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Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (21 August 2007)

III. FAIR AND PUBLIC HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.¹ The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.² A 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.³ It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.⁴ The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.⁵

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about

¹ Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

² Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.

³ Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

⁴ Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

⁵ Communication No. 933/2000, *Mundy Busyo et al v. Democratic Republic of Congo*, para. 5.2.

the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.⁶ Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.⁷

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,⁸ i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.⁹

23. Some countries have resorted to special tribunals of “faceless judges” composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives¹⁰ from the proceedings;¹¹ restrictions of the right to a lawyer of their own choice;¹² severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado;¹³ threats to the lawyers;¹⁴ inadequate time for preparation of the case;¹⁵ or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the

⁶ Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.

⁷ *Idem*.

⁸ Also see Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64 and general comment No. 31 (2004) on the *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 11.

⁹ See communication No. 1172/2003, *Madani v. Algeria*, para. 8.7.

¹⁰ Communication No. 1298/2004, *Becerra Barney v. Colombia*, para.7.2.

¹¹ Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.

¹² Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.

¹³ Communication No.577/1994, *Polay Campos v. Peru*, para. 8.8; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5.

¹⁴ Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.

¹⁵ Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3.

defendant.¹⁶ Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.¹⁷

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,¹⁸ or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury¹⁹ that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.

26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.²⁰ It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.²¹ The same standard applies to specific instructions to the jury by the judge in a trial by jury.²²

27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of

¹⁶ Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5; Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3; Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.

¹⁷ Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8 ; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.

¹⁸ Communication No. 770/1997, *Gridin v. Russian Federation*, para. 8.2.

¹⁹ See Committee on the Elimination of Racial Discrimination, communication No. 3/1991, *Narrainen v. Norway*, para. 9.3.

²⁰ Communications No. 273/1988, *B.d.B. v. The Netherlands*, para. 6.3; No. 1097/2002, *Martínez Mercader et al v. Spain*, para. 6.3.

²¹ Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6.

²² Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.13; No. 349/1989, *Wright v. Jamaica*, para. 8.3.

article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision.²³ Where such delays are caused by a lack of resources and chronic underfunding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.²⁴

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.²⁵ The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations,²⁶ or to pre-trial decisions made by prosecutors and other public authorities.²⁷

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

²³ Communication No. 203/1986, *Mínoz Hermoza v. Peru*, para. 11.3 ; No. 514/1992, *Fei v. Colombia*, para. 8.4 .

²⁴ See e.g. Concluding observations, *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), para. 21, *Central African Republic*, CCPR//C/CAF/CO/2 (2006), para. 16.

²⁵ Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2.

²⁶ Communication No. 301/1988, *R.M. v. Finland*, para. 6.4.

²⁷ Communication No. 819/1998, *Kavanagh v. Ireland*, para. 10.4.

Human Rights Committee, Concluding observations of the Human Rights Committee: Australia, UN Doc CCPR/C/AUS/CO/5 (2 April 2009)

8. The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant. (art.2)

The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.

(emphasis added)

Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, UN Doc E/C.12/AUS/CO/4 (22 May 2009)

34. The Committee recommends that the State party provide human rights education on economic, social and cultural rights to students at all levels of education and make available extensive human rights training for members of all professions and sectors having a direct role in the promotion and protection of human rights, including judges, lawyers, civil servants, teachers, law enforcement officers, migration officers, the police and the military.

(emphasis added)

