.¹⁶

The second safeguard is that a judge may not be prosecuted with a criminal charge without the consent of a relevant court, nor be detained without a court warrant, unless he was caught red-handed.¹⁷ Judicial immunity, in the Senate draft, does not include the prohibition to charge a judge before a penal or administrative authority without the consent of a relevant court. Article 120 is also silent about the prohibition to arrest judges without a court warrant.

The Senate draft declares the independence of the court from the legislative and executive powers. The guarantees for such a

¹⁵ Constitutional draft by the Senate Constitutional Commission, art. 118.1.

¹⁶ *Id.* at art. 119.

¹⁷ *Id.* at art. 120.

concept is the prohibition on changing or waiving a court verdict by any other organ (the sole exception being the power of pardon).

b. The Diet Constitutional Commission

The Sub-Commission for the Political System of the Diet Constitutional Commission considered several draft proposals for the chapter on the administration of justice. Among these drafts was one presented by Professor Pawel Sarnecki,¹⁸ which was considered confusing and was in essence rejected. Another draft of Professor Janina Zakrzewska and Professor Jerzy Cierniewski was finally adopted.

Among the main criticisms of Professor Sarnecki's draft was that it failed to recognise the institutional independence of the judiciary and focused only on interference with the judicial hearing. The proposal suggested that "[t]he courts when they hear cases and pass judgments shall be independent and subject only to the law. . . ."¹⁹

While judicial independence should be primarily, although not solely, concerned with securing the independence of passing judgments, such guarantees cannot be limited to trials as independence is necessarily connected with the entire judicial function.²⁰ Moreover, this draft did not acknowledge the rule of

¹⁸ See VIII BULLETIN OF THE DIET CONSTITUTIONAL COMMISSION 10-14.

¹⁹ *Id.* at art. 3.

²⁰ See A. Dieng, *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* in this volume, on the personal and collective independence. - *Ed.*

irremovability of judges. Judicial immunity was further limited to criminal charges only.

In another controversial section, article 6.3 stated that “[a] judge may be transferred to an equivalent or higher post only with his consent. Exceptionally, because of an obvious benefit for the administration of justice, he may be transferred to such a post without his consent.” The deputies enquired about the nature of exceptional cases. According to the author of the draft, this situation would arise, for example, if no qualified candidates offered to transfer to a new regional court. In such a case, the head of this court may be appointed even without his consent. This explanation was not accepted, and the deputies argued that regional courts should be closed down if the judicial posts could not be filled by consent.

This proposal was clearly highly inadequate. Without formally rejecting it, the Chairman of the Diet Constitutional Commission, Professor Bronislaw Geremek, proposed that the whole chapter on the administration of justice in criminal and civil cases be reconsidered. As a result, Professor Janina Zakrzewska and Professor Jerzy Ciemniowski were requested to prepare another draft which was finally adopted by the Diet. This draft is commonly referred to as the “Diet Draft.”

In accordance with article 138 of the Diet Draft, the administration of justice in the Republic of Poland is carried out by the Supreme Court, the common courts, the Supreme Administrative Courts and the military courts. (The military courts adjudicate only in cases of offences committed by soldiers in active service.)

Three articles of the Diet Draft declare judicial independence and the independence of the courts and define guarantees for both: articles 140, 141 and 142 of Chapter IX. One of the most important elements in the draft's guarantees for the independence of the judiciary is the constitutional prohibition to change or repeal the judgments of the courts by other authorities.²¹ Furthermore, the judge in discharging his duties is independent and subject only to the statutes.²² The judge is also irremovable. He may not be suspended in discharging his duties, and may not be forced to transfer to another judicial post or position.²³

By giving the definition of judicial immunity, article 141.3 completes the judicial guarantees: "A judge shall not be prosecuted with criminal or administrative charges; he shall not be arrested detained without the consent of a competent court. This provision shall not exclude the possibility of detaining a person in the act of committing an offence." Finally, the National Council of the Judiciary shall, according to article 142, safeguard the independence of courts and judges.

