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# Chapter 4

## Independence and impartiality of judges, prosecutors and lawyers

*Facilitator's Guide*

# Learning objectives I

- To consolidate knowledge and understanding of the importance of an independent and impartial Judiciary, independent and impartial prosecutors as well as an independent legal profession to ensure the rule of law and an effective protection of the fundamental rights and freedoms of the human person

# Learning objectives II

- To familiarize the participants with the existing international and regional legal rules and principles applicable to judges, prosecutors and lawyers, including relevant jurisprudence

# Questions I

- How do you as judges, prosecutors and lawyers perceive the principle of the separation of powers?
- How is this principle ensured in your country?
- How is the independence and impartiality of the Judiciary and the independence of lawyers guaranteed in the country where you carry out your work?

## Questions II

- Have you ever experienced any difficulties in exercising your professional responsibilities in an independent and impartial manner? If so, what were these difficulties, and how did you deal with them?
- Have you, as judges, prosecutors and lawyers, ever been confronted with attempts to corrupt you? If so, how did you deal with this proposition?

# Questions III

- For women jurists: have you experienced any specific problems or difficulties in your work that may be attributable to your gender?
- If so, how did you confront these problems?

## Questions IV

- If you had to deal with any of the above situations, were you aware that there were international legal standards that might have been conducive to strengthening your position vis-à-vis the Executive or Legislature, or other groups or persons?

# Questions V

- In your country, would there be any room for you, as judges, to soften the effect of repressive laws by means of interpretation?



# Key legal texts I

International Covenant on Civil and Political Rights,  
article 14 (1):

... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

# Key legal texts II

African Charter on Human and Peoples' Rights,  
article 7 (1):

Every individual shall have the right to have his cause heard. This comprises:

[ . . . ]

(b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

[ . . . ]

(d) The right to be tried within a reasonable time by an impartial court or tribunal.

## Key legal texts III

African Charter on Human and Peoples' Rights,  
article 26:

State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

## Key legal texts IV

American Convention on Human Rights,  
article 8 (1):

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

# Key legal texts V

European Convention on Human Rights,  
article 6 (1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . .

# Key legal texts VI

## Selected United Nations principles and guidelines

- The Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985; endorsed by General Assembly resolutions 40/32 and 40/146
- Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990
- Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990

# Key legal texts VII

## Basic Principles on the Independence of the Judiciary (1)

### Principle 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.

### Principle 3:

The Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

# Key legal texts VIII

## Basic Principles on the Independence of the Judiciary (2)

### Principle 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.

### Principle 7:

It is the duty of each Member State to provide adequate resources to enable the Judiciary to properly perform its functions.



# The notion of the independence of the Judiciary

## What it means I

The notion of independence of the Judiciary means, in particular, that:

- The Judiciary must enjoy *institutional independence*, that is, it must be independent from the other branches of government, namely the Executive and the Legislature
- The Judiciary must be independent as to *internal matters of judicial administration*, including *the assignment of cases to judges within the court to which they belong*

# The notion of the independence of the Judiciary

## What it means II

The notion of independence of the Judiciary means, furthermore, that:

- The Judiciary must have independence in *financial matters* and have sufficient funds to perform its functions efficiently
- The Judiciary must be *independent as to decision-making*: both the Government as well as other institutions have the duty to respect and observe the decisions rendered by the Judiciary

# The notion of the independence of the Judiciary

## What it means III

The notion of independence of the Judiciary also means that:

- The Judiciary must have *jurisdictional competence*, which means that there must be judicial autonomy in the determination of questions of competence
- The Judiciary has both the right and the duty to *ensure fair court proceedings and issue reasoned decisions*

# The notion of the independence of the Judiciary

## What it means IV

The notion of independence of the Judiciary means, furthermore, that:

- Individual judges must enjoy independence in the carrying out of their professional duties; the individual judges have a right and a duty to decide cases before them according to law, free from outside interference, including the threat of reprisals and personal criticism
- Individual judges must be appointed or elected exclusively on the basis of their professional qualifications and personal integrity

# The notion of the independence of the Judiciary

## What it means V

Finally, the notion of independence of the Judiciary means that:

- *Individual judges* must enjoy long-term security of tenure
- *Individual judges* must have adequate remuneration
- The *promotion of individual judges* must be based on objective factors
- The question of the *accountability of individual judges* for unethical or unprofessional behaviour must be dealt with by a fully independent and impartial organ, ensuring due process guarantees

# The notion of the impartiality of the Judiciary

The notion of the *impartiality of the Judiciary* is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of one of the parties. It is not sufficient for the judge to be impartial: he or she must also be perceived to be impartial.

# Special courts and tribunals

According to Principle 5 of the Basic Principles on the Independence of the Judiciary:

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Specialized jurisdictions or tribunals can be established if based on reasonable and objective criteria, such as for juvenile justice or indigenous justice.

# Military tribunals I

The Human Rights Committee has indicated that military trials must be in conformity with the international standards on fair trial and that the guarantees of article 14 of the Covenant “cannot be limited or modified by the military or special character of the court concerned.”



# Military tribunals II

The Human Rights Committee has determined that “trials of civilians by military or special courts should be exceptional, i.e., limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”

The European Court of Human Rights has ruled that the presence of a military officer as a judge on a tribunal trying a civilian is a legitimate cause to doubt the independence and impartiality of the tribunal and is a breach of article 6 (1) of the European Convention on Human Rights.

# International law and the independence of prosecutors I

Prosecutors fulfil an essential function in the administration of justice and must be strictly separated from the Judiciary and the Executive. Prosecutors must, in particular:

- Be able to perform their professional duties in criminal proceedings in safety, without hindrance or harassment
- Act objectively and impartially, and respect the principles of equality before the law and the presumption of innocence, as well as due process guarantees
- Act in a non-discriminatory manner

# International law and the independence of prosecutors II

Furthermore, prosecutors must:

- Give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law
- Not use evidence obtained by unlawful methods which violate human rights (forced confessions through torture, etc.); and take all necessary steps to ensure that those responsible for using such methods are brought to justice

# International law and the independence of lawyers I

Lawyers constitute a fundamental pillar for maintaining the rule of law and ensuring effective protection of human rights. In order to be able to fulfil their professional duties, lawyers must, in particular:

- Be able to work in true independence, free from external political or other pressure, threats and harassment; for example, they shall not have to obtain permission from the Executive to exercise their professional duties

# International law and the independence of lawyers II

Lawyers must furthermore:

- Be assured of due process guarantees, which include the legal right and duty to advise and assist their clients in every appropriate way to protect their interests
- Be able to act to uphold nationally and internationally recognized human rights
- Be allowed to answer for violations of rules of professional conduct before an independent disciplinary board which respects due process guarantees

# International law and the independence of lawyers III

Finally, lawyers must also, inter alia, be allowed to enjoy the fundamental freedoms of association, assembly and expression.