Judicial Independence: a destination or a horizon?

INTRODUCTION

Judicial Independence, as a concept for the entrenchment of the rule of law in democratic societies, has in the past few decades become a popular topic for legal sector conferences. My task today is to explore the concept, to see if it is a destination capable of attainment at all, or if it is a horizon that open up new grounds, vistas of possibilities beyond the current thinking.

This is a conference of lawyers, so I consider it safe to assume that at some point in one's legal career, most, if not all persons present, would have come across the concept of judicial independence, and would have attained some understanding of it in varying degrees. I therefore decline to make this paper about a checklist of elements, components, requirements, or a literature review. What I will do is to expound upon the elements widely recognised as permitting, contributing to, or entrenching the concept into the judicial process, and some strategies that have been applied to translate the concept into practice.

In doing so I intend to shed light on how countries both within and outside the Commonwealth have sought to apply the principles, where they have fallen short of the mark, either altogether, or through compromise, and to explore with you, ways to improve performance.

To do this, I must place the concept of judicial independence in its proper frame, commencing with the recognition that the independence of the Judiciary is not a nebulous idea, engaging in concept as a desirable model, but it is in fact, essential to the rule of law, to good governance, and therefore pivotal to democracy, and to our quality of life.

Nor is it a one size fits all, for what may constitute an anathema to independence in one jurisdiction may be an accepted occurrence in another. Regarding this, I take guidance from this insightful exposition*:*

> *"A brief survey of courts from around the world demonstrates variation in what is seen as problematic. This diversity appears to result from different economic, political and social factors at the ground level. For example, it is common for German judges to be members of political parties, sit on city councils and even campaign for political office... By contrast, any such political involvement by judges in Canada would be seen to impair the judge's impartiality in deciding public law cases and would amount to a breach of the judicial ethics code."*[1]

In my search for a working definition for judicial independence to sum up the concept in one pithy statement, I came across a concise definition that I could not improve upon, and adopt for this paper:

> *"…the ability of courts and judges to perform their duties free of influence or control by other actors, whether governmental or private".*[2]

As a working definition, it is broad enough to encompass what may be the aspiration of every democratic society, which is, that in the decision-making process*, "justice must not only be done but must manifestly and undoubtedly be seen to be done"*[3]. This is an aspiration that the judicial institution, judicial officers comprising judges and magistrates of various descriptions (all referred to loosely

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[1] Lorne Neudorf Judicial Independence: The Judge as a Third Party to the Dispute available at https://ouclf.law.ox.ac.uk/judicial-independence-the-judge-as-a-third-party-to-the-dispute/#3_Impartiality_and_Judicial_Independence

[2] Encyclopaedia Britannica www.britannica.com

[3] Per Hewart CJ in R v. Sussex Justices[1924] 1 KB 256

as judges in this paper), be so independent of outside influences, that court decisions would bear the hallmarks of competence, fairness, and impartiality.

The global recognition of judicial independence as integral to the rule of law and good governance is recognised in its articulation in global, international, regional and national human rights provisions, as in: Art. 10 of the Universal Declaration of Human Rights:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"*.

This is echoed in Art 14 of the International Covenant on Civil and Political Rights, Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts 7(1)(b) and (d) and 26 of the African Charter on Human and Peoples' Rights, and in the aspirational Goal 16 of the United Nations Sustainable Development Goals which provides for Peace, Justice and Strong Institutions, including enhanced access to justice for all, and an accountable judiciary.

Principle IV of the Commonwealth Latimer House Principles[4] asserts that: *"An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice"*.

[4] Commonwealth (Latimer House) Principles on the Three Branches of Government, November 2003

It is worthy of note that the provision of a competent, independent, and impartial tribunal, as a right of the individual, is enshrined in a few national constitutions, more particularly in their fair trial provisions.

While my discussion will predictably be anchored on independence from other branches of government, it will not be limited to it, although time will not permit me to explore in much detail, other forms of interference that arise from other sources, including a media landscape which sometimes creates controversy, and interference which may come from within the institution itself, both of which may intimidate judicial actors in the performance of their duties.

The Building Blocks

The outworking of judicial independence is three-pronged, as it relates to the institutional, and individual independence of judges, as well as the role of other governance institutions in ensuring the rule of law by facilitating institutional independence.

A Strong, Credible Institution

The first building block of judicial independence is a strong credible institution with the ability to insulate itself and its officers from both internal and external influences in the performance of the judicial function.

The institution does so by building strong internal structures that ensure transparency and accountability in the judicial process, while promoting and preserving the independence of its officers from both internal and external actors.

Integral to independence in the decision-making process is competence which starts with appointments to the office on merit and continues with continuing judicial education and access to material for legal research.

Internal accountability mechanisms such as transparency in the assignment of cases, and decisive action by the institution against judges who operate beneath expected standards of competence and propriety, especially in cases of corruption which undermine impartiality, preserve the integrity of the institution.

Impartiality, Integrity, and Competence – Hallmarks of Independence

The second building block of judicial independence is the ability of judges to perform their task of judging with competence and impartiality, as they insulate themselves from outside influences, and maintain integrity.

The Bangalore Principles of Judicial Conduct[5] concerned with the key values of independence; impartiality; integrity; propriety; equality, competence and diligence establish the standards for the ethical conduct of judges and reinforce that independence of judges and the judicial institution is bound up with accountability, which includes due and proper performance of one's work according to law, with integrity and impartiality.