²¹ Diet Draft, art. 140.2.

²² Diet Draft, art. 141.1.

²³ Diet Draft, art. 141.2.

Conclusion

Since 1989, extensive legal and political work has been invested in the preparation of a new Polish constitution that would include provisions which would better guarantee the independence of judiciary. While there is always room for improvement, the current drafts serve this purpose adequately.²⁴

Jurists in Poland have been enthusiastically willing to lend their expertise to identify the shortcomings of the legal system and to propose reforms. It takes more than the enthusiasm of jurists, however, to create an effective constitutional system. It is now up to the politicians to take practical moves towards reconciling these two drafts and adopting a new Polish constitution.-*Ed.*

²⁴ See H. Suchocka and L. Kanski, *Sadownictwo i Prokurature po nowelizacji Konstytucji RP*, 1 PANSTWO I PRAWO at 34 (1991).

II - REPORTS

The Independence of the Judiciary in Japan: Theory and Practice*

The Japan Federation of Bar Associations

The Japanese Constitution grants the judiciary independence from the legislature and the executive. Japanese judges have a tradition of integrity and of maintaining a scrupulous distance *vis-à-vis* those in power. It seems, nevertheless, that the safeguards to protect the independence of individual judges within the organisation and operation of courts are inadequate. This inadequacy is of particular concern as most Japanese judges spend their entire careers within the judicial system.

The Status of Judges

The Japanese Constitution guarantees the independence of judges in the exercise of their duties. Article 76(3) provides that “all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.” In addition, the status of judges is strongly supported by the Constitution. Article 78 stipulates: “Judges shall not be removed except by public impeachment, unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.”¹ In principle,

* Edited excerpts from *The Independence of Judges and Protection of Lawyers' Activities*, submitted to the United Nations Centre for Human Rights (June 1991).

¹ KENPO (Constitution) art. 78.

“there shall be no dismissal, transfer, suspension of duties or pay reductions of judges.”²

The Constitution, however, limits the period that judges are protected in office by providing for ten-year periods of appointment for lower court judges.³ This places the lower court judges in a weaker position than those whose status is secured for life.

It is a normal practice for those who are appointed judges to stay within the judiciary until the age of compulsory retirement.⁴ Judges might change positions within the court system, and be appointed as chiefs of the district courts, the family courts or the high courts. These chief judges are responsible for matters of judicial administration. Some judges also become public prosecutors for a certain period during their career. It is very rare, on the other hand, for those outside the bench to become judges.

Judges, like other public servants in general, are not free from concerns for their treatment. These concerns include matters of assignment location, status and income. The Supreme Court General Secretariat controls judicial administration, including the assignments of personnel. It is believed that judges are therefore unable to disregard the judicial policies, legal interpretations and views of the General Secretariat.

² Court Organization Law, art. 48.

³ A lower court judge can seek re-appointment after his or her original term expires.

⁴ Only 42 to 60 judges each year resigned in mid-career from 1985 to 1989.

The Administration of the Judiciary

In Japan, judicial administration is under the control of the courts. The overall structure of the judicial administration is stratified, with the Supreme Court at the top.⁵ At each level for each type of court is a Judges Council which consists of all the court's judges, excluding associate judges not granted the powers of a judge. They share responsibility for administration with the chiefs of court and, in the case of the Supreme Court, with the Supreme Court General Secretariat as well.⁶ The chiefs of court supervise their staff, including judges, with the assistance of the deputy chief and the presiding judges of each panel. The chiefs of the courts also have increasingly been assigned the powers of the Judges Councils. In addition, it is believed that the chief judges prepare job evaluation reports on judges which are sent to the Supreme Court as reference material used in the consideration of judges' promotions, assignment of posts, or appointments to presiding judge of judges panels.

