

Draft Preliminary Notes on Judicial Independence¹

International Law Guarantees of Judicial Independence:

An independent, impartial and competent judiciary is a prerequisite to democracy, human rights and fundamental freedoms and the rule of law. International law recognizes that democracy cannot be maintained, human rights cannot be protected and the rule of law cannot be upheld in the absence of equal access to a judiciary empowered to act independently of the executive and legislative branches of government. As resolved by the UN General Assembly, "...the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."

The essential function of an independent judiciary to ensure rights implementation and rule of law compliance has been confirmed many times by international bodies and instruments. The UN General Assembly has on many occasions confirmed, "...that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice².

The Bangalore Principles on Judicial Conduct state, "the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice."³

The judiciary must be empowered and free to determine lawsuits, interpret the law and ensure compliance with constitutional requirements, free from actual or apparent control by or influence from government. States are required to enact constitutional laws guaranteeing judicial independence from government and national laws providing for security of tenure, financial security and administration and adjudicative independence.

Judicial independence refers to the capacity of judges and courts to determine lawsuits involving criminal charges, the rights and obligations of individuals and the constitutionality of laws and to prevent and remedy abuse of power in accordance with rule of law principles free control influence or threats from state or non-state actors. In Canada the judiciary also determines issues of provincial or federal jurisdiction. The judiciary must determine lawsuits on the basis of facts, laws and submissions before the court and free from control, influence, threats or inducements by state or non-state actors.

The essential role of the judiciary to provide, in accordance with the rule of law, a safeguard against the abuse of power and prevent the imposition of tyranny is ill defined and vulnerable to restriction.

¹ Prepared by Gail Davidson. These notes are incomplete and unedited so may contain errors and do suffer from omissions.

² UN General Assembly A/RES/67/1, 30 November 2012 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, at para.13.
<https://docs.un.org/en/A/RES/67/1>

³ Bangalore Principles of Judicial Conduct adopted in 2002 by the Judicial Group on Strengthening Judicial Integrity⁴ and endorsed by the UN Economic and Social Council (ECOSOC) in Resolution 2006/23, Preamble

As stated by the Supreme Court of Canada,

“Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.”(Emphasis added)

“...[C]ourts are not charged solely with the adjudication of individual cases... It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it--rule of law, fundamental justice, equality, preservation of the democratic process. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies”⁴ (Emphasis added)

International Law Obligations of States

International law requires that individual judges and the judiciary be independent of control or influence by the executive and legislative branches of government.⁵ and that judicial independence be guaranteed by the constitution and protected by national laws.

“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**”⁶

Individual rights to and state duties to ensure judicial independence have been identified, confirmed and guaranteed by a plethora of international law instruments. The UN General Assembly has on many occasions confirmed, “...that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice⁷.

In addition, “the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.”⁸

Article 14 of the UN *International Covenant on Civil and Political Rights* (ICCPR), one of the treaty guarantees of the right to an independent, impartial and competent judiciary has been interpreted as applying to the determination of rights and obligations, criminal charges and the constitutional legitimacy of laws and other state actors affecting rights.

⁴ *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, paras 21 and 24.

⁵ “the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded.”, Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995)

⁶ Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly Resolution 40/32 of 29 November 1985, and adopted on 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, para. 1.

⁷ UN General Assembly A/RES/67/1, 30 November 2012 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, at para.13.
<https://docs.un.org/en/A/RES/67/1>

⁸ Bangalore Principles of Judicial Conduct,³ adopted in 2002 by the Judicial Group on Strengthening Judicial Integrity⁴ and endorsed by the UN Economic and Social Council (ECOSOC) in Resolution 2006/23, Preamble

The UN Human Rights Committee (HR Committee)⁹ has identified the purpose of and scope of legal protections of judicial independence that Canada and other State Parties to the ICCPR should provide,

“States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”¹⁰

Right to independent judiciary is absolute

The right to an independent, impartial and competent judiciary to determine criminal charges and individual rights and obligations is considered absolute and not subject to any restriction. The UN Human Rights Committee has determined the absolute nature of the right to judicial independence in the following terms.

“The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.”

“The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.”¹¹

Canadian Law

Canada has no constitutional guarantees of judicial independence.

The *British North America Act, 1867*, 30-31 Vict. c. 3 (U.K.) (BNA Act), renamed the Constitution Acts 1867 to 1982 provides only as follows:

⁹ The HR Committee is a committee of 18 independent experts who monitor implementation of the ICCPR, determine complaints of ICCPR violations, interpret ICCPR provision through General Comments, receive, review and make recommendations to State Parties to the ICCPR and report to the UN Human Rights Council.

¹⁰ UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para. 19. , https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en

¹¹ *Ibid* at paras 6 and 19

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97 Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98 The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Canadian Charter of Rights and Freedoms (Constitution Act, 1982): provides only as follows.

Preamble “Whereas Canada is founded on principles the recognize the supremacy of God and the Rule of Law”

This reference to the rule of law has been interpreted as conferring on courts the role of protecting Charter protected rights and freedoms from unlawful restriction by all levels of government.

Section 11: “Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Notes on ‘Constitution’

Canada does not have a written constitution—a law that is the ‘supreme law’, secures rights, establishes governing principles and determines what the government can and cannot do with sufficient clarity to allow knowledge of and reliance on.

The BNA Act cited above is actually a United Kingdom statute. The current Prime Minister Mark Carney recently called Canada a ‘constitutional monarchy.’ Prime Minister Carney was appointed as the unelected Prime Minister of Canada by Governor General Mary Simon,

representative of King Charles on 14 March 2025 when Parliament was prorogued. The selection and appointment of Mr. Carney took place without the involvement of Canadians or Parliament. Carney was appointed and sworn in as Prime Minister of Canada by King Charles' representative Mary Simon. Research to date indicates, the only oath sworn by Mr. Carney to become the unelected Prime Minister of Canada in March 2025 was an oath of allegiance to King Charles, namely,

“I, [name], do swear that I will be faithful and bear true allegiance to His Majesty King Charles the Third, King of Canada, his heirs and successors. So help me God.”

Again without the approval of the prorogued Parliament or of Canadians, Prime Minister Carney arranged for King Charles to deliver the throne speech at the opening of Parliament on 27 May 2025 and for the wife of Charles—Queen Camilla—to be appointed as a member for life of the Privy Council.

Prior to re-opening on 27 March 2025, Parliament had been prorogued since 6 January 2025, (i.e. more than 20 weeks). The stated purpose of this extraordinary shutting down of Parliament was reported as, “to allow the Liberal Party to hold a leadership contest.”

The invitation to King Charles was explained as a “reminder of the bond between Canada and the Crown.” Canadians do not know what that bond is other than to “promote the interests of the British Empire”¹² as stated in the Preamble to the BNA Act.¹³ Canadians cannot know what those interests are and could not challenge laws or state actions on the basis of violations of or failure to adhere to the ‘constitution’.

The British North American Act, Section 11 provides that the Privy Council is the monarch vehicle for aiding and advising the Government of Canada and appointments to the Privy Council will be made by the monarch's representative. Section 13 provides that all references to the Governor General in Council shall be construed as referring to the Governor General action and with the advice of the monarch's Privy Council.

¹² *Parliament is prorogued. Here's what that means*, Global News, 6 January 2025. At <https://globalnews.ca/news/10944498/parliament-prorogued-justin-trudeau-resigns/>.

¹³ The BNA Preamble states, “And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire.”