

**OSCE HUMAN DIMENSION IMPLEMENTATION MEETING**  
**Working Session 4 – Rule of Law I**  
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Ladies and Gentlemen, Distinguished Delegates and Colleagues,

First of all, I would like to express how honoured I am to have been invited to take part in the OSCE Human Dimension Meeting and present perspectives from the UN mandate on the independence of judges and lawyers. I am grateful in particular to Ms. Eva Katinka Schmidt for all her efforts in making my visit to Warsaw possible.

The rule of law is a comprehensive concept and, as such, it encompasses crucial aspects of the mandate entrusted to me by the Human Rights Council, including the defence of the independence of judges, prosecutors and lawyers as a prerequisite for the protection of human rights.

The rule of law is at the heart of the principles promoted by the United Nations, and in a 2004 report of the Secretary-General it was defined as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>1</sup>

This definition guides and reaffirms the vital role that the independence of the judiciary, prosecutors and lawyers plays in the process of ensuring and defending the rule of law and protecting human rights in accordance with international norms and principles.

One can only speak of democracy when there is a rule of law based on the respect for the principle of separation of powers, which in turn determines judicial independence. I wish to address in my intervention some of the elements of this relationship.

Distinguished colleagues,

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<sup>1</sup> S/2004/616, para. 6

The independence of the judiciary from the other branches of the State has been established as an irreplaceable element of the rule of law and of any democratic system. The rule of law further requires that justice is applied through a pre-established regular procedural system, organized and coherent, which adequately guarantees equality before the law and the legal security of all. This point is, indeed, central to check whether there exists a genuine rule of law. When guarantees of due process are lacking, when the rights of defendants and detainees are no longer guaranteed, when the due process of law is ignored, when large areas of public activity are left outside of the reach of legal remedies, one can question the existence of the rule of law.

The rule of law is also affected when representatives of the other branches of the State, politicians, or holders of economic powers are allowed to interfere in different ways in the work of the courts, or when ordinary courts are replaced by special jurisdictions. The rule of law is affected when judges are questioned publicly and in the media by representatives of the other branches of the State and accused of serious crimes of corruption and abuse of office, when their judgments are publicly criticized without ground or respect for the procedure, or when such judgements are rejected or simply not complied with.

The independence of the judiciary is a necessary consequence of the principle of separation of powers and one of the basic conditions of the existence of the rule of law and a democratic system. Unlimited power tends to lead to abuse particularly when prolonged over time and in the hands of a few institutions and/or individuals. The principle of separation of powers is the result of a historical process that marked the evolution of human society, oriented towards the control and limitation of State power. The branches of the State, reciprocally limiting and controlling each other, constitute a guarantee against leanings towards absolutism, which can in turn lead to dictatorship. The existence of this system of balance and distribution of functions still constitutes today an indispensable prerequisite for the rule of law.

If the principle of separation of powers is crucial for the development of democracy and to guarantee judicial independence, judicial independence is the key to an administration of justice that is independent, impartial, transparent and effective.

The right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law is enshrined in both the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights. The requirement of competence, independence and impartiality has been recognized as an absolute right that is not subject to any exception.<sup>2</sup> Pursuant to this provision, States are required to take concrete measures to ensure the independence of the judiciary and the independence and impartiality of judges, protecting them from any interference by representatives of other branches of the State.

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<sup>2</sup> CCPR/C/GC/32

This element has been stressed repeatedly by the United Nations treaty bodies. Indeed, the Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights noted in its General Comment No. 32 that any situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.<sup>3</sup> Concerns regarding lack of clarity of the functions of the different branches of the State were also stressed by my predecessors, Mr. Paaram Kumaraswamy and Mr. Leandro Despouy. As Special Rapporteurs, we all have insisted on the importance to establish the principle of judicial independence in the Constitution and to develop its content further through ordinary legislation. Where there is no written Constitution, the independence of the judiciary must be considered as a fundamental principle of law.

Ladies and Gentlemen,

One can observe today, as the establishment of democracy and the building of the rule of law have unfolded, that the role of the law and its application by judges has become even more important. This gives a great responsibility to judges and lawyers. The demands of society regarding the justice system, and in general with respect to all public services, have increased, as has increased control and observation of legal action by the media. Therefore, it is necessary to strengthen the integrity of the judiciary to increase the confidence of society in its operation.