As for interference in judicial duties, sometime after the mid-1960s there was criticism that some judgments concerning constitutional ideals, including the fundamental rights of workers, were biased against the government and/or the ruling Liberal Democratic Party (LDP). At present, however, there are

⁵ Court Organization Law, art. 80.

⁶ The Supreme Court is the ultimate director of judicial administration of all the courts. This function of the Supreme Court is carried out by a Council of Justices (Court Organization Law, art. 12). The Supreme Court General Secretariat, meanwhile, handles the general affairs of the Supreme Court. Many people believe, however, that the General Secretariat exerts a leadership role on the Council of Justices and has *de facto* control over judicial administration.

no visible signs of movement by politicians or bureaucrats to interfere in the judicial process. The decreased need for such intervention seems to result from the executive's ability to secure judicial submission through the power of the cabinet to appoint Supreme Court Justices.

It is not unusual for a person with experience as a prosecutor who represented the state to become a judge in a case in which the state or an administrative agency is the defendant. This, for example, was the situation in the Sunomata Nagara River flood damage case; the appeal of the Kanemi oil food poisoning damage case; the Iwate-Yasukuni case (in which the separation of church and state was at issue) and the appeal of the Tamagawa flood damage case.

The Supreme Court maintains that post transfers pose no problem, explaining that there are a number of cases in which judges, despite having previously served as public prosecutors, have ruled against the government's position. There naturally remains, however, the suspicion that the decisions in the cases mentioned above were influenced to some extent by the post transfers. This ability of public prosecutors and judges to "cross over" from their respective positions is often criticised as eroding the principle of the separation between the courts and the Ministry of Justice and that of judicial independence.⁷ It consequently undermines the people's faith in the fairness and independence of the courts.

⁷ Approximately 55 post transfers between judges and public prosecutors took place in 1990.

The Appointment of Judges

As previously mentioned, the cabinet has the authority to appoint Supreme Court Justices, as well as to name the Chief Justice.⁸ The qualifications for these appointments are specified in article 41 of the Court Organization Law. The selection process, however, is not public. It is believed that in many cases this process is decided in a conference between the Prime Minister and the Chief Justice of the Supreme Court. Newspaper editorials, which command a great deal of influence in Japan, have criticised this practice as strengthening the tendency to bring the the Supreme Court under the control of the legislature and the executive.

The cabinet appoints the lower court judges as well, on the basis of a list compiled by the Supreme Court. In conformity with article 43 of the Court Organization Law, “associate judges . . . [are] appointed from graduates of the Legal Training and Research Institute.” The Supreme Court registers the approved applications in the Associate Judge Appointment Register.⁹ In practice, the cabinet automatically accepts the Register *en toto*, thereby respecting the Supreme Court’s intent.

⁸ The Emperor appoints the Chief Justice, in accordance with the choice of the cabinet (art. 6(2)). The other 14 Justices are appointed directly by the cabinet. Art. 79(2) and (3) provide for a popular referendum on Supreme Court appointments every 10 years. At this time, Supreme Court Justices can be dismissed by a majority vote.

⁹ Judges of one type of Japanese court — the summary courts — do not have to be qualified members of the legal profession. They are not laymen, however, and have experience of working for a fixed period of time in the legal field. Other judges are required to have passed a two-year course of training at the Legal Training and Research Institute and the National Bar Examination.

Not all students of the Legal Training and Research Institute who apply to become associate judges are appointed. Since 1970, 49 applications have been refused. The reasons for these refusals have not been made clear by the court. The Supreme Court has instead explained that it selected appropriate persons taking into consideration all aspects of the applicants, including the results of their court interviews, their academic achievements, their ability to handle practical problems and their character and fitness to be judges. Bar associations, however, maintained that there were strong suspicions that the refusals were based upon, among other things, the fact that the applicants had been members of the Young Jurists Association, an organisation which advocates the defense of the Constitution. The bar associations consequently submitted protests to the Supreme Court requesting that the standards by which the court makes appointments be publicised. They further requested that the unsuccessful applicants be notified of the reason for their refusals.

