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## **AN INDEPENDENT JUDICIARY: THE CORE OF THE RULE OF LAW**

by

**Justice F. B. William Kelly \***

*The purpose of this paper is to attempt to explain to an audience of Chinese legal professionals the concept of judicial independence as it has been applied in some member states of the United Nations. The perspective will be principally Canadian, with reference to some other major common law jurisdictions, and with some brief allusions to larger civil law jurisdictions. The more important elements of judicial independence referred to in United Nation's documents will be reviewed and some practical applications of these principles will be discussed.*

*A thorough review is beyond the scope of any single paper, but this work will refer to numerous judicial and academic authorities where the subject has been discussed in considerable detail which may be helpful for future reference. The paper also discusses the historical and jurisprudential basis for the requirement of judicial independence.*

### **1. Introduction**

The United Nations has endorsed the essential importance of an independent judiciary by its adoption of the *Basic Principles on the Independence of the Judiciary* at its Seventh Congress in 1985.<sup>1</sup> As a consequence of the adoption of the *Basic Principles* by the UN General Assembly, each member state is expected to guarantee the independence of its judiciary in its constitution or the laws of the country.<sup>2</sup> Although judicial independence seems on its face to be an obviously essential ingredient to any just and fair legal system, a precise definition of the scope of the principle may be difficult in a world of diverse cultures and legal systems.

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\* The author is a Justice of the Supreme Court of Nova Scotia, Canada. This is a summary of a paper written while the author was on study leave at the International Centre for Criminal Justice Reform and Criminal Justice Policy in Vancouver, Canada.

<sup>1</sup> See General Assembly resolution 40/146, 1985.

<sup>2</sup> See *Basic Principles on the Independence of the Judiciary*, Art. 1.

Simply stated, judicial independence is the ability of a judge to decide a matter free from pressures or inducements. Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power. The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it to “keep its distance” from other governmental institutions, political organisations, and other non-governmental influences, and to be free of repercussions from such outside influences.

## **2. The Basis of Judicial Independence**

***1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.***<sup>3</sup>

Some type of criminal law has existed since humans first recognised that their disputes could be better resolved by means other than physical battle. Dispute resolution gradually transformed from judgement by a family or clan elder, or chief, to resolution by professional judges usually designated by the state. Some of the earliest examples of written criminal law include that made during the Xia Dynasty<sup>4</sup> (2100-1600 BCE) and that of Hammurabi<sup>5</sup> (1792-1750 BCE) of Babylon, which themselves were undoubtedly preceded by written criminal codes and relatively sophisticated justice systems.

The English philosopher, John Locke, and the French philosopher, Montesquieu, are generally considered to have the most influence on the evolution of the modern concept of judicial independence.<sup>6</sup> At the end of the

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<sup>3</sup> This is one of the *Basic Principles* as numbered in that document. Others will be listed in this manner in the following.

<sup>4</sup> These criminal laws were made during the reign of the ruler Yu, and although not yet discovered are referred to in later texts, and are said to contain 3,000 sections.

<sup>5</sup> He made his city the chief city of Mesopotamia and codified the laws of the region. This ancient code was found on a column at Susa, and was decoded by the British archaeologist Francis Steele in 1947.

<sup>6</sup> The Hon. Ken Marks, “Judicial Independence” (1994) 68 Australian Law Journal 173. Montesquieu’s doctrine of the separation of powers was substantially the basis for many national constitutions, including the Canadian and United States constitutions. Theoretically it enables the three branches of government,

Eighteenth Century Locke, who strongly influenced the English Revolution of 1688 and the American Revolution of 1776, stated that established laws with the right to appeal to independent judges are essential to a civilised society and that societies without them are still “in a state of nature”.<sup>7</sup> At the core of these and more modern concepts of judicial independence is the theory of separation of powers: that the judiciary should function independently of the legislative and executive arms of government.

*The Universal Declaration of Human Rights*<sup>8</sup> enshrines the principles of: (1) equality before the law, (2) the presumption of innocence, and (3) *the right to a fair and public hearing by a competent, independent and impartial tribunal established by law*. The recitals of the *Basic Principles on the Independence of the Judiciary*<sup>9</sup> observe there is frequently a gap between the vision underlining these principles and their actual implementation. It can fairly be said that no justice system in the world fully complies in every particular with the ultimate implementation of the *Basic Principles*, but they obviously exist in some countries to a greater extent than others.

