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## A European Perspective on Judicial Independence and Accountability

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# A European Perspective on Judicial Independence and Accountability

MADS ANDENAS\*

Roberto MacLean has made important contributions to the strengthening of judicial independence at different stages in his career. The understanding of the role of an independent judiciary in a modern market economy has not been all that clear. Roberto MacLean's work in the World Bank has been instrumental in both developing this understanding and then in taking the consequences in developing programs for Latin American countries.

There is a perpetual tension between judicial independence and accountability, leading to frequent controversy and occasionally even constitutional crises. The European perspectives are of interest now. One could expect a well-established constitutional compact to respect an independent judiciary and protect it from executive intervention in judicial decisions. There is, however, a growing tension in many European countries.<sup>1</sup> This article sets out some of the reasons for this growing tension and contemplates whether the current discussion can contribute to some further understanding of judicial independence and accountability concepts at a more general level.

## I. Courts and Their New Constitutional Role

Judicial independence and accountability are live issues in most countries. Modern constitutions and international treaties establishing international courts will have provisions about the independence of courts and judges. International law and principles add increasingly important sources for the application of the independence principle. However, the different national solutions, and also those found for international courts, vary considerably. Presently, anti-terrorist measures adopted by national executives and legislatures continue to test judicial independence. The constitutional bases for judicial review, and on several levels, the court systems, are in a process of change.

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1. GUY CANIVET ET AL., *INDEPENDENCE, ACCOUNTABILITY AND THE JUDICIARY* (British Institute for Int'l & Comparative Law 2006) (discussing different European current perspectives in more detail).

The tension between judicial independence and accountability has become stronger for a number of reasons. The development of individual civil and human rights in national constitutional law and in European and international law has been accompanied by remedies requiring ever closer judicial review of legislation and executive action. Internationalization requires courts to mediate between the national legal order and European and international law, also outside the field of human rights protection. A situation where courts adjudicate on the balancing of rights and the public interest requires a stronger protection of judicial independence at the same time it leads to calls for higher accountability.

The United Kingdom is an interesting case in point. Cases involving human rights and constitutional issues have contributed to a reconsideration of the foundations for judicial review of legislation and administrative acts. Giving effect to parliamentary intent in the way courts normally apply legislation has not convincingly provided judicial authority to deal with conflicts between parliamentary legislation and European Union and European human rights law. Such authority may be found in the view that courts have an inherent jurisdiction to review legislation and administrative acts in parallel with Parliament's legislative authority.<sup>2</sup> This view may now be in the process of replacing the Diceyan parliamentary sovereignty or supremacy doctrine. The inherent jurisdiction provides the basis for setting aside legislation otherwise difficult in a system not recognizing a level of norms above parliamentary legislation. However, it does not set limits for the review. There are no limits in the way one finds for the constitutional review in countries where this has gradually evolved. A balance of powers, in particular when the executive dominates the legislature, as in the present UK system, would be difficult to establish under a doctrine of parliamentary supremacy.<sup>3</sup> Separation of powers under the new system with a parallel, inherent jurisdiction of courts brings with it other challenges.<sup>4</sup> In the United Kingdom the parallel legislative process of abolishing the Lord Chancellor, whose judicial powers already had been given up under pressure from the senior judiciary,<sup>5</sup> and the establishment of a new supreme court has made judicial independence an even more critical challenge.<sup>6</sup>

2. See Paul Craig, *Competing Models of Judicial Review*, in Public Law 428 (1999); Paul Craig & Nicholas Bamforth, *Constitutional Analysis, Constitutional Principle and Judicial Review*, in Public Law 763 (2001); Paul Craig, *The Common Law, Shared Powers and Judicial Review*, 24 OXFORD J. LEGAL STUD. 237 (2004).

3. See *infra* Part V, Independence Concepts and Courts, wherein a different view on separation of powers and judicial independence is discussed.

4. The UK discussion focuses on concepts such as "constitutional balance" not "separation of powers." See Brenda Hale, *A Supreme Court for the United Kingdom*, in 24 LEGAL STUD. 36 (2004); see also various works of Paul Craig, *supra* note 2.

5. See the important article by one of the senior law lords criticizing the role of the Lord Chancellor, Johan Steyn, *The Case for a Supreme Court*, 118 L.Q. REV. 382 (2002), and the further discussion by another law lord, Lady Hale, in Brenda Hale, *supra* note 4. In Lord Steyn's argument, a certain level of separation of powers is required for a balance of powers to be maintained. The relationship between the executive and legislature is, in many European countries, not governed by any clear separation, and in the UK model there is a requirement that ministers are members of one of the houses of parliament. This does not weaken the argument for a separation between the executive/legislature and the judiciary. In the United Kingdom the strong domination of the executive may provide support as an independent and separate judiciary becomes an essential contribution to the balance of the system that otherwise would be subject to a dominating and unchecked executive.

6. The traditional view, that this is about the relationship to the executive, is complemented by requirements of independence from the legislature, which, in the United Kingdom and most other countries, is dominated by the executive, with further deference paid in matters involving national security.

In the first years of the new millennium, the review of different anti-terrorist measures has put judicial independence to the test. It may be too early to draw any conclusions on the outcomes of these review processes, but the executive in many European countries has reacted critically against the scrutiny to which they have been subjected. Ministers in many countries have claimed that the protection of individual rights has gone further than required by a realistic balancing with the conflicting public interest in the protection against terrorist acts. History, however, rarely sides with those who force through such measures, and events (and public opinion) seem already to support the judicial restraint imposed on new legislation and other measures setting aside the most basic guarantees.

Many countries have seen court decisions on issues involving a 'national interest' no longer helpful to government in the way in which in previous times would have been guaranteed. The French *Clemenceau* case<sup>7</sup> from 2005 provides a clear illustration: the Conseil d'État enforced environmental law over the government's argument that the decommissioned warship could be sent to a third world country as war equipment (and that it was not waste, in spite of the asbestos and other toxic materials). The English *World Development Movement v. Secretary of State for Foreign and Commonwealth Affairs*<sup>8</sup> case from 1995 reviews a development aid project, and in another Court of Appeal decision from 2005, the European Convention on Human Rights is given application to acts of representatives of UK authorities (including soldiers) in Iraq.<sup>9</sup>

Areas in which government has had a practical prerogative or immunity (the issues have not been regarded as justiciable) have been increasingly limited by European Union law, European human rights law, or international law, and this has been enforced in decisions by national courts. Even when the relevant law is purely domestic, there is little left of unfettered discretion.

In some countries, the pressure on judicial independence has additional reasons. The criminal law provides an active judicial review of the executive and the political sphere. The reach of the criminal law goes beyond traditional corruption and unlawful party financing with broadly formulated criminal offenses directed against qualified breaches of duty. In France, Italy, and Germany, particular tension has been created by prosecutions and court cases bringing politicians and other high ranking state officials to justice for corruption. In Italy, the leading political parties collapsed, and the political system was fundamentally changed in the early nineties. In France, investigations have brought former senior ministers before the courts, and even the President of the Republic had to invoke the protection of head of state immunity against public prosecutors.<sup>10</sup>

7. CE decision No. 288801-288811, Feb. 15, 2006.

8. *R v. Sec'y of State for Foreign and Commonwealth Affairs*, (1995) 1 W.L.R. 386.

9. *R v. Sec'y of State for Defence*, [2005] All ER (D) 337.