The Role of Other Governance Institutions

The third building block is the supporting role of other governance institutions. Independence, it has been said, is: *"…an outcome that emerges from strategic interactions among the judiciary, the legislature, and the executive*." [6]

Support of the judiciary by other governmental institutions is crucial for the maintenance of its independence from the same actors and others. An embrace by other governance actors of the role of the judiciary as the interpreter and enforcer of the collective will of the people expressed in the national constitution, as well as the provider of the necessary check to executive actions which may flout the

[5] The Bangalore Principles 2002

[6] Conditions for Judicial Independence: McNollgast (Chancellor's Associates Chair of Political Science, University of California, San Diego and Professor of Law, University of San Diego; Morris M. Doyle Professor of Public Policy, Department of Economics, Stanford University; and Senior Fellow, Hoover Institution, and Ward C. Krebs Family Professor of Political Science, Stanford University.)

parliamentary intent, will enable them to provide the necessary support and uphold its independence.

This is important, as, with the best of judicial leadership and the best of internal accountability mechanisms, a judiciary is only as strong and independent as the other arms of government charged with resourcing it, filling its ranks, assuring security of tenure, providing security, and legislation to promote efficiency, will permit.

It has been said in jest so often that it no longer permits humour, that judiciaries are often treated as distant poor relations of the other branches of government. The judicial institution must be enabled to not operate with the inferiority that has characterised many judiciaries in relation to the other branches of government.

A strong judicial institution is a well-resourced one. Where the institution is placed at the mercy of other arms of government, in that proper arrangements for adequate resources are not made, there is no insulation from external pressure. In such circumstances, real, or perceived control by governmental actors who hold or keep of the public purse and determine which resources to provide, compromises the credibility of the institution as an independent institution.

Like the judicial institution, poorly remunerated judges, are a challenge to independence, for they are more likely to yield to forms of corruption and subject them to the control of or influence by factors other than adherence to the law, and commitment to justice. This influence may be subtle or overt, and may come from the holder of the public purse, or private interests.

The appointments process also affects the credibility of the institution and has been the subject of much concern, suspicion and finger-pointing when appointments of certain persons who are perceived to lack qualities of integrity, competence, experience or impartiality, are appointed as judges.

Security of tenure has been identified as integral to the independence of judges. Thus in many commonwealth jurisdictions, tenure is until the age of retirement which varies by jurisdiction. There has on occasion been a challenge to tenure where autocratic governments and judicial commissions under the control of such

governments, unlawfully terminate judicial contracts for many reasons including the pursuit of a political agenda, a desire to control the judiciary, or to prevent adherence to human rights principles. There is also the phenomenon of contract judges and lately, a challenge to acting judgeship which is the subject of discussion later in this paper.

Benchmarks

It is manifest from the foregoing that an independent judiciary is a well-resourced institution which has strong internal accountability mechanisms, and in which capable judges, appointed on merit, well remunerated, and properly secured by the national security apparatus, have no fear of the future because they have security of tenure. They perform their duties without interference from external actors, whether they be governmental institutions or private interests.

With these elements as the benchmarks for the attainment of, or the preservation of judicial independence, I discuss the failures of jurisdictions in ensuring the independence of the judiciary as a component of good governance, and compromises made by countries and judiciaries which have an appearance of adherence to principles of independence, but lack effectiveness. I also discuss some successes that demonstrate that judicial independence is not unattainable, and then I make recommendations to hopefully light the path towards the desired outcome.

FAILURES/COMPROMISES OF INDEPENDENCE

Without intending to over-generalise, my research has revealed that in many modern constitutions, the independence of the judiciary is assured. However, in practice, the said provisions despite their strong wording, are more of an aspiration than an assurance. There are jurisdictions which do little to adhere to the separation of powers or uphold judicial independence as essential for governance. But perhaps the more invidious practice, harmful to judicial independence, is the country that takes the trouble to acquaint itself with proper principles for attaining it, but only pays lip service to it when it is found to be inconvenient.

In varying degrees, some jurisdictions within the Commonwealth are guilty of the compromises that result in the paying of lip service to securing an independent judiciary. Thus, whether through complete disregard or through compromises, judicial independence is placed at risk or denied altogether. In this category are countries with constitutions which assure judicial independence, set up proper appointment and disciplinary procedures, provide for adequate resourcing and assure the remuneration of judges, only to whittle away the effectiveness of these provisions, little by little, or from time to time when it is inconvenient to apply them.

Failures or compromises of independence affect the strength and credibility of the institution as well as its judges, whether the fault lies with the institution, the judges, or other governmental institutions that should provide support but sometimes fail to do so adequately.

Because the interests of the three are intertwined, a discussion of this subject must necessarily be of the failures, or compromises of all three, bound up with one another.

Lack of internal accountability

- Over-Fraternization with the Executive Arm of Government

An independent judiciary does not mean an isolated, neglected judiciary. However, the pandering of the judicial institution to other governance institutions, especially the executive, robs the institution of independence and its effectiveness as a key player in democratic governance. In 2011, the alleged hobnobbing of the Chief Justice with the executive which led to a directive by the Chief Justice that no claims could be brought against the King, was seen as an affront to judicial independence in Swaziland (now Eswatini), and led unfortunately, to a three-week strike of lawyers who accused him of bringing the judiciary into disrepute. This undoubtedly had dire consequences for persons needing the services of the courts, and was considered an abysmal failure of judicial independence in then Eswatini..[7]

[7] https://www.news24.com/news24/swazi-lawyers-boycott-courts-20110708

- External and Internal Interference

The inability or unwillingness of the judicial institution to insulate judges from outside influences, including politics, and societal affiliations weakens the institution. Lifestyles incompatible with the sober disposition of judgeship sometimes, if unchecked by the institution, may affect the public perception of the independence of judges.

Inappropriate pressure from senior judges or the judicial administration is a subject that is rarely given the attention it deserves, but not a few judicial officers have been pressured by persons in authority to depart from independent decision making.

