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# INDEPENDENCE OF THE JUDICIARY – WHY PARLIAMENTS SHOULD CARE

June 12, 2017  
Auditorium Pictet, Maison de la Paix  
Geneva, Switzerland



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A High-Level Public Event held during the 35<sup>th</sup> session of the Human Rights Council.

Organized by the International Development Law Organization (IDLO) in partnership with the Inter-Parliamentary Union (IPU) and the Albert Hirschman Centre for Democracy at the Graduate Institute.

With the the support of the Permanent Missions of Italy, Japan, Mexico and the United Kingdom in Geneva.

## INDEX

1. Introduction .....	2
2. Overview .....	4
3. Summary of Discussion .....	6
4. Agenda .....	9



## 1. INTRODUCTION

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An independent judiciary is critical to promoting peaceful and inclusive societies as envisaged in Goal 16 of the 2030 Agenda for Sustainable Development.

Organized during the 35th session of the United Nations Human Rights Council, this high-level public event marked the presentation to the Council, earlier the same day, of the annual report by the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Diego García-Sayán.

The event was organized by the International Development Law Organization (IDLO) in partnership with the Inter-Parliamentary Union (IPU) and the Albert Hirschman Centre on Democracy at the Graduate Institute, with the support of the Permanent Missions of Italy, Japan, Mexico and the United Kingdom in Geneva.

### BACKGROUND

One of the pillars of rule of law in the modern state is the division of powers, with the vesting of legislative, executive and judiciary authority in different branches or bodies of government responsible for different functions.

The relationship and interaction between parliaments and the judiciary is central to good governance and key to ensuring a culture of rule of law and justice: parliaments promulgating laws on the one hand, and judges interpreting, validating and applying them on the other.

Parliaments develop rules for the selection or removal of judges, and often have budgetary authority to allocate financial and other resources to the judiciary and justice sector.

In today's troubled international order in which human rights and the rule of law are under increasing pressure, well-established principles of international law are being threatened. Where the courts are controlled by the executive branch, democratically elected parliaments may be dismissed and their powers usurped by the executive. In countries with dysfunctional legislatures, judicial appointments and confirmation processes may be unduly politicized.

An independent judiciary is essential to safeguarding the mandates of other branches of government and, where necessary, holding them to account and preventing executive or legislative initiatives that are outside the bounds of national constitutional frameworks or inconsistent with international standards.

Independent judges ensure fair and equal treatment for all: fair trials; equality before the courts; guarantees of due process of law; access to justice and legal aid; independence, integrity and impartiality of judges and

prosecutors; preventing impunity for human rights violations; and restrictions on lawyers and their work. Independent judiciaries can counter pressure, threats, attacks and intimidation on prosecutors and judges.

At the same time, “independent” judiciaries that do not respect the boundaries of their own mandate and functions may find themselves encroaching on the roles of parliaments and executives and accused of inappropriate “judicial activism”.

The United Nations Human Rights Council has supported the independence of judges and lawyers in a myriad of ways, including resolutions on the following subjects: human rights, democracy and the rule of law; the role of good governance in the protection of human rights; integrity of the judicial system; the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers; human rights in the administration of justice, including juvenile justice; and transitional justice.

In an important development, in 1994 the Mandate of the Special Rapporteur on Independence of Judges and Lawyers (SRIJL) was created by the predecessor to the Human Rights Council (then Human Rights Commission).

### OBJECTIVE

The main objective of this public event was to explore the linkages between the work of parliaments and the independence of the judiciary, focusing on how the independent work of each branch can protect the proper mandate of the other and, in turn, foster good governance.

The dialogue aimed at identifying good practices of how parliaments have contributed to the independence of the judiciary, but also how an independent judiciary can contribute to the democratic and legal performance of parliaments consistent with human rights principles and standards of good governance.

Specific outcomes included:

- Identified and shared best practices of parliamentary action and engagement in ensuring an independent judiciary, including parliaments as guardians against undue influence from other branches of government and from non-State actors (e.g., private sector corporations, organized crime);
- Highlighted examples of legislation protecting the independence of the judiciary consistent with international standards, such as principles and guidelines adopted or referenced by United Nations entities (e.g., Basic Principles on the

Independence of the Judiciary; Basic Principles on the Role of Lawyers; Guidelines on the Role of Prosecutors; and the Draft Universal Declaration on the Independence of Justice);

- Discussed the ways in which parliaments can be affected by, and can address situations of a non-independent judiciary;
- Analyzed ways in which parliaments may themselves insufficiently support, or undermine, the independence of the judiciary;
- Presented best practices by independent judiciaries in the protection of parliamentarians and in parliamentary accountability;
- Shared experiences of parliaments working in concert with independent judiciaries to promote economic growth and sustainable development.