10. As an aside, it must be observed that a flawed judiciary is not the reason that there are no convictions in any of the major United Kingdom political scandals involving illicit personal gain of the 1980s and 1990s (or matters later brought to public attention). Criminal investigations or prosecutions were simply not brought. Some may be blamed on the law, for instance parliamentary immunities and inadequate anti-corruption offenses. The United Kingdom does not have criminal offenses of a reach that make criminal review and sanctions such an important feature of the French and Italian legal systems. But a major reason (for instance in the personal corruption scandals) must be the lack of allocation of resources at the investigative and prosecutorial level. The level of real independence of the prosecution service in high level corruption matters may also be questioned. See Mads Andenas, *Independence and Efficiency: A Comparative Study of Prosecuting Services* (BIICL/Asian Development Bank 2000).

The way politicians execute their duties is subject to constant review of investigatory and prosecuting bodies, also beyond the investigation of corruption.

This creates an atmosphere in which politicians who have been, are, or fear they may be investigated and prosecuted may look at courts and their independence with critical eyes. Being on the receiving end, there is a temptation for politicians in this position to more easily consider judicial power to be abused and based on self interest. This can be accompanied by a temptation (and even as an emotional response) to find less value in a strong and independent judiciary.<sup>11</sup>

Even without this background, in the United Kingdom a previous Home Secretary while in office made statements to the effect that, not only were the courts wrong in overturning his decisions, but he indicated that he would not abide by their decisions. He gave several warnings, via the tabloid press, to the judges.<sup>12</sup> There is an emerging tradition that ministers greet decisions by the European Human Rights Court, in cases involving rights and terrorism, with threats of withdrawal from the European Human Rights Convention. On the background of threats to withdraw from the European Human Rights Convention, it is progress of a kind when 2005 saw statements by Prime Minister Tony Blair to the effect that decisions striking down new anti-terrorist legislation could require the amendment of the Convention.<sup>13</sup>

The speeches at the opening of the 2006 court year in several jurisdictions reflect the pressure that courts are under. At the *Inaugurazione Anno Giudiziario* in January 2006, Nicola Marvulli, the Primo Presidente della Corte di Cassazione spoke about the crisis of the judiciary. "Judges have lost their reputation (La magistratura non ha più prestigio)," he said.<sup>14</sup> He also targeted for criticism the legislation introducing shorter limitation periods for, in particular, economic crimes that, together with the ministerial and parliamentary immunities, would have a strong impact on ongoing prosecutions. He described the legislation as an undue interference in the process of the law. He characterised one part of this legislation, the ex Cirielli, as "un'amnistia mascherata" and condemned "alcune scelte di politica legislativa che . . . si sono rincorse nella ricerca di un'esasperata tutela garantistica che spesse volte è servita a pregiudicare la sollecita definizione dei processi."<sup>15</sup>

On a more general level Primo Presidente Nicola Marvulli added this statement about judicial independence:

Ciononostante continuo a credere che questa riforma non sia in grado di accrescere l'indipendenza della magistratura: mi rassicura la convinzione che ho maturato nella mia lunga

11. Both France and Italy provide clear examples on this. The most extreme form is in the frequent attacks by the Italian Prime Minister, Mr. Silvio Berlusconi. Foreign reactions, as manifested in leading international press organs (which he cannot accuse of belonging to the left) have become increasingly critical of what is referred to as the Prime Minister's undermining of judicial independence.

12. See Andrew Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK*, 24 LEGAL STUD. 73 (2004). These most blatant statements by Mr. David Blunkett while he was home secretary were followed by a much more respectful line by his successor, Mr. Charles Clarke. He did, however, initiate informal discussions with the law lords on how to resolve the issues relating to detention of terrorist suspects. Both his approach, and the rejection by the law lords, is a matter of public record.

13. This is not a realistic prospect.

14. Nicola Marvulli, Primo Presidente della Corte di Cassazione, *Relazione sull'attività Giudiziaria nell'anno 2005* (Jan. 27, 2006), [http://www.avvisopubblico.it/categorie/pubblicazioni/allegati/rel\\_inaug\\_anno\\_giudiziario\\_2006.pdf](http://www.avvisopubblico.it/categorie/pubblicazioni/allegati/rel_inaug_anno_giudiziario_2006.pdf).

15. *Id.*

e variegata esperienza professionale, e cioè che l'indipendenza del giudice è indissociabile dalla sua funzione, è una qualità personale, al pari dell'onestà morale ed intellettuale, è una nostra gelosa ricchezza, che nessuno ci potrà sottrarre, se soltanto noi vorremo e sapremo conservarla.

Altrettanto certo è che né il Paese, né la stessa magistratura può più approvare la verifica della professionalità con i criteri sinora utilizzati, perché quei criteri hanno avuto il pregio di aver giudicato tutti astrattamente idonei alle funzioni superiori, e, non sempre neppure abbiamo saputo liberarci da condizionamenti correntizi che mal si conciliano con l'indipendenza e l'autonomia della magistratura e, ancor più, con l'immagine che di questa deve avere l'opinione pubblica.<sup>16</sup>

In his conclusion Primo Presidente Nicola Marvulli added:

Dobbiamo altresì, nell'irrinunciabile difesa della nostra indipendenza, essere consapevoli che questa difesa non può prescindere dall'arricchimento della nostra professionalità: l'ignoranza apre la porta all'errore ma spalanca anche la finestra alla cieca obbedienza ad ogni possibile sollecitazione verso soluzioni che possono offendere la giustizia e la legalità.<sup>17</sup>

In the same month, at the Audience solennelle opening the French court year, Guy Canivet, the Premier président de la Cour de cassation, also addressed the pressing issue of the independence and accountability of the French judiciary.<sup>18</sup> In this elegant and reflective piece, Premier Président Canivet identifies a series of crucial challenges facing the judiciary, not only in a purely domestic context but also transcending frontiers and arising in all modern jurisdictions:

Rendre compte de la justice, . . . il en est diverses manières, statutaire, institutionnelle, hiérarchique, disciplinaire, civile, pénale, qui toutes posent la question—controversée—de la responsabilité des juges confrontée à leur indépendance . . . objet délicat de réflexion, . . . dit-on prochainement aboutie. Mais aujourd'hui, à bien comprendre l'attente citoyenne, l'exigence de justification va bien au-delà; c'est devant la société civile qu'elle rend le juge responsable. Juger les autres a pour contrepartie d'être jugé par eux. Toute décision de justice expose son auteur à critique publique . . . et, le cas échéant, au désaveu du souverain. . . . Aujourd'hui, en République, la souveraineté est au peuple au nom de qui justice est rendue; c'est à lui que les juges doivent compte.<sup>19</sup>

The judiciary has a constitutional role which is developing. This will continue to raise problems, both in relation to the executive and the legislature. Much of the discussion will continue to be on the intensity of review or about how far courts should go in overturning administrative decisions or legislation. This is closely related to the topic of the independence and accountability of the judiciary. Both sets of questions lead one to the basis or foundation of judicial review and separation of powers. Let us now turn to what are discussed as the most pressing problems of judicial independence and accountability.

## II. The Pressing Problems

The pressing problems of the current discussion can be brought in under the following headings: (1) appointment and promotion of judges, including the use of shorter-term

16. *Id.*

17. *Id.*

18. Guy Canivet, Premier président de la Cour de cassation, Audience Solennelle de Debut D'annee Judiciaire (Jan. 6, 2006), <http://www.courdecassation.fr>.

