

# JUDICIAL INDEPENDENCE: NEW CHALLENGES AND JUDICIAL GOVERNANCE INNOVATIONS

**THE CEELI INSTITUTE  
THE JUSTICE STUDIES CENTER OF THE  
AMERICAS**

Judicial independence—meaning the ability of judges to function independently from outside influences that may corrupt or curtail their ability to fairly administer justice—is fundamental to maintaining judicial integrity and the rule of law itself. Yet efforts to curtail and infringe judicial independence are increasingly common across the globe, chiefly as a result of overreaching executive and legislative actions to restrict the function of the judiciary. Often, such governmental infringements on judicial independence are insidious and not immediately obvious. Many small and incremental changes in judicial function and administration may nevertheless have a cumulative consequence of reducing the ability of judges to act independently, and apply the law fairly and without undue external pressures.

This session will examine current trends that undermine judicial independence, looking both at broad politically motivated campaigns against judiciaries, but also at the more subtle ways in which administrative and legislative changes can undermine independence. However, threats to individual independence of judges are not only external, but internal. Institutional factors such as disciplinary rules and institutions, or the participation of judges in the election of the head of the judiciary might have relevant effects in the individual independence of judges.

The session will also examine ways in which the judiciary itself can protect and promote judicial independence. The institutional structure with the aim of developing the set of actions directed to preserve judicial independence has been known as Judicial Government. This responsibility usually rests in the High Courts and Judicial Councils. By shining light on these practices, this session will assist the Global Judicial Integrity Network in promoting its overall goals.

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The Lebanon Tribunal, Netherlands

Justice Madan Lokur  
Supreme Court, Fiji  
Supreme Court, India (ret.)

Justice Luz del Carmen Ibáñez Carranza  
International Criminal Court

Judge Lozan Panov  
Supreme Court of Cassation, Bulgaria

### THE CEELI INSTITUTE

CEELI is an independent not-for-profit organization, based in Prague and dedicated to the development and training of an international network of legal and judicial professionals committed to advancing the rule of law. Through innovative training programmes and other activities, the Institute works to build laws-based societies.

### THE JUSTICE STUDIES CENTER OF THE AMERICAS

Its mission is to support the countries of the region in their justice reform processes. To this end, it develops training activities, studies and empirical research, as well as other initiatives in order to meet its three key goals: to undertake in-depth studies of justice systems and develop innovative approaches in the discussion of judicial reforms; to promote cooperation and the exchange of experiences among key regional stakeholders and to generate and disseminate tools that improve the quality of the information available about justice in the Americas.



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### Main Issues:

Judicial independence is critical to maintaining the integrity of the judiciary. Judges must feel free to fairly evaluate the matters before them based on the evidence presented and the relevant law, secure from external pressures. Judges who are subject to such outside pressures and interests will feel constrained in their decision-making powers. Limits on judicial independence corrupt the function of the judiciary, subject it to external pressures and undermine the transparency of the judicial function.

Increasingly, however, judges are subject to outside interference and pressures that reduce their independence, in both subtle and direct ways. Obvious, but common, threats to judicial independence include very public political attacks on the judiciary, as currently seen in the U.S., Poland and Ukraine, often involving personal threats against individual judges. Similarly, in some instances, one faction of judges gains administrative control of a court and uses the accompanying power to limit, punish or demote opposing factions. One particularly notable practice in recent years is the use of legislative “reforms” to manipulate the membership of high judicial councils in such a way as to increase control of the government or of a ruling political party over the council, and by extension over the national judiciary—effectively ending self-governance of the judiciary, and removing judicial control of the council.

