

Judicial Independence, Challenges, and Safeguards: Perspectives from Another Legal System

THE HONORABLE ZARELA VILLANUEVA MONGE*

I am grateful for the invitation to participate in this event. Among my motivations for accepting this opportunity is the long-lasting friendship that our two countries have enjoyed, together with the fact that we share a history of respect for fundamental rights.

I have been asked to address the topic of judicial independence, and it must first be understood that my remarks relate to the historic development of a particular country, the Republic of Costa Rica. The country's Constitution of 1949, considered the founding document of our Second Republic, is based on a republican system of government with separation of powers.

The principle of the separation of powers, which is essential to a democratic state, can be seen as a mechanism of checks and balances designed to avoid the concentration of political power—as a safeguard against tyranny. An essential element of the system is the principle of respect for judicial authority and the prohibition on interference in its exercise: in brief, what is known as judicial independence.

Let me point to the constitutional provisions that define the scope of the Judicial Branch's powers and guarantee its functioning, beginning with the republican model and its classic division into three distinct and independent powers or branches, Legislative, Executive, and Judicial. Under our Constitution, the judicial power is exercised

* Chief Justice, Supreme Court of Justice of Costa Rica; Licenciada en Derecho, Universidad de Costa Rica, 1977; Especialista en Derecho Agrario, Universidad de Costa Rica, 1984; Master en Violencia Social y Familiar, Universidad Estatal a Distancia, 2003. The text is a translation into English of Dr. Villanueva's prepared remarks, which were in Spanish.

by the Supreme Court of Justice (“Supreme Court”), composed of twenty-two justices, and other, lower courts throughout the country. All judicial employees are under the authority of the Supreme Court. In addition, under our unique system, the Prosecutor’s Office, the Office of the Public Defender, and the Judicial Police are all administered by the Supreme Court, a structural feature aimed at guaranteeing the independence of these entities.

I would like to emphasize that the Supreme Court, as ultimate judicial authority, has in its charge the governance and administration of the entire court system. Thus the scope of its attributions embraces judicial affairs in the strict sense, administrative matters, the budget, investments, defining the rules for hiring personnel, and others. In short, the Supreme Court has global administrative responsibility for the services provided by the court system in its entirety.

In its functioning, the Supreme Court is subject only to the Constitution and to the law. This is clearly set forth in the Constitution, which bars subjection to other branches of government or to internal or external interests.¹ Financial independence is ensured by the constitutional guarantee that a minimum of 6 percent of the national budget’s ordinary revenues be allotted to the judicial system.² To prevent interference in the organization and operation of the judiciary, the Legislative Assembly must request the opinion of the Court regarding any bill that affects it and a supermajority vote is required for the Assembly to overrule the opinion issued by the Court.³

The Legislative Assembly, in its capacity as the representatives of the people, is responsible for the appointment of members of the Supreme Court. This occurs through a competitive public process and review of nominees’ qualifications. The term of service for a justice is eight years, at the conclusion of which reelection to a like period is considered automatic unless a supermajority of two-thirds of the members of the Assembly decides to the contrary.⁴

1. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [hereinafter CONST. POL. C. R.], art. 154. The official text of the Costa Rican Constitution can be found at <http://www.mep.go.cr/ley-reglamento/constitucion-politica-republica-costarica>. This and subsequent quotations from the text of the Constitution have been translated into English.

2. *Id.*, art. 177.

3. *Id.*, art. 167.

4. *Id.*, art. 158.

Accompanying this framework of stability is a disciplinary regime guaranteeing that members of the Court cannot be dismissed except for such cause and following such procedures as are prescribed by law. The regime is applied by the Court itself. In the event that a justice's appointment is revoked, once the applicable procedure has been completed, the Court informs the Legislative Assembly, so that it can adopt the corresponding resolution.

These, then, are the key features of the constitutional structure that protects the Supreme Court, and the courts as a whole, from interference by other branches of government, and ensures its independence relative to finances and administration.