19. *Id.*

appointments; (2) the organization of the administration of the court system; (3) judges' non-judicial activities; (4) working conditions including salary and pension systems; and (5) complaints and disciplinary sanctions including protection of tenure.

These pressing problems are discussed in most jurisdictions, under rather similar headings, and they are also reflected in the deliberations of the different international fora and their outcomes. The judicial systems and their environments differ, as do the solutions found for the problems of independence and accountability. But there are distinct features in the recent developments that create a common ground.

The process of appointment and promotion of judges is subjected to much scrutiny, and there is a development where political or executive discretion is minimized or excluded. Independent commissions appointing or recommending appointment on merit are becoming the accepted model. This has long traditions, for instance in Italy where it has been part of the constitutional arrangements after the Second World War. For many years, France has had a body recommending judicial appointments, most recently reformed by the 1993 constitutional amendment. In the United Kingdom, such a body was first appointed for Scotland, soon to be followed by one for England and Wales. Norway and many former communist European countries have also recently followed this model. Judges are often in the majority in the council, but the executive and parliament will usually be represented.

The organization of the administration of the court system has been reviewed in many countries. The control of the executive has been reduced, for instance by establishing an independent agency for court administration, taking over functions which previously were under the direct responsibility of a minister in a department of state. In some countries, the supreme courts may have more control over administration and expenditure.<sup>20</sup>

Judges' non-judicial activities have been another important issue. Legislation or codes of conduct, or both, have limited the freedom of judges to get involved in non-judicial activities. This is related to the discussion of working conditions, in particular of salary and pension systems. It is generally acknowledged that the salaries must be so high that judges can refrain from involvement in non-judicial activities, but in many countries there is a long way to go before this is achieved. The question of pensions is another awkward issue where reasonable solutions seem to be found in most countries. This has recently come to a head in the Council of Europe where an extreme instance of the occasional inertia and ineffectiveness of the decision making of international organizations has blocked the necessary steps to establish a pensions system for the judges of the European Human Rights Court.<sup>21</sup> In practice, they remain dependent on pensions or later appointments from their Member State. This puts the independence of these European judges in jeopardy; they are repeatedly asked to rule on matters of vital interest to their Member State. Of course the incentive for Member State ambassadors and their ministries of foreign affairs and finance to get the matter right is limited, and public discussion is required to set them under pressure to do so.

Complaints, disciplinary sanctions, and the protection of tenure bring up core independence issues. Individual accountability has been strengthened in many countries by

20. This is, for instance, the model in the United Kingdom. The Supreme Court replacing the House of Lords will have a higher degree of administrative and budgetary independence than the rest of the court system. Current arrangements for the House of Lords are difficult to assess, as they are less than transparent.

21. For instance, following the model of the Court of Justice and other tribunals of the European Union, and practically every other international court or tribunal.

establishing or strengthening systems for complaints and disciplinary sanctions. The consensus is that the executive must not be given any role or further functions in such systems. One interesting perspective is in the handling of the major political corruption or mismanagement scandals in countries such as Italy and France. Increased executive power, for instance by a minister of justice, may have blocked the work of prosecutors and judges in a more independent and decentralized system. Carlo Guarnieri explains in his article how even limitations on appeal over certain procedural decisions from local courts to higher courts have, in the Italian tradition, been seen necessary to reduce the influence of the executive.<sup>22</sup> A national prosecutor or a supreme court could become the instrument of the political influence of an executive. Procedures and systems for complaints and disciplinary sanctions can establish accountability but equally threaten the execution of important constitutional tasks in the control of the executive. The ground here is dangerous, and legislative or other inroads into judicial independence on the proposal of the executive in response to scandals of different kinds, can easily upset a constitutional balance.

As an extension of the protection of tenure, shorter term appointments have been subject to scrutiny. More informal arrangements have generally been replaced, and the area continues to be subject to reform to comply with standards of independence.

### III. The Utility of Comparative Study

The discourses on judicial independence and accountability are primarily national. But comparative material is increasingly used in argument, creating a need for a more systematic presentation and analysis.

The validity of some kinds of claims can be tested by comparative analysis. This applies in particular to the assertion of universal validity for particular concepts or solutions. Perhaps more pressing, the emergence of international and European law and of international professional standards requires comparative analysis as these sources cannot be understood or applied in an isolated bilateral perspective.

The compliance with general principles of the rule of law or independent courts can realistically only be assessed in a comparative perspective. Where international standards are seen to require domestic reform (or limit the scope for reform sparked by other concerns), comparative study provides a useful toolbox. This may indeed be useful in reform also where it is purely domestically driven and clearly kept within the requirements of international requirements. This article is intended as a contribution to a comparative discourse on judicial independence and accountability.<sup>23</sup>

### IV. National Traditions and International Standards

Modern constitutions and international treaties establishing international courts will have provisions about the independence of courts and judges. The Italian Constitution, with its detailed provisions intended to protect judicial independence, is in a class of its own.<sup>24</sup> But all modern written European constitutions share basic provisions about judicial

22. Carlo Guarnieri, *Le contrôle informel: l'institution judiciaire, les juges et la société* (2), in INDEPENDENCE, ACCOUNTABILITY AND THE JUDICIARY, *supra* note 1.

23. INDEPENDENCE, ACCOUNTABILITY AND THE JUDICIARY, *supra* note 1.

24. COST. [Constitution] art. 101, 111-113 (Italy).



independence,<sup>25</sup> and a reorganization of the systems for appointment, tenure, and discipline will require a constitutional amendment.<sup>26</sup>

Judicial independence and accountability is based on national traditions. A primary source is found in the national constitutions. This is to an increasing degree complemented by the European Human Rights Convention's Article 6 requiring an independent court or tribunal.<sup>27</sup> There is an ever richer case law by the European Court of Human Rights, and also now a national case law on the requirements of Article 6.

Many countries have seen national reforms to achieve compliance with the requirements of Article 6. In the United Kingdom, this spurred the fundamental reform of new legislation (not yet entered into force) abolishing the office of the Lord Chancellor and establishing a Supreme Court.<sup>28</sup> We first turn to the European Human Rights Convention (Subsection A) and its consequences in national law (Subsection B) and will then continue with the international conventions and standards (Subsections C-D).

#### A. THE EUROPEAN CONVENTION AND THE REQUIREMENT OF AN INDEPENDENT AND IMPARTIAL TRIBUNAL

The fair trial guarantees of Article 6 of the European Convention on Human Rights now provide a general framework for the independence and accountability of the courts and the judiciary and the foundations of minimum standards for separation of powers in this respect. Article 6(1) provides the basic guarantee of a fair trial before "an independent and impartial tribunal established by law."<sup>29</sup> This has been developed in the case law of the European Court of Human Rights. National court systems have been reviewed and States held in breach of Article 6 in a number of cases.

The starting point for a fair criminal or civil trial requires a court which is not, or does not appear to be, biased against the defendant or litigant. The natural extension of the fair trial guarantees is that the court's decision cannot be overturned by some other authority which does not offer such guarantees.<sup>30</sup> The fair trial guarantees thus limits the extent, and the form, of discipline that can be imposed on individual judges.