- Discipline

The inability of the judicial institution to carry out the disciplining of its officers where allegations of impropriety in office merit such, is also a failure of independence.

Regarding this, while some judiciaries lack laid down procedures for disciplining its members, some countries do have such, but fail to use them.

In some jurisdictions, the procedure is set out in their constitutions. In others, Codes of Conduct which are aimed at governing behaviour on the Bench, contain provisions for discipline. However, lack of adherence to these where there have been serious breaches, even commissions of criminal acts, affect the reputation of the judicial institution as an institution of integrity, credible in its professed independence from outside forces and considerations outside the operation of the law. Thus, when in Ghana, some judges were filmed (whether properly or improperly), in the act of taking bribes, that the judicial administration failed to lead in prosecuting such conduct was seen as a failure of credibility even though the said judges were dismissed from office.

Allocation of Resources - Inadequacy

The failure to realise the financial independence of the judiciary has been the bane of many judiciaries.

An example of this is a country which, citing competing needs, provides minimal funding for the judiciary, rules out accommodations of special projects that will modernize the judiciary, such as digitization, or even the improvement of capacity through judicial education conferences. Thus, while the resourcing institution may appear to be carrying out its task, what it does is to stunt the growth of the judicial institution, and the development of new strategies for effective service and effectual adjudication. Despite the sometimes-strong wording of constitutional provisions and legislation regarding funding, in some judiciaries the financial autonomy needful for them to properly conduct their business, is rarely provided.

Budgetary cuts that are imposed because the institutions charged with resourcing the judiciary do not consider its projects and programmes necessary, have the effect of curtailing the operations of the judicial institution, including programmes for increased access to justice, and necessary modernization to increase efficiency. Sometimes such cuts affect salaries, as well as positions needed for the performance of its function.[8] Beyond the deprivations is that another institution of government gets to dictate what it considers to be important to the judicial institution's operations.[9]

Nor is the perception of the compromise of independence helped when such budget cuts and other deprivations appear to be punitive when they come after certain decisions are made against the executive or legislative branches of government. The converse also obtains where the judiciary is provided with needed resources at a time decisions are made in favour of especially the executive arm.

Lack of guarantees regarding the remuneration of judges, sometimes adversely affect judges and place them at the mercy of other arms of government.

Recently in Mozambique, the harmonization of public sector salaries, resulted in a situation described as "a crisis of the democratic rule of law", for the new wage which redefined the following state actors as sovereign: the President of the

[8] Crisis in the courts: Bars take steps to stave off judicial funding cuts
ABA May-June 2010 available at
https://www.americanbar.org/groups/bar_services/publications/bar_leader/2009_10/may_june/courtcrisis/
[9] Nov 4, 2019 — Statement by Kenya's Chief Justice David Maraga on Judiciary Budget Cuts.

Republic, the Prime Minister, Members of the Parliament, the Ministers and the President and the Judges of the Supreme Court, did not include other judges.

The compensation clause doctrine[10] which provides that the remuneration of judges shall not be varied to their disadvantage, is echoed in many modern constitutions. Even so there are subtle forms of whittling away the contractually agreed remuneration. One area is the imposition of taxes, especially where the tax regime changes every so often or starkly, without an accompanying review of remuneration. Thus, while in the USA, the judicial pronouncement in ***United States v. Hatter***[11] regarding this, does support the imposition of some taxes, as not eroding judicial independence which underlies the compensation clause, judiciaries in countries with fluid taxation rates may not be similarly unaffected.

High inflation without review mechanisms to respond to it, affects remuneration which, adjusted against major trading currencies would be economical salaries when they were first determined, but lose value with fluctuations though the salaries remain in the same figures but are worth so much less in real terms of purchase value.

The under resourcing of judiciaries which places the burden of procuring books and legal resource material on judges is another subtle form of whittling away of the contractually agreed remuneration.

Lack of Provision of Security

To say that judging – not the art, but the act, is a dangerous one, may invite challenge or at best, indifference, but it is a matter that requires serious consideration. Tragic incidents come without warning, and the threat or apprehension of harm, may affect the independence of a judge in difficult cases that expose the person of the judge to danger. Yet, it is apparent that in some countries, there is no provision of close protection for judges, even though routinely judges in the discharge of the criminal jurisdiction deal with persons

[10] the ArtIII.S1.10.3.2
[11] 532 U.S. 557 (2001)

accused of heinous crimes some of whom may belong to gangs or cartels capable of reprisals. In Ghana, it took the murder of three High Court judges for the government to provide close protection security for judges [12].

That a judge could come to harm for performing his duty according to his oath is the more reprehensible, as the provision of security is a ready solution.

Lack of transparency in the Appointment/Promotion Process

The process of appointments to the Bench has been beset with accusations of impropriety where the selection is not transparent, and is not seen to be based on merit or experience. Indeed, so passionate has been the discussion that many countries, anxious to rid judicial appointments of accusations and suspicion of cronyism, corruption, or improper control by the appointing authority, have endeavoured to provide measures to promote transparency, and to ensure, at least a perception of fairness, and impartiality in that equal opportunity and merit are the true criteria for judicial appointments.

Judicial Commissions/ Councils

While the appointing authority remains in most countries, the head of the executive, the establishment of independent judicial commissions or councils serves as a measure to ensure impartiality in the selection process towards judicial appointments. These commissions/councils, employ measures such as the introduction of a system of applications, the conduct of interviews, a system of conducting examinations, and the use of psychometric evaluations. The departure from systems of appointments to the present use of independent councils and commissions is a commendable step in the drive towards the independence of judges. However, this otherwise excellent approach has fault lines where the commissions/councils themselves, lack, accountability, and fail to provide clearly defined internal mechanisms ensuring transparency in their operations.