On the recommendation of the Committee on Crime Prevention and Control, The Economic and Social Council of the UN adopted in 1989 the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*.<sup>10</sup> The *Procedures* require member governments to respect and take into account the *Basic Principles*, and to incorporate them into their justice systems in accordance with their constitutional process and domestic practice, to publicise the *Basic Principles* in their official languages, and to make the text available to all

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that is the legislature, executive and the judiciary, to act as watchdogs each on the other so that a system of checks and balances is inherent in the structure of the constitution. The nature and effectiveness of the checks and balances is affected by the structure of government, as, for example, in Canada and the US where in the former the executive and the legislative are more closely associated than in the latter where they are clearly separated. In both, however, the judiciary is very clearly separated.

<sup>7</sup> See generally Professor Thomas P. Peardon, *Introduction to the Second Treatise of Government by John Locke* (New York: Liberal Arts Press, 1952).

<sup>8</sup> Adopted by the United Nations in December, 1948. Article 10 reads: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” See also article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*, UN General Assembly Resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976 in accordance with Article 49.

<sup>9</sup> Endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>10</sup> Economic and Social Council resolution 1989/60.

members of its judiciary. These *Procedures* also encourage various United Nations institutions to assist Member States, at the invitation of their governments, in reviewing and strengthening judicial independence.

The concept of judicial independence has many elements, but generally they fall under the headings of security of tenure and pay, and individual and institutional freedom from unwarranted interference with the judicial process. I will review these elements under these headings, with particular emphasis on listed principles of the *Basic Principles*. It is my intention to expand somewhat on these elements and to provide examples of how they have been applied in some jurisdictions.

### **3. Doctrine of Separation of Powers**

*2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats of interferences, direct or indirect, from any quarter or for any reason.*

*4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*

The above *Basic Principles* incorporates several areas of possible breach of judicial independence, including the primary ingredient for adjudication, impartiality; freedom from outside influences. Only where an independent judiciary exists, can judges decide cases impartially and justly, because “the rule of law” requires that a judge not be apprehensive of repercussions or retaliation from outside influences.

The history of the judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties. An independent judiciary must not only *be* independent of these and other influences, but also it must *appear* to be independent. This is so because a court can only be truly accepted as a just one if it has the confidence of the public that it is just and fair. This concept gives rise to the famous adage “justice must not only be done, but also must be seen to be done.” As the late Justice Thurgood Marshall of the US Supreme Court once

said “We must never forget that the only real source of power that we as judges can tap is the respect of the people.”<sup>11</sup>

For courts to appear just they must not be influenced by any outside sources, or appear to be capable of such influence. To avoid such a perception, they must have no real or apparent contact with a political party. If indeed they had such contact they would appear to be biased in favour of the policies of that party, or, if that party controls the current government, to be biased in favour of the state.<sup>12</sup> If a court or an individual judge is subject to, or even appears to be subject to, inappropriate pressure or interference by the executive or administrative arm of government, that is considered to be an inappropriate interference with judicial independence. As one constitutional commentator expressed it, “it is inherent in the concept of adjudication, at least as it is understood in the western world, that the judge must not be an ally or supporter of one of the contending parties.”<sup>13</sup>

In a criminal case, this means that the individual before the court should not be tried by a judiciary that is part of the official state structure which is, in effect, prosecuting that individual. Thus, in a criminal law trial, the dispute obviously involves the state. Public bodies, such as state departments, the military, municipalities, nationalised corporations (e.g. oil, gas, electrical power and other industries), and others, as well as the state itself, frequently become involved in disputes that lead to judicial activity. For example, the fact that such a body is a litigant doesn’t necessarily affect the nature of the dispute or the law that should be applied to the issues. The fact that it is the government and not a private contractor who breached a contract to build an office building does not change the legal issues.

The executive branch of government is often the most active party before the courts as a litigator on behalf of the state and in its enforcement of the criminal laws. It is, of course, inevitable that there be some dealings between the courts and the executive branch for financial and administrative purposes. But the emphasis in any attempt to comply with the UN

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<sup>11</sup> *Chicago Tribune*, August 15, 1981.

<sup>12</sup> This is an area of considerable controversy in jurisdictions where judges are elected on the basis of party sponsorship, such as some of the state jurisdictions of the United States. In the US the nature of such involvement is strictly limited. See the American Bar Association’s 1990 Model Code of Judicial Code of Conduct, particularly Canon 5 which is entitled “A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity”.

<sup>13</sup> Peter Hogg, *Constitutional law of Canada*, 3d ed., (Toronto: Carswell, 1992) at p. 168.

international standards must be to limit the formal interaction between these two branches of government to only the extent necessary to provide security and the necessary financial and administrative support to the courts.