A similar problem has arisen in the context of reappointments of judges whose ten-year terms have expired. In one case, the reasons for a refusal were not made explicit. There have also been cases in which judges have been constrained to withdraw their applications for reappointment rather than accept an objectionable placement for which no alternative location had been suggested.

Judges' Remuneration

In order to insure the stability of judges in office, the Constitution provides that "judges shall receive adequate

compensation, which shall not be decreased during their terms of office.”¹⁰

Currently, there is a 20-stage pay scale for judges, with a seven-fold difference between the starting pay and the highest pay levels. Similar to other public officials, increases are tied to seniority. Such increases are almost automatic for approximately the first 21 years of service, after which point they follow no set pattern. The standards used in determining pay increases have never been made public. It is alleged that pay increases have been discriminatorily delayed for those judges belonging to the Young Jurists’ Association or to the National Association for Discussion of Judges.¹¹

The Posting of Judges

It is common in Japan for judges to be transferred throughout Japan to new posts once every three years during their first 10 years as associate judges, and once every 4-5 years thereafter. Courts in major cities are preferred since the posts in these courts are deemed to be superior. Courts in the jurisdiction of the Tokyo High Court are the most favoured, followed by those in the Osaka High Court’s jurisdiction, and then by the courts located in surrounding big cities like Yokohama and Kyoto. Courts in smaller towns in the other regions are said not to be

¹⁰ KENPO (Constitution) arts. 80(2) and 79(6).

¹¹ The National Association for Discussion of Judges is an independent study group.

favoured. Judges also seem to prefer local district courts over family courts, and district headquarters over branch courts.

The tendency to rank the value of post assignments makes it possible to use such assignments as a tool of personnel policy. The Supreme Court nevertheless denies that placements are made on the basis of punitive considerations or for discriminatory motives.

Judicial Education

The Supreme Court General Secretariat and the Legal Training and Research Institute sponsor many study sessions in the form of "Meetings of Judges" or "Conferences of Judges." During these sessions, the General Secretariat reveals the results of studies concerning topics which had been debated during the session. Judges who had not participated in the study session learn of these results through reports by the participants or records of the session. The study results are then used by the judges in the course of their jobs. There is a danger that the judges are consequently unduly influenced by the views of the General Secretariat.

In addition to study sessions, the Supreme Court General Secretariat compiles and disseminates information to judges which it deems useful to the performance of their judicial functions. For example, starting in 1987, family courts across the country prepared guidelines for handling juvenile cases, after a "model proposal" prepared by the Supreme Court. Such an exercise risks that this might be deemed *de facto* "instruction and/or guidance" by the General Secretariat concerning the handling of cases by judges.

The Civil Liberties of Judges

In theory, the rights and liberties of judges are protected as fully as those of any individual citizen. In practice, nevertheless, most judges tend to refrain from expressing their political opinions or from acting as a group. For example, judges do not participate in political assemblies or demonstrations. There have been no reports of judges forming or joining a labour union, nor of them taking any sort of action on behalf of any economic issues, including wage increases, for the last 20 years.

According to interviews with ex-judges by the bar association, those responsible for court administration, including the chiefs of courts, have directed judges not to respond to questionnaire surveys conducted by bar associations. They have also discouraged judges from signing a petition calling for a ban on the hydrogen bomb, and from frequenting taverns at which ordinary people gather.

Judges are required as well to give notification of their intended journeys when their destinations are outside the area of their courts' jurisdiction. They are also prohibited from teaching at universities, giving lectures or teaching seminars except on Saturday afternoons. Previously, there had been no such limitations imposed on a judge's out-of-court activities.

The Supreme Court General Secretariat might consider these restrictions as reasonable and rational. In light of the general practices of judicial administration, however, they can be considered as more stringent measures which restrict judges' civil liberties.