Judges and magistrates must be mindful that their judgments and decisions can be influenced by personal bias or prejudice, or preconceptions about the matter referred to them. They should always be and seem to be independent and impartial to any reasonable observer. As a result, the judiciary must not only fight against any threat or intimidation from the other branches of the State, economic or social power circles, or against pressures from the media, but also against their own personal biases, preconceptions, or values not connected to the case under litigation. Judges and magistrates should also take full responsibility for their judgments and decisions, as well as the effects and consequences of such judgements. These are necessary aspects of fairness at all times.

How can the judiciary ensure its own effective independence? One of the essential elements is a good and consistent administration of justice that guarantees impartiality and, at the same time, includes effective instruments for monitoring and sanctioning possible abuses from judges and magistrates.

The administration of justice encompasses issues relating to the selection, appointment, promotion, suspension, demotion, transfer, termination and retirement of judges; trial

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<sup>3</sup> CCPR/C/GC/32, para. 19

management; human resources, financial and material management; budget preparation and execution; initial and on-going training; access to justice; and so many others.

Distinguished Delegates,

The judiciary is one, but composed of various actors, like judges, magistrates and judicial officers, each with its own specific competence. Prosecutors and lawyers too have an important role to play in the functioning of the justice system and, consequently, in the consolidation of democracy and the rule of law.

Very often the violations and abuses affecting judicial actors, including prosecutors and lawyers, cannot be separated from the situations that affect the structure and functioning of the judiciary as such. For that reason, strengthening the independence of all stakeholders in the judicial system, including the lawyers and prosecutors, and ensuring their protection against all types of threats, attack, and violations, has a major positive impact on the functioning of justice in general and directly improves respect for democratic institutions.

The need to establish, build and strengthen a strong judiciary within the national criminal justice system, composed of independent and impartial judges, magistrates and lawyers, as a fundamental tool in the fight against impunity, is also essential. A human rights violation or a crime that goes unpunished contributes to an environment favourable to the commission of other crimes or human rights violations. Impunity undermines the rule of law, public confidence in the State institutions, and ultimately democracy.

Without independence of the judiciary there is no separation of powers, and without such separation there is no rule of law or democracy.

States should thus provide adequate resources to enable the judiciary to adequately discharge its functions and, more importantly, States must ensure the protection of all courts and tribunals, as well as their members, against interference, threats, attacks and acts of intimidation or reprisal. When such interference, threats or attacks occurs, they should not go unpunished. In those States where impunity prevails, special arrangements should be urgently put in place to ensure compliance with and enforcement of orders, judgments and judicial decisions.

Impunity is a cause and a consequence of the instability and the erosion of the rule of law, the weakness of accountability mechanisms and limitations imposed on the enjoyment of human rights. Although the underlying causes of impunity are many and go beyond the justice system, impunity occurs in situations where there is a weak and dysfunctional criminal justice system. A lack of accountability for human rights violations often leads and perpetuates a culture that provides space for State and non-State actors to continue perpetrating violations, including ill-treatment, torture, extrajudicial killings, enforced disappearances, arbitrary arrest and detention, and unfair trial and lack of due process. In such a culture of impunity, victims

of human rights violations cannot obtain legal redress, which may lead to a loss of trust, and respect in, as well as legitimacy of, the judicial system. Such situations contribute to communities choosing other means of conflict resolution, such as vigilantism, mob justice and other forms of traditional or religious-related justice.

Ladies and Gentlemen,

We must all continue working for judicial independence to become a reality in the OSCE region but also throughout the rest of the world. International law provides us with useful instruments to guide and ground our actions. Institutionally, we must protect the judiciary from undue interference and intervention of the other branches of the State. We must also defend and protect with energy the judges who interpret the laws in accordance with the Constitution and international human rights law, fundamental guarantees for the construction of any democracy and the rule of law.

Many of us, including experts of the United Nations like myself, are watching with interest and attention developments and struggles for the consolidation of democracies in the most diverse places on earth and the efforts undertaken to overcome situations of serious institutional crisis. Meetings like the OSCE Human Dimension can and do contribute greatly to positive reflections on what more can be done to strengthen the rule of law, democracies and protection for all human rights.

Thank you very much.

\* <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>