## 2. OVERVIEW

### “CHECKS AND BALANCES: INDEPENDENCE OF JUDICIARY AND PARLIAMENTS”



“It’s about building people’s confidence in the courts,” explained IDLO Director-General Irene Khan on the topic of why judicial independence matters. “What are the issues of independence, integrity, approach, principle, ethics that build people’s trust in the judiciary?”

How parliaments and the judiciary can maintain independence with one another and with the executive branch of government – while respecting the boundaries of their mandates – was the subject of a high-level panel discussion in Geneva organized by IDLO in partnership with the Inter-Parliamentary Union (IPU) and the Albert Hirschman Centre on Democracy at the Graduate Institute.

Timed to mark the presentation of the first report by the new United Nations Special Rapporteur on Independence of Judges and Lawyers, Diego García-Sayán, the event featured international voices from Supreme Court Justices of Uganda and Tunisia, as well as perspectives from the UK Parliament and academic centres in Switzerland and the United States.

As an example of the real-world implications, Ms. Khan noted that in Kenya, where concerns about the independence of the judiciary deterred candidates from using the courts to adjudicate electoral disputes, the perceived illegitimacy of the 2007 general election result led to widespread violence. In 2015, following constitutional and judicial reform supported by IDLO, the Kenyan judiciary was able to resolve the electoral disputes effectively and the elections took place peacefully.

The Special Rapporteur, having presented his report to the UN Human Rights Council earlier that same day, drew the connection between human rights, democracy and rule of law, and the independence of judges and lawyers. He noted that the Council has repeatedly reaffirmed the

importance of an independent judiciary, which he defined as impartiality and independence from improper influences – whether political, economic or extra-legal forces such as organized crime.

The separation of powers is a fundamental element of good governance and the rule of law. And while the balance of powers between the judiciary and other branches of government is inherently delicate, speakers noted the increasing threats to independent judiciaries in recent months as the political environment in some countries has become ever more polarized.

“What should be healthy tension is sometimes amplified beyond proportion,” stated IPU’s Rogier Huizenga. “We see political leaders speak out publicly, without restraint, against judicial decisions that don’t go their way. We see situations in which the work of parliament or individual parliamentarians is made difficult because they are subject to politically motivated legal proceedings.”

An independent judiciary is essential to preventing executive initiatives that are outside the bounds of national constitutional frameworks or inconsistent with international standards. In a prominent public interest case in Uganda, a member of parliament challenged the President’s appointment of a retired judge as interim Chief Justice, arguing that it was unconstitutional. A judicial panel reviewed the case and, in a majority ruling, put a stop to the appointment.

Speaking about the case on the panel, the Ugandan justice responsible for writing its lead judgment, Hon. Lady Justice Prof. Lillian Tibatemwa-Ekirikubinza, commented on the deliberations that went into the ruling, as well as about its aftermath. “Later on, I was actually promoted to the Supreme Court,” she said. “It was the President who promoted me, which shocked the public because everyone had thought that would be the end of my career.”

Considering the flipside of the argument, Ms. Khan asked the panellists whether too much judicial independence is a bad thing. Judiciaries that encroach on the roles of the executive and legislative branches of government are often accused of ‘juristocracy’. Professor Nico Krisch of the Graduate Institute responded: “In many courts, by necessity, judges are engaged in creative interpretation if the constitution isn’t specific. Judges become lawmakers when they do this, which raises all kinds of questions of accountability.”

The discussion also turned to the judicial selection and appointment process. In many countries, parliaments hold a measure of control over the judiciary through the selection process as well as through budgetary authority. In countries with dysfunctional legislatures and an overreaching executive, judicial appointments and confirmation processes may be unduly politicized.

“For many years I have tried to invent a perfect system for the appointment of judges without political intervention,” said Special Rapporteur García-Sayán. “I have not been able to invent it. But transparency and public participation seem to be part of the idea.”

The discussion was organized with the co-sponsorship of the Permanent Missions of Italy, Japan, Mexico and the United Kingdom in Geneva.

<http://www.idlo.int/news/highlights/checks-and-balances-independence-judiciary-and-parliaments>

Please visit <http://www.idlo.int/news/multimedia/videos/independence-judiciary-and-role-parliaments> to view the video recording of the panel discussion.



### 3. SUMMARY OF DISCUSSION

Following opening remarks, panelists were invited to give brief remarks in response to the moderator’s questions, a summary of which follows.

After the discussion, panelists engaged in an interactive discussion with members of the audience.

#### WELCOME REMARKS – MR. ROGIER HUIZENGA, INTER-PARLIAMENTARY UNION (IPU)

- The topic addressed at this event goes to the heart of democracy: it is the separation of powers – the legislature, executive and judiciary. Of particular importance is the need for checks and balances in the delicate inter-play between these branches.
- This event provides an important opportunity to explore the inter-play between parliaments and judiciaries, and to illuminate both challenges and solutions.

