

## Chapter 2 : Relevant International Norms

2.01 The concept of an “independent and impartial tribunal” has been referred to in various fundamental instruments of international human rights. Article 10 of the Universal Declaration of Human Rights provides –

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.

A similar provision may be found in article 14(1) of the International Covenant on Civil and Political Rights –

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.

Reference may also be made to article 6(1) of the European Convention on Human Rights and Fundamental Freedoms –

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.

With reference to this provision, the European Court of Human Rights has held that in order to establish whether a body can be considered “independent”, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.<sup>1</sup>

2.02 The meaning of an “independent” tribunal has not been defined in the international instruments mentioned above. Since the early 1980’s, a number of instruments which attempt to give content to the concept of judicial independence have been adopted by various international bodies. While none of the documents have legally binding force, they have varying degrees of persuasive value depending on the nature and status of the persons or bodies which have adopted them, the circumstances of adoption and the extent to which they have been cited or relied on. In the following, these instruments will be described, with special reference to relevant provisions on judicial remuneration.

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<sup>1</sup> *Bryan v United Kingdom* (1995) 21 EHRR 342 at 358, para 37. See also *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: Interights, 2003).

The instruments will be discussed in chronological order, although the degree to which they are authoritative depends mainly on the factors mentioned above rather than on whether they are older or more recent.

(1) *The Syracuse Draft Principles on the Independence of the Judiciary* –<sup>2</sup>

In May 1980, the Economic and Social Council of the United Nations authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Special Rapporteur Dr L M Singhvi from India the task of preparing a report on the independence of the judiciary and of lawyers. To assist Mr Singhvi in his task, in May 1981 the International Association of Penal Law and the International Commission of Jurists organized a meeting of a Committee of Experts in Syracuse, Italy, to draft principles on the independence of the judiciary. The participants included judges and jurists from African, Asia, America, Eastern and Western Europe. The Syracuse Draft Principles were then submitted to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in August 1981.

The Syracuse Draft Principles comprise 32 articles, most of which are accompanied by a “note” printed immediately below the article. The article on judicial remuneration reads –

Art. 26. Judges should receive, at regular intervals, remuneration for their services at a rate which is commensurate with their status, and not diminished during their continuance in office. After retirement they should receive a pension enabling them to live independently and in accordance with their status.

[Note: It is essential for the independence of the judiciary, that salary levels should be such that judges are not exposed to the temptation to seek other sources of income.

An exception to the principle of non-reduction of salaries may be made at a time of economic difficulty if there is a general reduction of public service salaries, and members of the judiciary are treated equally.]

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<sup>2</sup> See Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), chapters 35 (text of the Draft Principles) and 36 (commentary).

(2) *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region* –<sup>3</sup>

In July 1982, the Lawasia Human Rights Standing Committee met in Tokyo to discuss the application of the principle of judicial independence in Asia. The meeting was attended by a number of chief justices, judges, lawyers and professors. As a result the Tokyo Principles were drafted. They include the following provision –

12. Relationship with the Executive –

(a) The Committee is aware of instances of threats and pressures made or applied to judges – for example –

(i) judges have been transferred from one court to another, or suspended from office for wrong reasons;

(ii) the remuneration or facilities of a judge have been affected because of decisions given by the judge;

(iii) the value of judicial salaries has not been maintained.

(b) Powers which may affect judges in their office, their remuneration or their facilities, must not be used so as to threaten or bring pressure upon a particular judge or judges.

(3) *International Bar Association Code of Minimum Standards of Judicial Independence* –<sup>4</sup>

In 1980, the International Bar Association (IBA) Project on Minimum Standards of Judicial Independence was initiated. Professor Shimon Shetreet of the Hebrew University of Jerusalem was appointed General Rapporteur of the Project, and Chief Justice Leonard King of South Australia appointed General Coordinator. In the course of drafting the Minimum Standards, reports from

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<sup>3</sup> Ibid, chapter 37.

<sup>4</sup> Ibid, chapters 31 (the IBA project on minimum standards of judicial independence), 32 (text of the minimum standards), 33 (commentary by Shimon Shetreet), 34 (commentary by the Hon. Leonard King, Chief Justice of South Australia). The text of the minimum standards is also available at [www.ibanet.org/pdf/HRIMinimumStandards.pdf](http://www.ibanet.org/pdf/HRIMinimumStandards.pdf).

leading jurists from 30 countries were submitted and considered. Several working conferences were held in Lisbon in 1981, in Jerusalem in March 1982 and in New Delhi in October 1982, and were attended by judges, lawyers and scholars from many countries. At the New Delhi conference, the Minimum Standards were finally adopted. The Standards include the following provisions –

14. Judicial salaries and pensions shall be adequate, and should be regularly adjusted to account for price increases independently of Executive control.
15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.  
  
(b) Judicial salaries cannot be decreased during the judges' service except as a coherent part of an overall public economic measure.