I will mention the only instance of a Supreme Court Justice not being reelected, that of Justice Fernando Cruz Castro, a member of the Constitutional Chamber, in 2012. In the 68 years of existence of our current Constitution, it had never before occurred that a Supreme Court justice was denied reelection. Justice Cruz complete his first term on the Court in 2012. Under the Constitution, the Legislative Assembly had to determine Justice Cruz's continuing in office. Without justification, the Legislative Assembly decided against reelection. Through the media, a member of the Assembly explained the decision as a way to restore the status of the Legislative Assembly as the preeminent branch of government, in the face of alleged "excesses" and "non-governability" attributed to the Constitutional Chamber of the Supreme Court. Availing himself of a popular expression, the Deputy stated that the decision against Justice Cruz was made "to teach them a lesson."

The decision, and the Deputy's comments, elicited a strong response from the Court itself, as well as from the legal community both nationally and internationally, in defense of the Court's independence. The repudiation of this action through street marches and expressions in the national media was the greatest such movement in the history of the Costa Rican judiciary and led to motions from the members of the Assembly to revoke their decision. Finally, a judicial ruling from the Constitutional Chamber of the Court, which had to be convened with substitute Justices able to hear the case, struck down the Congressional measure on the basis of the constitutionally-mandated time to adopt it having been exceeded.

The matter of Justice González Camacho also comes to mind, in this broad area. There, the Court itself had recommended that Congress revoke the justice's appointment. This was the result of disciplinary proceedings, initiated in 2013, on charges of sexual harassment made against him by a female judge. The decision to revoke was confirmed by Congress. The investigation was handled internally by the Court, with the due process guaranteed to the person charged. Undoubtedly, it is difficult to judge one's own peers. The decision was not unanimous, but finally agreed upon by a majority of 15 to 7, after numerous rounds of voting.

The other sphere of judicial independence is related to the guarantees that allow judges to issue their rulings with absolute independence from any outside influence. How can we assure the conditions necessary so that judges' decisions are not affected by the pressure of interests or forces, whether external or internal?

Regarding this issue the Court's organic statute⁵ imposes a series of limitations on all judicial employees—be they judges, administrative personnel, or, in the case of the Supreme Court, employees of the Prosecutor's Office, Office of the Public Defender, and the Judicial Police. Employees are prohibited from practicing, outside of the judicial institution, the profession from which they were appointed; from engaging in any political or electoral activity other than casting ballots in public elections; from praising or criticizing public officials or agencies for their acts; and from undertaking any involvement or expressing any opinion regarding matters pending before a court.

Solidifying the stability and independence of the judiciary has been an evolving process. Prior to 1993, the appointment of judges was to six-year terms, subject to reelection; a decision against reelection could be made without any corresponding proceeding and without formal cause. This situation highlighted the precariousness to which judges could be subjected based on their decisions.

In 1993, the Career Judiciary Law was enacted with the aims of fostering a highly qualified judiciary and ongoing professional development, ensuring objective hiring practices, and regulating the salary, transfer, and promotion of judges at all levels, with the exception of

5. Ley No. 7333, 31 March 1993, Ley Orgánica del Poder Judicial [Organic Statute of the Judicial Branch] [hereinafter: Organic Statute], LA GACETA, DIARIO OFICIAL, 1 July 1993.

Supreme Court justices, who are elected by the Legislative Assembly.⁶ This legislation has promoted a culture of respect for the judiciary in the exercise of its duties, and for the protection of judicial independence against outside encroachment. As a result, any intrusion into the judicial realm not according to the law is today considered unacceptable.

I have expressed on numerous occasions that job stability must be accompanied by accountability; judges, no less than other public servants, must perform their jobs efficiently and with respect for the law. Judicial independence is unequivocally not a license to act arbitrarily, or unfettered by mechanisms to ensure the proper discharge of official duties. Along with the resolute defense of the independence of the institution, the judiciary is working steadfastly to strengthen mechanisms of performance evaluation and accountability so as to promote a culture of efficient service and responsible use of the public resources entrusted to us.

