“How to Promote in Practical Way the Independence of Judges as Protectors of International Human Rights Law”

POLITICAL INDEPENDENCE

1- In your country and legal system, with respect to reducing the influence of politics on the decisions that are made by judges, what guarantees or provisions of law exist to ensure the independence of judges in their decision-making? NOTE: We list several examples and invite you to add any others that may also apply in your own judicial system:

- As a preliminary note, the following responses will be based on federally appointed Superior Court judges in Canada.

a- Is there security of a judge’s tenure in office? If so, please describe how this is provided – for example, by constitution, by statute, by judicial rules, etc.

- S.99 of the Constitution Act, 1867, provides for the security of tenure of judges, until the age of 75 years, subject to good behavior. A judge can be removed by the Governor General on Address of the Senate and House of Commons as a result of physical or mental incapacity or misconduct.

b- Is there legislation that prohibits others in the government from interfering in the judicial decision-making process? If so, please describe.

- Although the Constitution Act, 1867, contains some express provisions (ss. 96-100) enshrining aspects of judicial independence, it does not provide an exhaustive code. Judicial independence is an unwritten principle, recognized and affirmed by the preamble to the Constitution Act, 1867. This unwritten constitutional principle entails three elements: (1) security of tenure; (2) financial security; and (3) administrative control. (Reference re Remuneration of Judges of the Provincial Court of PEI et al, [1997] 3 SCR 3, at para 83, Lamer CJ [Provincial Judges Reference]).

- Moreover, judges have the power to declare laws to be unconstitutional, and would therefore be able to prevent legislation from infringing on the ability of judges to make decisions without external influence.

c- Is there legislation that prohibits others outside the government from attempting to influence improperly a judge’s decision? If so, please describe.

- S.119 of the Criminal Code of Canada makes it an offense both for a judge to accept a bribe and for any member of the public to attempt to influence a judge by making them any sort of offer. (Criminal Code, RSC 1985, c C-46 s.119)

- Is there a system to provide for the physical security of a judge and the judge’s family that may be invoked by the judge? If so, how is this security provided and who provides it?

- A number of measures are taken to ensure the physical security of a judge. In the courthouse, judges have offices in secured areas with card restricted access. Sheriffs are present in some
courtrooms as a matter of course. Judges always have the ability to request the attendance of a sheriff, if they have concerns about the safety of those present in the courtroom. An allowance is given to judges to purchase private home security services, if they so choose. This fund is provided by the federal government.

- The courthouses have perimeter security, which ensure that anybody entering the building is screened for weapons or contraband.
- Judges park their vehicles in a secured underground parking area.
- Government employed drivers are available primarily to assist the Chief and Associate Chief Justice, but other judges have access to this service when the drivers are free.
- When justices are newly appointed, court security staff collects their personal information which in turn is provided to the city police. This information is then used by the police to better respond to circumstances in which a judge’s security may be at risk.

e- Are there any special provisions to ensure a judge’s independence from improper political influence when the judge is deciding a matter involving alleged human rights violations? If so, please describe.

- S.11(d) of the Charter requires that each individual charged with an offense be afforded “a fair and public hearing by an independent and impartial tribunal” (Constitution Act, 1982, s.11, being Schedule B to the Canada Act 1982 (UK), 1982, c 11).
- The same Criminal Code provision mentioned in (c) above is applicable here, to prohibit any kind of influence on a judge.
- Apart from this, a broad unwritten constitutional principle of judicial independence is recognized at common law, as annunciated in the Provincial Judges Reference.

f- Please describe any other guarantees or provisions of law that are intended to reduce the influence of politics on a judge’s decision-making?

- The constitutional guarantees discussed above, both express and unwritten, provide a robust degree of protection against the influence of politics on a judge’s decision-making.

**APPOINTMENT SYSTEM FOR THE JUDGES/JUSTICES**

2- Are the procedures and criteria for judicial selection clearly defined by law in order to ensure transparency in the selection process? Please describe the procedures and criteria that exist.

- A procedure for judicial selection is clearly established by the Office of the Commissioner for Federal Judicial Affairs Canada, which acts on behalf of the Minister of Justice. Eligibility for judicial appointment is set out in the Judges Act. Lawyers of at least ten years standing at the bar of a province may be appointed (Judges Act, RSC 1985, c J-1 s.3).
- Qualified lawyers must submit an expression of interest and eligibility in order to be considered. Subsequently, an independent judicial advisory committee will review the applications. The advisory committee consists of a nominee of the provincial law society, a nominee of the Canadian Bar Association, a judge nominated by the Chief justice, a nominee of the provincial Attorney General, a nominee of the law enforcement community, and three nominees of the federal Minister of Justice representing the general public.
- Following extensive consultation, the judicial advisory committee either “recommends” or indicates that it is “unable to recommend” the individual applicants. Professional competence and overall merit are the two primary considerations. Any potential impediments to fulfillment of the judicial office are also taken into account.
- Those lawyers who were “recommended” receive a place on a list for two years, during which time they may be appointed by the Governor General acting on the advice of the federal Cabinet.
Before Cabinet advises the Governor General, it receives a recommendation from the Minister of Justice, who in turn is able to consult with members of the public, the judiciary, the bar, and his or her appropriate provincial counterparts.

- In recent efforts, the Canadian Bar Association has urged the Minister of Justice not to propose any candidates to Cabinet who were “unable to be recommended” by the relevant advisory committee (“Federal Judicial Appointment Process” (October 2005), online: Canadian Bar Association <http://www.cba.org/cba/submissions/pdf/05-43-eng.pdf>). Although it is possible for the Minister of Justice to put forward to Cabinet individuals from the “unable to be recommended” category, in practice, this is rarely done.