[12] https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Three-judges-murdered-in-1982-were-impeccable-exceptional-Sam-Okudzeto-1628705

There is no gainsaying that the commissions/councils are only as effective if the members maintain integrity, are not concerned with considerations other than the transparent criteria of equal opportunity and merit, or cowed by the executive authority. The willingness of the other arms included in the appointment process to accept their recommendations dictates their effectiveness and relevance.

Sadly, some commissions cowed by executive authority, have operated as rubber stamps of the executive arm in the area of appointments, discipline and termination of appointments. Where governing constitutional provisions make dismissals by the executive possible after consultation with the commission or council[13], a weakened, compromised, or timorous commission may lend itself to rubber stamping the will of an autocratic executive even within "democratic" governance.

Sometimes, the lack of effectiveness of the commission is exposed by either the overt control of the commission, or the disregard of it by the appointing authority. This is what happened in Ghana in 2015 when the President appointed Supreme Court Justices without relying on the recommendations of the Judicial Council. In a challenge of this in a suit by the Ghana Bar Association and others, the court, in ***Ghana Bar Association and Others v. Attorney General and Others***[14], the court unfortunately, in a blow to judicial independence, failed to censure the conduct, as it held that while the President was mandated to obtain advice from the Judicial Council in respect of the appointment of Supreme Court Justices, he was not bound to follow the Council's advice.

Also, despite the existence of commissions or councils, appointments that wear political colours and the phenomenon of "court-packing" by the executive which is enabled more particularly in jurisdictions without an upper limit on its constitutional courts, dents the reputation of, and questions the effectiveness of such commissions or councils.

Judge-led Processes

[13] S. 141(2)(c) of the 1997 Constitution of the Gambia
[14] (J1 26 of 2015) [2016] GHASC 43

It has been said that if judges are placed in charge of the process, there will be no interference from other governmental actors or independent bodies whose accountability may not always be assured. But where this obtains, there have sometimes been accusations of cronyism, and other factors that challenge the independence of the system of appointment, and of the persons so selected.

The decades-old collegium system of choosing judges for appointment to the Indian Supreme Court, has recently come under attack by the Indian government which has indicated the wish to have a bigger role in the process,[15] describing it as "opaque and not accountable".[16]

The society expects its judges to exhibit integrity, competence and impartiality; but when appointments to judgeship are made for reasons other than merit, it results in a lack of competence in decision-making. This impacts upon the integrity of the institution, so does cronyism or other factors of compromise in the appointment process which produce judges beholden to interests that affect their independence in their decision-making. Compromised appointments have placed on the Bench, persons with questionable lifestyles and in whom the public has no confidence. All these affect the strength of the institution and the perception of independence which is so crucial to its role as a governance institution.

Non-Compliance with Court Judgments and Intimidation by Governments

One area in which judiciaries are rendered ineffectual to uphold the rule of law, is the failure of other arms of government to comply with the judgments of the courts. This impacts upon the independence of the institution in no small measure.

While courts have the power to hold persons in contempt of its orders, this is not always advisable in nascent democracies, where the alleged contemnors are governance institutions. Nor is it easy or even practicable to assume that jurisdiction of contempt of court, where the governments are democratic in name, but autocratic in operation. In these circumstances, the judicial administration may itself be on shaky ground, as its officers who may lack security of tenure, may be

[15] BBC World News India 25th January 2023 available at https://www.bbc.com/news/world-asia-india-64372672

[16] Law Minister Kiren Rijiju

subject to reprisals when enforcement is pursued as it should be. Indeed, in some jurisdictions, the position of a judge is not without fear of the actions of a vengeful executive arm of government if a judge's decisions are unfavorable to government.

Such a judge may be targeted as being in opposition to the government, and reprisals in the form of dismissals, withholding of contract renewals, or refusal to give requisite confirmation to the further appointments or promotions of the judge is not unheard of.

In recent times, Kiribati has come under the microscope for such activity. Three appellate judges were suspended by the government following a ruling that prevented the deportation of a judge unpopular with the government.[17] The court's judgment was described as 'autocratic judicial tyranny' by the President. The Chief Justice had been suspended earlier, after he reportedly held that the deportation was unconstitutional. Perhaps more telling was the fact that the government then appointed its Attorney General as the acting Chief Justice.[18]

Some judges have been put in fear of their lives, for upholding their own, or the institution's independence.

In recent years in Poland, a disciplinary regime for judges that has left judges vulnerable to control by the executive, has been widely criticized as forming part of an autocratic agenda of the ruling coalition, and a brazen attempt to put an end to judicial independence. It commenced with a 2015 legislation which solidified political control over Polish courts, a 2017 law that would have forced all Supreme Court judges into mandatory retirement save where exempted by the Minister of Justice and which following a public outcry, resulted in a revised bill which reduced mandatory retirement age of judges from seventy to sixty-five years, a move that effectively retired about forty percent of the Supreme Court; and a 2019 law, (the "muzzle law"), which gave the government power to dismiss judges, or cut their

[17] https://www.rnz.co.nz/international/pacific-news/474297/kiribati-president-suspends-three-judges-following-ruling

[18] https://www.rnz.co.nz/international/pacific-news/477748/kiribati-attorney-general-appointed-acting-chief-justice

salaries, for speaking out against legislation aimed at the judiciary, or for questioning the legitimacy of new judicial appointees. This situation which extended the executive's disciplinary powers against judges, and has been recognised as a bid to control the judiciary, has been condemned by the European Union as not representing their democratic values.[19]

In Ghana's judicial dark days of the 1960s, the President could under the 1960 Constitution, remove judges by getting a two-thirds majority of Parliament which he could hardly fail to get. Thus, judgments of the court which did not bend to the will of the executive were disrespected and judges themselves could be removed. A typical example was the *State v Otchere*[20] in which the then President, affronted that the judiciary dared to give judgment according to law and not according to his desire, in a case in which the High Court acquitted a number of individuals charged with an attempted assassination of the President, declared the court's decision null and void by an Executive Instrument. This was followed by the constitution of a new Bench which re-tried the accused persons, found them guilty, and condemned them to death. The Chief Justice having sat on the first hearing, was removed from office.