25. One example is the Italian Constitution (1947) establishing the courts and the judiciary as the Third Branch of State. The principle of judicial independence is expressed in Article 101 stating that "I giudici sono sogetti soltanto alla legge" ("the judges are subject only to the law"). Cost. [Constitution] art. 101. Articles 111-113 lay down a constitutional framework for appointment (by an independent commission), safety of tenure and other matters pertaining to judicial functions and independence. Cost. [Constitution] art. 111-113.

26. There are proposals to amend the Norwegian Constitution of 1814 with an article containing a statement of the principle of judicial independence.

27. European Convention on Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222.

28. See BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES (Andrew Le Sueur ed., Oxford Univ. Press 2004); MORGAN, DEREK, ET AL., CONSTITUTIONAL INNOVATION: THE CREATION OF A SUPREME COURT FOR THE UNITED KINGDOM; DOMESTIC, COMPARATIVE AND INTERNATIONAL REFLECTIONS, 24 Legal Stud. Special Issue (2004).

29. European Convention on Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222.

30. Van de Hurk v. Netherlands, App. No. 16034/90, 18 Eur. H.R. Rep. (Ser. A) 481 (1994). See also, CLARE OVEY & ROBIN WHITE, JACOBS & WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. 2006) (providing a clear and helpful general overview).

The case law distinguishes between subjective and objective elements of independence and impartiality. The subjective element involves an inquiry into whether the personal conviction of a judge in a particular case raises doubts about his or her independence or impartiality. Lack of bias is presumed unless there is evidence to the contrary. Subjective bias has been established only in few cases.

The objective element involves a review on the national court system. The question posed is whether the accused's doubts about the tribunal's independence and impartiality are legitimate. The focus is on structure and on appearance.

The judge in *Salaman v. United Kingdom*<sup>31</sup> was a Freemason. The applicant challenged the codicil of a will made by a Freemason. An earlier will in favour of the applicant was revoked by the codicil. The man the property was left to was claimed to be another Freemason. The applicant referred to "the secretive, pervasive nature of Freemasonry which has a corrupting . . . influence."<sup>32</sup> The European Human Rights Court considered the applicant's doubts about the impartiality of the judge and held them not to be objectively justified. That a judge and also a witness or party in a case were Freemasons was, in the Court's view, not sufficient to raise doubts about the judge's impartiality. The consequences of a judge's relationship with a fellow Freemason or the interests of a Freemason institution would depend on all the circumstances. This is the same whenever a member of a tribunal knows one of the parties to or witnesses at a trial. In *Pullar v. United Kingdom*,<sup>33</sup> one of the jurors in a corruption case had been in the employment of a prosecution witness. The Court did not find a breach. The juror's relationship with the witness—who had dismissed him from his job—did not demonstrate that the juror would be predisposed to believe his testimony.<sup>34</sup>

In many systems a judge may have had some involvement in the pre-trial stages of the process, and the question is how far this constitutes a breach of Article 6(1). Routine pre-trial supervision of the case does not. It could constitute a breach if the nature of the decision suggests some pre-judging of the substantive issue.<sup>35</sup> A number of jury cases deal with situations where jurors made racist remarks and jokes. In one case the Human Rights Court found a violation of Article 6 and, in another, that the judge's redirection guaranteed the jury's impartiality.<sup>36</sup>

More interesting in our context are the cases where the defect in the court is not based on any one particular member but on more formal concerns about the court's structure, powers, and composition. The European Human Rights Court has reviewed national systems of appointment of judges and their terms or conditions.<sup>37</sup> Already early in the case law, the

31. App. No. 43505/98, admissibility decision of 15 June 2000; see also *Kiiskinen and Kovalainen v. Finland*, App. No. 26323/95, admissibility decision of 3 June 1999.

32. *Salaman*, App. No. 43505/98, at 6.

33. App. No. 22399/93, 22 Eur. H.R. Rep. 391 (1996).

34. See also *Langborger v. Sweden*, App. No. 11179/84, 12 Eur. H. R. Rep. (ser. A) 416 (1990).

35. *Hauschildt v. Denmark*, App. No. 10486/83, 12 Eur. H.R. Rep. (ser. A) 266 (1989); see also *De Cubber v. Belgium*, App. No. 9186/80, 7 Eur. H.R. Rep. (ser. A) 236 (1985); *Ben Yaacoub v. Belgium*, App. No. 9976/82, 13 Eur. H.R. Rep. (ser. A) 418 (1987); *Fey v. Austria*, App. No. 14396/88, 16 Eur. H.R. Rep. (ser. A) 387 (1993); *Nortier v. Netherlands*, App. No. 13924/88, 17 Eur. H.R. Rep. (ser. A) 273 (1993).

36. See *Sander v. United Kingdom*, App. No. 34239/96, 31 Eur. H.R. Rep. 1003 (2001); *Gregory v. United Kingdom*, App. No. 22299/93, 25 Eur. H.R. Rep. 577 (1998).

37. *Le Compte v. Belgium*, App. No. 6878/75, 4 Eur. H.R. Rep. 1, ¶ 55 (1981).

existence of guarantees against outside interference was addressed.<sup>38</sup> Also, the appearance of independence is among the questions that were addressed in the early case law.<sup>39</sup>

*Findlay v. United Kingdom*<sup>40</sup> is interesting for different reasons. It has had a considerable impact in the United Kingdom, making use of the principles mainly developed in cases against Turkey. United Kingdom authorities and courts could not understand that the same principles should apply to the UK system (and in fact it required yet another round, and another loss before the European Human Rights Court before the UK legislator and courts fully understood the consequences). In *Findlay*, the European Human Rights Court examined the independence and impartiality of an army court martial. A court martial in the United Kingdom was convened on an ad hoc basis by a senior officer in the defendant's regiment. He appointed the officers, who sat as judges in the court martial, and the prosecuting and defending officers. He also prepared the evidence against the accused and had the power to quash or vary the court's decision. Today it seems unsurprising that the European Court held that the court martial was not "independent and impartial."<sup>41</sup> The court martial system has since, in several rounds and stages, been reformed to comply with *Findlay* and a subsequent judgment.

The first of a number of Turkish cases and the one to be cited here is *Incal v Turkey*.<sup>42</sup> The issue in this case was the effect of the participation of military personnel as criminal judges. A civilian was convicted of disseminating Kurdish separatist propaganda by a National Security Court. This court was composed of two civilian judges and a legally trained army officer. Such courts were set up to deal with "offences affecting Turkey's territorial integrity and national unity."<sup>43</sup> The Court of Human Rights found a violation of Article 6(1). The applicant could fear that the reason for including a military judge on the tribunal was to lead it to be unduly influenced by other considerations than the evidence in the case. Also in the case of Abdullah Öcalan, the Grand Chamber of the European Human Rights Court found a violation of Article 6(1). The issue here was a military judge on the panel determining Öcalan's culpability for numerous terrorist offences. In this case, the military judge was replaced before the verdict by a civilian who had sat as a substitute. This was not sufficient to redress the initial breach.<sup>44</sup>

The Article 6 requirements of independence and impartiality apply in civil cases and set minimum standards in terms of the court's or tribunal's composition. The European Human Rights Court held that the presence of civil servants on adjudicating tribunals did not constitute a breach if there were appropriate guarantees of their independence. Public authorities are prohibited from instructing them in the exercise of the judicial function. Where the first instance tribunal is not sufficiently independent under Article 6, this can be remedied by judicial review by a court that complies with Article 6.<sup>45</sup>

38. *Piersack v. Belgium*, App. No. 8692/79, 5 Eur. H.R. Rep. (ser. A) 169, ¶ 27 (1982).