(4) *Universal Declaration on the Independence of Justice* –<sup>5</sup>

This Universal Declaration, in both its English and French versions, was adopted at the First World Conference on the Independence of Justice held at Montreal in June 1983. The conference was organised under the leadership of Justice Jules Deschenes of Canada and sponsored by seven Canadian organisations (including the Canadian Judicial Council, the Canadian Judges Conference, the Canadian Bar Association, the Canadian section of the International Commission of Jurists, etc). It was attended by representatives of 26 international bodies, including the United Nations, the International Court of Justice at the Hague, the European Court of Human Rights, the International Bar Association, the International Commission of Jurists, Lawasia, Amnesty International, etc. The Universal Declaration contains the following provisions –

- 1.14 The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

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<sup>5</sup> Ibid, chapters 33 (commentary by Shetreet), 38 (introduction by Justice Deschenes), 39 and 40 (English and French texts of the Declaration), 41-42 (commentaries).

2.21 (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.

(c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

(5) *Basic Principles of the Independence of the Judiciary* –<sup>6</sup>

These were adopted at the 7<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Milan, Italy, in September 1985. The General Assembly of the UN, in its resolution 40/146 of 13 December 1985, welcomed the Basic Principles and invited governments to respect them. The Economic and Social Council, in its resolution 1986/10 of 21 May 1986, invited member states to inform the Secretary-General every five years of the progress achieved in the implementation of the Basic Principles. The General Assembly welcomed this recommendation by its resolution 41/149 of 4 December 1986 on human rights in the administration of justice. Article 11 of the Basic Principles reads –

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

There is no provision on the issue of reduction of judicial remuneration.

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<sup>6</sup> *Basic Principles of the Independence of the Judiciary* (New York: United Nations, Department of Public Information, 1988) (DPI/958), also available at [www.unhcr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhcr.ch/html/menu3/b/h_comp50.htm).

(6) *Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”)*<sup>7</sup>

This Draft Universal Declaration was prepared by L M Singhvi, Special Rapporteur entrusted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1980 with the task of preparing a report on the independence and impartiality of the judiciary and the independence of lawyers. An initial draft was submitted to the Sub-Commission in 1985 and circulated to members for comments. A revised draft was submitted to the Sub-Commission in 1988, which referred it to the Commission on Human Rights for further consideration. The Commission in 1989 by resolution 1989/32 invited governments to take into account the principles set forth in the Singhvi Declaration in implementing the UN’s Basic Principles on the Independence of the Judiciary. The following provisions in the Declaration touch upon the issue of judicial remuneration –

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.
- (b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.
18. (a) During their terms of office, judges shall receive salaries and after retirement, they receive pensions.
- (b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.
- (c) Retirement age shall not be altered for judges in office without their consent.

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<sup>7</sup> (1989) 25 CIJL Bulletin (Bulletin of the Center for Independence of Judges and Lawyers which is based in Geneva) pp 38-58.

- (7) *Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges* –<sup>8</sup>

This was adopted by the Committee of Ministers on 13 October 1994, and was referred to in the European Charter on the Statute for Judges mentioned below. As far as judicial remuneration is concerned, the Recommendation contains the following provisions –

The terms of office of judges and their remuneration should be guaranteed by law. (para 2(a)(ii) of Principle I)

Proper conditions should be provided to enable judges to work efficiently and, in particular, by ... (b) ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities. (para 1(b) of Principle III)

There is no provision on the issue of reduction of judicial remuneration.

- (8) *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA (Law Association of Asia and the Pacific) Region* –<sup>9</sup>

This Statement has been discussed in the Mason Report.<sup>10</sup> It was first adopted at the Biennial Conference of Chief Justices of Asia and the Pacific organised by LAWASIA's Judicial Section and held in Beijing in 1995, and slightly revised at the following conference in Manila in 1997. There are now 32 signatories to the Statement, who are all chief justices in the Asia Pacific region, including the Chief Justice of the Supreme Court of the Russian Federation. Articles 31 and 38 of the Statement provide –

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the

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<sup>8</sup> <http://cm.coe.int/ta/rec/1994/94r12.htm>

<sup>9</sup> [http://lawasia.asn.au/beijing\\_statement.htm](http://lawasia.asn.au/beijing_statement.htm)

<sup>10</sup> paras 6.6-6.8.

judges of a relevant court, or a majority of them, have agreed.

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

The principal draftsman of the Beijing Statement is the Honourable David K Malcolm AC, Chief Justice of Western Australia and Chair of the Judicial Section of LAWASIA. In a lecture delivered at the Asian Development Bank Symposium on Judicial Independence in August 2003,<sup>11</sup> he explained his views on judicial remuneration –

Related to the question of security of tenure, is that of an adequate and secure remuneration. That judicial remuneration should be commensurate with the office of a judge is important, firstly, as it assists to attract suitable people to judicial service. Secondly, it minimises the potential for litigants to exercise financial influence over the decision making process. Thirdly, it helps contribute to, and helps maintain, the status of the Judiciary as an institution.