In the leading Canadian case on judicial independence, *Valente v. R.*<sup>14</sup>, Justice Le Dain, speaking for the unanimous court, discussed the nature of judicial independence and impartiality and the distinction between the two terms. He stated that “impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” while independent “connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.”

The executive branch of government has, however, a legitimate interest in properly co-ordinating the justice system as a whole. Therefore there should be appropriate co-ordination between the administration of the courts and the other parts of the justice system, such as the police, the prosecution service and the corrections service.<sup>15</sup> The purpose of this co-ordination is to ensure the efficient operation of the justice system, but it is an administrative co-operation that is required and not a substantive one; for example, government branches do not instruct the courts on what their decisions should be and the courts do not tell the police how to investigate crimes.<sup>16</sup>

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<sup>14</sup> [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161, 49 C.R. (3d) 97, 23 C.C.C. (3d) 289 at pp. 201-222 C.C.C. See also generally Ian Green, “The Doctrine of Judicial Independence Developed by the Supreme Court of Canada” (1988) 10 26 Osgoode Hall L.J. 177

<sup>15</sup> See Martin L. Freidland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Ottawa: Canada Communication Group-Publishing, 1995). This is a report prepared for the Canadian Judicial Council which is a statutory body composed of all (35) of the federally appointed chief justices and associate chief justices in Canada. Chapter 9 of this book thoroughly reviews the conflicts involved in administering the courts, discusses the methods used in several other countries, and recommends some solutions for Canada. The phrase “a place apart” in the title was taken from a statement of Senator Arthur Meighen, a former Prime Minister of Canada, who said in 1932 during Senate debates, “a judge is in no sense under the direction of government...The judge is in a place apart.”

<sup>16</sup> The courts do not interfere in the direct sense, but if called upon to make an adjudication on whether any branch of government has overstepped its powers under the constitution or the general laws, the courts must make such a determination.

Security of remuneration and tenure were two of the three essential conditions of judicial independence identified by the Supreme Court of Canada in *Valente*<sup>17</sup>.

#### **4. Remuneration**

*11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law.*

Remuneration security means that the salary of all judges should be adequate, fixed and secure and not subject to arbitrary change by any branch of government. The objectives, of course, are to ensure judges are not subject to temptation, are not unduly worried or distracted by their present and future financial state, and that judicial remuneration is sufficient to attract the most competent and qualified citizens into the judicial ranks.

The Chinese adage that “a high salary for officials gives you a clean government” has held true in most of the major common-law jurisdictions. The 1701 *Act of Settlement*<sup>18</sup> provided that judges’ salaries in England should be “ascertained and established.” In the United States, there is a constitutional proscription against reducing the salaries of federal judges.<sup>19</sup> Judicial salaries in Canada are approximately equivalent to that of the most senior level of the civil service. Generally speaking, there is a similarity in the salaries of federally appointed judges in Canada and the United States, both of which are also comparable with the higher level of the judiciary of the United Kingdom.<sup>20</sup>

As a general overall comment, I would suggest that most informed objective observers would conclude that judicial remuneration in the major common-law countries, with the possible exception of a few lower court jurisdictions, is reasonable and sufficient to ensure independent and impartial justice.

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<sup>17</sup> See *Valente v. R.*, at p. 206 C.C.C., where Le Dain, J. stated that the three essential ingredients were security of tenure, financial security and “institutional independence of the tribunal with respect to the matters of administration bearing directly on the exercise of its judicial functions.”

<sup>18</sup> 1701, (U.K.), 12 & 13 William III c.2.

<sup>19</sup> U.S. Constitution, Art. III, s.1.

<sup>20</sup> There is an useful discussion on various techniques used in different jurisdictions for establishing judicial remuneration in Friedland at pp. 56-66.

Secure tenure and adequate remuneration have played a significant role in developing in these countries a “legal culture” where judicial bribery of even a minor nature is virtually unknown.<sup>21</sup>

## 5. Removal From Office

*12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists.*

*17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.*

*18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.*

In England only one judge had been formally removed from office subsequent to the *Act of Settlement* in 1701.<sup>22</sup> This statute established the security of tenure in that country, providing that judges should hold office during “good behaviour,” and could be removed from office only by “address” to both Houses of Parliament. Most of the judges in the common law systems of the world are appointed not for a term, but rather “during good behaviour.”<sup>23</sup> In a recent report into a Canadian complaint against judges, this term was defined as a test and phrased as follows: “Is the

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<sup>21</sup> In the United States there have been fifty-eight House of Representatives impeachment investigations involving federal judges since independence (1776). Of these, eleven federal judges were tried in the Senate, and seven were convicted, three involving bribery. Other judges, both federal and state judges, have been convicted of criminal offences, including bribery, but did not face impeachment proceedings. See “Report of the National Commission on Judicial Discipline & Removal”, March 1994, 152 Federal Rules Decisions 265. This report provides considerable information on the US federal judiciary.