39. *Delcourt v. Belgium*, App. No. 2689/65, 1 Eur. H.R. Rep. (ser. A) 355 (1970).

40. App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997).

41. The Grand Chamber found, in 2003, that the new procedure, as amended by the Army Act 1998, complies with Article 6. See *Cooper v. United Kingdom*, App. No. 48843/99, 39 Eur. H.R. Rep. 171 (2003); *contra* *Grieves v. United Kingdom*, App. No. 57067/00, 39 Eur. H.R. Rep. 51, ¶ 65 (2003).

42. App. No. 22678/93, 29 Eur. H.R. Rep. 449 (2000).

43. *Id.*

44. *Öcalan v. Turkey*, App. No. 46221/99, 41 Eur. H.R. Rep. 45 (2005).

45. *Edwards v. United Kingdom*, 15 Eur. H.R. Rep. (ser. A) 417 (1993), *Rowe & Davis v. United Kingdom*, App. No. 28901/95, 30 Eur. H.R. Rep. 1 (2000), *Bryan v. United Kingdom*, 21 Eur. H.R. Rep. (ser. A) 342

## B. THE CONSEQUENCES IN NATIONAL LAW

The consequences in national law of breach of Article 6 have been several. For the court system the most important consequence has been reforms to bring the system in compliance with Article 6. The legislation in the United Kingdom abolishing the office of the Lord Chancellor was partially prompted by the prospect of a challenge under Article 6. New reforms are scrutinized to ensure compliance. Also, in countries that are not member states of the Council of Europe and signatories to the European Human Rights Convention, Article 6 and the case law provide standards to measure domestic arrangements against.

Most of the cases where the European Human Rights Court has held in favour of the complainant, compensation has also been provided for. There is also the prospect of wider use of damages by national courts for breach of Article 6 as a tool for accountability.

In French law, Article 6 has had an impact on both institutional structures as well as the content of substantive law of which a noted example is the recent decision in *Magiera*. In this case, the *Conseil d'État* set aside the traditional standard of *faute lourde* concerning liability for judicial acts so that the mere violation of the right to a hearing within a reasonable time, underpinned by Article 6(1), gave rise to liability.<sup>46</sup>

## C. INTERNATIONAL CONVENTIONS AND STANDARDS

The fair trial guarantees of the 1966 International Covenant on Civil and Political Rights also require minimum standards of judicial independence. Article 14, paragraph 1 indicates the importance of the independence of the judiciary by establishing that:

All persons shall be equal before the courts and tribunals. 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.<sup>47</sup>

The fair trial guarantees in Article 14 of the Covenant on Civil and Political Rights have been further developed by a series of basic principles on the independence of the judiciary endorsed by the United Nations General Assembly.<sup>48</sup> These principles cover appointment, dismissal, and terms of service. They provide that any method of judicial selection shall safeguard against judicial appointments for improper motives. 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. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the conclusion of their term of office, where such exists. 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. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders

(1996), *Kingsley v. United Kingdom*, App. No. 35605/97, 33 Eur. H.R. Rep. 288 (2001), *W. v. United Kingdom*, 10 Eur. Ct. H.R. (ser. A) at 29 (1988).

46. CE decision No.239575, June 28, 2002.

47. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14 (Dec. 16, 1966).

48. See Basic Principles on the Independence of the Judiciary, G.A. Res. 40/132, U.N. Doc. A/RES/40/32 (Nov. 29, 1985), G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985).

them unfit to discharge their duties. All disciplinary, suspension, or removal proceedings shall be determined in accordance with established standards of judicial conduct.

Different professional bodies contribute to the further development of international standards. Development institutions, such as the World Bank, have in recent years become more involved in the judicial systems and judicial independence in their countries of operation. The development institutions do this primarily as they see a link between a functioning judicial system and economic development.

A number of nongovernmental organizations with a human rights remit extend their political monitoring to judicial independence issues. This is now also reflected the human rights monitoring by international organisations and governments. This work is perhaps of limited assistance for our purposes as it does not contribute much to any international agreement on the requirements to judicial independence.

#### D. INTERNATIONAL AND EUROPEAN COURTS

We now turn to the international and European courts, including the World Trade Organization (WTO) dispute resolution system. The number and role of international courts and tribunals continues to grow. Globalization and the density of international relationships, or the converse eroding sovereignty and increasing international regulation, makes legitimacy and accountability of international courts ever more pressing. Judicial independence is seen to be increasingly important.<sup>49</sup>

However, the meanings of the concepts of 'independence' and 'impartiality' in international courts are unclear. Much reliance has been put on the different institutional context. It is often stated that, lacking a legislature and an executive, concepts developed in the domestic context cannot necessarily be imported into the international legal system.<sup>50</sup> This can be turned around, and, in addition to the different independence matrices discussed in this chapter and in this book, one can add some pressing problems of international courts and tribunals.

There are many institutional and cultural reasons for the difference between the judicial culture of the main European courts (the European Human Rights Court and the European Union Court of Justice) and the predominantly 'diplomatic' cultures of the other international courts. The European Human Rights Court has had a judicial character<sup>51</sup> from its inception and an increasing degree of independence.<sup>52</sup> The model of the early years where judges were regarded as representatives of their home countries, expected to put

49. See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003).

50. This is developed and criticised by Ruth Mackenzie and Philippe Sands. See *id.*

51. Several modifications of general independence principles continue to be applied. For instance, the practice of having a judge from the country of the case sitting on the panel, even appointing an *ad hoc* judge if there is no ordinary judge from the country available. If the home country were to have been taken into account, normal bias or conflict of interest rules would have excluded judges from sitting on a case about a complaint against their home country. The arguments for the system are different but linked to the particular and different position of an international court. It is interesting to note that *ad hoc* judges show a stronger tendency than permanent judges to vote in favor of their home country.

52. The European Human Rights Court was established by the European Convention on Human Rights of 1950. The Convention was drafted in the wake of the Second World War and the Holocaust. It was conceived as an 'early warning system' to prevent states from lapsing into totalitarianism. It set out the fundamental rights and freedoms that states should secure to everyone in their jurisdiction. By establishing the European Court

their case and voting in their favour, has gradually given way. One clear indicator is the voting patterns of the judges: they do not always vote in favour of their home country. Judges from most countries have in individual cases held against the submissions of their home countries and for finding that the home country is in violation of various provisions of the European Human Rights Convention. The application of rules of procedure and evidence is paying less respect to the status of member states to the detriment of individual applicants. Appointment procedures, terms of appointment, pensions and many other issues continue to require attention.<sup>53</sup>

The European Union Court of Justice also has a distinctly judicial character. It has had this from its inception, and the degree of independence is increasing.<sup>54</sup> It delivers collegiate judgments and individual voting is not made known. From what is known from the voting of the judges (this is also supported by the opinions by the Advocates General which are made public), they cannot be relied upon to vote in favour of their home country. Also before the Court of Justice, the application of rules of procedure and evidence is less and less according member states special advantages. There are, however, still serious independence issues with the appointment and reappointment of judges.