Sadly, even after a new and more democratic Constitution came into force in 1969, the darkness that plagued the judiciary as it sought to fulfil its mandate, was not lightened. In 1970, following the decision upon a judicial review of the Court of Appeal which was at the time sitting as the apex court, in *Sallah v Attorney-General*[21], declaring certain dismissals of public servants unconstitutional, the Prime Minister being unhappy with it stated publicly: *'no court can enforce any decision that seeks to compel the government to employ or re-employ anyone. That would be a futile exercise..."*[22]

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[19]The Collapse of Judicial Independence in Poland: A Cautionary Tale
by Allyson K. Duncan and John Macy https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/#:~:text=The%20new%20law%2C%20popularly%20referred,questioning%20the%20ruling%20party's%20platform

[20] [1963] 2 GLR 463

[21] 2 G & G 1319 (2d).

[22] Prime Minister Dr Busia's Radio Broadcast (20 April 1970) on the Sallah Decision—see 2 G & G 1374 (2d

It remains a sad commentary some members of government in advanced democracies have publicly questioned the correctness of court judgments that find disfavour with them, hinting that the judges exhibited bias[23] or were otherwise influenced by political opponents. Beyond endangering the lives of the individual judges who are seen as compromised, in such circumstances where supporters of political parties may think that the solution is to rid the earth of such judges, is the weakening of the institution, which is seen as corruptible, or corrupted.

A direct consequence of this is the weakening of the independence of judges who are called upon to adjudicate such cases. When this happens, democracy is the loser, for the credibility of the judicial institution depends on its accountability which speaks of its independence. When courts are perceived as unreliable and tainted with corruption or bias, the society is bound to descend into difficulty, especially in cases of election disputes where a volatile atmosphere may easily descend into mayhem.

Security of Tenure

Contract Judges

The tenure of judges in many national jurisdictions for the most part is assured, and a judge will work until the age of pension determined for judicial officers, unless for reasons of incapacity or bad behaviour, the judge is removed. The matter is not as cut and dried in the case of contract judges who typically are appointed for renewable terms of two to three years. There has been much discourse regarding the compromise of the security of tenure which further compromises the independence of such judges who have to perform their duties ever mindful of the spectre of unemployment if their contract is not renewed, should they fail to find favour with the appointing authority, which is so often the head of the executive arm of government, even with a commission or council serving as a buffer.

[23] Cabinet minister has raised accusations of "bias" against the judiciary after a Scottish court ruled Boris Johnson had misled the Queen when he “unlawfully” prorogued Parliament. https://www.telegraph.co.uk/politics/2019/09/11/cabinet-minister-says-public-see-courts-biased-judges-rule-proroguing/

There has been considerable discourse on the independence of such judges. Yet despite advocacy for judges' security of tenure, that contract judges will continue to exist cannot be gainsaid, especially in small jurisdictions which are still developing their judiciaries and building capacity in the local professionals. International organisations that offer technical assistance to such judiciaries that lack personnel or expertise also necessarily provide such technical expertise through the provision of contract judges. As was observed in the Latimer House Principles,[24] the solution to this is to provide safeguards, and countries are enjoined to make such appointments subject to appropriate security of tenure. I daresay that some of these safeguards include the provision of needed assurance to such judges that they may perform their duties with independence and not fear the reprisal of non-renewal of their contracts.

Acting Judges

The phenomenon of acting judges has also sometimes come under unfavourable scrutiny, as undermining the independence of persons so appointed, especially in the countries where there is no constitutional provision or legislative act permitting it. In the recent Ugandan case of ***Kabumba and Anor v. AG***[25]acting High Court judge appointments for two year periods made by the President of Uganda were challenged successfully at the Constitutional Court of Uganda which held it to be unconstitutional The learned justices appeared to have been swayed by among other matters, the forceful argument that the appointments would subject the acting judges to the control of the appointing authority and were therefore contrary to the dictates of the Constitution.

The following are reported incidents of compromise in judicial appointments:

> *"In Brudnicka v Poland (3 March 2000) the Court found that maritime chambers in Poland… are not independent, because their presidents and vice-presidents are appointed and removed from office by the minister of justice in agreement with the minister of transport and maritime affairs. They cannot be regarded as irremovable, and they*

[24]Principle II Preserving Judicial Independence - Latimer House Guidelines For The Commonwealth 19 June 1998
[25] Constitutional Petition No. 15 Of 2022

> *are in a subordinate position…. In Gurov v Moldova (11 July 2006) the ECtHR found that a Moldovan court was not 'a tribunal established by law' because, at the relevant time, judges whose term of office had expired were authorised to continue to exercise their functions for an undetermined period…"*[26]

It is manifest that failures in the areas of appointments, security of tenure, institutional resourcing the proper remunerating of judges, and the provision of security to judges, has unfortunately led to compromised institutions and judges whose independence is questionable.