<sup>22</sup> *Supra*, at footnote 18. See Shimon Shetreet, *Judges on Trial* (Amsterdam: North-Holland Publishing, 1976) at p389. The author notes that informal pressures were used to force out “ill or aberrant judges”, who were pressured by their peers to resign for illness or “deviation from acceptable moral standards (adultery), habitual intemperance, and the like.” Sir John Barrington was removed for taking public money in 1830.

<sup>23</sup> The term used in the *Act of Settlement* is “*quamdiu se bene gesserint*”, as opposed to the other historical method of appointment, “*durante bene placito*”, meaning “during [the King’s] pleasure.” In the U.S. a number of the States elect some judges, usually for a fixed term.

conduct alleged so manifestly and profoundly destructive to the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?”<sup>24</sup> The *Basic Principles* provides the judges should only be removed or suspended “for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”<sup>25</sup> I suggest the two definitions are compatible.

The same ultimate judicial removal procedure as in the United Kingdom is in existence for federally appointed judges in Canada, but no superior court judge has been so removed since Confederation, that is since the birth of the nation in 1867<sup>26</sup>. Under Canadian law, as in most common law jurisdictions, judges can only be removed either because they have reached mandatory retirement age or are dismissed for failing to be of “good behaviour” after a hearing and a Parliamentary decision. In modern Canada, a complaint against a superior court judge may be lodged with the Canadian Judicial Council<sup>27</sup>, and, if it bears merit, the Council, after a hearing and a recommendation by an appointed inquiry committee, may reprimand the judge or recommend to Parliament the judge be dismissed.<sup>28</sup> Although such a recommendation has yet to be made, it is presumed it would be accepted by Parliament.

In addition to the Canadian Judicial Council, similar procedures for complaints are in place in the provinces of Canada for provincially appointed judges, which has resulted in the dismissal of a few provincially appointed judges. These committees consist of a combination of judges, lawyers and lay representatives. A majority on these committees are usually judges. The legislation establishing these committees normally provides that

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<sup>24</sup> *Report to the Canadian Judicial Council of the Inquiry Committee Members* (The Donald Marshall Jr. Affair) (1991) 40 U.N.B.L.J. 210 at p.219. See also discussion on grounds for removal and discipline of judges in Canada and other jurisdictions in Friedland at pp. 78-141.

<sup>25</sup> Principle 18.

<sup>26</sup> But some judges have resigned as a result of complaints, often after formal proceedings were commenced. As well, a small number of lower court judges have been dismissed. See Friedland at pp. 81-87.

<sup>27</sup> See explanation in note 15 on the Canadian Judicial Council.

<sup>28</sup> A recent review of the complaint files and how they had been dealt with by this complaints process has concluded the complaints had been dealt with “carefully and competently.” See Friedland at pp. 94-95.

other members be appointed by the appropriate attorney-general,<sup>29</sup> the appropriate judicial council (of chief and associate chief judges), judicial associations, and national and provincial bar societies.

As in Canada, the removal of judges in Australia involves the process known as “address”, whereby the Governor General (the formal head of state) has the authority to remove a judge upon an address or decision of both houses of the Parliament. A judge may be dismissed if found not to be of “good behaviour” or for “incapacity.”

New German judges are appointed for a three-year probationary period, with further tenure conditioned upon satisfactory service. This provides an indirect form of discipline. As well, more formal discipline procedures exist. If requested by the German legislature, The Federal Constitutional Court has jurisdiction to decide if a judge has breached the German Basic Law and may dismiss, retire or remove that judge to other employment. Germany also has a Disciplinary Court which can discipline or remove judges for bribery and delay or failure to perform judicial duties<sup>30</sup>

In France, the president of a judge’s court may refer a complaint to the Minister of Justice and the matter is considered by the High Court of the Judiciary. This court, consisting of seven judges and two non-judges selected by the President of France, hears the matter and decides on the range of punishments, from a reprimand to dismissal.<sup>31</sup>

It is a fair summary to say that the vast majority of complaints about judges in the above countries are confined to less serious conduct than bribery, such as the use of improper language in court, intemperate behaviour, delay in rendering decisions, and verbal abuse of lawyers and witnesses in court.<sup>32</sup> In recent years, the Canadian commissions more frequently hear public complaints that some judges are not sufficiently sensitive to certain societal concerns such as the role of women in society and equal treatment of

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<sup>29</sup> In the Canadian and many other common law systems, an Attorney-General is the cabinet minister responsible for supervising government responsibilities for the legal system. This elected government member, through department staff, is also the law officer or legal advisor for government. In recent years, the title in some Canadian jurisdictions has been changed to Minister of Justice.