If the European Human Rights Court and the European Union Court of Justice belong to the judicial culture camp, the International Court of Justice in the Hague is firmly placed in the other camp of a predominantly 'diplomatic' culture. Before the International Court of Justice, procedure and evidence rules pay inordinate respect to the sovereign status of state applicants or respondents. Judges can as a rule be expected to vote for their home countries.<sup>55</sup> There are unresolved issues in the process of appointment of judges which reflect the 'diplomatic' culture.

There are evolving independence principles in international courts and tribunals, and this causes problems in the relationship with the states. The World Trade Organization's dispute settlement system is an interesting example. Member states have been very anxious not to give the dispute settlement bodies a clear judicial status. Members of the panels that sit at first instance. The Appellate Body is independent, but they are not referred to as judges. This reflects a clear intention of keeping the system within the diplomatic sphere and avoiding a judicial body developing legal principles that can bind the states beyond a narrow interpretation of the treaties they have signed up to.

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of Human Rights it also provided a judicial enforcement system by which states which violated human rights could be called to account. Today, the European Court of Human Rights struggles with the expectations that it can offer everyone the individual protection of the law in the last instance.

53. See Interights, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (May 2003), available at <http://www.interights.org/doc/EnglishReport.pdf>. The English Court of Appeal judge, Lord Justice Sedley, was among the members. The Report reviews the current procedures for the appointments of judges to the Court both at the domestic nomination and international review and election stages. It concludes that at all levels the processes lack transparency and accountability. Noting international standards on the independence of the judiciary, the Report makes a number of recommendations for reform of the system of judicial appointments. In a recent report, Lord Woolf highlights a number of issues with an impact on the independence issues. Lord Woolf, European Court of Human Rights, *Review of the Working Methods of the European Court of Human Rights* (Dec. 2005), <http://echr.coe.int/ECHR/Resources/Home/LORDWOOLFREVIEWONWORKINGMETHODS.pdf>.

54. The European Union Court of Justice was established by the Treaty of Rome of 1957.

55. Exceptions to this are very few indeed. This expectation will even apply to the President of the Court. Informal contacts with the home country authorities also seem to be subject to very few practical or informal restrictions. The practice and experience with *ad hoc* judges is similar to that of the European Human Rights Court.

There have been a number of recent initiatives to focus on the problems of independence of international courts and tribunals.<sup>56</sup> A Study Group of the International Law Association has promoted debate of candidatures of judges and adopted a set of principles on independence of the international judiciary.<sup>57</sup> These principles recognize the need for guidelines of general application to contribute to the independence and impartiality of the international judiciary. In the preamble it is stated that they were adopted with a view to ensuring the legitimacy and effectiveness of the international judicial process. They noted the United Nations Basic Principles on the Independence of the Judiciary and other international rules and standards relating to judicial independence and the right to a fair trial.<sup>58</sup> The preamble also pays respect to the "special challenges facing the international judiciary in view of the non-national context in which they operate," and notes "in particular that each court or tribunal has its own characteristics and functions."<sup>59</sup>

The status of the principles is formulated as "principles of international law to be of general application."<sup>60</sup> The principles then closely follow the outline of independence principles applying to national courts, with certain additional rules dealing with special problems of international courts and tribunals. They go into further detail about immunities which may be controversial and perhaps particularly problematic for tribunals where private parties are involved.

The work on judicial independence in the context of international courts provides another dimension to the discussions about national courts. It will contribute to the establishment of firmer international standards that in the next round will have an impact on national systems.

## V. Independence Concepts and Courts— The Historical Dimension

The principles and sources discussed in this book have long historical traditions. In their current form they are, however, new. There has been tremendous development in the common law courts and in the other court systems of the old nation states of Europe. The basic foundations in the principles of rule of law, *Rechtsstaat* or *état de droit* have developed and undergone fundamental change. The common core of a modern separation of powers doctrine is emerging.<sup>61</sup> Not only are the principles underlying any system for judicial independence and accountability undergoing change but also the principles for judicial independence and accountability themselves.

56. At the center of most of them one finds Professor Philippe Sands QC. He has initiated the Centre for International Courts and Tribunals which is based at University College, University of London and has initiated the other activities that are described below. A number of activities of interest to the topic of this book takes place under the umbrella field of 'Ethics, Conduct and Independence of the International Judiciary' at the Centre at University College.

57. The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, *Burgh House Principles On The Independence Of The International Judiciary*, [http://www.ucl.ac.uk/laws/cict/docs/burgh\\_final\\_21204.pdf](http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf) [hereinafter "Burgh House Principles"].

58. Basic Principles on the Independence of the Judiciary, *supra* note 48.

59. Burgh House Principles, *supra* note 57.

60. *Id.*

61. This is different from the "constitutional balance" or "shared powers" concepts that presently dominate in the UK constitutional discussion. See discussion *supra* notes 1-3. In particular, note the references to Paul Craig's work, which has shaped and today represents the majority view. International or European minimum standards of separation of powers will, however, have an impact on these domestic concepts. See Steyn, *supra* note 5.

In Lord Hobhouse's erudite and entertaining separate supplement to the Law Lords' response to the Government's consultation paper on constitutional reform the following point is made:

It is important not to confuse the United Kingdom's constitutional principle of the independence of the Judiciary with the United States of America's principle of the separation of powers. The latter is a doctrine based on a mistaken analysis of the British constitution developed by French thinkers in the 18th Century. It involves the complete and balanced separation of all three branches of government—the Executive, the Legislature and the Judiciary—from each other. Thus in the United States, the President and other members of the Executive are debarred from being members of the Legislature whereas in the United Kingdom the position is the reverse. It is a serious flaw in the Consultation Paper that, insofar as it adopts any constitutional principle, it appears to choose the doctrine of the separation of powers not the independence of the Judiciary.<sup>62</sup>

Whatever the merits of this argument (expressing a minority view), the 'confusion' that Lord Hobhouse refers to, is an expression of the emerging modern separation of powers doctrine with which he does not agree. Article 6 provides a focus for the development of the separation of powers doctrine in its modern form as an international minimum standard.<sup>63</sup>

In France, the separation of powers doctrine has been invoked as a bulwark for the judiciary against an increasingly over-bearing legislature and executive. Within the context of a parliamentary commission investigating the *affaire d'Outreau*,<sup>64</sup> the French *Conseil Supérieur de la Magistrature* (CSM)<sup>65</sup> issued a formal opinion underlining the importance of the principle of separation of powers and expressing surprise that judges which had appeared before the Parliamentary commission had been questioned about the way in which they had reached their judgments in that case.<sup>66</sup> The *Conseil* stated that:

[l]e Conseil supérieur de la magistrature estime de son devoir constitutionnel de rappeler les principes fondamentaux de séparation des pouvoirs et d'indépendance de l'autorité judiciaire qui, dans un Etat de droit, déterminent la place et le fonctionnement de la justice. Ces principes n'interdisent certes pas une réflexion sur son évolution, ses moyens, ses méthodes et ses conditions de fonctionnement; mais ils constituent les fondements essentiels d'une justice démocratique, quel que soit le système judiciaire ou le statut des magistrats.

Ces principes sont établis en faveur du citoyen. Ils lui garantissent l'accès à un juge impartial, qui doit pouvoir exercer ses fonctions juridictionnelles à l'abri de toute pression politique, sociale, médiatique ou autre.