The Exceptional Tribunals in Syria: A Threat to Judicial Independence

A CIJL Trial Observation Report

For the first time, an international organisation has succeeded in observing a trial before the State Security Court of Syria. Acting on the request of the Centre for the Independence of Judges and Lawyers (CIJL), Advocate Asma Khader, a member of the Executive Committee of the International Commission of Jurists (ICJ), proceeded to Damascus to observe the trial of a human rights lawyer and 16 others before the State Security Court of Damascus fixed for 16 March 1992.¹ Upon concluding her mission, Ms. Khader submitted a report to the CIJL which clearly indicated the shortcomings of the Syrian system of justice. Because of the significance of this mission, an edited copy of Ms. Khader's report is reprinted here. To put Ms. Khader's report in its proper context, a brief legal note examining the Syrian exceptional court system is included.

Legal Background

Judicial independence is formally recognized in the Syrian Constitution.² This independence, however, is gravely undermined by the laws promulgated pursuant to the State of

¹ This report was already released by the CIJL with its Alert of 26 March 1992 on behalf of Attorney Aktham Nouaisseh and others.

² See Constitution of Syria, arts. 131-148.

Emergency declared by Military Order No. 2 of 8 March 1963 (hereinafter "The State of Emergency Law"). Under these regulations, a system of extraordinary courts, comprised of the State Security Courts³ and the Military Field Tribunals,⁴ was created.

For an independent judiciary to exist, the judiciary must have jurisdiction over all issues of judicial nature.⁵ Under Syrian law, however, this principle is violated. Article 4 of the State of Emergency Law accords the military courts jurisdiction over those accused of violating the orders of the Emergency Law Governor. In addition, the State Security Courts are given jurisdiction over "any case referred to it by the Emergency Law Governor."⁶ Moreover, the Emergency Law Governor retains powers normally within the sole competence of the ordinary courts. For example, he can order administrative detentions, searches and the seizures of arms.⁷ Acts of the martial law authorities will generally be beyond the review jurisdiction of the ordinary courts as well.

To be truly independent, the judiciary must also be the sole authority empowered to determine its judicial competence.⁸ In Syria, it is the Emergency Law Governor, not the ordinary

³ Decree No. 47 of 28 March 1968.

⁴ Decree No. 109 of 17 August 1968.

⁵ The UN Basic Principles on the Independence of the Judiciary (hereinafter "Basic Principles"), art. 3.

⁶ Decree No. 47 of 28 March 1968, art. 5.

⁷ Law No. 51 of 1962, art. 4.

⁸ Basic Principles, art. 3.

judiciary, who determines judicial competence. As mentioned above, the Emergency Law Governor has the authority to refer cases to the State Security Courts. He can decide conflicts of jurisdiction between the ordinary courts and the special military courts as well.⁹

The principle of an independent judiciary “entitles and requires” that judges ensure “judicial proceedings are conducted fairly and that the rights of the parties are respected.”¹⁰ Article 7(a) of Decree No. 47, which permits the State Security Courts to deviate from normal court procedures, seriously jeopardises judicial fairness. Of particular note, evidence such as hearsay and opinion statements, not acceptable in ordinary courts, is admissible. The court may hold trials *in camera*, and utilise summary procedures. Syrian law, therefore, denies the accused the right to be tried by authorities “using established legal procedures.”¹¹ Moreover, it violates the mandate that “[t]ribunals 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.”¹²

Furthermore, there is no appeal of military court decisions.¹³ The decisions of the exceptional courts are legally required to

⁹ Law No. 51 of 1962, art. 8.

¹⁰ Basic Principles, art. 6.

¹¹ *Id.* at art. 5.

¹² *Id.*

¹³ Decree No. 47 of 28 March 1968, art. 5 and Decree Law No. 109 of 17 August 1968, art. 8(a).

be confirmed by the President. This confirmation provision further undermines the ideal of a judiciary independent from the political branches of the government.