More common, however, are the use of incremental legislative and administrative steps, implemented by governments and designed to directly limit the jurisdiction of judges and courts, or to make judges more directly accountable to political and governmental authorities. Such incremental changes often seem relatively innocuous to the casual observer, the public or the media, and the impact of such incremental changes is not always immediately apparent. Recent examples of such incremental limits on judicial independence include: giving the Ministry of Justice the ability to reassign court presidents without cause; reducing retirement ages (with the aim of forcing judges out of office early); increased use of contract judges, whose term is limited and whose reappointment is discretionary; the creation of additional layers of review, so that a decision of a first instance court can be set aside, even before the appeal process begins; budget cuts, which undermine working conditions; and changes in criteria for performance evaluations, including the use of non-transparent performance criteria.

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This session will also look at steps courts and judges themselves can undertake to protect and preserve their independence. The session will examine and discuss possible guidelines to improve the role of the Supreme Courts and Judicial Councils in key dimensions for judicial independence and prevention of corruption within the judiciary, including disciplinary rules and procedures; the judicial selection process; the participation of judges in the election of the head of the judiciary and the institutional management of social and media pressures. In particular, the session will incorporate discussions of the findings and insights produced by the empirical study Judicial Government. Independence and strengthening of Judiciary in Latin America, conducted by JSCA. The Latin American examples are particularly useful in demonstrating how the judiciary itself can take greater control over judicial governance and assert its role with the aim of developing the set of actions directed to preserve judicial independence.

### Specific Questions and Discussion Points:

- What new trends are we witnessing with regard to efforts by governments to limit judicial independence?
  - What are the personal experiences of the panellists in witnessing attacks and limitations on judicial independence, and from where have those attacks come?
  - How do seemingly small administrative or legislative changes have large impacts on judicial independence?
  - What is the cumulative effect of increased governmental or political control over the administration of the judiciary?
  - In which ways are the political and institutional independence of the judicial branch critical to enhancing the individual independence of the judges?
  - To what extent are limits on judicial independence self-imposed by the judiciary, through its own judicial governance tools, and to what extent are these limits imposed by external factors?
  - How do limits on judicial independence increase the likelihood that a judiciary will be subject to external pressures, including corrupt influences?
  - How do these limits on judicial independence undermine relevant international standards?
  - How do attacks by politicians and the media (especially state-controlled media) create an atmosphere in which judges feel threatened in their ability to act independently or in ways that may bring about political threats and attacks?
  - How do judges self-censor themselves as a result of public attacks?
  - How can judges and judicial associations effectively respond to challenges to their independence?
  - What steps can the judicial branch institutional structures, such as councils of justice or judicial associations, take unilaterally to strengthen and enhance judicial independence?
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- What has been the impact of judicial self-governance in promoting both institutional and individual independence?
- How do different aspects of judicial self-governance (i.e. judicial selection, disciplinary rules and institutions, relations with executive and legislative branches) have an impact on institutional versus individual judicial independence?
- How do measures aimed at enhancing judicial independence help in the efforts to prevent judicial corruption?

### Proposed Outcomes of the Session:

- To facilitate broader understanding as to how judicial independence is currently being undermined, both through political attacks and through more subtle legislative and administrative efforts that limit the powers, function and discretion of judges;
- To inform participants about actual examples of current efforts to restrict judicial independence, and how seemingly small administrative changes can have large impacts;
- To establish the link between lack of judicial independence and the increased susceptibility of the judiciary to external influences and increased corruption;
- To highlight effective responses—by judicial associations, individual judges, NGOs and the public—to such political and governmental efforts at limiting judicial independence;
- To discuss the findings of an empirical study, prepared by JSCA, highlighting the contributions of different institutional actors in enhancing judicial independence;
- To discuss issues and factors that have a key role in enhancing judicial independence;
- To construct, from a collaborative approach, key aspects of judicial governance and function that have been identified by empirical research as key for maintaining and securing judicial independence: Disciplinary rules and institutions; judicial selection processes; participation of judges in the election of the head of the judiciary and the institutional management of the social and media pressure.

These outcomes will allow for the exchange of good practices between the audience and the speakers, in order to construct a commonly understood set of prescriptive actions to be used in support of maintenance of judicial independence.