Judicial independence is not solely a matter of national law; an international legal framework is also relevant. The Basic Principles on the Independence of the Judiciary, adopted and confirmed by the United Nations General Assembly in 1985,⁷ begin with the fundamental stricture that “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.”⁸ Improper intrusions into the judicial sphere are prohibited:

There shall be no inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.⁹

The importance of non-removability is also underlined. Judges are not to be subject to removal on account of their judicial decisions,

6. Ley No. 7338, 5 May 1993, Ley de la Carrera Judicial [Career Judiciary Law], LA GACETA, DIARIO OFICIAL, 14 May 1993.

7. United Nations, *Basic Principles on the Independence of the Judiciary* [hereinafter *UN Basic Principles*], G.A. Res. 40/32 (Nov. 29, 1985); G.A. Res. 40/146 (Dec. 13, 1985), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

8. *Id.*, art. 1.

9. *Id.*, art. 4.

but rather, they “shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”¹⁰

With regard to disciplinary matters, our Organic Law sets forth the procedure to be followed, what types of conduct are sanctionable, and the corresponding sanctions. The law mandates the provision by the institution itself of legal assistance, free of charge. Sanctionable conduct is related to the fulfillment of the duties of judicial office, not with the substance of the judge’s rulings.

Disciplinary sanctions are imposed solely upon completion of all procedures required by law, and are administered by an office within the Judicial Branch whose members are appointed by the Supreme Court in plenary. These mechanisms are apart from the disciplinary authority exercised by superiors over their staff in matters of minor misconduct.

The grounds for removal from office are strictly limited. The Organic Statute provides the following list of proper causes for removal: misconduct in office, or private misconduct that affects the performance or image of the judiciary; incompetence or inadequacy for the discharge of professional duties; or the operation of any of the disqualifications for public office.¹¹

The Organic Statute also contains this forthright statement of the inadmissibility of disciplinary proceedings based on the substance of a judge’s decisions: “Any complaint made with exclusive reference to matters of interpretation of juridical norms shall be categorically dismissed.”¹² Statistics bear out the high rate of dismissal of complaints meant to use disciplinary procedures as a weapon to attack the content of judicial rulings, or to exercise improper pressure against a judge. The second part of the same statutory provision, however, contemplates an exception, allowing for disciplinary proceedings to go forward “in cases of serious and unjustifiable delay or error in the administration of justice. . . .”¹³ In such cases, the Court of Judicial Inspection, having conducted the relevant investigation, must inform the

10. *Id.*, art. 18.

11. Organic Statute, art. 28. This and subsequent quotations from statutory texts have been translated into English.

12. *Id.*, art. 199.

13. *Id.*

Supreme Court of the matter so that the latter may decide the continuity, suspension, or termination of the officer in question; the Supreme Court's role in making such decisions is intended as a procedural safeguard. While the provision has been questioned as conflicting with the principle of independence, our Constitutional Chamber has upheld it.

The ultimate significance of judicial independence to the citizenry was underscored in a recent ruling in which the Constitutional Chamber stated that, juridically,

[t]he reason for the existence of the guarantee of judicial independence is not in respect to the judge, but rather in respect to those persons who avail themselves of the courts or are subject to them. Those persons, in receiving the services of the judicial system, have the right to justice that is speedy, proper, that does not deny them their rights, and that strictly follows the law (Article 41 of the Constitution). To those ends, the professional skill and qualifications of the judge are nothing short of fundamental.¹⁴

When performance of a judge's judicial duties enters the realm of egregious error, manifest arbitrariness, or clear incompetence, the Court continued, the people's right to competent, lawful administration of justice is violated.¹⁵

Therefore, and in keeping with international norms, the Court has stated that the non-removability of judges, an essential element of judicial independence, is nonetheless not absolute. The right of the people to receive judicial services of quality justifies the application of disciplinary procedure for serious and unjustified errors in the administration of justice—provided that such proceedings are not based on mere disagreement over legal interpretation or reasoning, for discipline on such a basis would violate the constitutional guarantee of judicial independence.