Asma Khader's Trial Observation Report

I was requested by the Centre for the Independence of Judges and Lawyers (CIJL), which is a component of the International Commission of Jurists (ICJ), to attend as observer the trial of several individuals before the Supreme State Security Court in Syria. After the Syrian authorities were notified of this mission through the office of President Hafiz al-Assad in Damascus as well as through their mission in Geneva, I, Advocate Asma Khader, proceeded to Damascus on Monday 16 March 1992, to attend as an observer the session of 17 March 1992 which had been fixed for handing down the verdict in the case number 24 against 17 accused individuals. When in Damacus, I also notified the Syrian Bar Association of my mission and I handed them a copy of the *Ordre de Mission*. I also handed the court a copy of the *Ordre de Mission* at the beginning of the session, and asked the court's permission to attend as an ICJ & CIJL observer.

This report is based on my review of legal provisions, documents and evidence, in addition to my meetings with Advocate Mou'awiah a' Taba'a, the Secretary of the Syrian Bar Association, the Presiding Judge and members of the court in charge of the case, members of the defense team, and the families of the defendants, as well as on my personal observations.

a. Information Regarding the Trial

The trial took place before the Supreme State Security Court which is an exceptional court formed in accordance with Legislative Decree No. 47 dated 28/3/1968. The court is exempt from following the regular trial procedures by virtue of article 7 (a) of the above mentioned decree.¹⁴ It has jurisdiction over all matters listed in Legislative Decree No. 6 dated 7/1/1965 and its amendments. Cases are also referred to this court by the Martial Law Governor who can refer any case under article 5 of the said decree.¹⁵

The judgments of this court are not subject to review by any supreme judicial authority.¹⁶ Nevertheless, they are subject to the review of the President of the Republic, who may confirm, reject or modify them, or order a retrial.

The Supreme State Security Court which considered this case was composed of three judges: two civilian and one military. They were: Mr. Justice Fayez al-Nouri, the Presiding Judge; Mr. Justice Abdallah al-Tali; and (Colonel) Justice Kamel Issa. The Public Prosecutor in this case was Mr. Ali al-Taher. The court's record was registered by the Court Registrar.

¹⁴ Article 7(a) states that "although the rights of defence laid down in current legislation shall be retained, the State Security Court shall not be confined to observe the usual measures prescribed for them (i.e. the rights of defence) in current legislation in any of the stages and proceedings of investigation, prosecution and trial." - *Ed.*

¹⁵ *See supra* note 6. - *Ed.*

¹⁶ *Id.* - *Ed.*

The defence team in this case was composed of 12 lawyers chosen by the defendants' families or the defendants themselves. The lawyers, however, were prevented from meeting their clients except in the courtroom during the hearings. A representative of the Bar Association had collected the signatures of the clients on the powers of attorney.

The court fixed four sessions for the examination of the case. The first was on Saturday 29 February 1992, when the defendants were questioned by the court. The session of Tuesday 3 March 1992 did not take place at the request of the Public Prosecutor. In the session of 7 March 1992, the Prosecutor made his summation requesting the imposition of the death penalty. The hearing of Tuesday 10 March 1992 was designated for hearing the defence. The session of 17 March 1992 was fixed for passing the court's verdict.

The court's sessions were not public. The families of the defendants, however, were allowed to attend the hearing of 17 March 1992, in which the court's verdict was given.

The trial took place in the area of Saba' Bahrat in Damascus where the court usually sits, a location surrounded by a heavy military presence.