The Role of the Media

The media with its power to disseminate information and its wide reach, sometimes impacts on judicial independence when the reporting of incidents assume a verdict before a trial is conducted, and places either the judge or the judicial institution in an unfavourable light as being either incompetent or compromised. Irresponsible media reporting without knowledge of the facts which are ascertainable by ordinary diligence, or misreporting for any reason, including misinformation or a misapprehension of legal terminologies, and commentary on judgments, including headlines which are derogatory of the court, can negatively impact the decision-making process, placing pressure of the judicial process. The power of the media is not limited to the written word, as other forms of media can be just as injurious if not handled with care.

The fear of an unfriendly media environment that questions the competence of judges and opens them to ridicule or hate, can affect the independence of a judge in no small measure. The converse is also true, for a judge who curries favour with the media, may pander to the views of the public in decision-making.

[26] Council of Europe standards on judicial independence available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690623/EPRS_BRI(2021)690623_EN.pdf

For this reason, the relationship between the media and the judicial institution must not be taken lightly. The Madrid Principles[27] broadly provide for beneficial co-existence, and must be put into practice by judiciaries seeking to insulate its judges and the judicial process from unfair or uninformed criticism.

The politicising of legal issues is also a source of potential harm to the judicial institution and the security of judges, and has become the subject of recent concern as it also erodes the independence of judges in politically charged environments where the expression of a view in opposition to political agenda may be perceived to be enmity towards a political party[28]. While the court does have the tools to punish persons who bring the administration of justice into disrepute through contemptuous conduct, it is a tool that is not be seen to be used to stifle the media, whose role in good governance cannot be discounted, especially in nascent democracies. That the line between criticism and contemptuous reporting is thin, makes the use of such a tool imprudent, a matter that is echoed in the Latimer House Principles 2003[29].

The Other side of the Pendulum

Having set out these negative incidents as representing failures, I will now comment on another surprising failure. I use the word 'surprising' for while the intent of that circumstance may be to uphold the rule of law, it also qualifies as a failure, for it affects the judicial function negatively. This is, the judge who in the bid to establish their independence, places themselves on a constant and unnecessary collision course with the other arms of government, especially the executive arm. The judge who would rather skew a case against the government in order to not be seen to be compromised, than be the true arbiter their judicial oath dictates, is no more independent than the one who succumbs to governmental interference, for both are influenced by external pressures: societal or governmental.

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[27] The Madrid Principles on the Relationship between the Media and Judicial Independence 1994

[28] Personal Attacks On Judges Harm Rule Of Law; Social & Digital Media Employed Frequently To Politicise Legal Issues : Justice JB Pardiwala available at https://www.livelaw.in/top-stories/personal-attacks-on-judges-harm-rule-of-law-social-media-employed-frequently-to-politicise-legal-issues-justice-jb-pardiwala-202851

[29] Principle VI 1(2)(b)

SUCCESSES IN INDEPENDENCE

I will be painting an unfortunate and untrue picture if I did not point out the efforts some jurisdictions are making towards attaining judicial independence. These include improved arrangements for funding, remuneration, appointment procedures, discipline and security of tenure. I will provide a short summary of these.

Institutional Resourcing

The funding of the judiciary appears to have improved in varying degrees in a number of commonwealth jurisdictions. It is achieved in diverse ways, but commonly through constitutional provisions and legislation.

Article 123(1) the Constitution of Zambia states: *"The Judiciary shall be a self-accounting institution and shall deal directly with the Ministry responsible for Finance in matters relating to its finances."* Article 123(2), provides that: *"The Judiciary shall be adequately funded in a financial year to enable it effectively carry out its functions."*

This is echoed in s. 144 of the 1997 Constitution of The Gambia which further provides that the budget of the institution which should be submitted by The Chief Justice to the President for presentation to the National Assembly, must be submitted by the President to the National Assembly without amendment, although he may include his comments.

Art. 127 (1) and (7) of the Constitution of Ghana also provide for financial autonomy of the judiciary. In practice in Ghana, Parliament no longer controls the judiciary's budget as it only appropriates what the President approves for the Judiciary. Besides this, thirty percent of internally generated funds are returned to the judiciary from the Consolidated Fund for its projects. This follows a hard-fought battle for financial autonomy, and represents great success in the quest of institutional independence.

Remuneration

It is also comforting to know, that the remuneration of judges has received serious consideration and has been tackled in diverse, but no less effective ways in different jurisdictions, to ensure that the spectre of an impoverished judge, skewing judgments to interests other than justice, does not become a reality.

In this regard, some countries have provided mechanisms for determining remunerations in their Constitutions while others provide for such by legislation. In South Africa, the Judges' Remuneration and Conditions of Employment Act 2001 as amended, provides for the emoluments of judges. In Australia, the Parliament of Victoria has enacted the Judicial Entitlements Act 2015 No. 29 of 2015 which sets out how salaries for the several levels of the judiciary, including pensions, are determined. The Singaporean Judges Remuneration Act 1994 provides annual pensionable salaries and gratuity payments upon retirement or death, so does the Judiciary Act of Jamaica. In Canada, the salaries, annuities and other matters together with review mechanisms are set out in the Judges Act 1985 as amended. The same may be said of Namibia's Judges Remuneration Act 1990 as amended, Trinidad and Tobago's Judges Salaries and Pensions Act, and Barbados' Judges Remuneration and Pensions Act.

These are among a number of jurisdictions that have legislated the mechanism for the determination of salaries, not leaving it to speculation or to manipulation. In Ghana, the determination of salaries of superior court judges is left to an independent constitutional commission which performs the task every four years.

Appointments

The area of appointments has also seen a degree of success in recent years. It is the hope that the increasing use of truly independent commissions and councils will make the system transparent, and increase confidence in judicial appointments.

In the United Kingdom, the Constitutional Reform Act 2005 established an independent Judicial Appointments Commission to undertake the process of selection of candidates and to recommend their appointments in an open, transparent system, that is solely based on merit.