On previous occasions, when the Constitutional Tribunal has ruled on the constitutionality of this Article, it has stated that the different principles at stake must be balanced so as to ensure prompt and effective justice efficiently administered, judicial independence, transparency, and accountability, all of which are essential features of a democratic republic under the rule of law. Thus, a proper balance must

14. República de Costa Rica, Corte Suprema de Justicia, Sala Constitucional, Resolución No. 2015-016072 (Oct. 16, 2015). This and subsequent quotations from judicial opinions have been translated into English.

15. *Id.*

be sought between the guarantee of stability and non-removability of the judges as elements of independence, on the one hand, against the efficient and lawful exercise of judicial authority, on the other, in order to ensure the proper administration of justice to all citizens.¹⁶

Under these criteria, and based on the applicable inter-American jurisprudence, the Constitutional Chamber recently upheld the Supreme Court's decision to temporarily suspend from office a criminal court judge who, without providing any justification, modified a precautionary measure of preventive custody to house arrest, which allowed the individuals concerned to flee the country.¹⁷ At first glance, it might seem that the ruling amounted to interference with a duly issued judgment. However, further examination of the judge's decision reveals that the geographical area concerned was one marked by widespread activity by organized crime, a circumstance the judge was not free to ignore. Furthermore, the reason for the change from the precautionary measure of preventive detention to house arrest was not explained by the judge. With regard to this admittedly extreme case, the Court was at pains to declare that judicial rulings cannot be arbitrary, but must set forth the grounds that support the decision.

In like manner, the Constitutional Chamber has declared the nullity of disciplinary rulings that interfere with the interpretation and application of the law.¹⁸

Currently, a disciplinary matter against a judge is pending before the Supreme Court. The case concerns a judicial decree authorizing the civil union of two individuals of the same sex. The judge is charged with disobeying an order from the Constitutional Court to withhold issuing the decree pending resolution of the constitutionality of the statute allegedly recognizing such unions. The disciplinary proceeding has been continued until the ruling as to the statute's constitutionality has been handed down.

In conclusion, allow me to offer the following observations. First, judicial independence is a crucial safeguard in two ways. It protects those who exercise judicial authority, making it possible for them

16. República de Costa Rica, Corte Suprema de Justicia, Sala Constitucional, Resolución No. 2001-00249 (Jan. 10, 2001).

17. República de Costa Rica, Corte Suprema de Justicia, Sala Constitucional, Resolución No. 2015-016072 (Oct. 16, 2015).

18. República de Costa Rica, Corte Suprema de Justicia, Sala Constitucional, Resolución No. 9495-2008 (June 6, 2008).

to issue judgments solely on the basis of the laws and the constitution. At the same time, it protects the public, guaranteeing that their rights will be respected, ensuring the peaceable resolution of conflicts in the society and promoting confidence in the country's institutions.

Second, this safeguard requires the existence of conditions that buttress the judiciary with regard to other branches of government, affording judges the freedom to carry out their functions. Specifically, there is a need for stability in office, an adequate salary and pension plan, and a proper disciplinary regime that ensures due process. In this regard, the establishment of a career judiciary is necessary, one with objective criteria for recruitment and promotions.

Third, it is vital to remember that judicial independence emphatically does not mean arbitrary conduct or the absence of controls. As public servants, judges are subject to the law and must be accountable for their actions. Such accountability is very much in the public interest.

Fourth, those who administer justice provide a public service and are therefore subject to all the legal provisions that govern the discharge of their specific responsibilities as well as their conduct as public servants more broadly. The recognition that judges are accountable for productive job performance—both individually and in terms of the chambers assigned to them—represents a cultural shift not easy to achieve. This is still an on-going process.

Fifth, the current context increasingly underscores the central role of the judiciary in maintaining a democratic system and the respect for fundamental rights. We must therefore be vigilant in the face of any threat to the continued vitality of the judicial branch.

Finally, the judiciary must also have the capacity to read the signs of the times. We must understand how relevant our decisions are to the defense of the principles that underlie democracy.