<sup>30</sup> *Ibid.*, Report at note 21, p. 402.

<sup>31</sup> *Ibid.*, at p. 401-402.

<sup>32</sup> See Shetreet at p. 389 and Friedland at pp. 90-98.

minorities. In Canada this has resulted in the judiciary organising more seminars on these and similar topics.

## **6. The ‘Open Court’ Requirement**

Perhaps the most important safeguard for an independent judiciary is the ‘open court’ principle, in place in virtually all democratic societies. This principle requires that justice be dispensed ‘in open court’; that every member of the public has a right to enter any court at any time a trial is in progress.<sup>33</sup> The open court principle gives to the public the right to be present to assess the manner in which justice is being dispensed in their courts, including an assessment of whether their judges are acting independently and in accordance with the law.

As often all interested citizens cannot attend a small courtroom, for this principle to be effective, democratic societies give the press the right to attend, as agent for the people, to publish comments and reports on court proceedings. In many jurisdictions, the media and the justice system have developed guidelines or principles relating to media reporting and the nature of the approved contact between the courts, police, and lawyers participating in a trial process. The objective is to allow the press to communicate to the public what takes place in the courtrooms. The courts normally restrict dissemination of information and publication only to the extent necessary to ensure the parties have a ‘fair trial’<sup>34</sup>.

The open court principle also requires that a court give full recorded reasoned reasons for its decisions, for the benefit of the parties and for the public record. In addition to such reasoned decisions being useful to the parties in their assessment of justice being done, it is also useful to the public for the same reason. Thus, in most, if not all, common law jurisdictions, all court proceeding and court records are available to all members of the public, including the press, so that justice will not only be done, but will also “be seen to be done.” ‘Seeing’ in this context involves a full opportunity for the public to have access to trials and to reports of those

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<sup>33</sup> There are, of course, limited exceptions relating mainly to young offenders and the judicial discretion exercised to maintain security and order in the court as part of the guarantee of a fair trial.

<sup>34</sup> For a discussion on these restrictions in various countries and the relationship between the judiciary and the press generally, see F. B. William Kelly “Free Press v. Fair Trial: Judicial-Media Interaction” filed with The Criminal Law Research Centre at China University of Political Science and Law, Beijing, China, and the International Centre for Criminal Law Reform and Criminal Justice Policy, at the University of British Columbia, Vancouver, Canada.

trials by way of the actual reasons for judicial decisions and independent press summaries of them.

## **7. Communicating the Law to the People**

There is a statement that says “the common law is derived from the will of mankind issuing from the people, framed by mutual confidence, and sanctioned by the light of reason”.<sup>35</sup> United States Attorney-General Janet Reno, in a recent address quoted this statement and commented: “That is such a wonderful statement of the law to me, but for too many people the law is not issuing from them, because they do not know the law, and the law, to them, is worth little more than the paper it is written on.” She added that all of us must respond to the challenge of making the law real for people and further that it be fair and appear to be fair to all.

It is difficult sometimes to explain the law and the legal system to the public. But it is their law and their system and those who are involved in the system, judges, lawyers, prosecutors, police and corrections personnel, must all reach out to make such explanations, and to do so in comprehensible language, in “little words” to use a phrase of Winston Churchill, and not in “legalese.” To make a justice system responsive to the general population requires a system whose members are willing to engage in two-way communication with the people. It requires a justice system with personnel dedicated to the basic principles of justice for the people, adequately supported by state officials and legislators who also fully endorse these principles, to make real the dream of all peoples for a fair justice system.

A number of additional matters relating to judges are dealt with in the *Basic Principles*. These include the manner in which judges should be selected, the qualifications for selection, and judicial training after selection.<sup>36</sup>

## **8. Judicial Appointment Process**

***10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in***

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<sup>35</sup> This phrase is carved on the side of the Justice Building in Washington.

<sup>36</sup> See Principle 10.