The defendants who were tried in this case were:

- Nizar Ben Ali Naif
- Aktham Nouaisseh
- Mouhammad Ali Habib
- Afif Jameel Mezher
- Bassam al-Sheikh

- Thabit Mourad
- Hassan Ali
- Hussam Salameh
- Jadee' Noufal
- Yacoub Moussa
- Samer Nouaisseh
- Yaser Iskeef
- Nazem Hussen
- Nbeel Na'ous
- Mouhmad Abdel Kareem al-Soufi
- Hussien Rafa'ah
- Khaled Othman

b. Legal Provisions

The defendants were charged under paragraph (e) of the Legislative Decree No. 6 of 1965, to be read in conjunction with article 4 of the same decree. This article lists as illegal the following activities:

“Opposing the fulfillment of unity between Arab countries, or opposing any of the goals of the Revolution, or obstructing these goals through committing demonstrations, assemblies, or conducting disorderly acts, or inciting for them, or publishing false news with the aim of causing disorder and shaking the confidence of the masses in the aims of the Revolution.”

They were also charged under paragraph (f) (of the same decree) which criminalizes the acts of:

“Receiving money or any other donation or obtaining a promise or any other benefit from a foreign country or organisation or

Syrian or non-Syrian individuals, or [having] any contact with a foreign body with the aim of committing any verbal or physical hostile act against the goals of the revolution of 8/3/1963”;

as well as under the offence mentioned in article 388 of the Penal Code which was enacted by virtue of Legislative Decree No. 148 dated 22/6/49, and its amendments, which read:

“Every Syrian who knows about a crime against the security of the state, and does not report it immediately to the authorities, will be punished with imprisonment ranging from one to three years as well as the withdrawal of [his/her] civil rights.”

c. Regarding the Facts

The prosecution submitted evidence on the charges against the defendants consisting of the statements of the defendants, a seized monetary amount and a copy of a leaflet issued by the Secretariat of the Committee for the Defence of Democratic Freedoms and Human Rights dated 10/12/91. The defence attempted to call witnesses, and to present to the court another leaflet issued by the Defence Committee to be added to the court's file; the court, however, denied these requests.

The defending attorneys insisted that the statements of the defendants were extracted under duress, and that the defendants had been subjected to torture. The court however did not investigate their claims. None of the defendants were examined by a forensic doctor. The court file did not include as well any medical records or investigations or procedures to verify the allegation of torture.

The defence also argued that the legislative decree upon which the prosecution based its charges was unconstitutional. They argued as well that the acts committed by the defendants were legal and not punishable by law. They also submitted that the activities of the defendants were public and aimed at the defense of human rights, and that such activities were consistent with the Constitution and law, as well as with the guidelines of the President of the Republic concerning human rights and the necessity of citizens to exercise their rights and fulfil their obligations to correct mistakes. They also added that the establishment of the Committees is not contrary to the law, especially as the Articles of the Committees and their forming leaflet indicate that their goals are not contrary to the Revolution, nor is their mode of action illegal.

Aktham Nouaisseh insisted as well that the little amount of money sent to him by his brother was for personal subsidy and that the amount was seized before it had been used.

In general, the defence argued that the acts attributed to the defendants, even if they were substantiated, were legal and did not incur criminal responsibility. They further argued that the above-mentioned legal provisions did not pertain to them.

d. The Verdict

The court issued its verdict on 17/3/92. It ruled to convict the defendants Nizar Naif, Aktham Nouaisseh, Mouhammad Ali Habib, Afif Jameel Mezher, Bassam al-Sheikh, Thabit Mourad, Hassan Ali, Hussam Salameh, Jadee' Noufal and Yacoub Moussa, in accordance with paragraph (e) of Decree No. 6 of 1965, to be read in conjunction with article 4 of the same decree.

It sentenced the defendants to the following:

- Nizar Ben Ali Naif, ten years with hard labour
- Aktham Nouaisseh, nine years with hard labour
- Mouhammad Ali Habib, nine years with hard labour
- Afif Jameel Mezher, nine years with hard labour
- Bassam al-Sheikh, eight years with hard labour
- Thabit Mourad, five years with hard labour
- Hassan Ali, five years with hard labour
- Hussam Salameh, five years with hard labour
- Jadee' Noufal, five years with hard labour
- Yacoub Moussa, five years with hard labour.