3- Is there a separate expert commission or other authority either outside or inside the judiciary which has jurisdiction and competence to participate in judicial selection, including to conduct examinations of prospective judges if such examination are used in the process of judicial selection? If so, please describe.

- As indicated in the above response to question #2, an advisory committee merely provides recommendations to the Minister of Justice. No expert commissions have competence to participate in the actual judicial selection. Judges are not questioned or examined prior to appointment.

ADMINISTRATION OF THE JUDICIARY

4- a- How are the salaries of judges set?

- Judges’ salaries are set every four years by the Minister of Justice, and are recorded in the Judges Act. Pursuant to the Judges Act, a quadrennial Judicial Compensation and Benefits Commission was established in 1999 to review and make recommendations to the Minister of Justice with regard to the compensation and benefits of federally appointed judges.

b- Are those salaries and any other allowances paid to the judges adequate to satisfy the reasonable living expenses of judges?

- In short, yes. The salaries are of sufficient magnitude to dispel any concerns a judge may have in respect of living expenses.

c- Do the judges’ compensation adequately reflect the dignity and importance of the judges’ position?

- Yes, judicial salaries adequately reflect the importance of the judges’ position.

5- Is the administrative authority of the chief judges/justices used in a way to influence the adjudication of cases and to affect the content of judicial decision-making? If so, how?

- The chief justice is not able to use his or her administrative authority to influence the adjudication of cases or to affect the content of judicial decision making.
- The chief justice does not use his or her authority to cherry pick individual justices to hear particular cases. Superior courts are not specialized, and therefore each justice is capable of hearing any matter. However, speaking only to the situation at the Alberta superior Court, judges’ case work is not allocated entirely randomly. Schedules are primarily determined on the basis of availability. Judges are able to select their judicial writing weeks, and this will determine to some extent their ability to sit on longer trials. In the rare cases where long six month trials are being set down, all the judges will be canvassed to see who is willing to be seized with the matter.

6- To address disciplinary matters involving judges who are accused of violating judicial conduct rules, is there a judicial council or some other body that has the power to:
a- Receive complaints and conduct disciplinary investigations? If so, please describe.

• The Canadian Judicial Council receives complaints about judges, and is able to conduct disciplinary investigations. First, a complaint must be received in writing. This complaint will be reviewed by the Judicial Conduct Committee Chair, who may seek a response from the Judge in question. The Committee Chair may then refer the file to a Review Panel, which has the ability to request further inquiries from outside counsel. If the complaint is found to have merit, the Review Panel refers the file to an Inquiry Committee, which will report to the Judicial Council. Finally the Council makes a recommendation to the Minister of Justice either for or against removal of the Judge. The complaint file can be closed at any stage throughout the process if it is determined to be without merit.

• After receiving a recommendation for removal, the Minister of Justice must then take a position before the House of Commons and Senate. S.99 of the Constitution Act, 1867, allows for a federally appointed judge to be removed by the Governor General on address of the Senate and House of Commons.

d- Does the person who has made a complaint about a judge’s conduct have an opportunity to participate in whatever process is available for reviewing that conduct? If so, what is the extent of that participation?

• The person making the complaint about a judge’s conduct may have an opportunity to participate as a witness during the inquiry process. The extent of participation will vary.

INTERNATIONAL HUMAN RIGHTS ISSUES

7- What is the source of the law, if any, that a judge takes into consideration when deciding whether and how to enforce international human rights law? For example: the constitution, treaties, laws of the country?

• Canada is a ‘dualist’ jurisdiction. A treaty that is entered into by the executive branch of the federal government will not become binding domestic law until it has either been subsumed into Canadian law by an Act of Parliament or through provincial legislation, depending on the nature of the treaty, having regard to the constitutional division of powers.

• Customary law is an exception. Once a rule is recognized as customary law it automatically becomes a part of Canadian domestic law.

• A judge, therefore, is only bound by Canadian domestic law. International obligations are authoritative to the extent that they have been incorporated into domestic law by Parliament or the provincial Legislatures.
8- Do there exist procedures by which your courts may hear cases involving alleged violations of international human rights law when those alleged violations are separate from and independent of the laws of your country law? If yes, please describe these procedures.

- No such procedures exist.

9- If the answer to Question 8 is “No,” are there any types of cases in which a judge may consider and apply principles of international human rights law when making a decision, or is the judge limited to applying fundamental principles of international human rights law in making a decision only if such principles are embodied in the laws of the country?

- As indicated in response to question #7, the judge is limited to applying principles of international human rights law only if such principles are embodied in the laws of Canada.

10- Are there any persons or groups of people who work for the government in your country who have judicial immunity for their illegal actions?

- The Rule of Law is a principle that is at the heart of the Canadian legal system. No persons or groups have immunity for their criminal actions.
- Judges are immune from being compelled to testify as to their reasons for making a decision. This immunity is an integral component of judicial independence (Mackeigan v Hickman, [1989] 2 SCR 796, [1989] SCJ 99).
- Crown Liability and Proceedings Acts have been legislated both federally and provincially, providing that both levels of government will be liable in the same manner as if they were an ordinary person, subject to some exceptions. (Crown Liability and Proceedings Act, RSC 1985 c C-50.)
- Certain individuals employed by the government are personally immune from civil liability for actions made in the course of their employment (see for eg. Child, Family and Community Service Act, RSBC 1996 c 46, s.101; and Workers’ Compensation Act, RSA 2000, c W-15, s.46.4)

Respectfully submitted this 23rd day of August, 2013.

Canadian Superior Courts Judges Association

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