*law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.*

To have a superior judiciary, it is obvious that greatest care must be taken at the initial stage, the selection or appointment process. The judicial function is not wholly, and in fact rarely, automatic. Rather the judicial function is a creative one and thus it is necessary to recruit highly trained, competent, ethical and intelligent men and women, reflective of the society they serve, and to pay them substantial salaries. This element of creativity, the special adjudicative function judges play, and their role in society makes their job of particular importance to a balanced society. This is even more so if their reasons and decisions become precedents because of the effect these decisions will have on subsequent cases and the development of the law. Because of the significance of the initial selection process, it may be useful to review various judicial selection processes in place in a number of jurisdictions.

### **i. Common Law Systems**

Common law is the Anglo-American tradition of developing the body of law based on precedent, that is on the prior decisions of judges. In the common law system statute law made by the state plays a significant role in the justice system, but so does the law made by judges (called the common law). The common law is made as judges decide cases and state the principles on which they are basing their decisions, this accumulation of principles then building into a body of law. The hope is that is that this body of law evolves to meet social changes. Formulating practices of a particular time into codes of law may imbue them with a greater sense of permanency than they ought to have. However, in a common law system, statute law, including the constitutional law, predominates over common law, but indeed is often amended to reflect long-standing common law.<sup>37</sup>

Most judges in the common law systems are appointed for life. In Britain, most of the senior judicial appointments are made on the nomination of the

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<sup>37</sup> Griffiths, J. A. G. *The Politics of the Judiciary*, (3rd ed.), (Bodmin: Fontana Press, 1985), at p. 15.

Lord Chamberlain, a rather unique figure of cabinet stature, who serves as the law officer of the Crown. The Lord Chamberlain's selection role has developed by tradition, and the process is usually a consultative one involving the judiciary and the government of the day. Traditionally, superior court judges are appointed from the ranks of the barristers as opposed to the solicitors. The former are licensed to plead in the courts, while the latter do other types of legal services, including preparing a case for the barrister to present to the court. The judges are selected from among those barristers who are assessed to have the experience, competence, and personal traits best suited to the judiciary.

Selection of judges in Canada is a more formal and structured procedure. Although Canada initially followed a form of the English practice, it now has established selection committees in each province and territory and in the national federal jurisdiction. The Federal Government has established, by legislation, nomination committees in each province composed of a superior court judge, representatives of the provincial bar association and the Canadian Bar Association, and appointees of the provincial and federal attorneys-general, who are often lay persons. Lawyers who have a minimum of ten years of experience may apply for appointment as a federally appointed judges to these committees. When a federal judicial appointment becomes available, the appropriate federal committee provides the Federal Justice Minister with a list of the applicants they believe qualified. The Minister, after consultation with his or her political colleagues, then makes the appointment. Before this selection procedure was established, the government appointed judges, after some consultation with the bar, most often resulting in the appointment of supporters of the political party then in power.

Somewhat similar judicial selection processes are in place in Canada's provincial judges, with minor variations in some of them. At least one provincial committee has adopted the practice of recommending the top three candidates, in order of preference. To date, the governments in power in that province<sup>38</sup> have usually appointed the most highly recommended candidate. Canadian judges are not normally selected from among career bureaucrats or from elected officials, but from lawyers who have 15 to 20 years of experience in the legal profession and who are recommended by an impartial committee of informed legal professionals and lay persons.

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<sup>38</sup> The Province of Nova Scotia.

Although a chief judge of a provincial court or a chief justice of a superior court may be consulted on a court appointment, they have no formal appointive or even promotional powers. The duties of these offices are administrative and consultative and not supervisory. Chief judicial officers in Canada organise the services provided to the court and administer the system of assigning the caseload. They are considered “first among equals”, but for them to attempt to influence a judge in an adjudication assigned to that judge is clearly improper. However, it is not believed to be improper for a judge to consult with fellow judges on legal issues relating to a current trial.

## **ii. Civil Law Justice Systems**

Much of the discussion in this paper regarding the independence of individual judges relates to the experience in the common law system. Most of the judicial systems of major industrialised nations do not operate on the common law system, but rather in a legal system sometimes referred to as the civil law or continental system. In this system the legally trained individual follows a career path into the judiciary, frequently directly from law school. Typically the candidate participates initially in some level of service in the judicial administrative branch, progresses to lower levels of judicial service, and then is promoted to higher levels if deemed qualified and competent. Often there is more specialisation than with the common law system and the judicial structure is more hierarchical.

A judge's progress in the civil law system depends on the performance assessments of his or her superiors, a system which runs some risks of performance being tied to satisfying the superior in the judiciary. Although the civil law system judge may lack the degree of individual independence of the common law judge, in the former the judiciary typically has greater control over the administration of the justice structure than that found in most common law jurisdiction. With greater control, it may be said that independence in the continental system is more a function of the institution of the judiciary rather than that of the individual judge.