Their civil rights were also withdrawn.

In addition, Samer Nouaisseh, Yaser Iskeef, Nazem Hussen and Nbeel Na'ous were sentenced to three years imprisonment in accordance with article 388 of the Penal Code concerning concealing information regarding a crime against state security.

The court acquitted Mouhmad Abdel Kareem al-Soufi, Hussien Rafa'ah and Khaled Othman.

It is impossible to examine the verdict in more detail, however, pending the receipt of a copy of the verdict with all its details.

e. General Observations

The trial falls short of international standards pertaining to fair trial, especially with regard to procedures, ex. the right to appeal to a higher court, the right to a public trial, the right to a proper defence, and the verification of allegations of torture. Moreover, the defendants were not charged with any violent

activity or incitement for violence. Therefore, and in accordance with international standards, those sentenced may be regarded as prisoners of conscience.

It should be pointed out that from my personal observation, a number of the accused looked exhausted during the session. Advocate Aktham Nouaissech and Nizar Naif were brought into the courtroom with the help of the others as they were unable to stand or walk by themselves.

There was no investigation regarding the allegations of a beating made by Nizar Naif who said that he was beaten by a person wearing civilian clothes on the stairs leading to the court. He requested that the court investigate this matter. No official action was taken on this claim, at least during my presence.

A number of the defendants informed me that they were concerned that they might be transferred to another prison, as they were then being held in Sidnaya Prison which has better conditions. Those who were acquitted were concerned that their detention might continue as they were not immediately released. Those sentenced were concerned that family visits and medical care would continue to be denied.

The court expressed a positive attitude to my mission when I had a discussion with the court after the hearing ended. The President of the court as well as its members did not oppose my request to photocopy the court file and to obtain a copy of the verdict. They also allowed me to look at the file and promised that they would send me a copy of the file after a week. They also indicated that the sentence was subject to the confirmation of the President of the Republic who can reject it or amend it.

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The Independence of Judges and Lawyers: A Compilation of International Standards

A Special Issue of the CIJL Bulletin (No. 25-26, April-October 1990).

Published by the ICJ, Geneva. Available in English, French and Spanish.

15 Swiss francs, plus postage.

This compilation brings together for easy reference the most important international norms concerning the independence of the judiciary and the legal profession. Included in the bulletin are both instruments approved by the UN and those promoted by leading organizations of judges and lawyers, including: the UN Basic Principles on the Independence of the Judiciary; UN Basic Principles on the Role of Lawyers, UN Draft Declaration on the Independence of Justice (Singhvi Declaration), and the International Convention for the Preservation of Defense Rights.

Attacks on Justice. The Harassment and Persecution of Judges and Lawyers

June 1990 to May 1991

A CIJL study

Published by the ICJ, Geneva.

Available in English. 143 pp. 15 Swiss francs, plus postage.

The report, published annually, lists the cases of 532 judges and lawyers who have been killed, detained or harassed in 51 countries between June 1990 and May 1991. It includes 55 lawyers and judges killed, 103 detained, 8 "disappeared," 42 who have been attacked and 65 who have received threats. Cases of violence described in the report were carried out by governments, death squads, big landowners and drug traffickers. In almost none of the cases listed has the perpetrator of the violence been brought to justice.

The Burmese Way: to Where?

Report of a Mission to Myanmar (Burma)

Published by the ICJ, Geneva 1991

Available in English. 95 pp. 10 Swiss francs, plus postage.

The ICJ visited Myanmar without receiving specific approval from the military rulers, known as the State Law and Order Restoration Council. Based upon interviews with citizens and refugees and extensive research, the report details widespread human rights abuses. They include torture, the conscription of children and the elderly to be porters for the army and the forced relocation of more than half a million people.

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