That remuneration should be secure, in the sense that it cannot be altered to the detriment of a judge during the term of office, is also of particular importance. A judge who faces the possibility of financial disadvantage if his or her decisions displease the Executive is not placed in a position from which it is easy to exercise the judicial function with true impartiality.

A legitimate exception to this principle may be made where the reduction in remuneration is an across-the-board, non-discriminatory reduction in the national economic interest, which is agreed to by the

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<sup>11</sup> [www.adb.org/Documents/Events/2003/RETA5987/CJ\\_Malcolm\\_Keynote\\_Address.pdf](http://www.adb.org/Documents/Events/2003/RETA5987/CJ_Malcolm_Keynote_Address.pdf)



Judges concerned.<sup>12</sup> Such a reduction has no adverse implications for judicial independence.

(9) *European Charter on the Statute for Judges* –<sup>13</sup>

This was adopted at a multilateral meeting organised by the Council of Europe in July 1998. It is “a formal document intended for all European States” aimed at “raising the level of guarantees in the various European States”, in the hope that statutes on judges in various European states will take into account the provisions of the Charter. On the issue of judicial remuneration, the Charter provides as follows –

6.1 Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

6.2 Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

(10) *Universal Charter of the Judge* –<sup>14</sup>

This was adopted by the Central Council of the International Association of Judges in November 1999. Its preamble states that “Judges from around the world have worked on the drafting of this Charter. The present Charter is the result of their work and has been approved by the member associations of the International

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<sup>12</sup> [My own footnote:] The provision in the Beijing Statement regarding judges’ consent to a reduction in their remuneration has been criticised in the Mason Report (paras 6.7-6.8). It is perhaps possible to rationalise the second sentence of article 31 of the Beijing Statement (set out above) as follows: Where it is proposed to reduce the remuneration of judges as part of a uniform public economic measure, no threat to judicial independence is involved. However, judges’ consent to the reduction will still be sought before the reduction is imposed both as a sign of respect for the judiciary, and to ensure that the judiciary will have an opportunity to put forward other legitimate and publicly defensible reasons (i.e. reasons other than the threat to judicial independence) to oppose the reduction, e.g. the difficulty of recruiting and retaining well-qualified judges if the reduction is introduced, or the fact that (as in the USA as discussed in chapter 4 below) judicial salaries have not kept up with past inflation and have remained stagnant or not increased proportionately when the salaries of others paid from the public purse were raised in the past.

<sup>13</sup> [www.richterverein.de/j2000/eurstat1.htm#.htm](http://www.richterverein.de/j2000/eurstat1.htm#.htm)

<sup>14</sup> [www.iaj-uim.org/ENG/07.html](http://www.iaj-uim.org/ENG/07.html) or [www.domstol.dk/html/publikationer/universal/UniChaUk.pdf](http://www.domstol.dk/html/publikationer/universal/UniChaUk.pdf)

Association of Judges as general minimal norms. Member associations have been invited to register their reservations on the text in Annex A.” On the issue of judicial remuneration, article 13 of the Charter provides –

The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges’ work and must not be reduced during his or her judicial service.

The judge has a right to retirement with an annuity or pension in accordance with his or her professional category.

After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

2.03 ***Summary of this chapter*** : The concept of an “independent and impartial tribunal” has been referred to in various fundamental instruments of international human rights.<sup>15</sup> However, the meaning of an “independent” tribunal has not been elaborated in these instruments. Since the early 1980’s, a number of instruments which attempt to give content to the concept of judicial independence have been adopted by various international bodies. While none of the documents have legally binding force, they have considerable persuasive value. On financial security as one of the institutional guarantees for judicial independence, these instruments generally provide that judicial remuneration (including salaries as well as pensions) should be at an adequate level and commensurate with the status of judges in society, and should be secured by law. Some instruments also suggest that judicial salaries should be periodically reviewed and adjusted so as to adapt to increasing price levels. On the issue of non-reduction of judicial remuneration, 4 of the 10 instruments<sup>16</sup> surveyed in this chapter support a qualified rule against reduction (the qualification being an exception to the general rule against reduction where reduction of judicial remuneration is introduced as a coherent part of an overall public economic

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<sup>15</sup> They include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms.

<sup>16</sup> The 4 instruments are the Syracuse Draft Principles on the Independence of the Judiciary, the International Bar Association Code of Minimum Standards of Judicial Independence, the Universal Declaration on the Independence of Justice, and the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region. The Beijing Statement introduces an additional condition which needs to be simultaneously satisfied if the exception is to apply, which is the judges’ consent to the reduction.

measure to reduce government expenditure). Four other instruments<sup>17</sup> make no reference to the issue of reduction or non-reduction of judicial remuneration. Two other instruments<sup>18</sup> stipulate non-reduction of judicial remuneration without any qualification.

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<sup>17</sup> The 4 instruments are the Tokyo Principles on the Independence of the Judiciary, the Basic Principles of the Independence of the Judiciary (endorsed by the UN General Assembly), Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges, and the European Charter on the Statute for Judges.

<sup>18</sup> The 2 instruments are the Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”) and the Universal Charter of the Judge.