In France, for example, a person with a legal degree (which is a first degree) may apply to the National School of the Magistracy. On successful completion of a twenty-seven month course, they then apply for an appointment as a judge. Judicial candidates are selected on the basis of very competitive examinations. Only the top candidates are selected to fill the available appointments. Those appointed judges usually serve in small

centres, starting with less serious cases. Their performance is formally assessed on a regular basis by their superiors. When a vacancy occurs at the next higher court level, judges are promoted on the basis of these assessments. Promotion is determined by the Superior Council of the Magistracy, whose members, including judicial members, consider the assessments of the candidate's judicial superiors and, as well, the evaluations of prosecutors.<sup>39</sup>

In this system judges tend to specialise in particular areas of law and get their experience in legal matters as judges rather than as lawyers as in the common law system. Judges thus appointed and promoted may be perceived to have less individual independence because of reliance on assessments of superiors and prosecutors for advancement and because they are also seen as part of the "civil service" structure of formal government.

### **iii. Elective Judicial Appointment**

Many state judges in the United States are elected, and as each state has a variety of courts, the variety of judicial selection methods are considerable. Although there is a nation wide Federal Court system with an appointed judiciary, the state courts dispose of over nine-nine per cent of civil and criminal cases.<sup>40</sup> Partisan political elections are held in twelve states, and another twelve have elections where the judicial candidates are not sponsored by a political party. In four states the legislature elects the judges, in four they are appointed by the state governor, and in most of the remaining states they are appointed by a neutral merit plan. Some states in the latter categories have "retention plans" where it is decided if a judge should continue after the end of his or her term, usually by election.<sup>41</sup>

The alleged advantage of an elected judiciary is that the people chose who is to judge them. If the judge is elected for a term, and does not perform to the public satisfaction, he or she may be voted out. An election campaign also may serve to educate the public about the system. However, US judicial elections have traditionally low voter participation, and well financed campaigns and political party support may elect the marginal candidate over

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<sup>39</sup>See discussion on France's appointment judicial system in McCormick, Peter. *Canada's Courts*, Toronto: James Lorimer & Company, 1994, at pp. 101-103.

<sup>40</sup> See Holland, Kenneth M. "The Courts in the United States" in *Political Role of Law Courts in Modern Democracies*, edited by Jerold A. Waltman and Kenneth M. Holland. London: Macmillan, 1988, at p. 11.

<sup>41</sup> See discussion on US appointment judicial system in McCormick, note 34, at pp. 103-105.

the highly qualified one<sup>42</sup>. When turnout is low, well organised special interest groups and political groups can be most effective, but their support may also carry obligations. How much will a supporters policy or public sentiment generally affect the decisions of a judge due for re-election? Perhaps the greatest danger to judicial independence of the elective process in the United States relates to the cost of elections. Judges due for re-election and judicial candidates often must raise these funds, usually from those most interested in trial outcomes, the lawyers. What would be the public perception of the impartiality of a judge in a case where the lawyer for one of the parties has been a major contributor to the judge's election fund? It should be noted that considerable attempts have been made in the US to modify the election process<sup>42</sup> to reduce these risks to judicial independence.

#### iv. **Appointment conclusion**

I will not embark on a debate about which system can best provide impartial judges and an independent judiciary. However, I would suggest that all are capable of providing justice systems consistent with UN international standards, *if* they are operated in a manner which ensures the basic ingredients of judicial independence as described above are guaranteed.

If the courts are to have an appearance of fairness, it is argued that the judiciary and other justice officials, including corrections staff and police, could better reflect the actual racial, ethnicity, and gender makeup of the community they serve. For example, over the past decade or two, gradually increasing efforts are being made to accomplish such apparent fairness in Canada and many other jurisdictions by appointing more women and racial minorities to the judiciary and the other justice system positions. It is a difficult objective sometimes where prejudice and social conditions have kept some of these groups from the training or educational background necessary to qualify. But if such fairness is a stated objective and firm policy, it has been demonstrated that substantial progress can be made if directed by committed leadership.

## **9. Judicial Associations**

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<sup>42</sup> Perhaps the most extreme example of the disadvantages of judicial elections is the recent election of a teenage boy to a county court vacancy in a write-in campaign. See *Ibid.* at p. 104.

***9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.***

This particular section of the *Basic Principles* deals with the importance of judges working together in formal organisations to properly advance the matters covered in the *Basic Principles*, including the principle of the independence of the judiciary. There are several judges associations in Canada, but the principal two are an association of provincial court judges and one for federal court judges. These associations are voluntary and are supported mainly by fees paid by judges. These are very active groups who discuss and act upon judicially related subjects ranging from judicial salaries and benefits to judicial education.