#### MODERATION – MS. IRENE KHAN, DIRECTOR-GENERAL, INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO)

- Strong judicial and other legal institutions are essential for peace, justice and sustainable development – this is the work of IDLO on the ground: to reform laws and strengthen institutions towards these ends.
- A key issue is trust between citizens and their political parties on the one hand, and the courts on the other. Where such trust does not exist, reform is needed and can result in major transformational change. The progress made by Kenya, specifically the role of the courts in resolving electoral disputes peacefully, was cited as an example.
- “The judicialization of politics should not result in politicization of the judiciary” – this is a major challenge.
- Where rebuilding the confidence of the public in

the judiciary is needed, it is useful to explore the key factors that help build trust: independence, integrity, principles and ethics.

- The central issue of this dialogue is extremely important, as we have seen the links between democracy, rule of law, and independence of judges and lawyers are inter-linked, and they underpin the infrastructure on which human rights are based.
- Judicial independence is considered a public good, but the question has been raised whether we should be wary of the power accorded to the judiciary in some contexts – the issue of “juristocracy”.
- These ideas are related to the idea of judicial activism; do judges make law or interpret it? Where should the line be drawn between the powers and functions of the judiciary and parliament? Judgments of the Supreme Court of India provide an interesting example – that Court has given a wide reading on a provision concerning principles of social policy, in order to issue decisions in public interest and public rights. Is this consistent with the role of the judiciary or is this infringing?

#### MR. DIEGO GARCÍA-SAYÁN, SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

- There are three main challenges to upholding judicial independence:
  - Appropriate separation of powers, particularly between the legislature, a major expression of political power, and the judiciary;
  - Proper allocation of funds and budget for the judiciary by the parliament, and within the judiciary; resources must be properly channelled to enable the judiciary to work efficiently throughout the country, including in rural areas to effectively deliver justice to the people;
  - Joint efforts of all branches of government in innovation and change, in reacting to contemporary social and

human rights issues.

- Corruption is one of the biggest challenges to judicial independence, for two reasons:
- It is a threat in all major societies, less evident/prominent in some, more in others;
- It must be dealt with in a systematic way, it cannot be done by a single judiciary alone.
- Corruption and organized crime can be addressed through cooperation between the judiciary and parliaments. For example, international instruments such as the UN Convention Against Corruption include elements to be adopted by both the judiciaries and parliaments. International cooperation among judiciaries and prosecutors is also important.
- It is not possible to entirely disregard political input in the practice of selecting judges. However, it can be reduced considerably through transparency.
- Judicial legitimacy has to do with language and image, but primarily substantive decisions.

### HON. LADY JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA, JUSTICE OF THE SUPREME COURT OF UGANDA

- The Ugandan court case in which a member of parliament challenging the decision of the President to appoint an interim Chief Justice following the retirement of the former Chief Justice, evidences both independence of the judiciary in Uganda and the pressure that can befall justices in politically charged cases and public interest litigation. In this case, the Court, in a judgement written by Justice Tibatemwa-Ekirikubinza, found the interim appointment unconstitutional. Yet she was appointed to the Supreme Court after writing that decision by the same President. This arguably demonstrated to the public strong judicial independence.
- Judicial independence is a public good, there must be greater recognition of the critical role the judiciary plays in ensuring democracy.
- The main challenge to judicial independence is lack of transparency and public accountability.
- In order to combat this, we must recognise the importance of demystifying the judicial process

and language, in order to increase transparency and engage the public and the media.

### DR. DAVID SADOFF, EXECUTIVE DIRECTOR, CENTER FOR ETHICS AND RULE OF LAW, UNIVERSITY OF PENNSYLVANIA

- In understanding the politicized system and environment for appointment of judges in the US, the world's oldest democracy, it is important to consider historical precedents: US Supreme Court decisions (e.g., Roe v. Wade) that some factions considered as judicial activism, the rejection by the legislature of US Supreme Court nominations that were considered based on political ideology rather than legal competence, as well as a general ideological polarization in national politics.
- Political parties play a strong role in the selection and nomination of judges. More than 90% of nominations to the US Supreme Court shares the same political party as the president who appointed them.
- But little evidence to suggest that Supreme Court justices, once appointed, try to decide cases consistently with the views of the executive who appointed them.
- Appointing, rather than electing judges, reduces the politicization of the process of appointment, as they do not have to raise campaign funds or take partisan political positions.
- An important feature of the US system that allows judicial independence is that national bodies such as the American Bar Association set standards, and nominees undergo scrutiny through the confirmation process in the legislature.