In Ghana, the controversy generated by the recent nomination of four persons for appointment to the apex court by the executive, amid allegations of cronyism rather than competence, appears to have been addressed by the parliamentary role which subjected the nominees to a vetting procedure that resulted in the appointment of two of the four nominees.[30]

Discipline and Security of Tenure

In the United Kingdom, that there exists a credible system for discipline, to the point of removal, is manifest from the 2015 case of the removal of three judges (a fourth resigned) for watching pornographic material on their work internet connection. The investigation which resulted in their removal was conducted by the Judicial Conduct Investigations Office, described as "an independent office which supports the Lord Chancellor and Lord Chief Justice in considering complaints about the personal conduct of judicial office holders".

In Ghana, the disciplinary provisions of Art. 146 of the 1992 Constitution were put into play in the dismissal of seven High Court judges, and twenty lower court judges by the Judicial Council for corruption in 2015. It followed the hearing of a petition filed against them by investigative journalist which alleged corruption against them.

These efforts are clearly aimed at insulating the institution from an erosion of its independence through the control of external actors, by ensuring that judges are only removed after a disciplinary process that determines cause, scrupulously. They are bound to provide security of tenure which results in independent, fearless judges who execute their duties without the fear of losing their employment except for incapacity or proven misbehaviour.

RECOMMENDATIONS

[30] Ghana: Parliament Approves 2 Supreme Court Nominees ... Freezes Nomination of Two Others https://allafrica.com/stories/202212130405.html

Having highlighted failures and compromises of various jurisdictions, I make these recommendations for safeguarding and strengthening judicial independence across the Commonwealth.

1 A CREDIBLE APPOINTMENTS SYSTEM

It seems to me that appointments, security of tenure and discipline, are the main problem areas where governments have faltered in their avowed resolve to ensure the independence of the institution and of judges.

As I have pointed out, some jurisdictions have become alive to their responsibility to entrench principles and elements to assure impartiality in the decision-making process. However, we still have a long way to reach the desired destination. The statistics show that:

> *"19% of Commonwealth jurisdictions have executive-only appointment systems in this sense (appointments to the highest court are reserved for the executive in another 8% of jurisdictions, and the appointment of the Chief Justice in a further 23% of jurisdictions)…" "21% of Commonwealth jurisdictions there is some legislative involvement in the appointment of judges" "81% of Commonwealth jurisdictions there is a judicial appointments commission which plays some role in the selection or shortlisting of candidates for judicial appointment".*[31]

While these statistics show the move towards the use of independent councils/commissions in appointments in recent times, the existence of executive-only appointments in such a high percentage is concerning. This is because despite some of the dire issues thrown up by councils/commissions in their present operation, their proper use should be encouraged, as a lack of them will result in dangerous situations, demonstrated by the Kiribati issue where the President could and did suspend the Chief Justice, and easily replaced him.

[31] The Appointment, Tenure and Removal of Judges Under Commonwealth Principles, A Compendium of best Practices, Bingham Centre for the Rule of Law, 2015.

In Ghana, the recent demonstration of the check on executive power by the process of parliamentary vetting reveals the benefit of the involvement of another governance institution in the process of appointments[32]. Thus, the relatively small number of countries with some legislative involvement leaves much room for improvement, and leads me to the recommendation for a push in the direction of greater involvement of all arms of government in the process.

Commissions and Councils are helpful institutions in the appointments process. But as observed before now, where they lack independence, the appointments process becomes subject to the same weaknesses as direct appointments by the executive. To ensure their independence, it is my recommendation that the composition of, and the appointment process of the members of judicial commissions or councils, and the process or mechanism for their selection, be made the subject of legislation. The legislation must as much as possible, provide for a process that ensures the integrity, impartiality and competence of the persons selected to be members, and especially the chairperson of the council or commission. A number of such councils /commissions are chaired by the head of the judiciary. Until there is empirical evidence to support that greater independence will be attained if the commission/council was removed from the judicial administration, perhaps one must not be quick to assume such a state of affairs. It will however be a useful subject for further discussion.

Further, to safeguard their independence, the commissions/councils must be enabled to establish internal mechanisms that ensure that their nominations adhere to clear criteria for appointments, transparency in selection, commencing with an application process, and a credible interview process or process of examination, and are based solely on the needs of the judicial institution and the merit of applicants for judicial positions. Also, there must be a mechanism to assure their accountability without the sacrificing of their independence.

All this is because the continued use of commissions/councils will depend on their usefulness which in turn depends on their credibility. Thus, the use of commissions/councils as sounding boards, rather than as institutions integral to the

[32] Ibid 32

appointment process to bring transparency into the appointments process, waters down their effectiveness. The decision of *Ghana Bar Association and Others v. Attorney General and Ors* (supra) rendered Ghana's Judicial Council ineffectual, making it almost an appendage to the process of appointment, when it was expected to lead it in order to bring into it, the needed transparency.

It is recommended that commissions/councils be given teeth in the appointment process through appropriate wording in national constitutions or legislation to compel consultation with them, and a degree of reliance on such consultation, by the appointing authority.

2. INTERNAL ACCOUNTABILITY MECHANISMS –

- **Assignment of Cases**

The assignment of cases and the empanelling of judges in appellate courts has been the subject of much suspicion. This is so especially in politically charged cases where certain judges' political leanings are known or suspected either from their associations or their views expressed in their judgments. The assignment of cases to persons suspected of bias is also subject to the same negative perceptions. It is recommended that a system of transparency in the assignment of cases, and in the empanelling of judges must be established. Such may be mechanical, and thus removed from human manipulation.