Ces principes impliquent que les pouvoirs publics se gardent de toute ingérence dans la prise de décision du magistrat. De même que le juge ne saurait refaire la loi, les autres pouvoirs

62. Lord Hobhouse, *The Law Lords' response to the Government's consultation paper on constitutional reform: A Supreme Court for the United Kingdom*, (July 2003) <http://www.parliament.uk/documents/upload/JudicialSCR071103.pdf>.

63. Article 6 clearly influenced the UK reforms as such (as an international minimum standard).

64. A number of people allegedly involved in paedophile activities were detained in custody for long periods and then convicted at first instance (convictions overturned on appeal).

65. According to the Constitution, the CSM is to assist the President of the Republic in his mission as the "guarantor of the independence of the judicial authority" and the President of the Republic is to act as the President of the CSM. 1958 Const. art. 64.

66. Conseil Supérieur de la Magistrature, *Avis du CSM du 16 février 2006*, <http://www.conseil-superieur-magistrature.fr/actualites.php?id=11>.



doivent s'abstenir de refaire la décision juridictionnelle. Celle-ci ne peut être remise en cause que par l'exercice des voies de recours.

Enfin, c'est encore dans l'intérêt du citoyen que le magistrat doit respecter son secret professionnel et le secret du délibéré dont le Conseil supérieur a récemment rappelé que personne ne pouvait l'en relever.<sup>67</sup>

One major point in this article is the focus on this change. There is no one system which provides a set of principles for judicial independence and accountability which has remained more or less the same for more than a very short period of time.

The historical comparison demonstrates how, in the common law judicial tradition, senior judges could appear to be representatives of the executive, not only the Lord Chancellor who was a Cabinet Minister.<sup>68</sup> The Chief Justices and Masters of the Rolls, and this includes some of the most illustrious ones, could be relied on in the House of Commons and the House of Lords to fight the battles of the government of the day well into the nineteenth century. The biographies in Campbell's *The Lives of the Chief Justices of England*<sup>69</sup> chronicles the involvement in election fraud to favor the government side, both as a judge and as an MP, of one of his most contemporary subjects. The judicial careers were different, and well into the post-war period, senior judges would often have served as Members of Parliament on the government benches or as law officers (junior ministers).

The relationship to the legislature has been even less defined by separation of powers standards. The tradition of senior judges sitting as legislators will first be ended with the entry into force of the new legislation about a supreme court (at this point in time not yet determined). Senior judges (the two heads of the Court of Appeal, the Lord Chief Justice and the Master of the Rolls if they have been appointed as Life Peers; Law Lords as Life Peers according to statute) have taken part in the legislative process as members of Parliament's second chamber. There have been certain conventions limiting their participation in political activity, but it is first with some of the present Law Lords that self-imposed restrictions exclude speaking and voting on legislation in the parliamentary process.

Neither was the distinction between judicial and administrative functions all that clear. In civil law countries this has also been less clear distinction if one looks back to even very modern history. This applies to general courts and even more so to administrative courts which gradually have become more like the general courts in their procedures. The support that could be found in public administrative law independence concepts was limited. Also these concepts were underdeveloped, and are still undergoing rapid change. It is important to have in mind that even the strong and independent constitutional position of the common law judge that Montesquieu praises does not live up to contemporary independence principles.

It is interesting to turn to the recurrent theme in continental discourse contrasting the strong, independent constitutional position of the common law judge, and the weaker institutional setting of the French judge.<sup>70</sup> This finds its source in different historical traditions.

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67. *Id.*

68. It is very recent that issue was taken with the fact that Lord Chancellors as judges in the House of Lords who, in many cases, voted for the outcome that favoured the government position.

69. See JOHN LORD CAMPBELL, *THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND: FROM THE EARLIEST TIMES TILL THE REIGN OF GEORGE IV* (London, John Murray 1845); JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND FROM THE NORMAN CONQUEST TILL THE DEATH OF LORD MANSFIELD* (London, John Murray 1849).

70. This is certainly also reflected in the self-perception of the English judiciary.

In a recent book, Delaloy explains the traditional place of the French judiciary:

Contrairement à la conception de la fonction de juger dans le pays de *common law*, inspirée par le modèle anglais, la justice est perçue en France comme une fonction supplétive: l'élaboration du droit positif est avant tout l'affaire du législateur et les tribunaux, liés par la loi écrite, ne peuvent prétendre contrôler sa validité constitutionnelle ni, le cas échéant, refuser de l'appliquer. Cette conception de la fonction juridictionnelle explique que la question du statut constitutionnel du juge, dans sa globalité, a peu intéressé la doctrine française, du moins jusqu'à récemment. La lecture des manuels de droit constitutionnel montre en effet que la justice ne bénéficie que d'une place limitée. Le judiciaire n'étant pas considéré comme un pouvoir au même titre que le législatif et l'exécutif, il est largement.<sup>71</sup>

Garapon and Papadopoulos show how this modern premise is defined by historical differences:

Juger n'est pas, dans la culture de *civil law*, un acte créatif, l'interprétation d'une règle, mais une stricte application de la loi au terme d'un syllogisme judiciaire. Toute affaire tranchée par la justice est censée avoir *déjà* été jugée par le code dont le juge n'est que le porte-voix: voici le mythe révolutionnaire si élégamment ramassé par Montesquieu dans l'expression du juge 'bouche de la loi.' La tradition politique héritée de la Révolution, toujours vivace en France car la pensée libérale y reste très faible, aime croire que le juge exerce une puissance nulle et que toute la force contraignante du droit se trouve dans la loi, dont l'initiative revient au législateur. Pour la culture anglaise, les juges sont des *oracles of the law*, c'est-à-dire des personnalités choisies en fonction de la part de créativité raisonné que l'on attend d'eux.<sup>72</sup>

These different perceptions and traditions, and the rapid change at an institutional and conceptual level, require further study of what we do mean with 'independence' and 'accountability.'

## VI. What Do We Mean By 'Independence' and 'Accountability'?

Taking into account the changing nature of independence and accountability and the national variations, it may still be possible to structure the analysis around some core underlying concepts or components. We have already discussed a number of pressing problems under the headings of appointment and promotion of judges, the organization of the administration of the court system, judges' non-judicial activities, working conditions including salary and pension systems, and complaints and disciplinary sanctions including protection of tenure.

We have also looked at the European Human Rights Convention, the case law of the European Human Rights Court, and a number of other international instruments. The case law on Article 6 distinguishes between subjective and objective elements of independence and impartiality. The subjective element involves an enquiry into whether the personal conviction of a judge in a particular case raises doubts about his or her independence or

71. GUILLAUME DELALOY, *LE POUVOIR JUDICIAIRE* (2005).

72. ANTOINE GARAPON & IOANNIS PAPADOPOULOS, *JUGER EN AMÉRIQUE ET EN FRANCE: CULTURE JURIDIQUE FRANÇAISE ET COMMON LAW*, 161-162 (2003).

impartiality. Lack of bias is presumed unless there is evidence to the contrary. The objective element involves a review on the national court system: in terms of structure or appearance, are the accused's doubts about the tribunal's independence and impartiality legitimate?