The support of the public for an independent judiciary is substantially a reflection of the perception of judicial competence. In large measure, competence depends on judicial education. The National Judicial Institute, funded by both the federal and provincial governments, supervises judicial education in Canada and is chaired by the Chief Justice of Canada. Judicial education in Canada is controlled and directed by the judiciary and has been expanding significantly in recent years. Among its courses are sessions for new judges and a special lengthy intensive course on criminal law.

In addition to the programs run by the NJI, other non-governmental judicially controlled groups supply judicial education. These groups are provincial, regional, and national in scope and use mainly the seminar or symposium method of instruction in the areas of skills training, social issues, and a full range of substantial law topics. In all of these programs, the material is presented by judges, legal and other academics, and others who may have a useful perspective for the judiciary, such as native leaders and members of the press.

## **10. Communication With Parties**

***2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats of interferences, direct or indirect, from any quarter or for any reason.***

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

One of the implications of sections two and six of the *Basic Principles* is that judges must conduct themselves during the course of a trial in a manner that is not only fair to the parties, but is perceived to be so.<sup>43</sup> In most jurisdictions this means that once the judge or a panel of judges is seized with a case, it is necessary that they not have inappropriate contact with any of the parties or anyone else regarding the matters in issue. Essentially this means that the judge should only allow discussion of the matters in issue only to take place with her or him in the presence of all parties involved or their counsel.

There are some limited exceptions to this rather strict rule of judicial conduct. One relates to discussions without all parties being present of purely administrative matters such as scheduling or some emergency matter. In such an instance the judge is expected to notify the other parties about this contact and the substance of the discussion. In some jurisdictions judges are permitted to obtain advice of disinterested experts, but if this happens, the judge must disclose this consultation to the parties or their counsel and give them an opportunity to respond. Another exception is that a judge may consult with other judges and court personnel who have the specific function of assisting with the judge's adjudicative responsibilities.<sup>44</sup> This proscription against communications concerning an ongoing proceeding includes prosecutors and even legal professionals who are not participants in the matter before the court.

The essential core of these proscriptions is that the proceedings of an adjudication must be both fair and be seen to be fair, not only by the parties, but to the general public as well. Because fairness of the proceedings requires that the judgement must be based on evidence brought into the courtroom, or "on the record", then the judge must ensure that no bias or appearance of bias exists on the basis of extraneous or outside information received not in the presence of all of the parties. This also excludes the judge from independently investigating facts. In some jurisdictions the judge has an investigative function which is performed in the presence of the parties, but this is exercised "on the record."

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<sup>43</sup> In many jurisdictions there are formal or informal codes or guides to judicial conduct. See, for example, Canadian Judicial Council, *Commentaries on Judicial Conduct* (Quebec; Yvon Blais, 1991), and, in the US, the American Bar Association Model Code of Judicial Conduct of 1990.

<sup>44</sup> See, for example, Canon 3(7) of the American Bar Association's 1990 Model Code of Judicial Conduct. Some courts have law clerks or research assistants who may provide legal analysis or legal research on the legal issues involved in the case.

## 10. Conclusions

This paper is only a brief introduction to the concept of judicial independence as advanced by the United Nations. A Chinese adage is very appropriate here: we are “looking at flowers from a galloping horse.” One cannot see clearly the flowers of judicial independence from the gallop of this paper; much more can be understood about the concept by dismounting and reviewing further the many authorities on the subject.

It is important to emphasise that judges do not claim to be special people, but they do claim to hold a special office to which is assigned the function of guarding, separate and independent from other government institutions, the principal of the rule of law.<sup>45</sup> The principles advanced by the United Nations in all aspects of law are substantially based on the assumption that Member States will continue to develop within their states the predominance of the rule of law, sustained by an independent judiciary.

The key link to fostering and establishing the rule of law is ensuring an independent judiciary, and providing the environment of a fair and equitable legal system where an independent judiciary can flourish, safeguarded from outside influences. A society where people know their rights are guaranteed by fair laws which apply in the same way to all citizens equally, and are applied in an open and public way by an independent and impartial judiciary, is always a secure and stable society.

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<sup>45</sup> A recent statement made by Justice Guy Croft, President of the Canadian Judges Conference, the association of Canadian superior court judges, a voluntary organisation which advances the interests of its member judges by means such as submissions to government on terms of judicial service and participating in judicial education.