### HON. NAJET BEN SALAH, HEAD, INTERNATIONAL COOPERATION, MINISTRY OF JUSTICE, AND FORMERLY JUDGE, SUPREME COURT OF TUNISIA

- Tunisia is a new democracy and still conducting a

difficult process, an experience with many challenges because of the turbulence associated with politicization of issues. Tunisia provides important lessons in the challenges of ensuring judicial independence.

- Independence of the judiciary is considered the central pillar in this developing democracy and at the heart of the reform process,
- Even with a new constitution and a new law creating a high judicial council, it remains difficult to reach a common understanding and definition of independence of the judiciary.
- Presently, Tunisia is conducting continuing judicial reform, including the penitentiary system, with a national action plan including independence, quality and ethical standards.

### PROF. NICO KRISCH, ALBERT HIRSCHMAN CENTRE ON DEMOCRACY, THE GRADUATE INSTITUTE

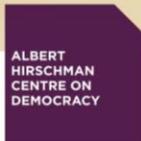
- In response to the question whether too much independence is of concern, and where the line should be drawn, it was noted that the term “juristocracy” has been coined, referring to a concept that captures the phenomenon in Western Europe and the USA, but also elsewhere, that judiciaries have gained increasing amounts of power to engage as political actors and to interfere in the political system. This is relatively new; we did not see this so much 50 years ago.
- We have seen a rise in the judiciary in some countries and what may be called the “judicialization of politics”, where courts can intervene in elections, in relationships between branches of government, but also in broader societal issues, thus creating what one commentator has called “government by judiciary rather than by parliaments or executives.”

- In their role of interpreting laws, sometimes creative interpretation where constitutions are not specific, courts assume the role of interpretation and become law-makers, which raises the question of accountability.
- Whilst there is a danger in allowing politicization of the judicial process, perhaps it is unavoidable.

### MR. MURRAY HUNT, LEGAL ADVISER TO THE JOINT COMMITTEE ON HUMAN RIGHTS OF THE UK PARLIAMENT

- There is a pervasive sense in many countries today around the world that there is some kind of “democratic deficit” in our institutional arrangements for protecting human rights and the rule of law, the concern (not necessarily well-founded) that judges have gone too far in getting involved in political disputes.
- The most important reason why parliaments should care about the independence of the judiciary is to respond to this perceived concern about a ‘democratic deficit’ found in the constitutional and institutional arrangements of states, where democracy is not properly institutionalized due to a failure to adequately ensure separation of the powers.
- Parliaments attempting to control or reign judges in is not what is being proposed as a legitimate approach. Rather, parliaments are uniquely positioned to protect rule of law and human rights and to ensure good governance, by setting the legal framework. Parliaments must get more involved and ask themselves what can they do to entrench rule of law and independence of the judiciary in society and make it a central pillar of democratic governance.

## 4. AGENDA



# INDEPENDENCE OF THE JUDICIARY WHY PARLIAMENTS SHOULD CARE

WITH SPECIAL RAPPORTEUR DIEGO GARCÍA-SAYÁN

**Monday 12 June 2017 | 18:30 – 20:00**

Auditorium Ivan Pictet, Maison de la paix, Chemin Eugène-Rigot 2A, 1202 Geneva

Public transports: Tram 15, Stop Maison de la paix | Bus 11 and 28, Stop Rigot

An independent judiciary is critical to promoting peaceful and inclusive societies as envisaged in Goal 16 of the 2030 Agenda for Sustainable Development.

Organised during the 35th session of the United Nations Human Rights Council, this high-level public event will mark the presentation to the Council of the annual report by the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Diego García-Sayán.

Opening remarks

→ **Mr. Rogier HUIZENGA**, Inter-Parliamentary Union (IPU)

Moderation

→ **Ms. Irene KHAN**, Director-General, International Development Law Organization (IDLO)

Panellists

→ **Ms. Najet BEN SALAH**, Head, International Cooperation, Ministry of Justice, and formerly Judge, Supreme Court of Tunisia

→ **Mr. Diego GARCÍA-SAYÁN**, Special Rapporteur on the Independence of Judges and Lawyers

→ **Prof. Nico KRISCH**, Albert Hirschman Centre on Democracy, The Graduate Institute

→ **Ms. Lilian TIBATEMWA-EKRIKUBINZA**, Justice of the Supreme Court of Uganda

The panellists will engage in interactive discussion with time for audience participation.

A cocktail reception will follow.

Organised in partnership with the International Development Law Organization (IDLO) and the Inter-Parliamentary Union (IPU).

With the support of the Permanent Missions of Italy and the United Kingdom in Geneva.



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➔ [graduateinstitute.ch/democracy](http://graduateinstitute.ch/democracy)

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## ABOUT IDLO

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law.

IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programs, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy.

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