An alternative way of organizing the discussion of independence is around these four core components: institutional, personal, functional, and financial independence. There is relevant material to build on outside the judicial sector. Independence concepts have long standing in a parliamentary context and increasingly for certain administrative bodies.<sup>73</sup> In a wider separation of powers doctrine, the independence of the judiciary becomes only one of several elements. Particularly in a phase when judicial independence is undergoing such change, this may be helpful. We will briefly show how in the setting out of the alternative way of organizing the discussion of independence around four core components.

First, institutional independence. This is usually formulated as duty to refrain from seeking, taking or giving instructions. Judges cannot seek or take instructions from anyone, and this requires particular sensitivity in relation to the executive, where this is seen to be an acute and ever-present danger. The duty also goes the other way: nobody can give instructions. This may be formulated as a particular duty for members of the executive to refrain from giving instructions or seeking to influence the judiciary or the judicial process outside the procedural contexts where government intervention is provided for.<sup>74</sup> Were such duties included in constitutional provisions, they may provide grounds for discussing the behavior of government ministers who in different countries, including France, Italy and the United Kingdom, have gone far in this respect. Clearer guidelines for the appropriate interaction between ministers and judges may then be based on principle.

Second, personal independence. Secure tenure until retirement age, or fixed terms of sufficient duration and with no reappointment, are the two alternative models. Setting out the grounds and procedures for dismissal is another important component here. Pensions and salary levels are most important, and the mechanisms for determining them can easily compromise independence. Going beyond the appointment of supreme court judges, the judicial careers at other levels bring up questions of promotion. Most of the issues we have discussed relating to judicial appointments commissions fall under this heading of personal independence. The emerging standards for independent administrative bodies are here useful as a comparator: Normal expectations to judicial standards would require that they should not be placed any lower.

Third, functional independence. This cannot be resolved outside a constitutional framework of separation of powers. It will have to be left to the courts in their adjudication, based on constitutional provisions or principle, to rule on the extent and intensity of judicial review. Here comparisons with administrative independence concepts are less helpful: The inherent jurisdiction of courts cannot be circumscribed in legislation. The comparison with the legislature is also less relevant: The extent of executive influence in most legislatures, and the devolving or delegation of legislative powers, cannot have parallels in the judicial sphere.

73. See *INDEPENDENT ADMINISTRATIVE AUTHORITIES* (Roberto Caranta, Mads Andenas & Duncan Fairgrieve eds., 2005).

74. The Treaty of Rome contains such provisions for the Court of Justice. The EC Treaty also contains similar provisions for other European Union institutions including for members of the European Commission, for the governing bodies of the European Central Bank and also for the national central banks. See Mads Andenas, *Independent Administrative Authorities in Comparative Law*, in *INDEPENDENT ADMINISTRATIVE AUTHORITIES* 250 (Roberto Caranta, Mads Andenas & Duncan Fairgrieve eds., 2005).

Fourth, financial independence. A court's or a court system's independence from an institutional and functional point of view can be undermined by a lack of financial and administrative independence. Courts must be able to avail themselves autonomously of the appropriate means to fulfill their mandate. As we have discussed, national models vary considerably. There are international trends towards greater financial and administrative independence.

## VII. The Constitutional Role of the Judiciary

Judicial independence and separation of powers have different consequences. One important one is that the constitutional role of the judiciary is increasingly requiring it to stand up to political pressure, both from the executive and the legislature. This follows in particular from the nature of judicial review of the other arms of the state, and the development of rights and remedies protecting individuals. It will often come up in cases dealing with individuals accused of crimes that are seen to challenge the security of society or that otherwise are seen as particularly heinous. The systemic pressure may be equally strong when it comes to the intensity of judicial review of legislation, administrative action concerning vital economic interest, or the development of remedies to protect individual interests.

Judicial independence and separation of powers also limits the freedom of action for the executive and the legislature in remedying what is perceived as wrongs or systemic flaws. In the United Kingdom, the miscarriages of justice after IRA terrorist acts in the 1970s led to calls for reform. Among the different proposals for reform was the introduction of French criminal procedure with an investigating magistrate. In France, after the failure of series of criminal prosecutions with serious consequences for the involved individuals, there are current calls for the reverse reform. The remedy is seen to be the introduction of an English model of a criminal process, based on contradiction and less active judicial participation at the stage of investigation. The problem in both the English and French miscarriages of justice cases may have been that judges failed by reflecting or responding to public opinion.<sup>75</sup> This lack of judicial independence in dealing with the individual criminal cases can hardly be remedied by intervention by the executive and the legislature in response to public opinion. The freedom of action by the executive and the legislature to respond to public opinion needs to be circumscribed in such situations. Improved procedures and rule of evidence will have to be considered in the normal manner,<sup>76</sup> and hasty and ill-considered reforms, which may serve executive or political expediency, will have to be rejected.

75. The tabloid-driven frenzied public opinion contributed to the failure of English judges at every level. It took some fifteen years after the convictions before redress was obtained by the review of the cases. In the French system, the normal procedures of the appeals system seem to have provided remedies.

76. Whereas the United Kingdom's miscarriages of justice show systemic failure, the legislative response is more of a positive model. In the early 1990s, the concern was growing about a succession of miscarriages of justice which had undermined public confidence. In 1991 the then Home Secretary announced the establishment of a Royal Commission on Criminal Justice chaired by Viscount Runciman of Doxford. The miscarriages of justice, including the Birmingham Six, were specifically referred to by the Home Secretary in announcing the commission. It was charged with examining the effectiveness of the Criminal Justice System in securing the convictions of the guilty and the acquittal of the innocent. The Royal Commission's report was presented to Parliament in July 1993. It rejected the introduction of a system with examining magistrates but proposed several reforms relating to police procedures and the organisation and practice of the prosecution service. It recommended the establishment of an independent body to consider suspected miscarriages of justice, arrange for the investigation where appropriate, and to refer cases to the Court of Appeal where matters needed further consideration. Most of the proposed reforms were adopted subsequently, including the establishment of The Criminal Cases Review Commission in the Criminal Appeal Act 1995.

The developments discussed here require that the constitutional foundations of judicial independence are clarified. We have pointed out its foundations in international and European law. The domestic national foundations need further clarifications in many countries. The United Kingdom remains a case in point. The Diceyan parliamentary sovereignty or supremacy doctrine previously encouraged language about courts giving effect to parliamentary intent in the way courts normally apply legislation. As discussed above, this did not convincingly provide judicial authority to deal with conflicts between parliamentary legislation and European Union and European human rights law. Fundamental constitutional principle outside these fields had an even more uncertain role. The present majority view on courts inherent competences only partially resolves this. This view is simply that courts have an inherent jurisdiction to review legislation and administrative acts, in parallel with Parliament's legislative authority. Other countries with written constitutions require express acknowledgement of the independence principle, as in the Norwegian example discussed above, or further development of the content of judicial independence as a constitutional principle. Important sources for this development are found in international and European law and standards, and in the laws of other countries. The challenge for comparative law in this process is great and comparative scholarship could provide crucial assistance.

The new constitutional role of the judiciary needs to take into account the failure of judicial review in many previous situations.<sup>77</sup> We can soon assess whether the stronger rights protection and judicial independence have provided a more balanced response to the present measures against the current terrorist threat.

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77. In the 1970s, judicial review of government acts and legislation failed in Northern Ireland (the European Human Rights Court and Commission did not), and the miscarriages of justice cases (as discussed above) add to the ignominy. Another example is provided by the failure of review of the measures against the Bader-Meinhof terrorist incidents in Federal German Republic.