- **Insulation from Internal and External Influences**

The leadership of the judicial institution must endeavour to insulate judges from external influences in their decision-making. Judges must be removed from politics, and be discouraged from "hobnobbing" with politicians. While they may hold political views, it is recommended that their views be not trumpeted, so as to make their decisions predictable as biased in favour of their political leanings.

The institution must encourage circumspection in the lifestyles and social interactions of judges, including their involvement in certain clubs and societies.

To counter the influence of judges from within, especially senior judges, or the judicial administration, it is important to create internal control mechanisms that

will expose such attempts. This may involve the establishment of an internal "ombudsman" to promote internal integrity and serve as an accountability body which is granted independence of operations within the institution.

Such a system may enable discreet reporting of attempts to influence decision-making, and a process of bringing such conduct to censure. Where the interference is by, or through the leadership of the institution, a mechanism for making a record of this, which may be produced when unfair disciplinary action follows, may be enabled.

- **Dealing with Perceptions of Bias**

Society does, and should expect of its judges, impartiality in the judicial function, therefore allegations of bias affect the perception of independence and should not be taken lightly. It is for this reason that if a judge has pecuniary interest in the outcome of a case, or where he is prejudiced against one party for some reason, there is actual bias and he must recuse himself from hearing the matter. In the grey area of apparent bias, however, while not all suspicions should result in recusal, the test is as set out by Lord Hope of Craighead in Porter v Magill: *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

I do not intend to go into the considerable body of law on the subject of bias, actual, apparent, or presumed, I simply point out that recusals on a judge's own motion, or after an application which is carefully considered in the light of considerable case law, should result in proceedings in which the parties are placed in the position to accept the outcome, as arrived at after impartial consideration.

3. DISCIPLINE

A clear system of discipline with the will to enforce it, contributes to independence. Judiciaries must not lend themselves to accusations of the "old school tie" that shields wrongdoers from consequences.

Decisive action against judges whose conduct falls beneath the expected standard must be provided for in disciplinary legislation, and must be rigorously applied to promote confidence in the institution, and in the integrity of the other judges in

the institution. It is recommended that judiciaries provide codes of conduct with disciplinary regulations that will set out infractions that will trigger disciplinary measures, and the mode of discipline.

4. CULTIVATING JUDICIAL-MEDIA RELATIONS

The relationship of the judiciary and the media must be cultivated. Channels by which a reporter can receive answers from the judicial administration before it reports cases, including the proper use of judicial words and their meanings, and court terminology may be created. This mechanism for verifying the import of decisions may include providing the media with executive summaries of judgments, in order to prevent misreporting through misapprehension. Also, judiciary-media workshops and seminars may provide insight into the decision-making process, to minimise trials in the media which are so injurious to the trial and decision-making process.

5. SECURITY OF TENURE

If the promised tenure must be curtailed, it must be for reasons of incapacity or bad behaviour. Nothing else will suffice. Thus, that a judge's decision does not find favour with the political elite, or even with the general populace is no reason for termination of appointment, which in any event, must be in accordance with constitutional or statutory provisions. Contract judges must receive the assurance of an automatic renewal of their contracts, except for incapacity or misbehaviour or where qualified local persons must be given the chance to also develop judicial careers, and there is no room for expansion of the Bench to accommodate such.

6. PROVISION OF PERSONAL SECURITY

Securing the person of the judge can only provide the comfort necessary for the independence of the judge who is enabled to perform his duty free from the fear of harm or worse.

7. ADDRESSING INSTITUTIONAL FUNDING AND REMUNERATION

It is recommended that the judicial institution be granted a degree of financial autonomy that will enable the judiciary to not only meet its current needs, but to

enable expansion, modernisation, and programmes to increase access to justice and efficiency in the dispensation of justice.

Regarding the remuneration of judges, the success stories in countries that use legislation to provide mechanisms for the determination of remuneration should encourage other countries to do the same for their judges. The situation in Mozambique which left the determination of remuneration of judges save for Supreme Court Judges to public service institutions, must be avoided. So must legislation which retards, rather than progresses the question of remuneration of judges.[33] Also, there should be a settled mechanism for the periodic review of judicial salaries to take account of inflation and other considerations that affect the cost of living, and the standard of living expected of judges.

CONCLUSION

The independence of the judiciary is a core value of democratic governance assuring the rule of law, and must be guarded jealously by the judiciary and the legal sector; it must be hallowed by other arms of government, and must be treasured by all as integral to good governance.

This is because a breakdown of the judiciary's independence affects the quality of justice, which in turn affects the quality of life.

The role of courts in society as regulators of conduct, protectors of the common good, and impartial arbiters in dispute resolution must be preserved. It is for this reason that while it is important to understand that the concept of judicial independence is multifaceted and its outworking is not a one size fits all (as jurisdictions differ in what they consider as negatively affecting the decision-making process), there is no gainsaying that all countries must be helped to apprehend its purpose, and be encouraged to adopt strategies to realise the elements that are now widely accepted as integral to its attainment.

[33] https://clubofmozambique.com/news/mozambique-tsu-judges-warn-that-the-single-salary-table-may-be-illegal-and-unconstitutional-228225/

It is hoped that this paper contributes to the discussion on why there is the need to both safeguard and to strengthen it, and how this may be achieved. This is a call to sentinel duty.

The title of this paper asks a searching question: whether judicial independence is a destination or a horizon. It seems to me, after the consideration of the realities that it does not matter either way, for a destination presents the motivation to reach a goal, while a horizon only opens up territories yet to be conquered, and vistas of possibilities and improvements even beyond the current thinking.

There is hope yet, for the society that recognises that its very life depends on the quality of justice it permits.

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28/02/23

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